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THE DISRUPTION WE NEEDED: ACCELERATED INNOVATION IN COURTS AND ACCESS TO JUSTICE

THE HONORABLE BRIDGET M. McCORMACK (RET.)*

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INTRODUCTION

Thanks very much to the team at NYU Law School for the invitation to join you today. Being here with so many friends and mentors is an honor. I will spend my time with you talking about the disruption courts have experienced over the last few years, what we've learned from it, and what it means for the rule of law.

* Copyright © 2024 by Bridget M. McCormack, former Chief Justice, Michigan Supreme Court; Chief Executive Officer, American Arbitration Association. A version of this Lecture was presented at the New York University School of Law on October 5, 2023.

I will ground my argument in two concrete ways to make it more tangible. First, I will focus on the massive market failure of our civil justice system as context for evaluating the pandemic change. Second, I will focus my discussion on Michigan because my experience allows me to discuss the topic in meaningful detail. But the Michigan courts are not unique. All courts face the same threats and opportunities.

I

CIVIL JUSTICE GAP THESIS

I want to start by contextualizing the state of our civil justice system. The Legal Services Corporation's 2022 Justice Gap Report found that ninety-two percent of the civil legal problems of low-income people get either no or inadequate help.¹ That is a six-percentage point increase over the prior study from 2017.² It isn't a pandemic blip. During roughly that same period, total revenue to legal aid programs increased by around fifty-seven percent.³

The National Center for State Courts measures the number of people navigating courts without lawyers, and it estimates that such parties have lawyers in only twenty-four percent of civil cases in state courts, where about ninety-five percent of civil litigation occurs.⁴

Every year, the World Justice Project ranks the world's countries on their compliance with various measures of the rule of law. One of those measures is the accessibility and affordability of civil justice. The most recent Rule of Law Index, released in 2022, ranks the United States 115th out of 140 countries on the accessibility and affordability of civil justice.⁵ Among the forty-three wealthiest countries in the world, the United States ranks forty-third.⁶

¹ LEGAL SERVS. CORP., *THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 7 (2022), <https://lsc-live.app.box.com/s/xl2v2uraitotbbzrhujtjlg0emp3myz1> [<https://perma.cc/D7E6-V9HX>].

² See LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 6 (2017), <https://lsc-live.app.box.com/s/6x4wbh5d2gqxwy0v094os1x2k6a39q74> [<https://perma.cc/APF4-368D>].

³ See AM. BAR ASS'N., *ABARRAY LEGAL AID FUNDING REPORT: U.S. FUNDING FOR LEGAL AID* (2022) (aggregating all funding for U.S. legal aid programs, including funds from LSCs and other federal, state, and local appropriations, and documenting an increase from \$1,771,684,000 in 2017 to \$2,784,384,957 in 2021), <https://public.tableau.com/app/profile/abarray/viz/ABArrayNationalData/NationalLegalAidFunding> [<https://perma.cc/NT7B-DJ7Q>].

⁴ CIVIL JUSTICE INITIATIVE: *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS*, NAT'L CTR. FOR STATE CTS. 31 (2015), https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [<https://perma.cc/5U6R-JV7X>].

⁵ *Rule of Law Index 2022: United States*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/rule-of-law-index/country/2022/United%20States/Civil%20Justice> [<https://perma.cc/UQ2E-HQQV>].

⁶ *Id.*

The cases litigants manage on their own are not cases we teach in law school, for the most part. They rarely get appealed.⁷ But they are high-stakes cases involving shelter, personal safety, family, and financial stability. I wish law school started with 1Ls watching civil court dockets in state courts—eviction, debt collection, and family court dockets. I imagine it would spark some solutioning that those of us many decades into our legal careers have a more challenging time seeing. It would starkly contrast to the rest of law school, where we read appellate decisions handed down in cases where both parties are represented by lawyers who present evidence and make legal arguments for their clients, and the best legal argument wins.

This is a relatively new problem. While state court data is opaque, our evidence shows that lawyerless litigants were the exception as recently as the start of the last quarter of the previous century. The numbers we see today we have seen since the early 2000s. But it wasn't this way as recently as the 1970s. In 1977, two Yale Law School students studied 331 divorce cases in two trial courts in Connecticut and published their results as an unsigned “project” in the *Yale Law Journal*.⁸ The students were Deborah Rhode and her husband-to-be, Ralph Cavanagh. They found that 2.7% of the divorce cases they studied involved an unrepresented litigant.⁹ They cited a then-recent study in San Mateo County, California, showing that twenty percent of divorce petitioners were proceeding without lawyers¹⁰—a figure they characterized as an “unprecedented surge” in self-representation.¹¹

II

ACCESS TO JUSTICE EFFORTS IN MICHIGAN

Like every other state, the bench and bar in Michigan have focused considerable attention on the civil justice gap for decades. We have best-in-class legal aid programs, innovative law school clinics, and a generous giving history by law firms and individual lawyers to the State Bar's access to justice arm, which funds legal aid programs throughout the state.

⁷ See, e.g., Spencer G. Park, *Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L.J. 821, 836 (1997) (finding that just over eleven percent of pro se cases were appealed from the sample of cases in San Francisco).

⁸ Deborah L. Rhode & Ralph C. Cavanagh, *The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104, 105 (1976).

⁹ *Id.* at 160 (finding that 63 out of 2,500 uncontested divorces were pro se dissolution in New Haven Superior Court from December 1974 to May 1976).

¹⁰ See *id.* at 110 n.25.

¹¹ *Id.* at 110.

Our vision for addressing the civil justice gap went beyond the one-to-one service model of traditional lawyer-client engagements. We recognized that we couldn't *pro bono* our way through the access to justice issues we faced. We, therefore, built programs and tools to support the many people navigating justice issues who would never have access to a lawyer.

A partnership between the State Bar, the Michigan Supreme Court, and a legal services program set up what I believe is the best online site to assist self-represented litigants, Michigan Legal Help, in 2012.¹² The Michigan Legal Help website provides reliable legal information and self-help toolkits that produce forms for court proceedings for people navigating justice problems without lawyers. There are also Michigan Legal Help centers in courthouses for people who need more guidance with the website's toolkits. The Michigan Legal Help team has chatbots and takes email questions from users, too. And they work with judges, courts, lawyers, bar associations, nonprofit legal aid agencies, legal self-help centers, libraries, and others to promote coordinated and quality assistance for self-represented litigants.¹³

Where Michigan Legal Help struggled to support users, we stood up other solutions. For example, we knew that most users of the expungement toolkit never finished it.¹⁴ Expungement was statutorily complicated; therefore, the self-help toolkit was also complex. People needed more intervention. The Court and the Bar collaborated with a Detroit law school and formed traveling clinics to go around the state and help people eligible for expungement with the process.¹⁵

In May 2019, the Michigan Supreme Court formed a task force to assess the civil justice system comprehensively. Partnering with the MSBF and Michigan Legal Help, and with funding from the National Center for State Courts (NCSC), the Justice for All task force set out to do a statewide inventory of available resources for people with civil legal problems, identify the gaps in those resources, and develop a strategic plan to address the civil legal needs of every Michigander.¹⁶

¹² MICH. LEGAL HELP, <https://michiganlegalthelp.org> [<https://perma.cc/88B7-M3NL>].

¹³ *About Us*, MICH. LEGAL HELP, <https://michiganlegalthelp.org/about-us> [<https://perma.cc/E7F4-Y5X4>].

¹⁴ Cf. J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2466 (2020) (estimating that only 6.5% of individuals eligible for expungement filed and received one in Michigan).

¹⁵ *Detroit Mercy Law's Traveling Expungement Clinic Serves 200 People Across Michigan*, DET. MERCY L. (2023), <https://law.udmercy.edu/news/2023/travel-expungement-clinic.php> [<https://perma.cc/4477-JXHC>].

¹⁶ *Justice for All*, MICH. CTS., <https://www.courts.michigan.gov/administration/special-initiatives/jfa> [<https://perma.cc/44Z6-QCAU>].

In late 2019, the Michigan Supreme Court Administrative Office stood up an online dispute resolution service in seventeen of Michigan's twenty-three counties. MI-Resolve is a user-friendly asynchronous platform that allows parties to resolve small-dollar civil and landlord/tenant disputes *for free* and avoid court altogether. Parties can use a mediator if they want to, in person or by videoconference.¹⁷

In other words, in 2019, we thought we were doing a lot to address the civil justice crisis in Michigan. I was the Chair of the Conference of Chief Justices Access and Fairness Committee—I'm confident we were doing as much as or more than any other state.

But despite the bench and bar's focus and effort, the civil justice crisis was not improving. Our imaginations weren't big enough. The tools and processes we have traditionally used have been lawyers' tools and processes—that is, they were careful, incremental, measured, and largely biased in favor of the one-to-one service delivery model.

We needed a legal service delivery, Uber, or Netflix. But lawyers are not generally skilled at building disruptive models, especially models that disrupt themselves.

A. *Change Management and Resistance in the Legal Field*

For many reasons, lawyers are not well-equipped to solve problems requiring transformation, innovation, and collaboration.

It's culturally a bad fit for us. We teach a one-to-one legal services delivery model where every client has a lawyer. Most mindsets that make a great innovator are incompatible with ethical, legal practice. Failing fast is excellent for Sam Altman, but there aren't many *legal* settings where failing fast is a great idea.

Our training and culture are risk-averse and backward-looking. In law, incremental change is often the path to lasting solutions with less conflict. And lawyers are committed to the way we have always done things. One of our most essential decision-making norms is backward-looking; stability and predictability require it. And there is a strong cultural bias in favor of the status quo: "We all did it this way, so you should, too." How else can we make sense of our unchanged licensure system?

Part of the answer is practical. A true transformation of what we do and how we do it would require coordination across stakeholders who rarely interact and are all busy with emergencies. Law schools, their accreditors, state bars, bar examiners, and state supreme courts

¹⁷ *MI-Resolve: A New Way to Resolve Disputes Online*, Ct. INNOVATIONS INC., <https://cii2.courtinnovations.com/MITRC> [<https://perma.cc/LY95-XAAS>].

own different parts of lawyer formation and legal service delivery. And they rarely interact. We each focus on many critical immediate problems, preventing us from collaborating on structural issues. I've been meaning to write a law review article for thirty years for which I have a great title but no pages: Let's Do Emergencies Last. While working in good faith to address the immediate problems squarely in their wheelhouses, stakeholders don't have room to step back and explore upstream solutions to a failing justice delivery system.

There is also no obvious funder for disrupting the status quo. There is little regulatory room for disruption by folks outside the profession, and there aren't resources for those inside it. Except for those lawyers in Big Law (a small minority of those in the profession), lawyers' priorities are structured around financing their practices and paying their employees. Courts struggle to keep the lights on, judges trained, and pay court staff a living wage; funding for technology, data collection, evidence-based study, and reform is minimal, and the competing priorities of dispensing daily justice are formidable.

Finally, unlike the rideshare industry or online shopping, justice solutions are delivered primarily through courts—a branch of government funded by another branch of government and staffed by elected judges in many places.¹⁸ Those government systems are structurally complicated, organizationally bureaucratic, and often impenetrable. Users likely find them at least as unworkable as department stores or Blockbuster. But, operating a monopoly outside the discipline of the market makes disruption far more complicated.

Take Michigan again: The Michigan Courts adjudicate over three million cases yearly across 242 trial courts.¹⁹ The Michigan Constitution vests the Michigan Supreme Court with administrative oversight

¹⁸ See generally GEOFFREY MCGOVERN & MICHAEL D. GREENBERG, RAND INST. FOR CIV. JUST., WHO PAYS FOR JUSTICE? PERSPECTIVES ON STATE COURT SYSTEM FINANCING AND GOVERNANCE, at xi–xii (2014), https://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR486/RAND_RR486.pdf [<https://perma.cc/V4P5-9UG2>] (examining state court financing models such as state- and county-based funding).

¹⁹ See *Interactive Court Data Dashboard*, MICH. CTS., <https://www.courts.michigan.gov/publications/statistics-and-reports/interactive-court-data-dashboard> [<https://perma.cc/22Y8-BPTC>] (demonstrating that the incoming caseload in Michigan courts from 2006 to 2022 was around three million). Circuit courts have original jurisdiction over most civil suits and are the only trial court with the power to issue equitable remedies. MICH. COMP. LAWS §§ 600.601, .8302 (2022). District courts are courts of limited jurisdiction that hear misdemeanors, most traffic violations, and civil suits where the amount in controversy is less than \$25,000. *Id.* § 600.8301. Probate courts have exclusive jurisdiction over proceedings about estates, guardianships, and conservatorships, and adult protective proceedings. *Id.* § 700.1302. A comprehensive overview of Michigan court operations is available at *Michigan Trial Court Administration: Reference Guide*, STATE CT. ADMIN. OFF. (2021), <https://www.courts.michigan.gov/490062/siteassets/publications/manuals/carg/carg.pdf> [<https://perma.cc/ZMM4-7XMH>].

authority over all the state courts, which it exercises through rulemaking, programs, training, and funding through the State Court Administrative Office (SCAO).²⁰

Among other administrative functions, the Michigan Supreme Court State Court Administrative Office supports and trains judges and court staff across the state.²¹ The day-to-day operation of our trial courts, however, is managed by local administrators acting under the supervision of a local chief judge.²² Trial judges are selected in local, nonpartisan elections, and the Michigan Supreme Court appoints the chief judges.²³ By law, the local county clerk (also an elected position) is designated as the circuit court clerk but does not work for the court system.²⁴ That means the clerk performs functions for the judicial branch but is not directly subject to the court's supervisory authority.²⁵

Trial court funding is also complicated. The state funds about a quarter of local trial court budgets, local government funds about half, and the rest is generated by courts—by costs assessed on litigants.²⁶ Federal funding can account for a very small percentage.²⁷

Where in that complicated structure would a disruptor get a foothold? It is a daunting change management landscape. The result is a growing civil justice crisis that has gotten away from us. The incremental access to justice work the bench and bar have taken on year after year is no match for it.

B. Pandemic Change

The pandemic changed almost everything about how courts operate, at least temporarily: not just what we did, but how we did it. Faced with managing a busy state court docket that relied on cramming strangers into small spaces with no ventilation, we were forced to

²⁰ MICH. CONST. art. VI, § 3.

²¹ *SCAO – About Us*, MICH. CTS., <https://www.courts.michigan.gov/administration/offices/scao-main/scao-about-us> [<https://perma.cc/UNZ5-6CV5>] (stating that the SCAO aids and oversees the administration of Michigan courts).

²² MICH. CT. R. 8.110(c)(2).

²³ MICH. CTS., MICHIGAN MANUAL 2009–2010: MICHIGAN TRIAL COURTS 25–26 (2010), https://www.legislature.mi.gov/documents/publications/MichiganManual/2009-2010/09-10_MM_V_pp_25-26_MITrialCts.pdf [<https://perma.cc/5PM2-384G>]; MICH. CT. R. 8.110(B)(1).

²⁴ MICH. COMP. LAWS §168.200; *see also County Clerks*, MICH. CTS., <https://www.courts.michigan.gov/resources-for/court-partners/county-clerks> [<https://perma.cc/YE5W-8H8F>].

²⁵ MICH. CT. R. 8.105 (outlining the duty of clerks in the Michigan Judicial system, such as keeping court records and delivering judgment, order, and opinions).

²⁶ *See STATE OF MICH. TRIAL CT. FUNDING COMM'N, TRIAL COURT FUNDING COMMISSION FINAL REPORT 7* (2019), https://www.michigan.gov/documents/treasury/TCFC_Final_Report_9-6-2019_665923_7.pdf [<https://perma.cc/8VSC-6BHH>].

²⁷ *See id.* (stating that 72% of trial court funding comes from federal sources).

innovate and collaborate. We couldn't stop adjudicating cases, but we had to keep everyone safe.

In Michigan, we were fortunate to have a running start. In 2010, the SCAO began implementing a videoconferencing project to equip at least one circuit, probate, and district courtroom in every jurisdiction.²⁸ A year before the pandemic, we had distributed Zoom licenses to every trial court judge.²⁹ This was not because we were clairvoyant but because we had identified the potential for increased accessibility and efficiency.

As a result, in March 2020, every Michigan trial judge was equipped to quickly move their proceedings to the Zoom platform. But because the day-to-day work of every court depends on the separately elected county clerks who keep our records and County Commissions who fund our local courts and their staff, we set up a rapid response team made up of court leaders and representatives from the associations of clerks and county commissions to provide emergency guidance, training, other support for administering justice.

The Supreme Court suspended rules and processes that were barriers to remote proceedings by emergency order. We issued twenty-one pandemic-related administrative emergency orders in eighteen weeks.³⁰

To maintain public access to courts, we required courts to stream their virtual hearings to YouTube or upload them immediately afterward. In May 2020, the Court's I.T. team built and launched an online Virtual Courtroom Directory that was a user-friendly interface that allowed anyone to watch virtual hearings in any courtroom in the state by clicking a link.³¹ This tool typically would have taken at least six months to build and went from concept to launch in three weeks. With a smartphone, anyone could easily find and watch the proceedings in any trial court.

²⁸ See, e.g., *Resolution to Approve Accepting \$22,800 in Polycom Video Conferencing Equipment from the State Court Administrators Office (SCAO) for the Purpose of Promoting Video Conferencing*, INGHAM CNTY. BD. OF COMM'RS (Aug. 24, 2010), <https://ingham.org/bc/bc/index/2010/10-255.htm> [<https://perma.cc/ZC3Z-WJPW>].

²⁹ See *Regional Quick Tip*, MICH. CTS. (June 15, 2019), <https://www.courts.michigan.gov/4a8642/siteassets/publications/newsletters/regionalquicktips/regionalqt-oct2019.pdf> [<https://perma.cc/98NR-JWT3>].

³⁰ See Rachael M. Sedlacek, *Michigan Court Changes due to COVID-19*, INST. OF CONTINUING L. EDUC. (July 26, 2021), <https://www.icle.org/updates/covid19/courtchanges.aspx> [<https://perma.cc/9JL8-G8W5>]. See generally STATE CT. ADMIN. OFF., MICHIGAN TRIAL COURTS: LESSONS LEARNED FROM THE PANDEMIC OF 2020–2021, at 12 (2021), <https://www.courts.michigan.gov/4af1e/siteassets/covid/lessons-learned/final-report-lessons-learned-findings-best-practices-and-recommendations-111921.pdf> [<https://perma.cc/9PXN-2N4X>] (reporting that the Michigan Supreme Court and SCAO guided the trial courts through COVID-19 shutdowns by implementing remote proceedings).

³¹ *MiCOURT Virtual Courtroom Directory*, MICH. CTS., <https://micourt.courts.michigan.gov/virtualcourtroomdirectory> [<https://perma.cc/3NYL-YC34>].

Judges, court administrators, and litigants quickly discovered what worked online and what didn't, and experimentation was encouraged. By the end of 2021, our trial courts had conducted nearly five million hours of online hearings.³² Michigan residents had used the Virtual Courtroom Directory to find a hearing on YouTube more than 450,000 times.³³ Collectively, trial court YouTube channels had nearly 185,000 subscribers.³⁴

Michigan Legal Help's traffic increased dramatically. In the last week of March 2020, visits were up 30% over the previous week and up 112% from a month earlier. We saw approximately 17,000 website visitors per day—almost 123,000 per week. Help chat and after-hours email traffic doubled. The most common topics people were seeking help with were unemployment insurance, eviction, child support, and public assistance.³⁵

We also significantly sped up our efforts to move MI-Resolve to the remaining sixty-six counties in the state. By July, it was available in every county, making Michigan the first to offer a statewide online dispute resolution (ODR).³⁶

Not only were we able to keep our courts operating, but we could measure the value that technology provided to court users. Virtual hearings reduced or eliminated transportation and parking problems, as well as childcare and work conflicts. Recording the proceedings was seamless, and the number of people who could witness any hearing was endless; more than 7,300 people watched a live court hearing on a

³² Jonathan Oosting, *Zoom Hearings Could Become Permanent for Michigan Courts, Burps and All*, BRIDGE MICH. (Apr. 26, 2022), <https://www.bridgemi.com/michigan-government/zoom-hearings-could-become-permanent-michigan-courts-burps-and-all> [<https://perma.cc/JAS6-VKZY>].

³³ Bridget Mary McCormack, *The Disruption We Needed*, in LEGAL TECH AND THE FUTURE OF CIVIL JUSTICE 307, 319 (David Freeman Engstrom ed., 2023), <https://www.cambridge.org/core/books/legal-tech-and-the-future-of-civil-justice/disruption-we-needed/FC627F7E773A9E05335C43B0AB4BBF71> [<https://perma.cc/FV47-KEJR>].

³⁴ *Id.*

³⁵ In the second week of December 2020, Michigan Legal Help's visits increased a bit to 60,964 visitors for the week, i.e., 8,709 per day. This is about forty-four percent more than last year; and virtually identical to the first week of March 2020. Live Help chat traffic was down this week with 111 chats but up with 139 after-hours emails. The most common topics were family (25) and housing (11), garnishment (4), PPO (3), and the Guide to Legal Help (6) (people chat when they can't find their legal problem). In the last week of August 2021, Michigan Legal Help's visits increased to 52,479 visitors for the week, i.e., 7,497 per day. This is a decrease from the same time last year; and a slight increase from the first week of March 2020. Help chat traffic was down this week with 104 chats and up 135 after-hours emails. The most common topics were family (33) and housing (13), unemployment (4), and the Guide to Legal Help (13).

³⁶ See SHARON L. PIZZUTI & MICHAEL D. CAMPBELL, STATE JUST. INST. & COURTILAND CONSULTING, EVALUATION OF TWO STATEWIDE VIRTUAL DISPUTE RESOLUTION SERVICES IN MICHIGAN 17, 19 (2022), <https://www.sji.gov/wp-content/uploads/MI-dispute-resolution.pdf> [<https://perma.cc/LZG4-J784>].

challenge to the governor's emergency powers.³⁷ The Michigan Supreme Court pushed the link out on its Twitter and Facebook feeds.

Pandemic innovations were not only technology-based. We worked swiftly with the other government branches to establish a statewide eviction diversion program funded by the American Rescue Plan.³⁸ We sent the program design to other states that copied it immediately. Many court leaders were agile.

The Justice for All task force moved its work online but kept on schedule. Online surveys and Zoom meetings worked well for the inventory and public input, and the Taskforce report and recommendations were released in late 2020.³⁹ They were creative and bold. I believe the background innovation in the legal profession produced more innovative recommendations. The Court quickly created a permanent Commission to put the recommendations into practice.

III

INNOVATIONS IN OTHER STATES

Innovations also spread from state to state due to formal and informal collaboration by the Conference of Chief Justices⁴⁰ and the Conference of State Court Administrators.⁴¹ CCJ and COSCA stood up Rapid Response committees to address the issues courts faced. These committees produced weekly deliverables, from training materials to emergency order drafts and data collection. And I had a weekly Zoom call with the Chief Justices from Ohio, Indiana, and Kentucky, which was invaluable.

The pandemic also was a growth moment for other access to justice innovations unrelated to keeping people safe. The Utah and Arizona Supreme Courts adopted regulatory changes in 2020 and 2021 to address the civil justice failures in those states.

A. Utah

In 2020, the Utah Supreme Court established a regulatory sandbox that allowed legal service providers to test innovative offerings in a

³⁷ McCormack, *supra* note 33, at 320.

³⁸ *Michigan Eviction Diversion Program*, MICH. EVICTION DIVERSION PROGRAM (2023), <https://miedp.org> [<https://perma.cc/LJ32-9SL5>].

³⁹ See JUSTICE FOR ALL, STRATEGIC PLAN AND INVENTORY REPORT 13–14 (2020), <https://www.courts.michigan.gov/4af54d/siteassets/committees,-boards-special-initiatives/justiceforall/final-jfa-report-121420.pdf> [<https://perma.cc/X4L4-XXDJ>] (listing online surveys and meetings that contributed as inventory of the Michigan Civil Justice System).

⁴⁰ CONF. OF CHIEF JUSTS. (2023), <https://ccj.ncsc.org> [<https://perma.cc/3MGX-G3H5>].

⁴¹ *About COSCA*, CONF. OF STATE CT. ADM'RS, <https://cosca.ncsc.org> [<https://perma.cc/Y6YW-DFQT>].

controlled environment while being monitored for consumer protection. The Licensed Paralegal Practitioner (LPP) program enables qualified non-lawyers to provide limited legal services in debt collection, landlord-tenant disputes, and family law matters.⁴² To become an LPP, individuals must possess an associate's or bachelor's degree and then complete an approved LPP education program, exams, and apprenticeship. LPPs must adhere to professional conduct rules and complete twelve hours of continuing education annually.

The Utah LPP program aims to address substantial unmet legal needs while maintaining consumer protections through licensing, especially among low- and moderate-income populations.

B. Arizona

In 2021, the Arizona Supreme Court adopted rules to create a new licensing program allowing qualified non-lawyers to provide legal services in family law, landlord-tenant disputes, debt collection defense, and administrative appeals.⁴³ They can prepare legal documents, advise clients on procedural issues, and represent clients in certain administrative hearings.

Legal Paraprofessionals (LPs) must meet specific education and training requirements, approved by the Court. They are bound by rules of professional conduct and complete annual continuing education.

In addition to creating the Legal Paraprofessional program, the Arizona Supreme Court amended Rule 5.4 of the Rules of Professional Conduct. As you know, Rule 5.4 prohibits lawyers from sharing legal fees or forming partnerships with non-lawyers for law practice.⁴⁴ The rationale for the rule is to prevent outside influence over lawyers' independent professional judgment. Arizona's revised Rule 5.4 allows for alternative business structures and non-lawyer ownership of law firms in Arizona, provided specific requirements are met.⁴⁵ For example, lawyers must still retain majority control of the firm and be responsible for ethical and professional conduct. Arizona is testing the idea that more flexible rules facilitate financial investment in innovation like technology solutions for cost-effective legal services.

⁴² *Licensed Paralegal Practitioner*, UTAH CTS., <https://www.utcourts.gov/en/about/miscellaneous/legal-community/lpp.html> [<https://perma.cc/W9YG-387W>].

⁴³ *Legal Paraprofessionals*, ARIZ. CTS. (2023), <https://www.azcourts.gov/cld/Legal-Paraprofessional> [<https://perma.cc/X4P2-PKU9>].

⁴⁴ MODEL RULES OF PRO. CONDUCT r. 5.4 (AM. BAR ASS'N 2021).

⁴⁵ ARIZ. RULES OF PRO. CONDUCT r. 5.4 (2021); *see also Legal Services Reforms*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/accesstolegalservices/Questions-and-Answers/abs> [<https://perma.cc/PLM4-8X5D>] (noting that the Arizona Supreme Court unanimously adopted the Alternative Business Structure (ABS) and eliminated the fee-sharing prohibition).

IV LESSONS LEARNED

Statewide eviction diversion kept millions of people in their homes and made landlords whole.

While, with hindsight, it shouldn't have been surprising, the benefits of remote court proceedings for self-represented litigants were incredibly impactful. People who would have missed a court date because they lacked access to transportation or could not afford to miss work were spared the consequences of failing to appear—jail, fines, lost housing, separated families, and more debt. Default judgments plummeted. The Michigan Supreme Court's Statistical Research Team found that the percentage of Michigan civil cases ending in default judgment fell by 16.9% compared to before the COVID-19 pandemic.⁴⁶ The data showed a thirty-eight percent decrease in the rate of defaults in landlord-tenant instances during the same period.⁴⁷

There was qualitative evidence of the benefits, too. For example, participants in guardianship and conservatorship hearings reported increased satisfaction with access and the ability to participate. These benefits, which I have seen firsthand in Michigan, have been well-documented. Interviews with judges who oversee child welfare courts found that parents, foster parents, and kinship caregivers appeared more often at virtual proceedings, and they attributed that increase in part to not having to travel, find parking, or miss work.⁴⁸

In addition to the efficiency and access gains, remote hearings offer extra protection and reduce the stigma of reporting sensitive matters such as domestic violence. There is also evidence that online jury proceedings increase jury participation and representation because those who do not have transportation or those who have to care for children have more flexibility in serving.⁴⁹

⁴⁶ See Memorandum from Laura Hutzler and Dian Gonyea to Tom Boyd, Michigan State Court Administrator (Oct. 27, 2021) (on file with the Michigan Supreme Court) (comparing the default judgment rate for a six-month timeframe prior to the pandemic with that of a six-month timeframe during the pandemic).

⁴⁷ See MICH. JUST. FOR ALL COMM'N, MICHIGAN JUSTICE FOR ALL COMMISSION: 2021 ANNUAL REPORT 5 (2021), <https://www.courts.michigan.gov/49c722/siteassets/reports/special-initiatives/final-2021-jfac-annual-report.pdf> [<https://perma.cc/GP9M-3RX2>].

⁴⁸ NAT'L CTR. FOR STATE CTS., STUDY OF VIRTUAL CHILD WELFARE HEARINGS IMPRESSIONS FROM JUDICIAL INTERVIEWS 2 (2021), https://www.ncsc.org/__data/assets/pdf_file/0018/65520/Study-of-Virtual-Child-Welfare-Hearings-Judicial-Interviews-Brief.pdf [<https://perma.cc/EQU3-BQ8K>].

⁴⁹ RICHARD GABRIEL, ONLINE COURTROOM PROJECT, THE ONLINE COURTROOM AND THE FUTURE OF JURY TRIALS 5 (2020), <https://www.courts.wa.gov/newsinfo/content/Reference%20Materials/Online%20Courtroom%20Project%20White%20Paper.pdf> [<https://perma.cc/2UVT-ZBLX>].

Some of these benefits were known before the pandemic. In 2020, the Joint Technology Committee of the Conference of State Court Administrators, the National Association for Court Management, and the National Center for State Courts published studies from ODR programs nationwide. In Franklin County, Ohio, using ODR for city income tax cases led to fewer default judgments and a more even distribution of positive case dispositions regardless of socioeconomic factors and race.⁵⁰ Utah used ODR as part of a restructuring of its small claims process. The program has led to fewer hearings and faster dispositions in cases that do end up “in court.”⁵¹ In Connecticut, ODR has been used to create an online ticket review program for traffic court. Most ticket recipients chose to opt into the program, which has shortened days from citation to adjudication.⁵²

V

WHAT HAPPENED NEXT

When it was safe to go back into courts, we had choices. We could go back to doing things the way we always had, or we could take account of this new data that giving people a remote option made it far more likely they could resolve their disputes and more likely they would be represented. Courts make the rules about how they administer justice.

In addition to the benefits we saw for litigants, remote proceedings could be a part of the solution to trial court backlogs because they increase capacity: Visiting judges can conduct remote proceedings for matters suited for those platforms, freeing up physical courtrooms for jury trials and other proceedings better handled in person. And the efficiency of remote proceedings would only improve over time as courts, attorneys, litigants, and other stakeholders become more familiar with new processes and technologies.

But, with some exceptions, courts have returned to doing things like they did in 2019.

We published a rule change in Michigan and took public input on whether to continue some hearings remotely.⁵³ The public hearing on the rule change was the most attended public hearing in my ten years

⁵⁰ JOINT TECH. COMM., JTC RESOURCE BULLETIN: CASE STUDIES IN ODR FOR COURTS 1 (2020), https://www.ncsc.org/_data/assets/pdf_file/0020/16517/2020-01-28-odr-case-studies-v2-final.pdf [<https://perma.cc/4U29-FGJ5>].

⁵¹ *Id.* at 2–3.

⁵² *Id.* at 7.

⁵³ *See* Mich. Sup. Ct. Order, Admin. File No. 2020-08 (2020) (Zahra, Viviano, Bernstein, JJ., dissenting), https://www.courts.michigan.gov/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2020-08_2022-08-10_formor_pandemicamds.pdf [<https://perma.cc/F4XV-QEVH>].

on the bench. The lawyers and members of the public who spoke were overwhelmingly in favor of the proposed changes. The judges were overwhelmingly opposed.

The Court adopted the rule change but with three dissents.⁵⁴ I responded to my dissenting colleagues in a concurrence to the order.⁵⁵ My view was that the judiciary should not be the only institution that does not benefit from the lessons learned from the pandemic and the accelerated innovation it brought. And, more importantly, the public should not lose a valuable new tool for accessing justice. Like the rest of government, the courts are for the *people*, not the judges.⁵⁶

Some other states have integrated remote operations into their permanent administration. You might be surprised by which ones: Alaska, Arizona, Illinois, Minnesota, Maryland, North Carolina, and Texas.⁵⁷ In Florida, the State Supreme Court encouraged judges to “take all necessary steps to support the remote conduct” where possible to “maximize the availability of facility space for trial court proceedings that must be conducted in person.”⁵⁸ Michigan also made some of the successful eviction diversion program process changes permanent.⁵⁹ I am not aware of any other state taking that step.

The pandemic also led to significant changes in federal courts’ operations, including allowing public streaming of remote proceedings. But most of these changes were temporary. While some flexibility remains for initial appearances, the federal procedural rules require in-person testimony and restrict broadcasting for many proceedings. Overall, the federal court system is transitioning back to how it operated before the pandemic, unable to permanently adopt many remote options authorized temporarily under the CARES Act.⁶⁰

⁵⁴ *See id.* at 24–39.

⁵⁵ *Id.* at 16.

⁵⁶ *Id.* at 22.

⁵⁷ Allie Reed, *Virtual Court Hearings Earn Permanent Spot After Pandemic’s End*, BLOOMBERG L. (May 18, 2023, 4:45 AM), <https://news.bloomberglaw.com/us-law-week/virtual-court-hearings-earn-permanent-spot-after-pandemics-end> [<https://perma.cc/PX6Y-8QEN>].

⁵⁸ *Id.*

⁵⁹ Beth LeBlanc, *High Court Weighs Making Pandemic Rules for Renter Evictions Permanent*, DETROIT NEWS (Nov. 25, 2022), <https://www.detroitnews.com/story/news/local/michigan/2022/11/26/high-court-weighs-making-pandemic-rules-for-renter-evictions-permanent-in-michigan/69661195007> [<https://perma.cc/7JF7-6EWF>]; Ross White, *Some Pandemic Eviction Rules to Become Permanent in November*, MLIVE (Oct. 14, 2023), <https://www.mlive.com/public-interest/2023/10/some-michigan-pandemic-eviction-rules-to-become-permanent-in-november.html> [<https://perma.cc/2TSJ-FHYZ>]; Mich. Sup. Ct. Order, Admin. File No. 2020-17 (2023), https://www.courts.michigan.gov/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2020-08_2023-09-07_formor_amdao2020-17.pdf [<https://perma.cc/W9AJ-JXX7>]; MICH. CT. R. 2.408; MICH. CT. R. 4.201.

⁶⁰ *Id.*

In most places, two steps forward, two-and-a-half steps back. I assign the extra half step because once you know you can do better and choose not to, you do more harm.

VI WHY DOES IT MATTER?

When you ask people who need courts how they feel about reforms that give them more options for getting help, they have views. As I mentioned, the public input on the remote hearing rule was loudly and clearly in favor of increased remote options.⁶¹ When the Arizona Supreme Court was working on its regulatory reform package, it held public meetings and sought public feedback through surveys and discussions.⁶² Lawyers surveyed about the reforms were overwhelmingly opposed.⁶³ The public surveys produced the opposite results, and that input played a significant role in the success of reform.⁶⁴

We hear and read a lot about polarization and partisanship threatening to undermine the independence and integrity of our judicial system. These are real threats. Public confidence in courts is declining.⁶⁵ In federal courts more than state courts, but state courts, too. Very few people under forty call the justice system the *justice* system. But I think the inability of courts to embrace changes that give people more options to access justice is an even more significant threat.

Today, approximately 1,400 eviction cases were heard in the Detroit district court—many of those ended in defaults.⁶⁶ Most people

⁶¹ See Mich. Sup. Ct. Order, *supra* note 53, at 17 (finding that the vast majority who submitted feedback supported virtual hearing in some form).

⁶² See Aebra Coe, *Where 5 States Stand on Nonlawyer Practice of Law Regs*, LAW360 (Feb. 5, 2021), <https://www.law360.com/articles/1352126/where-5-states-stand-on-nonlawyer-practice-of-law-regs> [<https://perma.cc/3BER-TBGP>].

⁶³ See *id.* (acknowledging pushback against the legal reform packages in the legal community).

⁶⁴ See *id.* (finding 57.5% of Arizona residents surveyed supported the legal reform packages).

⁶⁵ See, e.g., NAT'L CTR. FOR STATE CTS., STATE OF THE STATE COURTS // 2022 POLL 5 (2022), https://www.ncsc.org/__data/assets/pdf_file/0019/85204/SSC_2022_Presentation.pdf [<https://perma.cc/DY92-VLKM>]; David F. Levi, *Declining Confidence in the Judiciary*, BOLCH JUD. INST. (2022), <https://judicature.duke.edu/articles/declining-confidence-in-the-judiciary> [<https://perma.cc/8SZL-XZEG>].

⁶⁶ Interview with William C. McConico, Chief Judge, Detroit 36th District Court (Oct. 5, 2023); see also Lauren Slagter & Jared Wadley, *Detroit Eviction Filings on Track to Return to Pre-Pandemic Level as COVID-19 Protections Expire*, UNIV. OF MICH. POVERTY SOLUTIONS (Nov. 14, 2022), <https://poverty.umich.edu/2022/11/14/detroit-eviction-filings-on-track-to-return-to-pre-pandemic-level-as-covid-19-protections-expire> [<https://perma.cc/2FKL-A4PR>] (noting that default judgment accounts for twenty-four percent of all closed eviction cases post-pandemic).

who showed up didn't have lawyers and struggled to understand the language spoken in court. Some likely had defenses, but very few could have known about them.⁶⁷ Tomorrow, there will be another 1,400.

The rule of law is just a set of ideas that depends on the public having confidence in those ideas. What if the public loses confidence? What if, when the rules don't seem to care about you, you stop caring about the rules?

Disruption is almost always a threat, but it is also an opportunity. We can reconstruct courts so they better reflect and serve all Americans.

I see one big plot twist on the horizon. Generative AI is disrupting the business and practice of law.⁶⁸ The large language models that are publicly available right now are already automating many of the repetitive tasks that lawyers do. And they can and will democratize legal information and accelerate legal singularity. They will even a lot of playing fields. You likely followed ChatGPT's bar examination success, as one example.⁶⁹

Even the stickiest problems in the most opaque bureaucracies are headed for disruption. What's to stop the TikTok legal influencers from posting videos telling self-represented parties exactly what prompts to put into ChatGPT to produce an answer, a counterclaim, a demand for discovery, and a demand for a jury trial in every eviction case? Lawyers are hardly ready for the disruption that is headed our way. Courts are far, far less ready.

But we could be. Lawyers and judges can lead the change we'd like to see if we want to. The rule of law is our best hope for just, free, and equitable communities. But it requires the public's confidence. And that's wobbly.

⁶⁷ *Id.* (finding that only one in five tenants is fully represented by attorneys according to Detroit's 36th District Court's data).

⁶⁸ Generative AI is a branch of artificial intelligence focused on creating original content. *See, e.g.*, Kim Martineau, *What Is Generative AI?*, IBM BLOG (Apr. 20, 2023), <https://research.ibm.com/blog/what-is-generative-ai> [<https://perma.cc/V8BZ-555T>]. By leveraging advanced algorithms and deep learning models, this technology has the capability to analyze vast legal and business datasets, identify patterns, and generate contracts, or even assist in research. *See id.*; *Generative AI Could Radically Alter the Practice of Law*, ECONOMIST (June 6, 2023), <https://www.economist.com/business/2023/06/06/generative-ai-could-radically-alter-the-practice-of-law> [<https://perma.cc/4PB3-4ZZB>].

⁶⁹ *See* Debra Cassens Weiss, *Latest Version of ChatGPT Aces Bar Exam with Score Nearing 90th Percentile*, ABA J. (Mar. 16, 2023), <https://www.abajournal.com/web/article/latest-version-of-chatgpt-aces-the-bar-exam-with-score-in-90th-percentile> [<https://perma.cc/DHJ4-B894>].