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AVOIDING THE GREAT DIVIDE: ASSURING COURT TECHNOLOGY LIGHTENS THE LOAD OF LOW-INCOME LITIGANTS POST-COVID-19

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AVOIDING THE GREAT DIVIDE: ASSURING COURT TECHNOLOGY LIGHTENS THE LOAD OF LOW-INCOME LITIGANTS POST-COVID-19

KATHERINE L.W. NORTON*

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INTRODUCTION

Author Arundhati Roy states:

Historically, pandemics have forced humans to break with the past and imagine their world anew. This one is no different. It is a portal, a gateway between one world and the next. We can choose to walk through it, dragging the carcasses of our prejudice and hatred . . . and dead ideas . . . behind us. Or we can walk through

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lightly, with little luggage, ready to imagine another world. And ready to fight for it.¹

As courts have shifted to video conferencing platforms, webpages, and electronic filing methods to keep courthouse doors open during the pandemic, one thing is clear: these adapted methods have the power to widen the justice gap or to assist with closing it.² As courts take steps towards utilizing these technology platforms, they can choose their path. Ideally, courts should focus on designing a reimagined system geared towards the “consumers,” the litigants, versus the convenience of the court and the lawyers. Then, there could be a chance to lighten the burden on low-income individuals who need to utilize the court system.³

Exemplifying these divergent paths is Kim.⁴ Kim’s daughter Leigh tragically and unexpectedly died at the end of March 2020, when Leigh was murdered by a domestic partner. Leigh had two small children, Jen (age ten), and Chris (age six). Jen and Chris’ father, Vincent, has lived abroad since Chris was born and has not had any significant relationship with the children since he left the country.

Upon Leigh’s death, Kim took in the children to care for them. Kim immediately began to make the necessary arrangements for the children. She had to change the children’s school district, as she lived in a neighboring school district to the one where Leigh previously resided. Further, she wanted to obtain counseling for the children to help them process the death of their mother. Kim encountered difficulties in obtaining the services that the children needed. Both the medical providers and the school gave Kim a hard time as she did not have an order of court or a letter from Vincent permitting her to make these decisions for Chris and Jen. Kim reached out to Vincent for his assistance in registering the children for school and in

1 Arundhati Roy, *The Pandemic is a Portal*, FIN. TIMES (Apr. 3, 2020), <https://www.ft.com/content/10d8f5e8-74eb-11ea-95fe-fcd274e920ca> (discussing COVID-19’s impact on India and the plight of those suffering from structural, social, and economic inequalities).

2. See David Freeman Engstrom, *Post-COVID Courts*, 68 UCLA L. REV. DISCOURSE 246, 262 (2020).

3. See Matt Reynolds, *Courts Attempt to Balance Innovation with Access in Remote Proceedings*, A.B.A. J. MAG. (Feb. 1, 2021, 3:30 AM), <https://www.abajournal.com/magazine/article/courts-attempt-to-balance-innovation-with-access-in-remote-proceedings>.

4. As the director and supervising attorney of Duquesne University School of Law’s Family Law Clinic, Kim’s story is representative of the cases that the clinic encountered during the pandemic. Names and facts have been changed to protect anonymity.

obtaining a counselor for the children. Vincent, however, refused to assist Kim or even send an email to Kim providing his consent for her to care for or provide for the children.

Although Jen and Chris continued to attend school in their old district when all their classes moved online, Kim continued to have concerns that the children's mental health needs could not be addressed. Jen struggled with the death of her mother, and Kim believed that Jen would benefit from counseling sooner rather than later. Without Vincent's express consent, Kim's only option was to seek assistance from the court by requesting some form of custody of the children to address their needs. Kim could not afford a lawyer to address her issues. Kim knew that prior to the pandemic, she could have gone to the courthouse to receive free guidance. Unfortunately, Kim's situation required her to navigate the process when the pandemic caused the closure of the local family law court to in-person access. Instead of the typical access, the court directed litigants to the court website to address "emergency" issues.

Initially, Kim thought that obtaining a court order in this virtual method to address the needs of the children would be advantageous because she could avoid traveling to the courthouse. Additionally, Kim could not afford to take time off from her job given the new expenses that she had for the children. Furthermore, the local court is about thirty minutes from where she lives and works, and she does not have a car, so this means that getting to court would be difficult for her. Although Kim only has a cell phone, she felt comfortable that she could navigate the court's online process because she uses her cell phone for everything, such as ordering groceries online, paying bills, and even to visit her doctor regarding maintenance of her diabetes. As a result of the shift of the court to utilizing technology to address these types of legal matters, Kim was excited because she thought she could achieve what she needed to for the children from the comfort of her home.

However, Kim ran into some setbacks once she got to the website for assistance. When she looked at the court website on her phone, she discovered that the only custody matters being addressed were emergency custody matters. The website did not define an emergency custody situation, but Kim believed that providing for the children qualified as an emergency. Kim reviewed how to go about submitting a request for emergency custody relief, but the webpage did not provide guidance except to state that she had to fill out a form explaining what she was requesting and why. To complete the process, she had to print the form, fill it out, sign it, scan it, serve it on the other parties, and email it back to the court. However, Kim

does not have a printer at home, she is unclear about what “serve” means, and she does not have a means to scan and email the document back to the court as she only has a cell phone. Compounding the issue, in the past, she could have gone to the public library for tasks like this, yet her local library continued to be closed due to the pandemic. Quickly, Kim realized that she could only utilize these convenient technology solutions if she had a full home office, with a scanner, printer, broadband, desktop or laptop computer, and general office supplies like printer paper and ink. Her original excitement about being able to complete this process at home has faded. At this point, Kim did not know what to do, but she knew that the children needed help.

As the COVID-19 pandemic spread throughout the United States and devastated areas with dense populations like New York City and Philadelphia, states began to shut down.⁵ As the number of positive tests and deaths rose in Philadelphia, Tom Wolf, the Governor of Pennsylvania, began the process of issuing stay-at-home orders.⁶ Initially, only essential workers were permitted to continue working, which did not include legal aid offices or law firms.⁷ In an unprecedented manner, the Pennsylvania Supreme Court entered an order declaring a state of “judicial emergency” allowing state courts to close their doors as necessary.⁸ As closures began, court staff, judges

5. See Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement — United States, March 1–May 31, 2020*, *CTRS. FOR DISEASE CONTROL & PREVENTION: MORBIDITY & MORTALITY WKLY. REP.* (Sept. 4, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6935a2.htm>. Stay-at-home orders were mitigation efforts initiated by individual states to slow the spread of the COVID-19 pandemic. *Id.* These orders required that individuals remain in their homes to reduce contact between individuals. *Id.* All but fourteen states and territories implemented mandatory stay-at-home orders during the period of March 2020 through May 2020. *Id.*

6. See Pa. Exec. Order (Mar. 23, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/03/03.23.20-TWW-COVID-19-Stay-at-Home-Order.pdf>.

7. *Id.*

8. Order Declaring General Statewide Jud. Emergency, No. 531 (Pa. Mar. 16, 2020). On March 16, 2020, the Supreme Court of Pennsylvania issued an order of court declaring a “judicial emergency” allowing courts throughout Pennsylvania to close their doors to the public. *Id.* While certain emergency services of the court were required to continue, the order permitted that these services could be conducted remotely. *Id.* The order stated, in part, “[T]he President Judge shall have the authority . . . [t]o authorize additional uses of advanced communication technology to conduct court proceedings, subject to constitutional restrictions.” See also *Coronavirus and the Courts*, *NAT’L. CTR. FOR STATE CTS.*, [hereinafter *Coronavirus and the Courts*], <https://www.ncsc.org/newsroom/public-health-emergency> (last visited Feb. 19, 2021). The National Center for State Courts have created a web-based resource connecting

and court administration had limited time to vacate the courthouses and develop comprehensive plans for case continuation.⁹

Allegheny County, the home county of Pittsburgh and Pennsylvania's second largest city with approximately 300,000 residents,¹⁰ followed the Pennsylvania Supreme Court's lead and declared a "judicial emergency."¹¹ These closures included all divisions: criminal, civil, family, orphans', and even magistrate courts.¹² Closures had an immediate impact on the individuals that utilize the court. By way of example, the local Family Law Center remained open to the public, but only for "essential court business," which applied equally to child custody hearings.¹³ Given the sensitive issues surrounding child custody and the very personal nature of these issues to individuals, questions quickly arose for litigants about their cases.¹⁴ These questions included issues such as: whether individuals have to follow their existing custody orders with a stay-at-home order in place; what happens if there is an emergency; what if a parent was concerned about the other parent's exposure to COVID-19; how can individuals get their hearings rescheduled; how would

to all available state court COVID-19 websites with available revised operating procedures in light of the pandemic. *Id.* By way of example, in linking to utcourts.gov (Utah Courts' COVID-19 webpage), it can be discovered that generally all proceedings will be decided via paper or remote hearings (telephone or video conferencing). Order for Court Operations During Pandemic (Utah June 26, 2020), <https://www.utcourts.gov/alerts/docs/20200626%20-%20Amended%20Pandemic%20Administrative%20Order.pdf>. In-person hearings will only occur when there are exigent circumstances. *Id.*

9. See Order Declaring General Statewide Jud. Emergency, No. 531 (Pa. Mar. 16, 2020).

10. *Quick Facts: Pittsburgh City, Pennsylvania*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/pittsburghcitypennsylvania/PST045219> (last visited Sept. 9, 2021).

11. Order Amending Fifth Jud. Dist. Emergency Operations Plan, No. 23WM2020 (Pa. Aug. 31, 2020).

12. *Id.* As of January 2021, Allegheny County continued the judicial emergency requiring the majority of court proceedings to occur via video teleconferencing technologies. Order Temporarily Amending Fifth Jud. Dist. Emergency Operations Plan, No. 23WM2020 (Pa. Jan. 26, 2021).

13. Order Amending Fifth Jud. Dist. Emergency Operations Plan, No. 23WM2020 (Pa. May 28, 2020).

14. See generally Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1485 (2018) (explaining that parenting is a fundamental constitutional right).

individuals with questions obtain assistance now that courthouses and legal aid offices are closed?¹⁵

These questions are not simply academic; they are deeply practical and essential to litigants like Kim. Kim's experience highlights two specific issues that the pandemic has brought to the forefront. The already existing justice gap made it difficult for Kim to address her legal issues pre-pandemic.¹⁶ If Kim was able to hire an attorney, she would be able to navigate the previously mentioned technology issues more smoothly. Initially, Kim was under the belief that these online methods of addressing her matter would help her and not hinder her. Unfortunately, given that Kim did not have the required technology, she found herself falling into a technology gap.¹⁷

In light of potential emergency situations like Kim's, courts across the country immediately turned to technology solutions to keep functioning.¹⁸ Often these changes were band-aids with hopes that returning to business as usual would quickly occur. The situation experienced by Kim is not an isolated incident; it was replicated throughout the country. In Wayne County, where Detroit, Michigan's largest city is situated¹⁹, the courts also went into a state of

15. Calls about child custody represented the largest percent of calls that the Duquesne University School of Law Family Law Clinic received as the pandemic took hold. These were some of the questions received.

16. See LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 6 (2017) [hereinafter *JUSTICE GAP*]. In the United States, in 2017, 71% of low-income households had experiences with a minimum of one civil legal issue. *Id.* Of these reported problems, 86% of these low-income Americans reported receiving inadequate or no legal help with their civil matter. *Id.* These statistics exemplify the vastness of the justice gap experienced by low-income Americans.

17. See COUNCIL OF ECON. ADVISERS, *MAPPING THE DIGITAL DIVIDE* 7 (2015). There is a significant correlation with income and geographic location and accessibility of technologies as well as broadband services. See *id.* Those of lower income did not have the same available technologies or access to broadband services that those of middle or higher income enjoy. *Id.*

18. See, e.g., *Courts Deliver Justice Virtually amid Coronavirus Outbreak*, U.S. COURTS: JUDICIAL NEWS (Apr. 8, 2020), [hereinafter *Courts Deliver Justice*] <https://www.uscourts.gov/news/2020/04/08/courts-deliver-justice-virtually-amid-coronavirus-outbreak>. Courts moved to remote video and audio-conferencing platforms to protect judges, litigants, and court employees and ensure that all constitutional responsibilities were upheld, meaning that cases could move forward virtually amid the coronavirus outbreak. *Id.*

19. *Quick Facts: Detroit City, Michigan*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/detroitcitymichiganMI/PST045219> (last visited Sept. 10, 2021).

emergency.²⁰ As early as February 2021, the court prohibited all in-person filings due to this state of emergency.²¹ In family cases, new filing requirements mandated that individuals mail or email (the preferred method) all documents for motions or complaints.²² On the webpage, the process did not appear particularly daunting, even for unrepresented individuals, and the new process appeared to give a level of convenience to those utilizing it. Yet, after reviewing the list of required documents and the manner in which they must be completed, the requirements represented a potential issue for many pro se litigants.²³ The process required a number of the documents to be filed/mailed as PDFs (a specific electronic file format), for the documents to be filed/saved as separated PDFs, and some documents had to be forwarded to a number of locations via a separate email address.²⁴ The failure to comply resulted in the pleadings being rejected, requiring the litigant to start the process all over again.²⁵ In addition to the very technical and difficult procedural legal requirements involved in completing these documents and addressing service, these new filing requirements also required individuals to have a minimal level of comfort with technology for the litigant to address their legal needs.²⁶

A method to address the problems that were experienced in Wayne County, Michigan was exemplified by Allegheny County, Pennsylvania and the focus they placed on child custody emergencies.²⁷ As the court building was closed to the public, the court

20. Order Declaring State of Emergency in Family Domestic Division, (Mich. 3d Jud. Cir. Mar. 26, 2020).

21. *Family Domestic/FOC Filing Instructions*, MICH. THIRD JUD. CIR., <https://www.3rdcc.org/divisions/family-domestic/emergency-and-non-emergency-filings> (last visited February 16, 2021) (webpage incorporating the filing instructions which prohibited in-person filings and provided detailed and even difficult instructions on how to address an individual case)

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. See *id.*; see also D. James Greiner, Dalíé Jiménez & Lois R. Lupica, *Self-Help Reimagined*, 92 IND. L.J. 1119, 1126–28 (2017). When considering the difficulties associated with this type of requirement for cases to proceed, it is important to understand that procedural legal hurdles are one of the most difficult aspects of law for pro se individuals to overcome when trying to have the merits of their individual cases heard. *Id.*

27. *Family: Emergency Custody*, PA. FIFTH JUD. DIST., [hereinafter *Emergency Custody*] https://www.alleghenycourts.us/family/child_custody/EmergencyCustodyMotions.aspx (last visited Sept. 10, 2021) (website reflecting the emergency procedure for custody in Allegheny County, Pennsylvania).

required individuals to submit all information online.²⁸ Individuals could prepare their own pleading (if unrepresented), send it to a general email address, and the matter would be screened to determine the level of emergency and whether the matter would be forwarded to a judge.²⁹ Initially, these custody emergency pleadings required an individual to print a form from the court website, including a specialized cover sheet, and ultimately scan the document to be emailed.³⁰ However, the court quickly recognized that this process required printers and scanners, technology that not all unrepresented individuals had access to, especially considering the closures of all libraries.³¹ The concerns led the court to create a portal for emergency custody motions, allowing motions to be completed on a computer or mobile phone and automatically submitted to the court upon completion.³² A portal such as this could have helped Kim address the needs of her grandchildren. However, this portal was not perfect and did not alleviate all concerns. In fact, new questions were raised, such as how would the court hear/address the matter? And what happened if closures continued?

With questions like these arising for every area of legal practice, and the continual extensions of judicial emergency orders, courts had to quickly adjust their traditional operating procedures to address these questions and, ultimately, the legal and factual issues in each case beyond the limited time period of the stay-at-home orders. The end result of these quick changes was a swift turn to technology, such as remote meeting platforms like Microsoft Teams and Zoom, to ensure access to the courts in some capacity throughout the pandemic.³³

28. *Id.*

29. *Id.*; see also *Custody Matters Scheduled Before a Judge*, PA. FIFTH JUD. DIST., https://www.alleghenycourts.us/family/child_custody/CustodyMattersBeforeJudge.aspx (last visited Sept. 18, 2021) (instructing pro se litigants to consider whether their situation is an emergency before filing a motion in their custody case).

30. *Id.*

31. See Pa. Exec. Order (Mar. 23, 2020), <https://www.governor.pa.gov/wp-content/uploads/2020/03/03.23.20-TWW-COVID-19-Stay-at-Home-Order.pdf> (stating that while stay-at-home orders were in effect, libraries were not deemed “essential businesses”). As businesses opened up (or closed again depending on the spread of the virus), libraries and similar facilities had limited hours, opened for curbside book check out, or engaged in other limitations to assure safety. See, e.g., *Closing and Reopening Guidance*, PA. STATE LIBR. (2020), <https://www.statelibrary.pa.gov/COVID-19/Pages/Closure.aspx>.

32. See *Emergency Custody*, *supra* note 27.

33. See *Courts Deliver Justice*, *supra* note 18. See generally Jason Cohen, *Data Usage Has Increased 47 Percent During COVID-19 Quarantine*, PC MAG. (June 5,

These changes have been put in place to address the immediate needs of the legal system in light of the pandemic.³⁴ However, it is still unknown the ultimate impact that these changes will have and how long changes made to the everyday access to the courts will remain in effect. Given the potential conveniences of these procedures, there is a high likelihood that some of the changes are here to stay.³⁵

Lawyers mastered and adapted to these changes quickly because most already had computers, email accounts, copiers, scanners, internet, and other necessary technologies.³⁶ Yet, unrepresented low-income litigants often do not have the same access to the technologies available to lawyers and the court.³⁷ However, the technologies that

2020), www.pcmag.com/news/data-usage-has-increased-47-percent-during-COVID-19-quarantine (reporting that Zoom experienced a 2,900% growing in daily participants in December 2019, for Microsoft Teams there was a new record of 2.7 billion minutes of meetings during a single day, and the amount of time spent in Google Meet sessions in a single day is approximately 3,800 years); MICROSOFT TEAMS, <https://www.microsoft.com/en-us/microsoft-teams/group-chat-software> (last visited Feb. 19, 2021) (explaining Microsoft Teams is a shared-workspace collaboration application that is used for “teams” to assist in conversations. It is a chat-based collaboration platform that has video conferencing, audio conferencing, document sharing, and document storage); ZOOM, <https://zoom.us/about> (last visited Feb. 16, 2021) (explaining Zoom is a cloud-based video communications application that allows individuals to set up virtual video and audio conferencing).

34. See Alan Feuer, Nicole Hong, Benjamin Weiser & Jan Ransom, *N.Y.’s Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/06/22/nyregion/coronavirus-new-york-courts.html> (exemplifying that the backlog created by the courthouse doors being “closed” is overwhelming and will push back case resolutions months, if not years).

35. See Tim Grant, *In a Court Meant to Stave off Foreclosures, Hearings Move to Phones, Video. And They May Stay That Way*, PITT. POST-GAZETTE (Aug. 31, 2020, 6:41 AM), <https://www.post-gazette.com/news/crime-courts/2020/08/31/allegheeny-county-Foreclosures-mortgages-housing-cases-resolved-remote-court-hearings-COVID-19/stories/202008280024>; Zack Quaintance, *Will COVID-19 Cause Long-Term Tech Changes for Courts?*, GOV’T TECH. (May 29, 2020), <https://www.govtech.com/public-safety/Will-COVID-19-Cause-Long-Term-Tech-Changes-for-Courts.html>.

36. See John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041, 3041 (2014). Even by 2014, researchers were predicting the role of machine intelligence in the legal field. *Id.* at 3046. Due to the already available technologies that lawyers at the time had access to, researchers were able to expand on the ability for machine learning to help with issues like discovery, brief drafting, and even legal research. *Id.*

37. ALICIA BANNON & JANNA ADELSTEIN, BRENNAN CTR. FOR JUST., *THE IMPACT OF VIDEO PROCEEDINGS ON FAIRNESS AND ACCESS TO JUSTICE IN COURT 10* (2020), <https://www.brennancenter.org/sites/default/files/2020-09/The%20Impact%20of%20Video%20Proceedings%20on%20Fairness%20and%20Access%20to%20Justice%20in%20Court.pdf>.

the court turned to did create new opportunities for individuals to access the courts, such as expanding means of service thereby alleviating the need for personal service, and allowing individuals who are unable to make it to courthouses due to employment, location, or transportation issues to have access virtually.³⁸

The introductory quote by Roy equally applies to the impact that the pandemic can have on the accessibility of courts for those with low income. It is well known that access to justice is an ongoing challenge in the United States for low-income litigants.³⁹ Low-income litigants do not have the same access to justice as others, and this often results in individuals failing to address their civil legal needs.⁴⁰ There is a recognized justice gap in the United States between those who can afford counsel and those who cannot.⁴¹ The shift to technology during the pandemic has the potential to undermine the work that many have done to improve access to justice for low-income Americans.⁴² Or, by concentrating on effectively implementing the newly embraced technology platforms with a focus on the litigant user, courts can move towards lightening the burden for low-income individuals to address their legal needs.⁴³ At the same time, there is the potential that the

38. See Engstrom, *supra* note 2, at 255.

39. JUSTICE GAP, *supra* note 16 and accompanying text.

40. *Id.* at 9 (“Th[e] ‘justice gap’ [is] the difference between the civil legal needs of low-income Americans and the resources available to meet those needs.”).

41. *Id.*; see Leonard Wills, *Access to Justice: Mitigating the Justice Gap*, A.B.A. PRAC. POINTS (Dec. 3, 2017), <https://www.americanbar.org/groups/litigation/committees/minority-trial-lawyer/practice/2017/access-to-justice-mitigating-justice-gap>.

42. See, e.g., Greiner, Jiménez & Lupica, *supra* note 26, at 1135–36.

43. *Id.* at 1128–30. Greiner discusses hurdles that pro se litigants face with regard to available bandwidth to address their legal matter. *Id.* The necessary energy and mental bandwidth necessary to address their daily needs often make it impossible to move to address civil legal needs. *Id.*; see Joni Berner et al., *Unbundled Legal Services*, 90 PA. BAR ASS’N. Q. 96, 101 (2019); REBECCA L. SANDEFUR, ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY, AM. BAR FOUND. (2014) [hereinafter ACCESSING JUSTICE], <https://richardzorza.files.wordpress.com/2014/08/sandefur-accessing-justice-in-the-contemporary-usa-final.pdf>; REBECCA L. SANDEFUR, LEGAL TECH FOR NON-LAWYERS: REPORT OF THE SURVEY OF U.S. LEGAL TECHNOLOGIES, AM. BAR FOUND. 11–12 (2019) [hereinafter LEGAL TECH FOR NON-LAWYERS], http://www.americanbarfoundation.org/uploads/cms/documents/report_us_digital_legal_tech_for_nonlawyers.pdf. In Sandefur’s research and study, she discovered cost alone is not what keeps low-income litigants from seeking legal assistance. ACCESSING JUSTICE, *supra* note 43, at 12–13. Low-income litigants often have the perception of the legal community and the legal issue itself that keeps people from seeking assistance. *Id.* at 14–16; LEGAL TECH FOR NON-LAWYERS, *supra* note 43, at 15–16; see also David Hodson, *The Role, Benefits,*

quick shift in operating procedures of courts to utilize technology, during the pandemic, creates a heavier burden on low-income litigants, further exacerbating access issues because of the existing technology divide.⁴⁴

As the courts quickly turned to webpages to communicate with the public and posted standard online forms, the implications that this shift would have on low-income litigants could not be entirely considered. From all appearances, this swift change by the courts took an already broken system and put that same system online.⁴⁵ Without taking time to understand the benefits and concerns of utilizing technology in this way, it became clear that those with lawyers in the know could have access and those without could not.⁴⁶

As states have moved in and out of re-opening to pre-pandemic norms, courts have embraced these new technology resources and

and Concerns of Digital Technology in the Family Justice System, 57 FAM. CT. REV. 425, 425–33 (2019). Hodson has significant experience with the hands-on aspects of the limitations and benefits technologies can provide as a family law practitioner. See *id.* Ability to address the legal issue without traveling to a courthouse and easier document preparation are two very simple issues that technology can assist a low-income litigant in addressing. *Id.* at 426–28. However, limitations arise if these programs are not developed in collaboration with lawyers and the bench with similar goals in mind. See *id.* at 432–33; see also Anita Bernstein, *Minding the Gaps in Lawyers' Rules of Professional Conduct*, 72 OKLA. L. REV. 125, 133 (2019); Raymond H. Brescia et al., *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 ALB. L. REV. 553, 554–55 (2014); Dana Remus & Frank Levy, *Can Robots Be Lawyers? Computers, Lawyers, and the Practice of Law*, 30 GEO. J. LEGAL ETHICS 501, 545, 551 (2017).

44. See Emily A. Vogels, *59% of U.S. Parents with Lower Incomes Say Their Child May Face Digital Obstacles in Schoolwork*, PEW RSCH. CTR. (Sept. 10, 2020), <https://www.pewresearch.org/fact-tank/2020/09/10/59-of-u-s-parents-with-lower-incomes-say-their-child-may-face-digital-obstacles-in-schoolwork/> (discussing the digital hurdles that school students face in the pandemic, and the same concerns apply to court proceedings); see also Erin K. Morris, *Custody Quagmire: COVID-19 Has Forced Family Law Attorneys to Adjust*, 81 OR. ST. BAR BULL. 20, 22 (2021). In Oregon, as a result of discrepancies in litigants' access to technology, courts have limited remote hearings to telephonic hearings as opposed to utilizing video conferencing platforms. *Id.* As Judge Susan Svetkey, a family court judge, noted: "So many people accessing family law courts do not have internet access — as judges, we have to ensure that we don't create a two-tiered system where some can appear by video and some cannot due to lack of access to those technologies." *Id.*

45. See JUSTICE GAP, *supra* note 16.

46. Engstrom, *supra* note 2, at 263; see, e.g., Rachel Lippmann, *As Pandemic Shutdowns Drag On, St. Louis-Area Municipal Courts Go Virtual*, ST. LOUIS PUB. RADIO (Sept. 16, 2020, 5:08 AM), <https://news.stlpublicradio.org/government-politics-issues/2020-09-16/as-pandemic-shutdowns-drag-on-st-louis-area-municipal-courts-go-virtual>.

plan to utilize these resources moving forward.⁴⁷ As remote court proceedings become more common, it is important to consider what aspects could assist with lightening the load for low-income litigants versus what aspects could create a heavier burden for low-income litigants thereby widening the justice gap.

There are opportunities to utilize the pandemic related to operational and procedural changes to help to close the justice gap.⁴⁸ Simplification of procedural matters, access to the courts without having to take time off work or finding transportation to a courthouse, and simplifying the intimidating formalities of appearing in person for court all assist low-income individuals in addressing their legal needs.⁴⁹ To the extent that courts consider the needs of low-income litigants in adapting to remote access by, for example, utilizing understandable and readily available application interfaces and remote hearings, courts can become more accessible by eliminating transportation issues, limitations on available time and bandwidth to address legal problems, and even the lack of childcare.⁵⁰ Such a path would substantially assist a litigant who cannot afford a lawyer.⁵¹

The COVID-19 pandemic has touched every aspect of life including the justice system, social justice, and access to justice. This article focuses on the impact of the global movement to widely accept the use of technologies as part of the everyday court process. Specifically, in this article: part one discusses the impact of COVID-19 on the courts; part two focuses on pre-pandemic concerns directly impacted by the shift to remote technologies as the solution to court closures; part three discusses technologies utilized by courts pre-pandemic and during the pandemic, providing insights on the dangers and benefits provided by technology; and part four discusses how if courts focus on the litigant as the consumer when implementing technology solutions, low-income litigants access to justice can be increased.

47. Reynolds, *supra* note 3.

48. See LEGAL TECH FOR NON-LAWYERS, *supra* note 43, at 15–16. In her research, Sandefur concludes that technology can alleviate non-legal reasons why low-income litigants do not seek assistance and aid in addressing their civil legal needs. *Id.*

49. J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 1993, 2004–06 (2017).

50. See *id.*

51. Engstrom, *supra* note 2, at 262–63.

I. COVID-19 PANDEMIC, MITIGATION EFFORTS, AND COURT RESPONSE

As COVID-19 spread to the United States, much about the virus was still unknown.⁵² By January 2021, the United States had over twenty-one million reported COVID-19 cases.⁵³ From March 2020 through January 2021, the number of new COVID-19 cases ebbed and flowed.⁵⁴ These uncertain times led to significant changes to the daily life of Americans.

Beginning in March 2020, states quickly issued stay-at-home orders that closed businesses, schools, and even courts.⁵⁵ As courts closed, they quickly had to develop plans to address ongoing legal matters. Courts still needed to address critical legal issues, including: the right to a speedy trial in criminal cases;⁵⁶ delays in juvenile cases potentially placing children at risk for abuse;⁵⁷ and with unemployment on the rise, civil housing issues and similar legal

52. See generally *How COVID-19 Spreads*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (last visited Oct. 28, 2020) (providing detailed information on how COVID-19 spreads, as well as the signs and symptoms of the disease).

53. *COVID-19 United States Cases by County*, JOHNS HOPKINS UNIV. MED.: CORONAVIRUS RES. CTR., <https://coronavirus.jhu.edu/map.html> (last visited Feb. 19, 2021). John Hopkins University of Medicine created a research center for COVID-19 which includes a dashboard outlining the positive cases and death rate by country and even state. *Id.*

54. *Id.* (stating that significant increases in COVID-19 cases occurred during November 2020 and December 2020); John Elflein, *Number of U.S. Coronavirus (COVID-19) Cases from Jan. 20, 2020-Sep. 9, 2021, by Day*, STATISTA (Sept. 10, 2021), <https://www.statista.com/statistics/1102816/coronavirus-covid19-cases-number-us-americans-by-day>.

55. See, e.g., *2020 COVID-19 State Restrictions, Re-openings, and Mask Requirements*, NAT'L ACAD. FOR STATE HEALTH POL'Y [hereinafter *State Restrictions*], <https://www.nashp.org/2020-state-reopening-chart/> (last visited Feb. 17, 2021). The National Academy for State Health Policy created a webpage that outlines the initial stay-at-home orders and continued restrictions that occurred state by state. *Id.* By way of example, Colorado issued a stay-at-home order from March 26, 2021, through April 26, 2021, that limited non-essential business from opening. *Id.* Idaho had a similar stay-at-home order entered from March 25, 2020, through April 30, 2020. *Id.* In Idaho, there was significant ebb and flow of business openings, closings, and group gatherings due to the change in infection rate throughout the state. *Id.*

56. CONSTITUTIONAL CONCERNS RELATED TO JURY TRIALS DURING THE COVID-19 PANDEMIC, NAT'L CTR. FOR STATE CTS. 2-3 (2021), https://www.ncsc.org/_data/assets/pdf_file/0034/57886/Constitutional-Concerns-Related-to-Jury-Trials-During-the-COVID-19-Pandemic.pdf.

57. See *DUE PROCESS IN THE TIME OF COVID*, NAT'L JUV. DEF. CTR. 2 (2021), <https://njdc.info/wp-content/uploads/Due-Process-in-the-Time-of-COVID-19.pdf>.

matters that had the potential to leave families homeless if left unaddressed.⁵⁸

On March 13, 2020, the Los Angeles Times featured an article, *Justice in a Time of Coronavirus: Scared Jurors, Delayed Trials, Court Closures*, identifying numerous issues at the beginning of the pandemic.⁵⁹ With respect to criminal cases, Michele Hanisee, the president of the union that represents the deputy district attorneys in Los Angeles, explained: “You can’t just shut down the public safety function in a crisis We cannot deprive those accused of a crime their due process rights.”⁶⁰ Similarly, civil legal issues also needed to be addressed. Indeed, for some civil legal matters, the need increased. Ninety-seven percent of legal service organizations that are recipients of Legal Service Corporation (LSC) funding reported that the low-income Americans that they work with requested assistance at a higher rate to address issues of eviction, income maintenance, utility shutoff matters, domestic violence matters, or other general family law matters.⁶¹ It was estimated that to address the legal needs of low-income litigants at risk of eviction would cost over \$2.5 billion dollars.⁶²

While most courts and other “non-essential” businesses were hopeful that the initial closure orders could be lifted quickly and allow a shift back to “normal” operations, the ebb and flow of positive COVID-19 cases often resulted in the renewal of closures, including the continued closure of courts to the public.⁶³ As a result, significant

58. See Tulsa SEED Study, *Parents, Teachers, and Distance Learning During COVID-19 Pandemic: A Snapshot from Tulsa, OK*, Medium (Aug. 18, 2020), <https://medium.com/@TulsaSEED/parents-teachers-and-distance-learning-during-the-COVID-19-pandemic-a-snapshot-from-tulsa-ok-5b5fdb54ea18>. In this study conducted jointly by Georgetown University and the University of Oklahoma, researchers reflected on the issues that families faced in light of the pandemic. *Id.* These issues included insecurity with food, income, learning opportunities, and employment. *Id.*

59. Matt Hamilton & Matthew Ormseth, *Justice in a Time of Coronavirus: Scared Jurors, Delayed Trials, Court Closures*, L.A. TIMES (Mar. 13, 2020, 10:15 PM), <https://www.latimes.com/california/story/2020-03-13/coronavirus-impact-mostly-business-as-usual-in-californias-courts>.

60. *Id.*

61. Raleigh D. Kalbfleisch, *The Impact of the COVID-19 Pandemic on Legal Services*, DCBA BRIEF <https://www.dcba.org/mpage/v33-Raleigh-D-Kalbfleisch> (last visited Feb. 19, 2021). It was reported that there was a 17.9% increase in eligible clients (low-income individuals) seeking services. *Id.*

62. *Id.*

63. See, e.g., Sarah Mervosh, *Lockdowns, Round 2: A New Virus Surge Prompts Restrictions, and Pushback*, N.Y. TIMES (Nov. 16, 2020), <https://www.nytimes.com/>

changes were required to move away from the historically in-person nature of legal work.⁶⁴ These in-person interactions with the legal system were not just limited to trials, but behind-the-scene issues such as scheduling, filing, and pre-trial matters.⁶⁵ Over thirty states and the District of Columbia suspended in-person proceedings after the initial shut down in March 2020.⁶⁶ Ultimately, courts turned to remote technologies as the solution to move cases forward in at least some capacity while assuring the health and safety of individuals within the court system.⁶⁷ The legal field found itself in a situation where a historically in-person field of work transformed quickly into virtual and remote court proceedings.

A. Stay-at-Home Orders and Initial Closures

As the pandemic spread throughout the United States, states began to implement changes to how daily business and life would be conducted to protect individuals from the spread of COVID-19.⁶⁸ Starting on March 1, 2020, with Florida declaring a “State of Emergency,”⁶⁹ states began taking actions to mitigate the spread of the virus.⁷⁰ However, just declaring a “State of Emergency” did not automatically close businesses or limit group events. Individual business and county closures began to occur to address the spread of COVID-19.⁷¹ Ultimately, states began implementing state-wide

2020/11/16/us/coronavirus-lockdowns-restrictions.html. As the winter months approached, Coronavirus cases rapidly escalated causing the states to renew restrictions in an attempt to stop the spread of the virus. *See id.* As many states across the nation reported more new cases and hospitalizations than we had seen in the initial shutdown, states re-imposed restrictive measures and stay-at-home orders. *See id.*

64. *See* Quaintance, *supra* note 35; *see also* *Coronavirus and the Courts*, *supra* note 8.

65. Quaintance, *supra* note 35.

66. Reynolds, *supra* note 3.

67. *Id.*

68. Moreland et al., *supra* note 5.

69. Fla. Exec. Order No. 21-94 (Mar. 9, 2020).

70. *See* *United States v. Spencer*, No. 15-562, 2021 U.S. Dist. LEXIS 26958, at *13 (E.D. Pa. Feb. 12, 2021) (“The federal government and every state declared states of emergency, with more than half of the states and the District of Columbia imposing lockdown restrictions on their residents at different times and for varying periods of time.”).

71. *See, e.g.,* *New York City to Close Schools, Restaurants and Bars*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/nyregion/new-york-coronavirus.html>. As part of the reported commencement of shutdowns in New York City, including

business closures and stay-at-home orders.⁷² California and New York were some of the earliest states to issue stay-at-home orders.⁷³ Eventually, almost all states followed suit.⁷⁴ These orders closed all non-essential businesses, limited any non-essential gatherings, and asked individuals to stay home.⁷⁵ Grocery stores and medical facilities stayed open given the essential nature of the work of these businesses.⁷⁶ However, even these essential businesses urged individuals to use mobile tele-visits, mobile grocery ordering and delivery, contactless payments, and other options to keep people from leaving their homes.⁷⁷

schools and restaurants, this article aptly points out that the New York City public school system is the largest in the country with 1.1 million students in attendance. *Id.* This was one of the first efforts in the United States to mitigate the spread of COVID-19. *Id.* Similarly, at this time New Jersey Governor Philip Murphy planned for a school shutdown, as did Connecticut Governor Ned Lamont. *Id.* Given the dramatic impact that this closure would have on families, the closures of schools included a mandate by New York Governor Andrew Cuomo that New York City school officials were required to develop a plan for childcare for essential workers and a method to provide students meals in low-income households. *Id.* This exemplifies the multi-layer impact and potential disparate impact that mass closures, such as schools, have on individual families.

72. Moreland et al., *supra* note 5.

73. *Id.*; see also Cal. Exec. Order No. N-33-20 (Mar. 4, 2020).

74. Moreland et al., *supra* note 5; see also Jennifer Kates, Josh Michaud & Jennifer Tolbert, *Stay-at-Home Orders to Fight COVID-19 in the United States: The Risks of a Scattershot Approach*, KAISER FAM. FOUND. (Apr. 5, 2020), <https://www.kff.org/policy-watch/stay-at-home-orders-to-fight-covid19/>.

75. See Press Release, Andrew Cuomo, Governor, New York, Governor Cuomo Signs the “New York State on PAUSE” Executive Order (Mar. 20, 2020) <https://www.governor.ny.gov/news/governor-cuomo-signs-new-york-state-pause-executive-order>; see also Moreland et al., *supra* note 5.

76. See generally *State Restrictions*, *supra* note 55 (regarding the stay-at-home orders across the country and the nature of the closures associated with them compiled by the National Academy for State Health Policy (NASHP)). The NASHP consists of policy makers who work to implement solutions to health policy challenges. *About NASHP*, NAT’L ACAD. FOR STATE HEALTH POL’Y, <https://www.nashp.org/about/> (last visited Sept. 12, 2021). Part of their work includes an action center for COVID-19 information. *COVID-19 State Action Center*, NAT’L ACAD. FOR STATE HEALTH POL’Y, <https://www.nashp.org/COVID-19-action-center/> (last visited Sept. 12, 2021).

77. See Michael Hines, *How Costco, Walmart and Whole Foods Use Tech to Reinvent Grocery Shopping*, BUILTIN (May 5, 2020), <https://builtin.com/corporate-innovation/technology-grocery-store>; *Using Telehealth to Expand Access to Essential Health Services During the COVID-19 Pandemic*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 10, 2020) [hereinafter *Using Telehealth*], <https://www.cdc.gov/coronavirus/2019-ncov/hcp/telehealth.html>. As Hines notes, retailers such as Walmart and Whole Foods, prior to the pandemic, were expanding the uses of technology for their store operations and to “improve the shopping experience.” Hines, *supra* note 77. These advancements became a necessity during the pandemic. *Id.*

By the end of March 2020, some media outlets were reporting on state responses to the growing spread of COVID-19 as the seriousness of the situation continued to expand.⁷⁸ On March 21, 2020, *Cleveland.com* reported that state closures fell into four categories: most restrictive (closing non-essential businesses); many restrictions on business closings; fewer restrictions (no dine-in permitted at restaurants); and fewest restrictions (no state ban on dine-in restaurants).⁷⁹ Using these designations to gain a perspective of the landscape at the time, in March 2020: eight states had already enacted significant restrictions in response to COVID-19, closing businesses deemed non-essential; eighteen states had many restrictions limiting businesses ability to remain open but allowing some non-essential businesses to remain open; thirteen states allowed many businesses to remain open but prohibited dine-in restaurants; and eleven states had few restrictions and allowed individuals to visit dine-in restaurants.⁸⁰ State schools closed for in-person classes, with most remaining closed for the remainder of the 2019–2020 academic year.⁸¹ While not every state closed businesses by the end of March, almost all states had restrictions regarding the number of individuals that could gather in person indoors.⁸²

78. Adam Ferrise, *50 States of Coronavirus: How Every State in the U.S. Has Responded to the Pandemic*, CLEVELAND.COM (Mar. 21, 2020), <https://www.cleveland.com/metro/2020/03/50-states-of-coronavirus-how-every-state-in-the-us-has-responded-to-the-pandemic.html>; Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>.

79. Ferrise, *supra* note 78.

80. *Id.*

81. *Id.*; see Press Release, Tom Wolf, Governor, Pennsylvania, Governor Wolf Extends School Closure for Remainder of Academic Year (Apr. 9, 2020), <https://www.governor.pa.gov/newsroom/governor-wolf-extends-school-closure-for-remainder-of-academic-year> (announcing that all schools would remain closed for the entirety of the school year to ensure safety); see also Eliza Shapiro, *N.Y.C. Closes Schools for Academic Year, but Cuomo Says It's His Decision*, N.Y. TIMES (Apr. 11, 2020), <https://www.nytimes.com/2020/04/11/nyregion/nyc-schools-closed.html>. Shortly after Governor Wolf's school closure announcement, it was announced by Mayor Bill de Blasio that the nation's largest public school system in New York City would remain closed through the end of the academic year. *Id.* A few other states, such as California and Washington, announced year-long school closures in April. *Id.*

82. Ferrise, *supra* note 78; see Abha Bhattarai, *Supermarkets are Limiting the Number of Shoppers at One Time. Temperature Checks and Delivery-Only Stores May Follow*, WASH. POST (Mar. 17, 2020), <https://www.washingtonpost.com/business/2020/03/17/supermarkets-are-limiting-number-shoppers-one-time-temperature-checks-delivery-only-stores-may-follow/>.

By mid-April 2020, all but seven states adopted orders significantly restricting business operations, group gatherings, and requiring individuals to stay home.⁸³ Stay-at-home orders required all individuals to stay home and work from home, while schools either closed or utilized virtual education models.⁸⁴ Only essential businesses remained open during this time, which did not include local, state, or federal courts and their operations.⁸⁵ Initially, court closures resulted in a cessation of all work.⁸⁶ Cases were postponed and litigants generally did not have access to the courts.⁸⁷

Over time, states relaxed restrictions, allowing schools to open in hybrid formats, allowing limited indoor gatherings, and even some indoor dining.⁸⁸ By summer 2020, some courts returned to in-person proceedings; however, most courts remained closed or only allowed limited in-person activity.⁸⁹ Even during this time period, cases were often continued and rules relating to time calculations for hearings and appeals remained stayed.⁹⁰ These limitations on in-person

83. Chris Cillizza, *7 Governors Still Haven't Issued Stay-at-Home Orders. Here's Why*, CNN: POL. (Apr. 13, 2020, 3:28 PM), <https://www.cnn.com/2020/04/13/politics/asa-hutchison-arkansas-coronavirus/index.html>. The seven states that did not issue stay-at-home orders were contrary to the 97% of the country's population that were under stay-at-home restrictions. *Id.*

84. See Thomas Johnson & Angela Fritz, *You're Under a Stay-at-Home Order? Here's What That Means in Your State*, WASH. POST (May 5, 2020), <https://www.washingtonpost.com/health/2020/04/06/coronavirus-stay-at-home-by-state/>.

85. See *Court Orders and Updates During COVID-19 Pandemic*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/court-website-links/court-orders-and-updates-during-covid19-pandemic> (last visited Feb. 19, 2021). Courts, both federal and state, have coordinated with their state and local health officials to develop modified operations pursuant to their stay-at-home orders. *Id.*

86. See Alan Feuer et al., *Coughing Lawyers. Uneasy Jurors. Can Courts Work Under Coronavirus?*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/2020/03/20/nyregion/coronavirus-new-york-courts.html>.

87. See *id.* As the Coronavirus began to spread through the United States, courts postponed hearings and closed to the public. *Id.*; see *Coronavirus and the Courts*, *supra* note 8.

88. See Adam K. Raymond, *These Are the States Opening Back Up for Business*, N.Y. MAG.: INTELLIGENCER (May 18, 2020), <https://nymag.com/intelligencer/2020/05/states-stay-at-home-orders-ending.html> (stating that many states started reopening non-essential businesses, both indoor and outdoor, such as bars and restaurants, barbershops, and other non-essential retail stores).

89. See, e.g., Maura Dolan, *Some California Courts Start to Reopen as Coronavirus Restrictions Ease*, L.A. TIMES (May 21, 2020, 4:37 PM), <https://www.latimes.com/california/story/2020-05-21/some-california-courts-start-to-reopen-as-coronavirus-restrictions-ease>.

90. See *id.*; *Coronavirus and the Courts*, *supra* note 8. As new cases of COVID-19 spiked in November 2020, states returned to closures of indoor dining, schools

proceedings have had a significant impact on how court matters are handled.

B. Impact of Court Closures

Closures of the courts in March and April 2020 had an almost immediate impact on individuals who needed to utilize the legal system. While all courts and proceedings were impacted, the impact varied by the type of case, depending on whether the case was a civil, criminal, juvenile, or appellate case, in state court or federal court.⁹¹ This impact also changed over time as state safety restrictions were added or lifted.⁹²

With closures came modifications and suspensions of rules of court directly relating to timing.⁹³ Specifically, during the initial stay-at-home orders, courts extended the time for many filing deadlines, as well blanket continuances for hearings.⁹⁴ Many states suspended deadlines indefinitely, staying timing associated with specific cases.⁹⁵

returned to virtual learning models, and the courts that opened to in-person proceedings closed again. *See, e.g.*, Order Extending State of Emergency and Suspending Jury Trials, No. ADM2020-00428 (Tenn. Nov. 17, 2020).

91. *See* Kalbfleisch, *supra* note 61. Some forms of legal proceedings received automatic stays, such as foreclosure and eviction cases. *Id.* These mandates only lasted through summer 2020. *Id.* Other proceedings, such as ones dealing with domestic violence, could not be stayed given the risk to safety to the individual litigants involved. *See* Amanda Taub, *A New COVID-19 Crisis: Domestic Abuse Rises Worldwide*, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/world/coronavirus-domestic-violence.html>.

92. *See* Kalbfleisch, *supra* note 61.

93. *See* *Coronavirus and the Courts*, *supra* note 8 (providing links to state courts' COVID-19 websites); *see also* *COVID-19 Resources and Response: Supreme Court Orders Related to the COVID-19 Pandemic*, WASH. CTS. <https://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.COVID19Orders> (last visited Feb. 17, 2021). Washington state only rescinded their timing extensions in appellate proceedings in October 2020. Order Rescinding the April 2, 2020, Order that Temporarily Suspended the Application of RAP 18.8(b) and (c), No. 25700-B-648 (Wash. Oct. 13, 2020); *see also* *State Restrictions*, *supra* note 55 (reporting that data collected by the National Academy of State Health Policy demonstrated that the changes in restrictions instituted by states in general had a direct impact on court procedures and ultimate openings).

94. *Coronavirus and the Courts*, *supra* note 8; *see, e.g.*, Order Clarifying the Extension of Deadlines, No. ADM2020-00428 (Tenn. Mar. 31, 2020).

95. *See* Emergency Ord. of Statewide Jud. Admin. Applicable from May 1, 2020, Through June 1, 2020, 230 A.3d 1015, 1017–19 (Pa. 2020); *see also* *United States v. Velez*, No. 3:19-cr-30059-MGM, 2020 WL 5440626, at *2–3 (D. Mass. Sept. 10, 2020) (citing *United States v. Diaz-Nivar*, No. 20-cr-38-JD, 2020 WL 3848200, at *3 (D.N.H.

While some of these extensions expired, other courts continued the extensions through early 2021.⁹⁶

When courts closed initially to in-person access and all legal activities were stalled, the first challenge was determining what court activities were essential and could not be delayed.⁹⁷ While many legal matters could be delayed, others required immediate attention.⁹⁸ Specifically, these included matters relating to domestic violence, protection of children, unemployment compensation, and matters that kept criminal defendants incarcerated in small populated indoor placements.⁹⁹ Matters such as these required courts to attempt to continue some form of access, while other matters remained generally continued.

As time has moved on, most courts still are not back to operating “as normal.” As of August 1, 2020, Philadelphia only resumed preliminary hearings in criminal cases.¹⁰⁰ As criminal courts have not resumed normal operations, defense attorneys across the county have raised concerns about the negative impact the delay is having on defendants in the system that has nothing to do with guilt or

July 8, 2020)). In *Velez* (and *Diaz-Nivar*), the criminal defendants challenged the right of the government to stay enforcement of the Speedy Trial Act during the pandemic. *Velez*, 2020 WL 5440626, at *2. The courts have uniformly upheld the government’s right to enact this stay in light of the health and safety concerns posed by the pandemic and the continuation of jury trials. *Id.* at *3; see also Samantha Melamed, *Thousands Are in Limbo as Philly Courts Remain Mostly Stalled by Coronavirus: ‘It’s Just Been Mass Confusion’*, PHILA. INQUIRER (Aug. 1, 2020), <https://www.inquirer.com/news/philadelphia-criminal-court-coronavirus-pandemic-shutdown-jury-trials-preliminary-hearings-20200801.html>.

96. See e.g., Order of the Chief Admin. Judge of the Cts., No. AO/96/21 (N.Y. Mar. 15, 2021); Order of the Chief Admin. Judge of the Cts., No. AO/95/21 (N.Y. Mar. 15, 2021). In New York as recently as February 2021, the court issued virtual bench trial protocols and procedures for their hearings. *Virtual Court Appearances for the Public*, NYS UNIFIED CT. SYS., <https://portal.nycourts.gov/knowledgebase/article/KA-01070/en-us> (last visited Sept. 13, 2021).

97. See *Coronavirus and the Courts*, supra note 8; see, e.g., Order Declaring COVID-19 Essential and Critical Trial Crt. Proc., No. AOSC20-15 (Fla. Mar. 17, 2020); see also *State Restrictions*, supra note 55.

98. See *Coronavirus and the Courts*, supra note 8; see, e.g., Order for La. Cts., (La. Mar. 16, 2020) (modifying the Louisiana Supreme Court’s order prohibiting in-person proceedings to allow for in-person proceedings specifically for emergencies).

99. See Order for La. Cts., (La. Mar. 16, 2020); Katie Park et al., *Tracking the Spread of Coronavirus in Prisons*, MARSHALL PROJECT (Apr. 24, 2020, 3:05 PM), <https://www.themarshallproject.org/2020/04/24/tracking-the-spread-of-coronavirus-in-prisons>. The Coronavirus quickly spread through United States prisons and by April 24, 2020, at least 9,437 individuals in prison tested positive for the virus. *Id.* The Coronavirus was spreading at a 150% higher rate in prisons than in the general population. *Id.*

100. Melamed, supra note 95.

innocence.¹⁰¹ Given the delay in criminal trials, defense attorneys in Philadelphia expressed concerns that defendants would enter into plea agreements due to how long it would take to get released from incarceration while awaiting trial.¹⁰²

With stays in proceedings, case backlogs grew.¹⁰³ In New York City, the backlog in the criminal court system expanded by a third between the months of February 2020 and June 2020.¹⁰⁴ This backlog included 39,200 criminal cases, including jury trials which were stayed indefinitely.¹⁰⁵ For a court system that historically had upward of fifteen jury trials in progress each day in the Manhattan Criminal Court, this is an extreme statistic.¹⁰⁶ As of June 2020, there had been no jury trials since the middle of March 2020.¹⁰⁷ In New York state as a whole, as of October 2020, there were 101,140 pending criminal actions.¹⁰⁸ In San Diego (the second largest court system in California), there was still a backlog of 20,000 criminal cases by September 2020.¹⁰⁹ Backlogs grew in civil courts across the country as

101. *See id.*

102. *Id.* In fact, as of August 1, 2020, there were 1,400 people incarcerated for cases that had yet to have a preliminary hearing. *Id.* Normally, these hearings are required to take place within 21 days after bail being set or within 14 days if the defendant is in jail, and as of this time, the preliminary hearings were set out 137 days after the arrest. *Id.*; *see also* Feuer, Hong, Weiser & Ransom, *supra* note 34 (quoting Judge Jed S. Rakoff in *The New York Review of Books* when he stated that it will not be easy “to see how the constitutional right to a jury trial will be genuinely met”).

103. Feuer, Hong, Weiser & Ransom, *supra* note 34.

104. *Id.*

105. *Id.* What is most concerning about this backlog is that it appears that we are no closer to opening courts. *See id.* As courts attempt to open, they receive pushback regarding the safety concerns raised by implementing such a plan. *See* Madison Alder, *Court Reopening Plans Face Pushback as Coronavirus Surges*, BLOOMBERG L. (July 22, 2020, 4:50 AM), <https://news.bloomberglaw.com/us-law-week/court-reopening-plans-face-pushback-as-coronavirus-surge>. In fact, in Allegheny County, Pennsylvania, after the criminal courts began to re-open in August 2020 for in-person trials consisting of in-person appearances by judges, district attorneys, and defense counsel, COVID-19 cases began to spread amongst the criminal bar. Mick Stinelli & Nick Trombola, *Assistant District Attorney Who Filed OSHA Complaint After Getting COVID-19 has Died*, PITT. POST-GAZETTE (Aug. 11, 2020, 6:31 PM), <https://www.post-gazette.com/news/crime-courts/2020/08/11/Russ-Broman-Allegheny-County-assistant-district-attorney-COVID-19-death/stories/202008110138>.

106. Feuer, Hong, Weiser & Ransom, *supra* note 34.

107. *Id.* As the *New York Times* reported, this included the suspension of a murder trial that was nearing the end in March. *Id.* The two individuals on trial for murder have maintained their innocence and have waited for over two years for their trial. *Id.* As of June 2020, they remained in a Manhattan detention center awaiting the completion of their jury trial. *Id.*

108. Reynolds, *supra* note 3.

109. *Id.*

well.¹¹⁰ Using the same courts for comparison, New York State, as of October 2020, had 1,157,918 pending civil matters and San Diego, as of September 2020, had a backload of 54,000 civil cases.¹¹¹

These civil cases included family court matters, leaving families in limbo, landlord-tenant issues, impacting housing security for individuals, and unemployment compensation matters.¹¹² Given the high conflict nature of family law matters, specifically domestic violence and child custody cases, concerns about individuals utilizing the pandemic to their advantage began to surface.¹¹³ While most courts developed methods to deal with emergency custody issues, such emergencies were often ill-defined.¹¹⁴ Just as Kim experienced in her attempts to utilize the system, it was unclear if her circumstances rose to the level of an emergency. Kim's grandchildren were safe and in a stable environment, yet she was having difficulty arranging for their care. Whether or not this is an "emergency" is not something that is easily determined and could vary by state, court, judge, or even based on the parties' perspective.¹¹⁵ Given the lack of a comprehensive definition of "emergency," the pandemic often led to litigants engaging in self-help by taking matters into their own hands.¹¹⁶ These self-help measures ranged from parents refusing to follow custody orders, citing concerns regarding the spread of COVID-19 by parents unilaterally going on vacation to COVID-19 "hotspots," to conflicts about how children should (or should not) attend school.¹¹⁷

Concerns regarding court backlogs and misuse of the pandemic were not the only issues presented by court closures. The closure of other "non-essential" businesses contributed in somewhat unexpected

110. Feuer, Hong, Weiser & Ransom, *supra* note 34.

111. Reynolds, *supra* note 3.

112. See, e.g., Kalbfleisch, *supra* note 61; Paul Sullivan, *The Pandemic Has Slowed the Divorce Process. Here's What to Expect.*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/2020/05/08/your-money/divorce-coronavirus-courts.html>.

113. See Sullivan, *supra* note 98; see also *In Re: Custody Ords. During the Fifth Jud. Dist. Jud. Emergency & the COVID-19 Pandemic*, (Pa. Mar. 24, 2020) (exemplifying how Allegheny County courts addressed custody matters during stay-at-home orders).

114. See *Coronavirus and the Courts*, *supra* note 8; see, e.g., Order for La. Cts., (La. Mar. 16, 2020) (highlighting the Louisiana Supreme Court allowed for in person proceedings for emergency matters but did not define emergencies).

115. See, e.g., Order for La. Cts., (La. Mar. 16, 2020).

116. See Julie R. Colton, *Handling Co-Parenting Issues as Stay-At-Home Orders are Lifted*, JURIST (May 18, 2020), <https://www.jurist.org/commentary/2020/05/julie-colton-coparenting-stayathome-lifted-covid19/>.

117. See, e.g., *id.*

ways to the ability of litigants to access the courts.¹¹⁸ Specifically, stay-at-home orders also closed churches, libraries, law schools, and legal aid offices for long periods at a time.¹¹⁹ These additional closures impacted low-income individuals' ability to access information about legal issues, services, or even their cases.¹²⁰ Individuals without counsel often do not seek legal advice from lawyers, even if they are available, turning instead to churches, county agencies, social workers, or other non-legal sources that have access to legal information or referrals.¹²¹ Additionally, low-income individuals utilize libraries, neighborhood centers, and bar associations, which are now unavailable for self-help materials.¹²² Often, libraries provided low-income litigants with access to computers, printers, copiers, internet access, and even scanners.¹²³ With these closures, low-income litigants often found themselves without any access to the legal system.¹²⁴

The direct impact of the closure of courts and other “non-essential” business on unrepresented litigants or low-income litigants is exemplified by a *BuzzFeed* story from May of 2020.¹²⁵ The *BuzzFeed* article discusses a father who was scheduled for a child support hearing that had been canceled in March 2020 due to the pandemic

118. See Glenn R. Miller, *Libraries to Observe Governor Wolf's Order to Close Businesses That Are Not Life-Sustaining*, STATE LIBR. PA., <https://www.statelibrary.pa.gov/COVID-19/Communications/Pages/March20.aspx> (last visited Feb. 16, 2020).

119. See *id.*

120. See Greiner, Jiménez & Lupica, *supra* note 26, at 1121.

121. *Id.*; Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV. 443, 448 (2016) [hereinafter *What We Know*]. Sandefur reported that only 22% of individuals look to people outside of their social network when they have a civil legal need. *Id.*

122. Greiner, Jiménez & Lupica, *supra* note 26, at 1121; see, e.g., Miller, *supra* note 118. Self-help materials are a step-by-step guide to aid individuals without counsel in addressing their legal matter. This is the dominant form of assistance to low-income litigants without counsel. Greiner, Jiménez & Lupica, *supra* note 26, at 1121.

123. See Part 4: *What People Want from Their Libraries*, PEW RSCH. CTR. (Jan. 22, 2013), <https://www.pewresearch.org/internet/2013/01/22/part-4-what-people-want-from-their-libraries/>.

124. See Greiner, Jiménez & Lupica, *supra* note 26, at 1121.

125. Zoe Tillman, *Going to Court Without a Lawyer Was Always Hard. The Pandemic Has Made It Much Harder*, BUZZFEED NEWS (May 15, 2020, 10:59 AM), <https://www.buzzfeednews.com/article/zoetillman/coronavirus-courts-closed-civil-court-legal-help>. *BuzzFeed's* reporting on matters such as these exemplify the extreme to which these concerns are observed in daily life. *BuzzFeed* is a popular media news platform, often linking to social media feeds and reaching a significant number of readers. *About BuzzFeed*, BUZZFEED, <https://www.buzzfeed.com/about> (last visited Sept. 16, 2021).

and by May 2020, had not yet been rescheduled.¹²⁶ The father was let go by his employer and was unable to afford his child support obligation.¹²⁷ He tried multiple methods to determine how to move his case forward.¹²⁸ However, after he called the wrong unit at the courthouse (and after having waited for four hours to get through), his fiancée tweeted the court and received no response.¹²⁹ While normally the father would have gone to the courthouse for guidance, with closures, this was no longer possible.¹³⁰ Due to the pandemic, this relatively simple legal process was impossible to navigate, and there were no available resources for the father to access any help to move his matter forward.¹³¹

C. COVID-19 Courts

Given the ongoing need for courts' essential work, and understanding that hearing dates cannot be delayed indefinitely, courts strove to find ways to permit cases to proceed in some manner.¹³² Courts quickly turned to technology to allow some form of daily operations to continue and to mitigate the impact of the COVID-19 closures.¹³³ This turn to technology included the utilization of video conferencing platforms such as Microsoft Teams and Zoom, document sharing programs such as Google Docs, electronic filing systems, and email as a means to effectuate service and notice.¹³⁴ During the pandemic, video conferencing has been utilized for everything from

126. Tillman, *supra* note 125.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. See Deniz Arıturk et al., *Virtual Criminal Courts*, U. CHI. L. REV. ONLINE, Nov. 2020, at *57 (2020).

133. See *id.* Staff from The Ohio State University completed a study of the fifty-five Ohio Judicial Conference court orders that were posted as of March 20, 2020. JANA HRDINOVA, ET AL., OHIO ST. U., DOCUMENTING THE CHALLENGES (AND DOCUMENTS) AS OHIO COURTS RESPOND TO COVID-19, at 2 (2020). One of the provisions of the study was technology utilization, specifically, the endorsement of technology utilization for court proceedings and statements on select court actions using remote technology, as there were many limitations placed on access to physical courts. *Id.* at 4–5; see also Engstrom, *supra* note 2, at 250–51 (stating that between March 2020 and July 2020, 900 judges in Michigan clocked over 500,000 hours of video conference hearings on Zoom).

134. See Engstrom, *supra* note 2, at 250–51.

pre-trial conciliations to non-jury and jury trials.¹³⁵ Courts moved to utilizing electronic filing systems to assure that documents could be filed with the courts without requiring in-person trips to court record offices.¹³⁶ The adoption of these technologies was swift, often taking technologies occasionally utilized by courts and lawyers and making them the “new normal.”¹³⁷

Compounding these difficulties, even as some courts re-opened to in-person proceedings, the openings were sometimes short-lived as spikes in COVID-19 often quickly changed the status of court operations.¹³⁸ The primary source for sharing court updates during this time has often been through websites and local bar

135. See R. Thomas Dunn, *Virtual Mediations Are Zooming Forward . . . Jump on Board*, NAT'L L. REV. (Apr. 10, 2020), <https://www.natlawreview.com/article/virtual-mediations-are-zooming-forward-jump-board>; see also *Ben Crump Wins Historic \$411 Million Verdict in Zoom Trial*, AP NEWS (Oct. 6, 2020), <https://apnews.com/press-release/pr-newswire/north-america-transportation-transportation-accidents-automotive-accidents-trials-fb8714239bdd5e8e914d68016b8893e5> (reporting that during October 2020, Ben Crump, a renowned civil rights and personal injury attorney, won a jury verdict for his client in an amount over \$411 million; this jury trial was the first jury trial by Zoom held in Florida's Second Circuit Court in Northern Florida).

136. Engstrom, *supra* note 2, at 250.

137. See Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. L. REV. 933, 945 (2015) (discussing that video conferencing (via closed-circuit television) has been utilized by immigration courts since the early 1990s); see also Alan J. Crivaro, *Virtual Technology Solutions Transcend the Brick and Mortar Courthouse*, 63 ORANGE CNTY. LAW. 20, 21 (2021). While it is concerning that mistakes can easily occur, even to attorneys, more articles about post-pandemic practice and technology are being shared given the likelihood that these technologies are being incorporated into practice moving forward. See Eagly, *supra* note 137; Crivaro, *supra* note 137. The adaptation of these technologies had the potential to be confusing. Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORNELL J.L. & PUB. POL'Y 331, 336–39 (2016). Because pro se litigants are already more likely to commit procedural errors when addressing their legal matters than those represented by counsel, adding confusing technology to this only makes matters more difficult. *Id.* at 336–37; see also Benjamin K. Sanchez, *How to Prepare for the Post-Pandemic Courtroom*, GPSOLO, March/Apr. 2021, at 16–17. Even lawyers are not immune from technological glitches when utilizing the online video conferencing platforms embraced by the courts. See Rachel Metz, *That Cat Zoom Filter Is Almost Impossible to Find. Here's Why*, CNN BUS. (Feb. 10, 2021, 6:49 PM), <https://www.cnn.com/2021/02/10/tech/cat-lawyer-zoom-filter/index.html>. In February 2021, during a virtual hearing in Texas, an attorney appeared as a kitty instead of a human due to a Zoom filter that he could not initially figure out how to remove. *Id.*

138. See *Coronavirus and the Courts*, *supra* note 8; see, e.g., Order Extending State of Emergency and Suspending Jury Trials, No. ADM2020-00428 (Tenn. Nov. 17, 2020).

associations.¹³⁹ While nominally available to the public, such information is available only to those who know where to look for it and is inaccessible to individuals without internet access and a computer or smartphone.¹⁴⁰ While information is easily and widely spread to lawyers, those without lawyers are potentially left without the knowledge of how to proceed with their cases.¹⁴¹

Finding a balance between necessary closures and allowing court matters to continue became a significant challenge for the courts to navigate.¹⁴² As the majority of states allowed virtual court proceedings in 2020 (and have continued into 2021), understanding the impact of such a shift on all of the individuals that utilize the court system becomes immensely important.¹⁴³ This is particularly true because judges across the country predict virtual proceedings are here to stay, at least in some capacity.¹⁴⁴ While easing case burdens on judges and lawyers, and possibly providing additional access to the courts to low-income litigants, the potential for negative impacts from such a shift cannot be ignored.

II. PRE-PANDEMIC GAPS IN JUSTICE AND AVAILABLE TECHNOLOGY

Understanding the “lay of the land” regarding access to the courts and the impediments that low-income litigants face when addressing their legal needs pre-pandemic is an important first step to evaluating the impact of courts’ turn to technology to continue operations.

139. See, e.g., *Emergency Operations Orders*, PA. FIFTH JUD. DIST., <https://www.allegheycourts.us/administration/EmergencyOperations.aspx> (last visited Sept. 16, 2021) (posting Allegheny County emergency operations orders to the county court’s website).

140. See *COVID-19 Information & Resources for Clients*, LEGAL AID SOC’Y, <https://legalaidnyc.org/get-help/COVID-19/COVID-19-information-for-clients/> (last visited Feb. 18, 2021) (showing how this website, run by the Legal Aid Society of New York, provides information on common legal issues that low-income individuals are seeking assistance with during the pandemic); see also *COVID-19, NEIGHBORHOOD LEGAL SERVS.*, <https://www.nlsa.us/COVID-19/> (last visited Feb. 18, 2021). In review of this legal aid webpage as well as others, it is clear that legal aid providers are providing the majority of information to low-income litigants to assist these individuals with their legal needs. *Id.*

141. See Tillman, *supra* note 125.

142. See Feuer, Hong, Weiser & Ransom, *supra* note 34.

143. See UNITED STATES COURTS, *supra* note 85.

144. Reynolds, *supra* note 3 (citing Judge Scott Schlegel as indicating that he predicts at a minimum that pretrial conferences, an often five-minute proceeding, will remain online).

Technology solutions have the power to assist with or hinder access to justice.¹⁴⁵

The United States has a long history of struggling with access to justice for low-income litigants.¹⁴⁶ LSC, in 2017, issued its report on the “unmet civil legal needs of low-income Americans.”¹⁴⁷ The report found that in 2017 “71% of low-income households experienced at least one civil legal problem.”¹⁴⁸ These are civil legal problems directly impacting everything from an individual’s health, finances and housing, to custody of children.¹⁴⁹ Of these reported civil legal issues, 86% of low-income Americans reported that they received “inadequate or no legal help.”¹⁵⁰ This is particularly concerning given the serious

145. See SANDEFUR, *supra* note 43 (technologies have the ability to assist with the non-legal reasons as to why low-income litigants do not seek assistance, such as the misbelief that their issue is not “legal” but instead something that just “happens”); see also Hodson, *supra* note 43 (explaining that technologies can hinder access to justice if not developed in collaboration with all of the key players such as the litigant, the lawyers, and the bench).

146. Deborah L. Rhode et. al, *Access to Justice Through Limited Legal Assistance*, 16 NW. J. HUM. RTS. 1 (2018). The ongoing justice gap incorporates the influx of unrepresented litigants within the legal system. *Id.* at 3–4. This is often referred to as the “pro se crisis.” *Id.* at 4. However, as Rhode points out, this is in fact the new normal. *Id.*; accord D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013); see also Marsha M. Mansfield, *Litigants Without Lawyers: Measuring Success in Family Court*, 67 HASTINGS L.J. 1389 (2016) (exemplifying that the large number of pro se litigants within the court system has been constant, if not growing, for decades).

147. JUSTICE GAP, *supra* note 16, at 1–2. LSC is an organization that provides funding legal aid programs across the United States as well as researches the legal needs of low-income Americans. *Id.* at 2.

148. *Id.* at 6.

149. *Id.* at 7.

150. *Id.* at 6; see Greiner, Jiménez & Lupica, *supra* note 26, at 1128 (noting that low-income individuals struggled with having available “bandwidth” to address their civil legal issues given that the individuals have an already full plate dealing with issues of housing, income, food, or other necessary matters to maintain daily life); Sela, *supra* note 137, at 331 (noting the difficulties that pro se litigants have with addressing administrative, procedural, and substantive legal matters); see also *What We Know*, *supra* note 121, at 446 (noting the difficulties of living in a “law-thick” world and how it creates difficulties for pro se litigants to address routine and common issues given the regulations associated with them). The World Justice Project is an “independent, multidisciplinary organization working . . . to advance the rule of law worldwide.” *About Us*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/about-us> (last visited Sept. 16, 2021). The organization collects independent data throughout the world evaluating the rule of law. *What Is the Rule of Law?*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/about-us/overview/what-rule-law> (last visited Sept. 16,

nature of the civil legal issues that are at stake for low-income individuals. Some of these legal issues are even more prevalent as a result of the pandemic.¹⁵¹ Unemployment and housing concerns are at the forefront of pandemic-related legal concerns for low-income Americans.¹⁵²

Pre-pandemic, low-income litigants had resources available for assistance with their legal matters. Legal aid offices, attorneys taking cases pro bono, limited legal services, and self-help materials were available resources.¹⁵³ Although legal aid offices, law school clinics, and pro bono attorneys offer full legal services to those in need, these were not the primary resources utilized by low-income litigants.¹⁵⁴ Other options available that provide some, but not all, forms of representation, such as limited legal services (or unbundled legal services) and self-help materials, are the most frequent options utilized for assistance with the legal matters of low-income litigants.¹⁵⁵ These resources are often available directly at

2021). Specifically, they evaluate and compare 128 countries and jurisdictions on issues such as fundamental rights, access to civil justice, and criminal justice issues. *Id.* To obtain the data points, the World Justice Project relies on surveys of over 130,000 household and 4,000 legal practitioners and experts and their perceptions of how law is experienced. *Id.* The United States has one of the lowest rankings on accessibility and affordability of civil justice issues out of 128 countries and jurisdictions. *WJP Rule of Law Index*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/rule-of-law-index/factors/2020/United%20States/Civil%20Justice/> (last visited Sept. 16, 2021).

151. See Samuel Stebbins & Grant Suneson, *Amid Coronavirus Pandemic, Missed Rent and Mortgage Payments Are Piling Up in Nearly Every State*, USA TODAY (July 23, 2020, 7:00 AM), <https://www.usatoday.com/story/money/2020/07/23/missed-housing-payments-are-piling-up-in-nearly-every-state/41791933/> (explaining that as the pandemic surged, unemployment rates simultaneously skyrocketed leaving many Americans unable to afford their housing); see also GENE FALK ET AL., CONG. RSCH. SERV., R46554, UNEMPLOYMENT RATES DURING THE COVID-19 PANDEMIC 5 (2021) (reporting that in April 2020, the unemployment rate peaked to 14.8%, an unemployment rate that has not been seen in the United States since 1948).

152. See Stebbins & Suneson, *supra* note 151.

153. Rhode et al., *supra* note 146, at 4–6; see Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S.C.L. REV. 429 (2016).

154. Rhode et al., *supra* note 146, at 17; see Greiner, Jiménez & Lupica, *supra* note 26, at 1121; Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1788 (2001) (stating that there is “only about one legal aid lawyer or public defender for every 4300 persons below the poverty line compared with a ratio of one lawyer for every 380 Americans in the population generally” and “three to four billion dollars . . . would be required to meet the civil legal needs of low-income Americans.”).

155. Greiner, Jiménez & Lupica, *supra* note 26, at 1122–23 (explaining that unbundled legal services combine some in-person legal assistance, documentation preparation help, and self-help materials).

courthouses or outside locations like libraries.¹⁵⁶ Programs that assist low-income litigants are specifically designed to address their needs in navigating the legal system.¹⁵⁷

The inability to afford or obtain counsel is just one barrier to access.¹⁵⁸ Studies have indicated that low-income individuals often do not even seek assistance for their civil legal matters.¹⁵⁹ Individuals may not view their issues as legal matters, instead deeming them “things that simply happen” or private/family matters.¹⁶⁰ When these civil legal matters arise, individuals often turn to non-legal resources such as churches, social workers, or the internet to find resources to address the “thing that happened.”¹⁶¹ The pandemic can further exacerbate these issues with the closing of churches and other resources.¹⁶²

If low-income individuals overcome the initial hurdle of acknowledging their issue as a legal one, additional non-legal obstacles still exist. One obstacle is having the available “bandwidth” to address their civil legal needs.¹⁶³ Often, low-income individuals have significant daily primary concerns to address such as shelter, food, transportation, and employment that take up significant energy, leaving little room to address their legal matters.¹⁶⁴ Other non-legal barriers exist, such as a fear of public speaking and concerns

156. Greiner, Jiménez & Lupica, *supra* note 26, at 1121.

157. *See id.* at 1119. However, with the ongoing limitations on available funding for legal aid and closures of courts with limited legal services, available resources were cut off during the pandemic. *See* Adiel Kaplan, *More People than Ever Need Legal Aid Services. But the Pandemic Has Hit Legal Aid Funding Hard*, NBC NEWS (Apr. 25, 2021, 6:00 AM), <https://www.nbcnews.com/business/personal-finance/more-people-ever-need-legal-aid-services-pandemic-has-hit-n1264989>; *Coronavirus and the Courts*, *supra* note 8.

158. *See What We Know*, *supra* note 121, at 443–44. The primary reasons that individuals do not seek legal assistance include that the low-income individuals do not believe that their issue is legal or that law offers a solution. *Id.* at 444. In addition, individuals believe that they can handle their situation and understand the circumstances. *Id.*

159. JUSTICE GAP, *supra* note 16; *What we Know*, *supra* note 121.

160. *What We Know*, *supra* note 121, at 449.

161. *Id.* at 448. The *Middle City* study was conducted in 2013 and took its sample from residents of a middle-sized city in the Midwestern region of the United States. *Id.* at 445. The study asked respondents about ninety-eight specific civil justice situations. *Id.* at 445 n.18. In part, the study found that low-income individuals were more likely to do nothing about their legal problems than were people who were not of low-income. *Id.* at 448.

162. *See State Restrictions*, *supra* note 55.

163. Greiner, Jiménez & Lupica, *supra* note 26, at 1128.

164. *Id.*

regarding the outcomes or consequences of the legal matters, that hinder an individual's ability to address them on their own.¹⁶⁵

Financial concerns, in addition to the ability to afford counsel, also impact low-income litigants' ability to address their legal issues.¹⁶⁶ These concerns include whether an individual can afford to miss a day of work (if they do not have paid time off) and the ability to afford childcare or transportation.¹⁶⁷

Understanding the obstacles that low-income individuals face when attempting to address their civil legal needs, and how they previously received assistance, sheds light on the impact that the changes adopted by courts to address the pandemic court closures could potentially have on the justice gap. With the closure of libraries, legal aid offices, and churches to in-person meetings, low-income litigants were left without resources.¹⁶⁸ To address this, courts attempted to relay the necessary information on websites.¹⁶⁹ This change could be beneficial if the information can be easily accessible and the information is written in an understandable format.¹⁷⁰ The turn to remote hearing platforms during the pandemic offers an opportunity to alleviate some of these burdens.

The pre-existing issues are expected to be highlighted post-pandemic. It is anticipated there is likely to be an increase in landlord-tenant, family law, creditor-debtor, employment, and foreclosure cases.¹⁷¹ These directly correlate to the common issues that low-

165. J. J. Prescott, *Assessing Access-to-Justice Outreach Strategies*, 174 J. OF INSTITUTIONAL AND THEORETICAL ECON. 34 (2018); see NATALIE ANNE KNOWLTON ET AL., INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *CASES WITHOUT COUNSEL: RESEARCH ON EXPERIENCES OF SELF-REPRESENTATION IN U.S. FAMILY COURT* 45 (2016).

166. See Andrew C. Budzinski, *Reforming Service of Process: An Access-to-Justice Framework*, 90 U. COLO. L. REV. 117, 173-74 (2019).

167. *Id.* at 177.

168. See *State Restrictions*, *supra* note 55.

169. *Coronavirus and the Courts*, *supra* note 8 (providing links to state courts' COVID-19 websites).

170. Greiner, Jiménez & Lupica, *supra* note 26, at 1123-24. User-friendly self-help materials are often one of the most utilized and most effective methods in assisting low-income individuals with civil legal matters. *Id.* at 1119. Drafting these documents or webpages in plain language and digestible formats, considering layout and including visual imagery, offer a wonderful resource to unrepresented individuals. *Id.* at 1123-24, 1134-35.

171. Engstrom, *supra* note 2, at 260. Engstrom draws from past recessions, comparing those rates of unemployment and case distribution to current trends in unemployment and what that could mean for the rise of specific legal matters. *Id.* at 251-54.

income litigants face.¹⁷² The pandemic poses a risk that the justice gap could grow in light of the expansion of these cases. The technology solutions employed also offer an opportunity to increase access for those in need, assuming that the solutions are available to low-income individuals.

In addition to the pre-existing justice gap, the ability of low-income individuals to access technology must be considered when evaluating the solutions for court continuity. Shutdowns, stay-at-home orders, and safety concerns required many aspects of daily life to shift to utilizing technology to allow these routines to continue from the safety of individual homes.¹⁷³ Throughout the pandemic, Americans have reported on the importance of the internet and other technologies for sustaining schooling, work, and daily life.¹⁷⁴ In April 2020, it was reported that 87% of American adults believed the internet was important for them personally and 53% believed it was essential.¹⁷⁵ The importance of technology to individuals reflects the role it is playing during the pandemic. Its importance is emphasized by the fact that 49% of Americans believe that interruption to internet or cellphone service would be a significant problem for their household's daily life.¹⁷⁶

While internet was considered essential even prior to COVID-19, there was a technology gap and digital divide.¹⁷⁷ Although the United States has been at the forefront of creating technologies and expanding uses of the internet, not everyone has the same access.¹⁷⁸ The difference in access extends beyond just the internet and includes a divide in access to information technology and digital content.¹⁷⁹ By way of example, in 2019, a final report by the United Nations

172. See JUSTICE GAP, *supra* note 16, at 7. Legal Services Corporation reported that in 2017, 86% of the low-income individuals with unmet civil legal problems indicated that they received inadequate or no professional assistance with their legal issue. *Id.* at 6. In 2017, it was also reported that of these households, 41% had a legal issue relating to health, 37% relating to consumer protection or finance, 29% relating to rental housing, 27% relating to children and custody, 26% relating to education, 23% relating to disability, and 22% relating to income maintenance. *Id.* at 7.

173. See Brooke Auxier, *What We've Learned About Americans' Views of Technology During the Time of COVID-19*, PEW RSCH. CTR. (Dec. 18, 2020), <https://www.pewresearch.org/fact-tank/2020/12/18/what-weve-learned-about-americans-views-of-technology-during-the-time-of-COVID-19/>.

174. *Id.*

175. *Id.*

176. *Id.*

177. See COUNCIL OF ECON. ADVISERS, *supra* note 17, at 1.

178. *Id.*

179. Peter K. Yu, *The Algorithmic Divide and Equality in the Age of Artificial Intelligence*, 72 FLA. L. REV. 331 (2020).

Secretary General's High-level Panel on Digital Cooperation noted that:

Well more than half the world's population still either lacks affordable access to the internet or is using only a fraction of its potential despite being connected. People who lack safe and affordable access to digital technologies are overwhelmingly from groups who are already marginali[z]ed: women, elderly people and those with disabilities; indigenous groups; and those who live in poor remote or rural areas.¹⁸⁰

The Federal Communications Commission, in June 2020, found that a minimum of eighteen million Americans lack reliable internet.¹⁸¹

Exemplifying the concerns of low-income families and the digital divide are the concerns that have been raised during the pandemic relating to children's education going online. The Pew Research Center found that parents of primary and secondary students had significant concerns regarding the ability of their children to succeed in school due to technology limitations.¹⁸² In fact, at the end of April 2020, when the study was reported, one-in-five parents with children at home completing school virtually believed that their child's schoolwork would be difficult to complete.¹⁸³ These families reported not having a home computer, reliable internet, or internet at all.¹⁸⁴ These concerns are more prevalent among lower income families.¹⁸⁵ Specifically, 43% of low-income parents believed that their children would have to complete school work on a cell phone, and 40% said that their child would have to rely on public Wi-Fi to access the internet to complete the work.¹⁸⁶

180. *Id.* at 340 (citing UNITED NATIONS SEC'Y-GEN.'S HIGH-LEVEL PANEL ON DIGIT. COOP., *THE AGE OF DIGITAL INTERDEPENDENCE* 6 (2019)).

181. Tony Romm, *Lacking a Lifeline: How a Federal Effort to Help Low-Income Americans Pay Their Phone Bills Failed Amid The Pandemic*, WASH. POST (Feb. 9, 2021, 7:00 A.M.), <https://www.washingtonpost.com/technology/2021/02/09/lifeline-broadband-internet-fcc-coronavirus/>.

182. *See* Vogels, *supra* note 44.

183. Emily A. Vogels et al., *53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak*, PEW RSCH. CTR. (Apr. 30, 2020), <https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-COVID-19-outbreak/>.

184. *Id.*

185. *Id.*

186. *Id.*

For those who have broadband internet at home, upwards of 30% worry about the ability to pay their broadband and/or cell phone bills.¹⁸⁷ Recognizing concerns regarding the technology gap and how the pandemic has impacted the education field's quick shift to technology as the alternative to in-person education, it is apparent how the same technology gap has the potential to impact individuals who need to utilize the court. Concerns about available internet, technological concerns about ability to deploy the programs, or even the accessibility of the hardware, all apply to courts' utilization of technology as a means to remain open and the impact it will have on access to justice.¹⁸⁸

Closures of courts, public libraries, and other locations with public Wi-Fi and computers further complicate these matters, as low-income individuals are forced to rely on cell phones as a primary source for internet, email, and other technology requirements.¹⁸⁹ However, reliance on cell phones became more problematic during the pandemic. Due to loss of employment or other expenses related to daily life, many low-income individuals expressed concerns about their ability to maintain payment for their cell phones.¹⁹⁰

Low-income Americans already faced barriers with access to justice, a problem potentially compounded by an inability to access the technologies the courts are now reliant on.¹⁹¹ Representative Mike

187. *Id.*; see also Nina J. Ginsberg, *From the President: The Perils of Virtual Trials*, NAT'L ASS'N CRIM. DEF. LAWS.: CHAMPION, May 2020, at 5, <https://www.nacdl.org/Article/May2020-FromthePresidentThePerilsofVirtualTrials>. If low-income litigants have broadband available, additional concerns such as the tax on an individual's consistency of the broadband arises. See *id.* Specifically, home broadband is being daily taxed as children attend school from home, work has gone online for a number of employees, and adding a virtual hearing to the mix could cause the internet to slow or potentially not work at all. *Id.*

188. See Greiner, Jiménez & Lupica, *supra* note 26, at 1123; Vogels et al., *supra* note 183.

189. See Budzinski, *supra* note 167, at 215–16 (reporting that in 2019, 92% of individuals with an income at or below \$30,000 a year owned a cell phone, and of these individuals, 67% had smart phones).

190. See Vogels et al., *supra* note 183; see also Romm, *supra* note 181. Lifeline, a federal program to assist low-income Americans with cell phone costs, is not providing the assistance it promised due to the program suffering from “waste, fraud and abuse.” Romm, *supra* note 181. Approximately thirty-three million American households meet the Lifeline eligibility requirements, yet as of October 2020 (well into the pandemic) only one in four of these households take advantage of it. *Id.*

191. See *State of State Courts in a (Post) Pandemic World: Result from a National Public Opinion Poll*, NAT'L CTR. FOR STATE CTS. (2020) [hereinafter *State of State Courts*].

Doyle noted the importance of technology during the pandemic and the problem that the digital divide causes by stating:

People are ordering their groceries, they're learning, they're talking to the doctor, they're scheduling vaccine appointments — everything is being done on the Internet To say that a certain percentage of our population is not able to do these things in this day and age is not morally right, it's not fair, and it has to be dealt with.¹⁹²

Understanding that these hurdles can create a heavier burden for low-income litigants is important for considering the courts' utilizations of a technology solution.

III. FOUNDATIONS OF THE USES OF TECHNOLOGY BY THE COURTS: THEN VS. NOW

With the court closures, general continuances, and the turn to technology to ensure continuity of operations, articles in the popular media explored whether the response to COVID-19 would create long-term changes regarding the use of technologies in the court process.¹⁹³ Quaintance stated:

In effect, the courts are yet another segment of the public sector that is learning what some companies in the private sector have known for years — it is often easier to conduct business via phone or video chat, than it is to find time to gather a dozen-plus people in the same room. It's a lesson learned during the crisis, but as those involved point out, it's also a lesson that can shape the way work is done moving forward.¹⁹⁴

Because it is easier for courts to conduct business via technologies, it is likely that the trend will continue post pandemic. In addition, because all involved have access to a familiarity with the technology being utilized, judicial efficiency is only one part of the equation when considering how best to resolve issues and address the matters before

192. Romm, *supra* note 181.

193. *See, e.g.*, Quaintance, *supra* note 35.

194. *Id.*

the court.¹⁹⁵ The use of technology as a solution to keep courts “moving forward” can be one of the vehicles that lead us to a lighter future, assisting with access to justice for low-income litigants, or it can create a heavier burden, potentially widening the justice gap experienced by low-income individuals. Evaluating some of the historical uses of technology by the court and looking at the potential risks of this quick shift to the technology solution can shed light on a path forward.

A. Pre-Pandemic Court Technology Uses

Rita Reynolds¹⁹⁶ stated:

While many courts have been set up for sometime to conduct functions remotely on occasion — particularly in instances of proceedings that involve juveniles or other sensitive participants — the rate at which they have utilized technology in this way is minimal. In other words, when the impact of COVID-19 ground life to a halt in March, the vast majority of American courts did not have practices or in some cases the physical technology to go remote When COVID hits, all of a sudden we have to use video We can’t have people coming to the courthouse.¹⁹⁷

Ms. Reynolds’ statements regarding the issues of shifting to technology as the all-encompassing solution to court closures during the pandemic can be summarized with the following statement: technology in the courts pre-existed COVID-19, but technologies were not utilized often, and now we have no choice but to use this solution jumping in feet first.¹⁹⁸ The impact that an uninformed yet required

195. See Engstrom, *supra* note 2, at 264–65. As Professor Engstrom aptly notes, the courts can stay behind the curve, remaining “out of touch with the justice needs of ordinary Americans” or courts can embrace non-lawyer professionals and new technologies to “reshape the system and the distribution of burdens and benefits within it.” *Id.* at 248. Often lawyers and judges embraced the technology most easily adapted for their specific needs, such as video conferencing. See *id.* at 250–51.

196. Rita Reynolds is the chief technology officer for the National Association of Counties (NACo). Quaintance, *supra* note 35. NACo is an organization that supports county elected offices and employees advocating for county priorities, county policies, and more. *What We Do*, NAT’L ASS’N OF CTYS., <https://www.naco.org/what-we-do/about-naco> (last visited Aug. 4, 2020).

197. Quaintance, *supra* note 35.

198. *Id.*

switch to virtual proceedings, e-filings, and other technology within the practice of law has had on access to justice is something that has not been extensively studied, so there is not significant information to confirm the breadth of the impact. It is important to take a step back to take stock of what is known and unknown as we enter this “new normal” to assure that the impact on access to justice is not a negative one.

While technology has been extensively utilized in the legal field for some time and advances on its use continue to grow daily, it has taken years for lawyers to accept technology as part of the practice.¹⁹⁹ Exemplifying the slow speed at which the profession has adopted emerging technologies, it was only in 2012 that the Model Rules of Professional Conduct introduced the “technology amendments.”²⁰⁰ These technology amendments included adding to the American Bar Association (ABA) Cybersecurity Handbook that attorneys are required to exercise “continued vigilance and learning as technology advances, in order to comply with a lawyer’s duties under the ethics rules.”²⁰¹ It was not until 2017 that the ABA issued a formal opinion discussing what it means to protect client information and what “reasonable efforts” are required to protect information while using technology.²⁰² In light of the changes to the Model Rules of Professional Conduct and the amount of time it takes to determine their meaning, it is easy to see why the use of technologies in the legal field is not settled and really still remains at its infancy. Significant work to determine the appropriate role of technology in the legal field

199. See Mark A. Cohen, *Lawyers and Technology: Frenemies or Collaborators?*, FORBES (Jan. 15, 2018, 5:56 AM), <https://www.forbes.com/sites/markcohen1/2018/01/15/lawyers-and-technology-frenemies-or-collaborators/?sh=2cbfbccb22f1>. In this article, Cohen describes the complicated relationship between many lawyers and technology. *Id.* Lawyers historically have shied away from technologies in the field and across practice areas. *Id.* Slowly legal professionals are working with technology to solve challenges that arise and to help with collaboration in the field. *Id.*

200. ABA Comm. on Ethics & Pro. Resp., Formal Op. 477R (2017) (providing guidance on what it means to provide “reasonable efforts” to protect client information when technology is being utilized as a primary method of communication).

201. See Drew T. Simshaw, *Ethical Implications of Electronic Communication and Storage of Client Information*, RES GESTAE 9, 9 (2015) (quoting JILL D. RHODES & VINCENT I. POLLEY, ABA CYBERSECURITY LEGAL TASK FORCE, THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS 66 (2013)). In the ABA Model Rules of Professional Conduct, note that Comment 8 to Rule 1.1: Competence states that a lawyer is required to be aware of “relevant technology” that is available, including understanding the benefits and limitations of the technology. MODEL RULES OF PRO. CONDUCT r. 1.1, cmt. 8 (AM. BAR ASS’N 2021).

202. See ABA Comm. on Ethics & Pro. Resp., Formal Op. 477R (2017).

continues today. In addition to how technology is implicated in the Model Rules of Professional Conduct, there are also concerns about how it impacts the lawyer-client relationship and interactions between individuals and the courts, as well as what aspects of legal work technology has a role in versus what requires human interaction and decision-making capabilities.²⁰³ Because of these concerns, lawyers often shy away from fully embracing all of the available uses of technologies.²⁰⁴ Consistent with this, courts were historically slow prior to the pandemic to utilize technology as part of their operations.²⁰⁵ Pre-pandemic, some courts explored using technology to increase access to the courts, and today, scholars continue to research the benefits, concerns, and the role technology should play in the legal field.²⁰⁶

While courts are slow to adopt newer forms of technology, video conferencing technology has become widely accepted by the courts. Video conferencing technology (often in the form of closed-circuit televisions) began being utilized in Illinois in 1972 and in Pennsylvania in 1974.²⁰⁷ In the following twenty years, the use of video conferencing systems expanded to seventeen states.²⁰⁸ Over half of the states permitted some form of criminal proceedings to occur via videoconference by 2002.²⁰⁹ Since the late 1990s, Federal Immigration Courts have been using videoconferencing for hearings for immigrants in detention centers to determine whether the individual immigrant could be deported.²¹⁰

In 1999, Cook County, Illinois turned to holding bail hearings via a “closed circuit television procedure” (CCTP) that allowed the judge to stay in the courtroom and the defendant to remain in a remote location.²¹¹ “The assumption that justified the implementation of the

203. See generally David Luban, *Optimism, Skepticism, and Access to Justice*, 3 TEX. A&M L. REV. 495, 506–07 (2016) (demonstrating that while artificial intelligence (AI) has a place within the legal field, the human aspect of lawyering is important and should not be replaced by AI, such as emotional intelligences, moral evaluation, empathy, and creativity). “[T]he crucial difference between the human and the machine is very simple: the human can talk back.” *Id.* at 507.

204. See Cohen, *supra* note 199.

205. See Quaintance, *supra* note 35; Reynolds, *supra* note 3.

206. See, e.g., Luban, *supra* note 203.

207. Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 877 (2010).

208. *Id.* at 878.

209. *Id.*

210. See Eagly, *supra* note 137, at 934.

211. Diamond et al., *supra* note 207, at 869.

video system, as with many criminal justice system reforms, was that it would reduce costs without disadvantaging defendants Yet many courts have responded with enthusiasm to video technology, with its promise of convenience and cost savings.”²¹² The shift to these methods of court proceedings via video conference was encouraged as a method to reduce safety concerns by not being required to transport potentially dangerous or “mentally disturbed” prisoners to live hearings.²¹³ The Prison Litigation Reform Act of 1995 (the Act) encouraged the use of remote hearings for prisoner matters in the manner that Cook County embraced.²¹⁴ This Act required “courts ‘to the extent practicable’ to avoid removing petitioners from the prison facility for pretrial proceedings in prison condition cases.”²¹⁵ The Act stated that “proceedings ‘in which the prisoner’s participation is required or permitted’ [could be held] by telephone, videoconference, or other telecommunications technology.”²¹⁶ This form of technology was endorsed by the courts “as a way to minimize security breaches and costs associated with transporting prisoners to court proceedings [but also to reduce] frivolous claims by prisoners who are looking for a way to spend some time out of prison.”²¹⁷ The use of the CCTP in Central Bond Court in Chicago exemplified concerns about the use of technology in the courts that require consideration for continued use today.²¹⁸ These concerns included poor quality technology, inadequate defense preparation, and extreme brevity.²¹⁹

Often, the push for virtual hearings is the cost-saving opportunities it offers due to low court resources.²²⁰ As evidenced by the utilization of videoconferencing for bail hearings, the benefits highlighted by these virtual procedures focuses on the convenience of the court and not on the individuals who need to utilize it.²²¹

212. *Id.* at 869, 877.

213. *Id.* at 877.

214. *See id.* at 878.

215. *Id.* at 878 (quoting Prison Litigation Reform Act, 18 U.S.C. § 3626(f)(2) (2006)).

216. Molly Treadway Johnson & Elizabeth C. Wiggins, *Videoconferencing in Criminal Proceedings: Legal and Empirical Issues and Directions for Research*, 28 *LAW & POL’Y* 211, 213 (2006) (quoting Prison Litigation Reform Act, 18 U.S.C. § 3626(f)(2) (2006)).

217. *Id.*

218. Diamond et al., *supra* note 207, at 884–85.

219. *Id.*

220. *Id.* at 901.

221. *See* BANNON & ADELSTEIN, *supra* note 37, at 2 (summarizing the research regarding the use of video technologies that pre-existed COVID-19 as a means of guidance and demonstrating that the primary utilization of pre-COVID-19 technologies was for the convenience of the courts).

Federal immigration courts have been holding videoconference hearings for over two decades.²²² “In 2012 alone, immigration judges conducted over 134,000 hearings in which the trial judge and the immigrant litigant met over a television screen, rather than face-to-face.”²²³ To provide context, these hearings are where immigrants, while in detention, participate in their hearing virtually to determine if they will be deported.²²⁴

Notwithstanding the risk that such a hearing poses to the detained individual, the purpose of holding these hearings remotely was not to assist the detained individual. Rather, as the Department of Justice described: “remote adjudication” as a “force multiplier” that assists overburdened immigration courts by expediting the processing of cases, enhancing judicial flexibility in case management, reducing transportation costs, improving law enforcement and courtroom safety, and expanding access to counsel.”²²⁵ This process has very little to do with the rights and access of the detained immigrant. The focus on these “benefits” are the convenience to the court and not the individuals whose rights are at stake.

In support of the use of the technology, “court officials consistently return to one central refrain: televideo is functionally equivalent to in-person adjudication . . . it does not affect decisional outcomes at trial.”²²⁶ Although the focus for adopting videoconferencing was the court, studies generally confirm that remote virtual hearings do not unfairly tilt the balance against litigants at trial.²²⁷ Researchers even reached out for attorney input, including input from nonprofit legal services attorneys, pro bono and low-bono immigration attorneys, and others.²²⁸ For attorneys who did not like video hearings, they used strong language, including that they “hated” video hearings or that the video hearings “dehumanized” their client.²²⁹ Attorneys raised concerns about their ability to “guide their clients and technical interruptions in the video feed.”²³⁰ Yet, when specifically asked to provide examples, these attorneys could not point to a case where the video hearing negatively impacted their cases.²³¹ When investigating the impact on judicial decision-making, it was determined that there

222. Eagly, *supra* note 137, at 934.

223. *Id.*

224. *Id.*

225. *Id.* at 935.

226. *Id.* at 936.

227. *Id.* at 941.

228. *Id.* at 972 n.174.

229. *Id.* at 972.

230. *Id.*

231. *Id.*

was little to no impact from the utilization of the video-conferencing hearing method.²³²

This research, generally concluding that virtual hearings do not result in differential treatment or rulings, has been expanded further by a recent study regarding age, gender, and racial bias in decision-making for traffic citations. Specifically, this research concluded that online court proceedings, conducted asynchronously (via communications such as text message and emails), eliminate the implicit bias for age and gender during the in-person judicial decision-making process.²³³ In this study of over five thousand traffic cases comparing the outcomes from informal in-court hearings to an equivalent online process, the online process reduced or even eliminated the age and race-based disparities in the decision making process when compared to traditional in-person proceedings.²³⁴ As the study authors aptly noted, prior to the pandemic, online proceedings have been about the efficiency and access of the “courts, judges, and parties trying to cope with an ever-growing caseload and complex rules and procedures.”²³⁵ However, as their study found, these technology platforms can actually increase access to the courts and eliminate potential biases from the decision-making process.²³⁶

When looking back to the immigration virtual hearing study, there was further exploration into the “complementary relationship between remote adjudication and litigant participation in the adversarial process.”²³⁷ While virtual hearings did not necessarily result in higher deportation rates, there was “depressed engagement with the adversarial process.”²³⁸ The study raised serious concerns that remote adjudication interferes with “meaningful participation in the adversarial process.”²³⁹ For immigration deportation cases, this is problematic because “less attorney involvement and claim making by

232. *Id.* at 974.

233. See Avital Mentovich, J.J. Prescott & Oma Rabinovich-Einy, *Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality*, 71 ALA. L. REV. 893, 975 (2020). Researchers Mentovich, Prescott, and Rabinovich-Einy utilized state court data to study group-based disparities in online and offline civil infiltration cases. *Id.* They pulled comprehensive data from two district courts in Michigan’s case-management system, pulling both the personal information and descriptive details of each litigant, along with the specific traffic incident and the court processes that led to the final disposition. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. Eagly, *supra* note 137, at 936.

238. *Id.* at 937.

239. *Id.* at 941.

immigrants” can result in deportation.²⁴⁰ The study found that litigant participation can be deterred in virtual proceedings because the proceeding feels less real, encountering logistical and technical difficulties such as “interruptions in the video feed, challenges in communicating with interpreters not physically present in the same room [A]nd, especially for those who cannot find or afford an attorney, [they are] less equipped to assert their claims and file the required paperwork.”²⁴¹

Even with this in mind, the court and government officials still take the approach that “televideo [i]s ‘an important hearing tool’ that promotes efficiency in all types of immigration cases[.]”²⁴² This efficiency basis for hearings being virtual has a potential trickle-down benefit to individual litigants.²⁴³ The expansion of utilizing virtual hearings in immigration cases coincides directly with an expansion of detention laws.²⁴⁴ The research notes detained immigrants have cases that take years, in part due to court docket, and if virtual hearings can help alleviate docket issues this could be a benefit for litigants to embrace virtual hearings.²⁴⁵ In fact, the video hearings tend to resolve faster.²⁴⁶

Historically the use of technology in the legal field has been for primarily for the benefit of lawyers or courts.²⁴⁷ Technology has been utilized for widely accepted forms of conducting legal research, assisting with discovery and document review, and has been used for legal strategy and even jury selection.²⁴⁸ The most prevalent use of technology pre-pandemic was video conferencing. In addition to the use of video conferencing, some courts have developed more ambitious programs. Over the past twenty years, the view of technology in the legal field has shifted to include its potential as a path to increasing access to justice, focusing on the litigant user. Given the unmet civil legal needs of low-income Americans, ongoing efforts intend to use

240. *Id.*

241. *Id.*

242. *Id.* at 939.

243. *Id.*

244. *Id.* at 948.

245. *Id.* at 949.

246. *Id.* at 963.

247. See Jason Krause, *100 Innovations in Law*, ABA J. (April 1, 2015), https://www.abajournal.com/magazine/article/100_innovations_in_law.

248. See Emily S. Taylor Poppe, *The Future is Bright Complicated: AI, Apps, & Access to Justice*, 72 OKLA. L. REV. 185, 189 (2019); see also Frank Pasquale, *A Rule of Persons, Not Machines: The Limits of Legal Automation*, 87 GEO. WASH. L. REV. 1, 2 (2019).

technology to develop additional services to assist those in need.²⁴⁹ Starting in 2000, LSC began funding Technology Initiative Grants.²⁵⁰ These grants, offered to legal service organizations, encouraged organizations to develop technologies to improve efficiency and provide assistance for low-income Americans that have unrepresented civil legal matters.²⁵¹

Specifically, Michigan created a program to assist with addressing traffic citations by creating an internet platform which could be utilized on a mobile device.²⁵² This portal encouraged communication between prosecutors, judges, and litigants and provided litigants with options for addressing their matter.²⁵³ It was revealed that this platform was viewed as easy to use by 90% of users and 92% reported understanding the status of their matter.²⁵⁴ In Ohio, a platform was created to address small claim actions, including tax disputes, online.²⁵⁵ The platform provided litigants with a “[n]egotiation [s]pace” allowing for communication with the other parties and court mediators, and permitted individuals to upload files and even review settlement proposals.²⁵⁶ Most individuals that utilized this program preferred it to being required to utilize the court system and cases typically resolved faster than in-person proceedings.²⁵⁷ New York City created a mobile application that can be utilized by tenants to file housing code matters against landlords and offers advice for parties moving through the process.²⁵⁸ Building on this foundation, New York City is planning on expanding the platforms created to address consumer debt issues and assist with negotiations between parties in

249. See Benjamin H. Barton & Deborah L. Rhode, *Access to Justice and Routine Legal Services: New Technologies Meet Bar Regulators*, 70 HASTINGS L.J. 955 (2019).

250. See LEGAL SERVS. CORP., *Technology Initiative Grant Program*, <https://www.lsc.gov/grants-grantee-resources/our-grant-programs/tig> (last visited Feb. 12, 2021).

251. *Id.*

252. See Amy J. Schmitz, *Expanding Access to Remedies Through E-Court Initiatives*, 67 BUFF. L. REV. 89, 106–09 (2019). Schmitz’s article explores the benefits of online dispute resolution and e-courts to expand access to justice. *Id.*

253. *Id.* at 106.

254. *Id.* at 108 (describing how this platform was often utilized outside the “typical” courthouse hours).

255. *Id.* at 109.

256. *Id.*

257. *Id.* at 109–12 (explaining that 97% of users of this system preferred it to going to court).

258. *Id.* at 114.

a more convenient forum.²⁵⁹ By focusing on the individual litigant as the primary user, these programs have been able to assist with closing the justice gap. Notably, all of these programs pre-existed the pandemic.

Programs such as the ones in Ohio and New York have taken into account the issues that low-income litigants face, designing programs that assist the litigant in navigating the system in light of their specific needs. While these virtual proceedings may remove the pomp and circumstance of more formal legal proceedings, this may be what low-income litigants need.²⁶⁰ Researchers who focus on the needs of low-income litigants often note how the mundane aspects of the court process create a barrier.²⁶¹ These aspects include where to sit in the courtroom, who speaks first, how to address the court, and other relatively minor formalities that do not directly impact the legal issue itself.²⁶² The impact of these mundane issues is an emotional one, creating a greater toll on an already anxious unrepresented low-income litigant.²⁶³ Online or relaxed virtual procedures help eliminate these anxiety raising formalities, making the court more approachable and accessible.²⁶⁴

Moreover, in pilot programs across the country courts explored the use of online dispute resolution to address the reasons often identified as the basis for low-income individuals avoiding court, such as economic (including missing work and affording child care), physical (from difficulties in finding transportation or rural citizens), and psychological (the anxiety or even shame associated with utilizing the courts).²⁶⁵ In fact it was discovered that as of 2019, these pilot online dispute resolution programs addressing traffic cases, tax issues, and small claims in Michigan, Ohio, New York, Texas, and Utah were very

259. *Id.* (clarifying that New York City plans on utilizing the system that they have to address traffic citations in a similar manner to way the Michigan platform works to address these consumer debt matters).

260. Eagly, *supra* note 137, at 978–79 (explaining one of the faults noted of this process is the idea that removing the formalities and decorum of the courtroom can make litigants feel that their issue is not serious and even that the individual may fail to recognize the seriousness of the issue presented to the court).

261. Greiner, *supra* note 26, at 1130.

262. *Id.*

263. *Id.*

264. See Prescott, *supra* note 49, at 2007–08 (noting it is not just the formalities of court that cause anxiety in pro se litigants. Significant anxiety is cause by “fear about the outcome . . . stigma, confusion, and shame” as well as fears relating to public speaking which can be exasperated by the official nature of courts and judges).

265. Schmitz, *supra* note 252, at 104.

effective and expanded services to individuals who often would not utilize the court system otherwise.²⁶⁶

The backdrop for focusing on the needs of low-income litigants to assure that technology and its uses in the legal field are appropriately understood in order to assure that the justice gap does not widen is that upwards of 71% of litigants are unrepresented in civil matters.²⁶⁷ Courts and lawyers must take into account that the use of these technologies cannot just focus on being utilized as a convenience for the courts, but should also be directed at the individual litigants who make up the vast majority of the court “consumers.” Significant technology options pre-existed the pandemic that helped low-income individuals achieve access to the courts. In assuring that the technology and procedures are accessible to all individuals, and not just judges and lawyers, access to justice can be improved as the courts emerge on the other side of the pandemic.

B. Pandemic Court Uses of Technology During the Pandemic

Even courts that believed they were technologically advanced found it difficult to adapt to the swift changes required to keep open during the pandemic. Prior to the pandemic, the Fairfax County court system in Virginia had forty courtrooms handling cases from circuit court to juvenile proceedings.²⁶⁸ During an expansion in 2008, Fairfax County strived to incorporate high tech capabilities in the majority of the courtrooms.²⁶⁹ Nonetheless, even with efforts such as these, during the pandemic the court technology team in Fairfax County quickly realized it was still not enough.²⁷⁰ They needed to find and develop new methods for “all of the courts to conduct virtual business simultaneously.”²⁷¹

During the pandemic and resulting court shutdowns, courts had to turn to alternative methods to address the ongoing legal matters.²⁷²

266. *Id.* at 105–20. In Texas, the courts utilized an online platform for required mediations in small claim cases helping parties reach settlements. *Id.* In Utah, a similar online platform was utilized for small claims assisting with negotiations and even mediations, ultimately permitting users to file their settlements through this platform. *Id.* If a settlement could not be reached through this process, the court would hold a hearing which could take place online which included a portal for submitting evidence online and had a “on the record” chat feature. *Id.*

267. *See generally* JUSTICE GAP, *supra* note 16.

268. Quaintance, *supra* note 35.

269. *Id.*

270. *Id.*

271. *Id.*

272. *See Courts Deliver Justice*, *supra* note 18.

Initially, when courts turned to technology to keep courts moving, they simply took their existing court processes and procedures to an online format.²⁷³ This included looking to options like Teams and Zoom to conduct court proceedings, taking the typical in-person proceeding and simply shifting it to an online virtual conference platform.²⁷⁴ When hiccups arose in this approach, courts addressed these issues piecemeal.²⁷⁵ In Fairfax County, this included further expansion of technologies, such as having staff use iPads to go to holding cells, and facilitating criminal court proceedings with inmates.²⁷⁶ Fairfax County also moved civil functions, such as marriage licensing, concealed weapons permits, and probate matters to conferencing using technology options.²⁷⁷ These efforts allowed individuals to have access to primary functions that courts offer thus assuring continued access when in-person appearances were impossible. To effectuate this shift, courts generally took a one-size-fits-all approach with video conferencing as the primary technology solution, relying on the technology that was originally designated for the “convenience of the courts.”²⁷⁸

The use of video technology by the courts has the potential to negatively impact legal processes, while other concerns focus on the practical side of the court process and litigation. Some of the negative aspects of video conferencing affect those with and without lawyers and cannot be alleviated by simply having a lawyer. By way of example, in New York, arraignments are occurring virtually, with the defendants often in a booth, while their lawyers are in their offices

273. See Jamiles Lartey, *The Judge Will See You on Zoom, But the Public is Mostly Left Out*, THE MARSHALL PROJECT (Apr. 13, 2020), <https://www.themarshallproject.org/2020/04/13/the-judge-will-see-you-on-zoom-but-the-public-is-mostly-left-out> (summing up the concept of the swift shift from in-person to online is a statement by District Court Judge Keva Landrum from New Orleans, Louisiana, where she stated, “[t]his was the first time we’ve done Zoom proceedings, and we rolled it out fast.”).

274. See Anya Litvak, *Lawyers, Like All of Us, Are Figuring It Out on Zoom*, PITT. POST-GAZETTE (May 24, 2020; 7:30 A.M.), <https://www.post-gazette.com/news/insight/2020/05/24/A-new-way-to-practice-law-with-an-ice-bucket-COVID-19/stories/202005240047>.

275. See *Coronavirus and the Courts*, *supra* note 8.

276. Quaintance, *supra* note 35.

277. *Id.* (noting that Fairfax County also joined the ranks of other courts, such as New Jersey, with a move to conduct grand juries via video conferencing); see also *Judiciary Launches Virtual Grand Jury Pilot Program*, New Jersey Courts (May 14, 2020), <https://www.njcourts.gov/pressrel/2020/pr051420a.pdf>.

278. See *Coronavirus and the Courts*, *supra* note 8.

and not with their client.²⁷⁹ This setting can implicate due process: the right to a public trial; requirements of real-time signatures on court documents; statutory laws and court rules; and the potential for the defendant to make statements against their interest without the consultation of their counsel.²⁸⁰

Due process concerns are implicated not only by the inability of counsel to be in the same room as a client, but from the features that can come up during Zoom (videoconferencing) hearings.²⁸¹ For example, in Missouri, a judge muted an attorney and the attorney alleged that this was a violation of the defendant's due process rights and right to counsel.²⁸² In response, the Court noted that counsel must also be respectful and indicated that the rules of etiquette still apply even in the "Zoom Courtroom," and that screaming cannot be tolerated.²⁸³ While there is a petition pending about this specific situation, it does raise the issue of how much control the court can exert over the Zoom features such as muting, and what impact this could have on those who are unrepresented.²⁸⁴ As confirmed by the research regarding virtual immigration courts, litigants do not fully participate in these proceedings as they would if they attended in-person.²⁸⁵ This essentially leaves unrepresented litigants the inability to challenge these "Zoom mute" issues.

279. See Feuer, Hong, Weiser & Ransom, *supra* note 34 (explaining that there are other due process issues that arise when trying to find a way to navigate the pandemic and hearing issues; issues like whether jurors, witnesses, or defendants can wear masks impact the trial process); see also Shaila Dewan, *Jurors, Please Remove Your Masks: Courtrooms Confront the Pandemic*, N. Y. TIMES (June 10, 2020).

280. See Feuer, Hong, Weiser & Ransom, *supra* note 34 (referencing a scenario whereby a defendant charged with assault was sitting in a booth to participate in the process of setting the individuals bail, while the judge was in his house conducting the hearing, and defense counsel was sitting in another separate office. Once the judge set bail at \$5,000 the defendant became irate and as he was being removed from the booth, he started giving details about the alleged assault potentially hurting the defense without the ability to meet with counsel).

281. See Joe Patrice, *Fun with Mute Buttons: Civil Rights Violation Edition! How Far Is Too Far When It Comes To Managing The Virtual Courtroom?*, ABOVE THE LAW (July 21, 2020).

282. *Id.*

283. *Id.*; see also Joe Patrice, *Is This Attorney Naked During a Criminal Hearing? Suit Was Probably at The Cleaners*, ABOVE THE L. (2020) (discussing a picture from a Court Zoom hearing whereby one of the attorneys was displayed from the shoulders up and appeared to not have a shirt on, raising the question: did he come to the hearing naked? This is just an example of how establishing the new formalities of virtual hearings is one consideration).

284. Patrice, *supra* note 283.

285. Eagly, *supra* note 137, at 989.

Adding to concerns about a quick shift to a technology solution is the belief that courts were already “behind the curve” when it came to utilizing technologies and considering impacts.²⁸⁶ The accelerated shift to technology as the solution to court access was not limited to the United States. In Canada, a similar shift occurred, providing an additional perspective of the potential positives and negatives in the very beginning of the pandemic.²⁸⁷

In reviewing how forty-four Canadian Courts handled cases during the shutdown, it was observed that courts turned to technology to deal with administrative matters such as filing documents, submitting evidence, and scheduling.²⁸⁸ By limiting hearings to urgent matters, Canadian courts utilized technology to handle emergencies in criminal matters and family law related issues.²⁸⁹ Although the technologies utilized varied by court, some popular technology choices were video conferencing and conference calling.²⁹⁰ Notably, Canadian courts delayed or canceled proceedings that were not deemed urgent.²⁹¹ Compared to the Canadian courts, the American courts evinced more openness to the use of technology to assist with hearings and trials beyond emergencies.²⁹² Pre-pandemic, the focus of court technology in the United States appeared to be convenience of the court.²⁹³ In Canada, there were concerns about litigants’ use of technology and the potential inequalities that could be created through the use of remote hearings to address routine matters.²⁹⁴ These concerns surrounded access to technology and the litigants’ ability to utilize the technology, including the competence and skill necessary for effective technology deployment.²⁹⁵ At its most basic level, this included the ability to secure internet service as there are many remote and rural areas in Canada without internet.²⁹⁶ Canadians without access or the skill necessary to utilize these technologies were unable to address their legal matters.²⁹⁷ These

286. Engstrom, *supra* note 2, at 248.

287. See Kate Puddister & Tamara A. Small, *Trial by Zoom? The Response to COVID-19 by Canada’s Courts*, 53 CAN. J. POL. SCI. 373 (2020).

288. *Id.* at 374.

289. *Id.*

290. *Id.* (noting that some of the services utilized are a pay-by-use third party service, adding an additional cost to the litigants).

291. *Id.*

292. *Id.* at 375.

293. *Id.* at 373–74.

294. *Id.* at 375.

295. *Id.*

296. *Id.*

297. *Id.* at 375–376.

same concerns can be transferred to the rural areas of the United States and those who do not have reliable internet access.²⁹⁸ In spite of all of these concerns, Justice Pringle of the Ontario Court of Justice, stated that: “[o]ne of the silver linings . . . we feel that we have been booted into the 21st century of technology by this crisis.”²⁹⁹

In the United States, similar concerns to those in Canada began to appear in April 2020 when the Joint Technology Committee (JTC) raised concerns and considerations about conducting virtual hearings as the solution to closed courts.³⁰⁰ The purpose of the JTC is to “develop and promote technology standards for the courts; improve court processes and business practices; ensure adequate education and training for court leaders in technology; and collaborate with the justice community, and other stakeholders.”³⁰¹

Members of the JTC, which consists of key players involved in court management and administration, were able to issue a lengthy and compressive report on the issues to consider when changing to an environment where court appearances are conducted remotely.³⁰² When issuing the report, the JTC first focused on what “key decisions” needed to be made.³⁰³ Starting with courts, JTC noted that state and local courts, from trial to appellate courts, had begun to successfully initiate virtual hearings.³⁰⁴ Yet, at the time, most courts had not yet decided whether to bring every court proceeding online or if it should only be evaluated on a rolling basis, starting with cases dealing with emergent situations and later deciding the necessity of expansion.³⁰⁵ JTC recommended that courts initially make a decision on the types

298. JTC QUICK RESPONSE BULLETIN, STRATEGIC ISSUES TO CONSIDER WHEN STARTING VIRTUAL HEARINGS 4–5 (2020) [hereinafter QUICK RESPONSE BULLETIN]. The JTC was established by the National Center for State Courts (NCSC), Conference of State of Court Administrators (COSCA), and National Association for Court Management (NACM) as national organizations to focus on the effective running of state courts. *Id.*

299. Kate Puddister & Tamara A. Small, *supra* note 287, at 376.

300. QUICK RESPONSE BULLETIN, *supra* note 298, at 4–5.

301. NCSC, *Joint Technology Committee*, <https://www.ncsc.org/about-us/committees/joint-technology-committee> (last visited Sept. 19, 2021).

302. QUICK RESPONSE BULLETIN, *supra* note 298, at iii, 1.

303. *Id.* at 1.

304. *Id.*

305. *Id.* This report was created in April 2020, and to date there has not been an update to the report. However, as the pandemic spanned over a longer period of time courts had to expand the types of issues they would address virtually. The report further indicates that returning to “pre-pandemic norms” of in-person face-to-face hearings may no longer be desirable. *Id.* at 5.

of cases that were appropriate for virtual hearings.³⁰⁶ JTC acknowledged a range of technologies that could be utilized for virtual proceedings, from telephone hearings to the more complex videoconferencing with additional technology tools.³⁰⁷

JTC identified considerations to be taken into account as courts determined what technology tools should be utilized, and specifically addressed how to avoid widening the justice gap.³⁰⁸ Considerations include what technology courts, attorneys, and litigants have; ease of use of each technology; required equipment for everyone involved; and availability of remote access, such as reliable internet.³⁰⁹ Yet these are not the only considerations. It is important to remember that while the court may be able hold remote proceedings, it may not have the ability to share court records, files, or evidentiary documents during a proceeding without access to a document-sharing drive or even a scanner and email capabilities.³¹⁰ JTC recommended that courts need to prioritize technology solutions that meet the “simplest and broadest array of equipment.”³¹¹ Simply put, JTC reminded courts that not everyone has access to the same technology and litigants may only have telephone access and, at best, a smart phone.³¹²

Surprisingly, this lack of access can carry over into prison settings. In Philadelphia, for example, scheduling a date to enter into a plea bargain from prison (in order to be released to care for family) was taking upward of “three to four weeks.”³¹³ This was the result of the fact that the “entire prison system has only four video links.”³¹⁴ This is a prime example of why JTC recommended that prior to the deployment of these virtual hearings and services, that courts “realistically evaluate their current technical infrastructure to determine readiness to support a transition to virtual hearings.”³¹⁵

306. *Id.* at 1 (noting the prime example of a unique issue that could prevent the ability to have a virtual hearing is whether the case calls for a jury). Criminal proceedings are another example of cases that present hurdles to the virtual hearing solution. Specifically, rights such as the right to confront an accuser create a unique issue. *Id.*

307. *Id.* at 1–2.

308. *Id.* at 2.

309. *Id.*

310. *Id.* at 3.

311. *Id.* at 2.

312. *Id.*

313. Melamed, *supra* note 95.

314. *Id.*

315. QUICK RESPONSE BULLETIN, *supra* note 298, at 4.

Yet, as JTC identified as part of their concerns, many courts seem to require litigants to have a virtual at-home office in order to meet the requirements of proceeding with litigation virtually³¹⁶ – a space to send emails, draft word documents, save and send pdfs, print, sign, and scan documents, and have broadband Wi-Fi and a computer with a webcam and microphone.³¹⁷ While lawyers and law firms have these capabilities readily available, this is not the case for most low-income individuals. Lawyers have access to computers, telephone conferencing, copiers, scanners, and credit cards (for electronic filing fees), so lawyers did not struggle adapting to the new “normal” of virtual court procedures when compared to the resources available to help low-income litigants address their legal needs.³¹⁸ In fact, bar associations quickly developed methods to share information with their members, and court websites posted operating procedures including methods of contact (although often these procedures varied by whether an individual had representation or was representing themselves).³¹⁹ If courts were to focus on the “simplest and broadest” array of equipment, they would recall that the low-income litigant would likely be relying on a cell phone to conduct their legal work.³²⁰

316. See Pa. Bar Ass’n Comm. on Legal Ethics and Pro. Resp., Formal Op. 2020-300, 2 (2020). As courts and law offices moved remote, with judges and lawyers working primarily from their homes, guidance from ethics committees began to emerge. *Id.* In Pennsylvania, a formal opinion was issued providing very specific ethical obligations for virtual home offices. *Id.* These obligations included assuring that all calls, text messages, and video conferencing sessions were conducted in a manner that “minimizes the risk of inadvertent disclosure of confidential information” and that “remote workspaces are designed to prevent the disclosure of confidential information in both paper and electronic form.” *Id.* The intent behind these minimum requirements is to assure that others within the household cannot hear these conversations. *Id.*

317. NCSC, *SRL One Page Remote Hearings Sample Instructions*, https://www.ncsc.org/_data/assets/pdf_file/0013/40360/RRT-Technology-Sample-One-Pager-for-SRL-about-Remote-Hearings.pdf (last visited Sept. 19, 2021); see also Pa. Bar Ass’n. Comm., *supra* note 316, at 12. In the formal opinion there is an entire section dedicated to security relating to video conferencing. The formal opinion alludes to a presumption that lawyers will have these technologies available to conduct hearings and meetings on behalf of clients. *Id.*

318. See Cohen, *supra* note 199 (explaining that while there is a love/hate relationship between technology and lawyers, significant developments have been made and utilized by lawyers); see also Ed Walters, *The Model Rules of Autonomous Conduct: Ethical Responsibilities of Lawyers And Artificial Intelligence*, 35 GA. ST. U. L. REV. 1073 (2019).

319. PA. BAR ASSN., *COVID-19 Resources Guide for Lawyers*, <https://www.pabar.org/site/News-and-Publications/COVID-19-Resources-Guide> (last visited Sept. 19, 2021).

320. QUICK RESPONSE BULLETIN, *supra* note 298, at 2.

Ease of use of these technologies and their availability are key considerations when making determinations about usage for legal proceedings, yet the fact that these considerations remain exemplify the work that still needs to be done.³²¹ Even in the initial shift to remote proceedings, JTC noted in its recommendations to the courts that it was necessary to consider additional tools that would be needed for self-represented litigants to be able to effectively address their legal needs and rights.³²² Courts should be prepared to provide how-to guides (to assist self-represented litigants in utilizing technological tools) and specifically consider the limitations of access to specialized technological equipment.³²³ It is even more important to recall the often over looked issues such as potentially limited cellular phone minutes or even frequently changing phone numbers.³²⁴

The ability of lawyers to utilize these new systems seemed to be a primary focus during the shift to remote hearings. While platforms like Microsoft Teams and Zoom are available to the general public as an app, they are not necessarily intuitive.³²⁵ Concerns like these could have been alleviated by providing self-help materials for the technology platforms and frequently asked questions addressing the process.³²⁶ Yet while Continuing Legal Education (CLE) detailing the uses of virtual meeting platforms were provided to lawyers, often they did not focus on training the general public, let alone low-income litigants with the greatest need of assistance.³²⁷ Before an individual even gets to the “virtual courthouse doors” procedures often quickly change.³²⁸ Generally, this information was quickly distributed to lawyers via listservs, published orders of court, and bar association emails.³²⁹ These communications often did not reach self-represented low-income litigants.³³⁰

321. *Id.* at 1–2.

322. *Id.* at 3.

323. *Id.*

324. *Id.*; see also Auxier, *supra* note 173, at 4; Romm, *supra* note 181.

325. See Jennifer Lapinski, Robert Hirschhorn & Lisa Blue, *Zoom Jury Trials: The Idea Vastly Exceeds Technology*, LAW.COM (Sept. 29, 2020), <https://www.law.com/texaslawyer/2020/09/29/zoom-jury-trials-the-idea-vastly-exceeds-the-technology/>.

326. QUICK RESPONSE BULLETIN, *supra* note 298, at 2.

327. See *Coronavirus and the Courts*, *supra* note 8; see also *State of State Courts*, *supra* note 191.

328. See generally *Coronavirus and the Courts*, *supra* note 8.

329. PA. BAR ASSN., *supra* note 320.

330. *Id.* As courts rely heavily on their webpages to relay important COVID-19 information regarding the court process during the pandemic, these webpages are not necessarily easily available or understandable to non-lawyers, often referring

Although no entity is prepared for a pandemic, it is clear that courts were not prepared to utilize technology to assure that the needs of litigants were met. Given what we already know about the justice gap, it is clear that this lack of previous utilization of technologies in the legal field can widen the gap further without conscientious decisions being made when utilizing the same. It is clear that we can no longer wait to put in the time and effort into understanding how to appropriately use technology in the legal field.

Although it is too early to tell whether the current uses of technology by the courts have widened the justice gap, there are some intriguing clues. Notably, Chief Judge Robert Morin of the District of Columbia Superior Court, who presides over a court where approximately 10,000 people pass through daily, reported that once in-person access to the courthouse was limited, the filing of civil cases went down despite the use of alternative technologies being available.³³¹ Chief Judge Morin astutely noted that he “fears it’s because people can’t figure out how to handle cases on their own from home or don’t have the technology . . . ‘[i]t means either people’s legal issues miraculously resolved, or people feel they don’t have access to the court’s processes.”³³²

IV. ASSURING THE LOAD IS LIGHTENED

While this shift to technology as a primary resource to continue court operations is a result of COVID-19 and safety protocols, other fields have been using technology programs for some time.³³³ Prior to the pandemic, the medical field made headway into virtual medical appointments.³³⁴ As stay-at-home orders encouraged individuals to refrain from leaving their homes, especially for those in high-risk categories, individuals turned to these technologies in greater force to

individuals directly to administrative orders to obtain relevant information. *Id.*; see also *Coronavirus Resources*, SUP. CT. OHIO, <http://www.supremecourt.ohio.gov/coronavirus/default.aspx> (last visited Feb. 18, 2021).

331. Tillman, *supra* note 125.

332. *Id.*

333. Auxier, *supra* note 173, at 4.

334. See Elham Monaghesh & Alireze Hajizadeh, *The Role of Telehealth During COVID-19 Outbreak: A Systematic Review Based On Current Evidence*, 20 BMC PUB. HEALTH, NO. 1193, Aug. 1, 2020 (discussing the benefits of telemedicine during COVID-19 to assist with limiting exposure to the virus for those in need of routine medical assistance). The authors also discuss how telemedicine has a particular ability to help at risk populations such as individuals in the elder population. *Id.* This is particularly important as it is noted that the platforms to utilize telemedicine are designed in a manner to be readily available to the everyday user. *Id.*

order groceries and other staples for daily living.³³⁵ While companies like Amazon have utilized technology for sales and delivery of goods for years, others like Whole Foods and apps like InstaCart grew in popularity as people sought to avoid physically going to stores.³³⁶ Additionally, even though medical facilities were open, individuals were encouraged to use telemedicine when possible to avoid exposure to COVID-19.³³⁷ These systems for grocery delivery and tele-medicine were well established and developed prior to the pandemic and most individuals utilized them as part of daily life.³³⁸

Stores such as Target and Walmart were aptly prepared for such a transition.³³⁹ When considering that Target, Amazon, Whole Foods, and Instacart had technology platforms in place that quickly adapted to meeting consumer needs during the pandemic, it is concerning that the courts could not make similar adaptations. One of the key differences is the type of “consumer” targeted by these companies while developing their technology solutions versus the “consumer” that the court focuses on, judges and lawyers. Walmart and its rivals are designing platforms that can be utilized by as many people as possible.³⁴⁰ These platforms are easily used on cell phones, and even specific cell phone applications are available in addition to computer-based web interfaces.³⁴¹ While it is true that even during the pandemic these companies had stores that were open for in-person

335. See Madeleine Carlisle, *How Can You Safely Grocery Shop in the Time of Coronavirus? Here's What Experts Suggest*, TIME (Mar. 27, 2020, 2:10 P.M.), <https://time.com/5810782/grocery-store-safety-coronavirus/>.

336. See CHINONSO ETUMNU ET AL., WHAT DRIVES ONLINE GROCERY SHOPPING? 3 (2019), https://ageconsearch.umn.edu/record/290858/files/Abstracts_19_05_14_13_09_26_99_128_210_107_129_0.pdf. AI and technology platforms have been used in everyday life from ordering groceries to furniture. *Id.* Companies such as Amazon and Target have spent millions investing in online delivery services for their groceries, and the grocery delivery industry is projected to be worth \$100 billion by 2022. *Id.* at 2.

337. Monaghesh & Hajizadeh, *supra* note 334 at 4.

338. *Id.*; see ETUMNU ET AL., *supra* note 336, at 3.

339. See UNCTAD, *COVID-19 Has Changed Online Shopping Forever*, Survey Shows (Oct. 9, 2020), <https://unctad.org/news/COVID-19-has-changed-online-shopping-forever-survey-shows>; see also Nathaniel Popper, *Americans Keep Clicking to Buy, Minting New Online Shopping Winners*, N.Y. TIMES (May 13, 2020), <https://www.nytimes.com/interactive/2020/05/13/technology/online-shopping-buying-sales-coronavirus.html>.

340. See Richard Lehrfeld, *Inside Look: Walmart Media Group Continues to Gain Momentum*, WALMART (Dec. 16, 2020) <https://corporate.walmart.com/newsroom/2020/12/16/inside-look-walmart-media-group-continues-to-gain-momentum>.

341. WALMART, *Walmart App*, <https://www.walmart.com/cp/walmart-app/10878651> (last visited Sep. 24, 2021); TARGET, *Target App - Your Shopping and Saving Sidekick*, <https://www.target.com/c/target-app/-/N-4th2r> (last visited Sept. 24, 2021).

shopping, significant efforts went into assuring that the number of individuals in a store at any time were significantly limited.³⁴² This resulted in these companies expanding their mobile-based technology platforms to include options for goods to be delivered to cars in parking lots, picked up at the front of stores, as well as other options to limit in-person contact points.³⁴³ These companies further extended their technological capabilities to assist with the issues presented by the pandemic to predict supply and demand for food, toilet paper, and other products.³⁴⁴

In the realm of telemedicine, the expansion of remote services both grew and became a necessity to alleviate safety concerns with the risk of contracting COVID-19 in a traditional medical setting.³⁴⁵ A number of these programs have expanded to allow patients to communicate with medical professionals via smart phones and computers with webcams twenty-four hours a day, seven days a week.³⁴⁶ Patients also have a number of modalities to utilize telehealth services.³⁴⁷ These services are offered online synchronously (via smart phone with a doctor in real time), asynchronously (using a smart phone via messaging, images, and other data sent back and forth between the patient and medical professional), and even for remote patient monitoring (utilizing smart phones and devices to relay a patient's clinical information directly to the healthcare provider).³⁴⁸ Just as companies like Target and Walmart diversified the technologies and methods that they utilized to reach the most individuals, so did telemedicine.³⁴⁹ Combining synchronous video conferencing methods and asynchronous communication methods provides comprehensive options to those who need to utilize these services.

342. See Lauren Thomas, *Curbside Pickup At Retail Stores Surges 208% During Coronavirus Pandemic*, CNBC (Apr. 27, 2020), <https://www.cnbc.com/2020/04/27/coronavirus-curbside-pickup-at-retail-stores-surges-208percent.html>.

343. *Id.*

344. See Jared Council & David Uberti, *Coronavirus Disruption Puts Supply Chain Software to the Test*, WALL ST. J. (Apr. 9, 2020, 6:25 A.M.), <https://www.wsj.com/articles/coronavirus-disruption-puts-supply-chain-software-to-the-test-11586424600>.

345. See Monaghesh & Hajizadeh, *supra* note 334, at 4; see also Brendan G. Carr & Judd E. Hollander, *Virtually Perfect? Telemedicine for COVID-19*, 382 NEW ENG. J. MED. 1679 (2020).

346. Carr & Hollander, *supra* note 345, at 1679.

347. See *Using Telehealth*, *supra* note 77.

348. *Id.*

349. Carr & Hollander, *supra* note 345.

For both of these industries, the focus of technology development has been on the shopper or the patient as the “consumer.”³⁵⁰ Exemplifying this consumer-focused programming, not only are the platforms available via mobile devices, the programs often have a real-time chat option available to consumers, providing a number of technology options to individual users.³⁵¹ The consumer-friendly approach to technology by these companies underscores the need to offer a variety of technology options, geared towards the technological tools that their customers use with the understanding that their customers come from all ends of the socio-economic spectrum.

While there is some acknowledgement that courts are a customer-service industry, the courts are usually not the best at serving their litigant customer.³⁵² During the pandemic, courts did not deploy their technology platforms with the same customer considerations in mind as grocery stores and telemedicine platforms. Often, the discussion centering around the use of technology in the courtroom, even now, is focused on necessity and efficiency for the courts and lawyers.³⁵³

350. In the days where a number of grocery staples (such as meat and toilet paper) were flying off the shelves, companies like Walmart utilized technologies for the ordering of product as supplies got low to ensure that items were available for shoppers. See Nathaniel Meyersohn, *Grocery Stores Turn to Robots During the Coronavirus*, CNN (Apr. 7, 2020, 2:48 P.M.), <https://www.cnn.com/2020/04/07/business/grocery-stores-robots-automation/index.html>; see also Carr & Hollander, *supra* note 345, at 1679; Interview with Judd E. Hollander, M.D., *New Eng. J. Med.* (Apr. 30, 2020) (discussing using telemedicine to assist with triaging patients to allowing patients to be screened before they arrive at an emergency room potentially exposing themselves to COVID-19).

351. See Schmitz, *supra* note 252, at 98–104 (noting online sale providers go as far to offer online dispute resolution via chat and email, assisting the shopper in addressing issues).

352. John M. Greacen, *Eighteen Ways Courts Should Use Technology to Better Serve Their Customers*, 57 *FAM. CT. REV.* 515 (2019) (referencing the annual survey conducted by the National Center for State Courts (NCSC)). In this survey 52% of those surveyed believed that the courts provided “good customer service.” *Id.* While initially this appears to be at least the majority of individuals surveyed satisfied as a court consumer, when questioned further two-to-one people believed that judges did not understand challenges that the litigant faced. *Id.*

353. Reynolds, *supra* note 3, at 6; see Diamond, *supra* note 207, at 899–900 (noting that any due process challenges to video conferencing are unlikely to succeed). In *LaRose v. Superintendent*, the issue was raised that video hearings resulted in unfair bail orders. 702 A.2d 326 (N.H. 1997). Petitioners Jay LaRose, Shawna Brown, and Richard Theriault challenged the legality of their arraignments and bail hearings because the proceedings had been held by video teleconference and they could not make bail. *Id.* The court in *LaRose* found “no evidence that the use of video ‘would adversely bias a judge’s opinion of a defendant.’ The court specifically relied upon the

Judge Schlegel, a judge from Louisiana, told the American Bar Association that he predicts more courts will move certain proceedings like pre-trials online, as it does not make sense for lawyers to bill their clients two to three hours to appear in person for a five minute proceeding.³⁵⁴ He argues that remote proceedings have the ability to make the system more efficient.³⁵⁵ Yet a number of the public-facing resources for the courts are “simply not usable on a small smartphone screen and do not enable court users to easily complete forms or e-file.”³⁵⁶

The mass approach courts took to addressing closures was to take the in-person proceeding model and simply put it online. This process ignores who the actual consumer is, the litigant.³⁵⁷ As research has exemplified time and time again, self-represented individuals are the largest portion of “court customers.”³⁵⁸ These “customers” do not have the same familiarity with the court process and frequency of having to utilize the process that lawyers do.³⁵⁹ Often when unrepresented litigants have to utilize the court system, it is a first-time experience which is often “bewildering, intimidating, and frustrating.”³⁶⁰ Ignoring the hurdles that low-income litigants face can create a heavier burden on them when utilizing these new court solutions, leading to further gaps in access to justice. Oversights include the failure to consider cultural differences, educational barriers, and

fact that “[n]o evidence was offered to suggest that judges set bail at a higher amount for defendants who were arraigned by the video procedures than by in-person procedures.” Diamond, *supra* note 207, at 898. Issues still arise in arraignments (and other proceedings) during video hearings because clients are separated from their counsel and often there is little-to-no time for meetings between client and counsel. Some remedies to this issue have been proposed, such as a private chat feature to be available during hearings or even providing a beeper to the lawyer that the client can message confidentiality. *Id.* at 898–99. This still would not address the lack of nonverbal communication that occurs with litigants, witnesses, lawyers, and judges.

354. Reynolds, *supra* note 3, at 6.

355. *Id.*

356. See DANIELLE HIRSCH, NAT’L CTR. FOR STATE CTS., *COMING TO COURT FOR SELF-HELP DURING COVID-19: SIX WAYS TO KEEP COURT USERS AND STAFF SAFE 2* (2020), https://www.ncsc.org/__data/assets/pdf_file/0019/42076/Coming-to-Court-for-Self-Help-During-COVID-19-Six-Ways-to-Keep-Court-Users-and-Staff-Safe.pdf.

357. See Prescott, *supra* note 49, at 2019 (explaining that even pre-pandemic, such a “mirroring approach” has been criticized for not taking advantage of the capacities of online platform technologies).

358. See Greacen, *supra* note 352, at 516.

359. *Id.*

360. *Id.*

economic difficulties.³⁶¹ Often this causes low-income individuals to avoid seeking legal assistance or even acknowledge their matter is a legal one.³⁶² Of particular concern is the potential for litigants to become disengaged from remote proceedings, considering that pro se litigants already have a preexisting propensity to not view issues as legal.³⁶³ As discussed, when addressing the justice gap, even when a low-income individual recognizes a matter as legal, other hurdles still exist.³⁶⁴ These hurdles include the ability to find and understand an online tool, especially when considering that only half of households with annual incomes of \$30,000 or below have broadband internet.³⁶⁵

Without consideration of the hurdles faced by low-income litigants, there is a risk of creating a heavier burden on low-income litigants, thus increasing the justice gap. Even before the pandemic, research reflected that “[w]ithout intentional consideration of end users and their needs, limits, and preferences, technology can lead to end user frustration, perpetuate implicit biases, compromise users’ privacy, and create additional barriers that will prevent access to legal services.”³⁶⁶ Accordingly, “[i]n designing court proceedings, simply looking at efficiency is insufficient; we must also weigh the importance of access, equality, and legitimacy.”³⁶⁷ Because of COVID-19, the use of technology has been rushed to the forefront. In

361. See Tanina Rostain, *Techno-Optimism & Access to the Legal System*, 148 J. AM. ACAD. ARTS & SCI. 93, 94 (2019); see also Alejandro De La Garza, *COVID-19 Has Been ‘Apocalyptic’ for Public Transit. Will Congress Offer More Help?*, TIME (July 21, 2020, 5:03 P.M.), <https://time.com/5869375/public-transit-coronavirus-covid/>; Christina Goldbaum & Will Wright, *‘Existential Peril’: Mass Transit Faces Huge Service Cuts Across U.S.*, N. Y. TIMES (Dec. 6, 2020), <https://www.nytimes.com/2020/12/06/nyregion/mass-transit-service-cuts-covid.html> (exemplifying the compounding effect of the economic issues). In order to obtain certain services without a car, litigants would potentially be putting themselves at risk by utilizing mass transportation during a pandemic. *Id.* Even if transportation was available, often low-income litigants would find that the legal-aid office or court that they traveled to for assistance was not open to in-person meetings. *Id.* Even if resources were open to help low-income litigants, they often found mass transit to no longer be safe and in some circumstances, it was eliminated entirely. See generally *State Restrictions*, *supra* note 55.

362. See Rostain, *supra* note 361, at 94.

363. See *id.*

364. See *id.*

365. See *id.* Rostain notes that literacy rates are a substantial hurdle. Fourteen percent of Americans are functionally illiterate, and 30% have minimal levels of literacy with the ability to only understand common phrases. *Id.*

366. Sherley E. Cruz, *Coding for Cultural Competency: Expanding Access to Justice with Technology*, 86 TENN. L. REV. 347, 366–67 (2020).

367. Prescott, Mentovich, & Rabinovich-Einy, *supra* note 233, at 976; see also Cruz, *supra* note 366, at 366–67; Greacen, *supra* note 352, at 515 (“Courts have traditionally used technologies to enhance their internal operations.”)

considering the use of technology, it is critical to assure that this implementation does not push us backwards. Instead, courts should view this as an opportunity to close the justice gap.

There are thirty million self-represented litigants every year.³⁶⁸

Imagine a world where a man convicted of a crime can use an app to legally expunge his record so he can get a job. Or where a cleaning lady paid by the hour can use an app to figure out whether her employer is stealing her wages. Or where a tenant can use an app to document the mold growing in her bathroom and get her landlord to follow the law and eliminate the mold.³⁶⁹

In its best form, technology can help low-income individuals achieve access to justice. “Richard Allen appeared before an Allegheny County judge last week to ask for more time to save his Penn Hills home from foreclosure. His request was granted. It all happened on a cellphone call while he was sitting in his car in the parking lot at his job.”³⁷⁰ Mr. Allen stated, “[t]his was better than going to the courtroom I didn’t have to take off work or go look for a place to park [in] Downtown.”³⁷¹ Mr. Allen still reported some surprises along the way.³⁷² Among them, there was still a call of the list where he listened to other individuals cases.³⁷³ While this required Mr. Allen to be available for a longer period of time than it would take for his proceeding, it still limited the amount of time he was required to set aside for the case given the lack of travel, parking, and other hurdles that individuals face when traveling to a courthouse to address their legal matter. Although it added to his time, this remote call of the list gave Mr. Allen an opportunity to listen and observe how the

368. See Rostain, *supra* note 361 at 95.

369. *Id.* at 93 (footnotes omitted) (describing techno-optimistic vision as one that believes that apps can be utilized to make the legal system more accessible and not just for the lawyers within it). This exemplifies the light path we can choose to walk, leaving behind our notions of technologies place in the legal field.

370. Grant, *supra* note 35.

371. *Id.*

372. *Id.*

373. *Id.* (explaining counties such as Butler, Beaver, and Lawrence counties generally do not have the volume of cases that Allegheny County has, and in-person foreclosure conferences resumed in June). In-person hearings resumed in these counties partially due to the fact that there were significantly less individuals attending, but also in part because the other counties around Allegheny County did not have comparable systems to Allegheny. *Id.*

proceeding would occur prior to his case being called, potentially eliminating some of the anxieties associated with court proceedings. The type of proceeding experienced by Mr. Allen is exactly what JTC recommended courts consider when deploying technologies to address court closures.³⁷⁴ Here, the court considered an important legal issue where the proceeding would lend itself to a virtual conferencing procedure.³⁷⁵ The court offered both telephone conference and video conferencing for this proceeding, making it easier for all parties to participate, including low-income litigants.³⁷⁶

To develop programs that are consumer-friendly, developers should consider collaborating with those outside the legal profession.³⁷⁷ Partnering with community organizations can lend credibility to the programing offered online to assist with legal matters.³⁷⁸ Community organizations can promote and potentially train individuals to utilize the programing.³⁷⁹ Also, looking to the successes and failures of other professions utilizing these technologies can give significant guidance for development.³⁸⁰

Just as JTC noted, if programs are developed with the consumer in mind (the litigants), courts have the potential to create a lighter burden for low-income litigants and to assist with decreasing the justice gap.³⁸¹ It is important to move away from the “commitment to a lawyer-centered” focus for the process given that at least one side in civil cases is unrepresented in millions of cases filed each year.³⁸² Mr. Allen’s story exemplifies how the pandemic forced the use of technology into the courts and how it can bring a lighter burden to low-income litigants required to utilize the court process. Remote proceedings help make the process for first time users less intimidating than in-person proceedings.³⁸³ Further, it assists in alleviating concerns regarding issues of missing work, needing childcare, and travel.³⁸⁴

Closures of courts impacted judges, lawyers, and unrepresented litigants. However, delays held a greater cost to low-income

374. See QUICK RESPONSE BULLETIN, *supra* note 298.

375. See Grant, *supra* note 35.

376. *Id.*

377. See Cruz, *supra* note 366, at 393.

378. See *id.*

379. See *id.*

380. See *id.* at 394.

381. See QUICK RESPONSE BULLETIN, *supra* note 298, at 3.

382. See Engstrom, *supra* note 2, at 258.

383. See Grant, *supra* note 35, at 7.

384. *Id.*

litigants.³⁸⁵ Legal cases such as landlord-tenant, family law, and employment are likely to rise post-pandemic.³⁸⁶ Failure to address these matters timely can lead to the potential loss of housing and employment.³⁸⁷ Intentionally designed technology can assist with addressing these legal matters for low-income litigants.³⁸⁸

While many states suspended evictions and expansions were made regarding the ability for individuals to receive unemployment compensation, this did not mean that these issues were automatically resolved.³⁸⁹ In fact, the expansion of unemployment compensation benefits led to significant backlogs for hearings challenging the denial of benefits and, in some circumstances, individuals were unable to even file for unemployment due to the inability to appear in person at unemployment offices or get through on the phone.³⁹⁰ Recognizing that internet may be unavailable now that libraries are closed, and that phone lines may be jammed, Philadelphia Legal Assistance launched a hotline to assist people filing for unemployment compensation who did not have access to the online portal that Pennsylvania uses for filing, as unemployment offices were closed.³⁹¹ Following the deployment of the hotline, Philadelphia Legal Assistance created their own online portal to walk litigants through the unemployment compensation application process.³⁹² This portal exemplifies the beneficial impact technology can have on low-income

385. See Engstrom, *supra* note 2, at 257.

386. *Id.* at 251.

387. See *id.* at 253.

388. See Eagly, *supra* note 137, at 934–35 (noting that immigration courts provided insights on how technology, even if designed for court convenience, can expedite a case through an overburdened docket); see also Frederic I. Lederer, *The Evolving Technology-Augmented Courtroom Before, During, and After the Pandemic*, 23 VAND. J. ENT. & TECH. 301, 339 (2021) (discussing the continually evolving potential that technology can improve the court system, which can enable remote access to the court for those that otherwise would not have access); LEGAL AID SOC'Y, *supra* note 140, at 1–3 (stating that The Legal Aid Society, an organization to assist those who cannot afford counsel, is working to assure no person should be denied their right to equal justice). Legal Aid created a COVID-19 “Information for Clients” website to provide a list of services and legal information relating to issues such as housing, unemployment, and the like as a result of these legal matters that have been exacerbated by COVID-19. *Id.*

389. See Engstrom, *supra* note 2.

390. See PHILA. LEGAL ASSISTANCE, *Unemployment Compensation and COVID-19*, <https://philalegal.org/unemployment-compensation-and-COVID-19> (last visited Feb. 18, 2021).

391. See PHILA. LEGAL ASSISTANCE, *Hotlines*, <https://philalegal.org/get-legal-help/hotlines> (last visited Sept. 19, 2021).

392. See PHILA. LEGAL ASSISTANCE, *Apply Online*, <https://philalegal.org/apply> (last visited Sept. 19, 2021).

litigants. It allowed the individual access to the unemployment compensation system, and it was adapted quickly to reach even more individuals by diversifying the technology options.³⁹³ The benefit to being able to expediently address a legal matter without leaving the comfort of home could be a draw to encourage litigant participation, especially in rural areas where it is difficult to get to a courthouse.

The needs of low-income litigants are well known as are the obstacles they face.³⁹⁴ While technologies could have a negative impact if courts and lawyers continue to ignore the concerns that have been raised, technologies also offer a unique opportunity. More and more technology portals are developed to connect low-income individuals with legal aid providers who can directly assist with their specific legal needs.³⁹⁵ In addition, legal aid attorneys and lawyers alike are taking the charge to creatively think about how to virtually provide services to those in need.³⁹⁶ Given the inability to find self-help materials and programs during the pandemic, having intermediaries to help those in need (such as non-lawyer professionals) creates the potential to assist with this gap, taking the role that libraries and churches have served in the past.³⁹⁷ Programs for non-lawyer legal assistance have begun to pop up around the country.³⁹⁸ These provide an opportunity for expansion by partnering non-lawyer assistance to help individuals with these technology platforms and other technological procedural changes that assures a

393. See generally Rostain, *supra* note 368 (explaining that COVID-19 exacerbated many of the pre-existing hurdles that low-income individuals face when attempting to address their legal problems). These include issues with recognizing matters as legal, turning to non-legal resources for assistance such as libraries and churches, problems with transportation, and even available “bandwidth” to address these while also trying to handle the payment of bills, finding employment, or other life necessities. *Id.* Low-income individuals utilizing public libraries as a resource often seek help from librarians to aid in their search for self-help materials. *Id.* COVID-19 closed the doors to libraries as well as the librarians who help individuals look for resources. *Id.* These barriers made it even more difficult for low-income litigants to obtain the information that they needed to effectively deploy the court technology solution. *Id.*

394. See JUSTICE GAP, *supra* note 16.

395. See ABA Disaster Relief Pro Bono Portal: COVID-19, AM. BAR ASS’N (2020), <https://aba.joinpaladin.com/aba-disaster-relief/>.

396. See LEGAL AID SOC’Y, *supra* note 140.

397. See Rostain, *supra* note 368, at 95.

398. See Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 *FORDHAM L. REV.* 2587 (2014) (discussing how in rethinking the laws regarding the unauthorized practice of law, an opportunity is created for special paraprofessional licensing that could assist low-income litigants addressing routine document preparation and other legal needs).

technology gap will not hold back low-income litigants.³⁹⁹ More research, creative thinking, and openness to the use of technology will help to assure that the justice gap does not grow. In fact, it could be utilized to help close this gap.

With this research in mind and the pandemic requiring courts to utilize technology as a solution, programing emerged focused on helping with COVID-19-specific legal issues that were arising and having a greater impact on those with low-incomes.⁴⁰⁰ Early on in the pandemic, some states even recognized the disparate impact the closing of the courts could have on low-income litigants.⁴⁰¹ In March, as court closures and stay-at-home orders were issued, the Massachusetts Access to Justice Commission formed a COVID-19 task force to address the civil needs of low-income individuals.⁴⁰² This included a subcommittee for pro bono and a subcommittee for materials and communication.⁴⁰³ Ultimately, the COVID-19 task force and Pro Bono Committee launched a COVID-19 Pro Bono Portal in June 2020 to pair volunteer attorneys and law students with pro bono opportunities serving low-income individuals with civil legal matters.⁴⁰⁴ This portal came into being after assessing the legal needs

399. *Id.*

400. See LEGAL AID SOC'Y, *supra* note 140; see also PHILA. LEGAL ASSISTANCE, *supra* note 390 (providing a hotline to address the needs of individuals trying to file for unemployment compensation in Pennsylvania). This hotline was designed to help individuals who did not have access to internet to apply for unemployment compensation through the state's online portal. *Id.*

401. See Press Release, Massachusetts Supreme Judicial Court, Massachusetts Access to Justice Commission Launches COVID-19 Pro-Bono Portal (June 22, 2020), <https://www.mass.gov/news/massachusetts-access-to-justice-commission-launches-covid-19-pro-bono-portal>.

402. See *id.*

403. See *id.*

404. See *id.*; Cruz, *supra* note 366, at 358–59 (continuing this measured and deliberate approach to embracing technology in the legal field is the fact that legal technology is growing as part of law school curriculums across the country). “As of 2017, over forty law schools currently offer some version of legal technology instruction as part of their law school curricula.” *Id.* at 358. This includes everything from legal writing programs which incorporate the use of Word, Excel, to teaching students how to develop applications to simplify aspects of legal practice keeping the litigant in mind. *Id.* In fact, a number of schools have developed competitions such as “hackathons” used to highlight programing to help with the practice of law. *Id.* Often these programs fall within clinical legal education programs, where students are educated on client-centered lawyering, i.e., the litigant as the court customer. *Id.*; see also Stephanie Francis Ward, *For Some Law Students, Clinic Work During COVID-19 Feels More Real than Ever Before*, ABA (Apr. 28, 2020), <https://www.abajournal.com/web/article/for-some-law-students-clinic-work-during-covid-19-feels-more-real-than-ever-before>.

that are presented as a result of the COVID-19 pandemic and conducting surveys of legal aid and service providers.⁴⁰⁵ These opportunities focus on remote pro bono opportunities.⁴⁰⁶ The COVID-19 Task Force Committee served as a recognition of the need to address barriers relating to remote hearings as well as information regarding “pandemic-related law and legal procedures.”⁴⁰⁷ The work of this task force exemplifies the knowledge of the impact of the pandemic, including the potential impact of the quick turn to remote legal proceedings and the barriers that they pose.⁴⁰⁸

This growth of available services shows how the pandemic can push us forward in using technologies to assist with addressing the justice gap, so long as this shift is mindful and avoids creating a heavier burden for low-income Americans.⁴⁰⁹ In fact, low-income and self-represented litigants expect courts to solve “customer service” related problems by the use of technology.⁴¹⁰ Simply, the courts have to remember who the consumer is during the deployment of such technologies.

405. See Massachusetts Supreme Judicial Court, *supra* note 401.

406. See *id.*

407. See *id.* (“This pandemic has magnified the racial disparities in our communities and further highlighted the critical nature of providing frontline legal services and advocacy through legal aid, and also, importantly, through pro bono services.”).

408. *Id.*

409. See *id.*; see also Susan Saab Fortney, *Online Legal Document Providers and the Public Interest: Using a Certification Approach to Balance Access to Justice and Public Protection*, 71 OKLA. L. REV. 91, 95 (2019) (discussing ways to address best practices for the use of technology to assist with legal issues). By way of example, the New York County Lawyer Association recommended guidelines for best practices for online document preparation and ultimately the New York Bar Association submitted this as a resolution for voting by the American Bar Association. Ultimately, the ABA approved this resolution. *Id.*; see also, AM. BAR ASS’N HOUSE OF DELEGATES, *Resolution* (Aug. 12–13, 2019), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/10a-annual-2019.pdf> (last visited Jan. 18, 2020); Corey A. Lederman, *Courts are Successfully Using Technology to Stay Operational in the Face of COVID-19*, ROBINS KAPLAN, LLP (Apr. 6, 2020), <https://www.robinskaplan.com/resources/publications/2020/04/courts-are-successfully-using-technology-to-stay-operational-in-the-face-of-covid19> (explaining the shift to technology as a solution for the courts to keep their doors open and how federal funding became available to assist with this shift). This funding provided one billion dollars to support the civil and criminal justice system. Specifically, this resulted one hundred million dollars to the federal prison system, six million dollars for federal court expenses, one million dollars for defender services, and fifty million dollars for Legal Services Corporation. *Id.*

410. Greacen, *supra* note 352, at 516.

Focusing on a diversity of mobile methods of delivery can provide access to more individuals.⁴¹¹ Understanding how mobile devices deliver information is a key component to this design.⁴¹² Individuals need to understand the material and how to navigate it.⁴¹³ Some technology offerings include “chat platforms, mobile applications, and virtual client portals” and these platforms offer communication mechanisms for litigants that assist with updates regarding cases and are accessible to litigants.⁴¹⁴ Even the ability to submit documents or images via a mobile device are available.⁴¹⁵ Other industries embraced these concepts years ago: banks allow the deposit of checks via mobile phones, and individuals with auto accident insurance claims are encouraged to take pictures of the damage and submit the photos via mobile phone application.⁴¹⁶

In evaluating the potential that online technology platforms have on litigation outcomes and ultimately access to justice, Prescott, Mentovich, and Rabinovich-Einy have noted:

Technology, of course, can lower the costs, time, and travel necessary for participating in face-to-face legal proceedings. Yet . . . access to and familiarity with online technology were unequally distributed in society. . . . [A]s advances in mobile technology have made Internet access broadly available and improvements in the interface and language of digital platforms have made using them simpler and more engaging, handling one’s claim online has become a realistic option for virtually everyone. And yet the digital divide remains. . . . [P]atterns of use vary across socioeconomic strata. . . . [P]atterns mirror existing

411. See Cruz, *supra* note 366, at 394; see also *State of State Courts*, *supra* note 191 (noting the survey results from this National Public Opinion Poll indicated that 64% would use a court service online and 94% of those surveyed own a cell phone that they could utilize to participate in a remote proceeding).

412. See Cruz, *supra* note 366, at 395–96 (discussing how in the design process it is important to determine what information should be provided on the initial primary webpage versus what information is provided on subsequent pages requiring “clicks” to ensure that adding additional steps for the unrepresented litigant does not lead to unnecessary confusion).

413. *Id.*

414. See *id.* at 357 (noting that in addition to understanding the design aspects of focusing on mobile devices, ensuring that explanations and instructions are written in plain language and understandable for the everyday user is another key component to assure that the technology does not create a further divide in access to justice).

415. Greacen, *supra* note 352, at 518.

416. *Id.*

social, cultural, and economic divisions

Online proceedings entail their own weaknesses
 Nevertheless, under the varied procedural options available with online technology, courts can calibrate more carefully and easily when and where more traditional approaches would contribute to an equitable resolution and a just judicial system, breaking the all-or-nothing nature of face-to-face court settings [O]nline proceedings support more structured procedures, which curb implicit and structural biases by limiting discretion and carefully controlling the ways in which parties interact. . . . [D]esign choices [are] vital to the potential of online proceedings; the right ones, in the right contexts, will make it possible to make our legal system impartial in a way it has never been.⁴¹⁷

They highlight the dichotomy that technology platforms have the opportunity to either widen or help close the justice gap. Focusing on the litigant, specifically the low-income litigant, as the primary consumer of these platforms can help keep the focus and emerge from this pandemic with a heavier burden on low-income litigants. Lawyers, judges, and court administration have greater access to technology than the everyday litigant. Ensuring that the continued use of technology in court proceedings post-pandemic does not leave the low-income litigant behind is the only path that will bring us through the pandemic lighter and ready to re-imagine the world.⁴¹⁸

As Michigan Supreme Court Chief Justice McCormack stated to Congress in June 2020: “This pandemic was not the disruption any of us wanted . . . [b]ut it might be the disruption we needed to transform the judiciary into a more accessible, transparent, efficient and customer-friendly branch of government.”⁴¹⁹

417. Prescott, Mentovich & Rabinovich-Einy, *supra* note 233, at 972, 975–76 (footnotes omitted).

418. Reynolds, *supra* note 3 (explaining that the suspending of certain court procedural rules and hurdles that prevented a shift to technology as a means to keep the courthouse doors open may be the start of court reform to make it accessible to all).

419. *See id.* at 2.

CONCLUSION

One thing is clear, as COVID-19 pushed the courts to consider alternatives to in-person proceedings, this gives courts and the legal profession the opportunity to consider methods to simplify court “procedures to promote access to justice” to focus on the low-income litigant user as the consumer.⁴²⁰ “Adapting to virtual hearings in response to a crisis presents an unusual opportunity to rapidly and iteratively reengineer court processes. ‘Pandemic perspective’ has changed perceived limitations. . . . When the pandemic is over, newly gained capabilities and expectations will have changed the world. It will not be possible or even desirable to return to pre-pandemic norms.”⁴²¹ The time to change is now.

420. QUICK RESPONSE BULLETIN, *supra* note 298, at 4.

421. *Id.* at 4–5.