

The High Cost of Efficiency: Courthouse Tech and Access to Justice

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Half a century ago, after a Florida state trial court refused to appoint counsel to represent Clarence Earl Gideon for a non-capital felony offense, Mr. Gideon appealed *pro se* his conviction from prison, first to the Florida Supreme Court and then to the United States Supreme Court. In a handwritten certiorari petition, Gideon argued that he had been “denied the rights of the 4th, 5th and 14th amendments of the Bill of Rights.”¹

Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963) emerged as a landmark case based in part on implicit proposition that the justice system must remain open to all citizens, including those without means, and regardless of the form or formality of their pleadings. Overruling *Betts v. Brady*, 316 U.S. 455, 62 S. Ct. 1252 (1942), the Supreme Court reversed the Supreme Court of Florida and remanded, directing the lower court to provide counsel to Mr. Gideon.

Imagine how different the course of justice might have been if Clarence Gideon had been required to file electronically his certiorari petition. A poor man from Florida, Gideon may well have been unable to gain access to the courts, or the resources that he needed to file his petition, because technology had passed him by. The Supreme Court may never have gotten his handwritten certiorari petition, and our legal system may never have benefited from his personal victory.

Hyperbole, you say? Even today, courts still accept paper submissions from indigent or self-represented litigants. True enough. But as courts move with ever increasing speed toward full-on electronic records and case processing, submissions such as

those of Clarence Gideon are sliding out of the mainstream of judicial processing. And more ominously, with legal resources becoming available primarily online, self-represented litigants like Mr. Gideon, who may lack the skills and experience to access those resources, are further and further removed from the protection that the courts were meant to provide.

Technology is changing the way people communicate, conduct business, and even process information; the momentum of technology cannot be halted. With ever increasing speed, technology is sweeping into the courts and transforming how advocates litigate and how courts deliver justice.

The benefits gained by integrating the justice system's processes and procedures with web-based and other technology are quite evident. Electronic filing and record-keeping cuts costs dramatically by reducing paperwork and making searching and storing of files far more efficient, requiring fewer court staff. Indeed, adoption of technology in times of inadequate funding has become an important survival skill for courts across the country.²

For all the benefits that the justice system stands to gain from technology, however, there are unanticipated consequences that affect the most vulnerable of society. Indigent people have fewer resources, including access to technology. Although the Internet is readily available to the affluent, indigent persons are less able to benefit from court-adopted technologies—they lack both the equipment and the experience to use the resource.

The result is that without access to technology, or support from others more familiar with the technology and the legal process, growing segments of our society are increasingly isolated from the justice system. But approached with an eye toward mitigating this inequity, technology can help close the justice gap.

Legislators, court administrators, and all those in charge of investment in our justice system need to recognize that technological efficiency is ineffective unless that technology is accessible. Moreover, the cost of an ineffective justice system goes far beyond the negative impact on the rights of litigants. It reaches all of us in a real and direct economic way. The economic losses caused by justice systems that are neither efficient nor effective are far greater than most realize.

Recognition of that causal link between an ineffective justice system and larger economic and social costs is the critical first step toward a lasting commitment to preserving real access to justice for all—a net benefit to society as a whole. Increased funding for the justice system ensures not only increased technological resources available to the poor, but also adequate court staffing and the availability of legal service providers such as legal aid and public defenders, who are indispensable in filling the client-service gaps that evolving court processes and burgeoning technology create. That in turn results in positive and significant economic benefits for the communities served. Fully funded courts, accessible to all citizens, are not only the morally and ethically right thing; they are the economically smart thing.

Economic Reality: Courts Are Turning to Technology to Save Cost and Increase Efficiency

Access to technology and access to justice are intertwined. In times of economic downturn, funding of our justice system gets cut—that has been the case for courts nationwide. Those funding cuts most immediately affect courts' human resources—staff and legal services lawyers. This leaves courts less equipped to deliver justice in a timely manner to all who rely on courts to decide disputes.

By increasing their use of technology, courts can offset some of the effects of budget cuts by reducing time and effort associated with paper. The federal court system is now nearly paperless.⁵ “With the maturation of the Public Access to Court Electronic Records (PACER) system, virtually every federal district, appellate, bankruptcy, and other specialty court filing may be electronically accessed by the public, the litigants, and the courts. State courts are not far behind.”⁴

At the appellate level, the use of technology generally emerges in three areas: (1) electronic filing; (2) electronic case management and processing; and (3) electronic case analysis and resolution.⁵ While the last two areas are internal to the court systems, electronic filing affects all litigants by demanding not only access to technology, but also familiarity with the electronic filing system.

The Undeniable Socio-Economic Gap in Access to and Ability to Use Technology

Technology has pluses, but it also has minuses. As commonplace as computers, smartphones, and internet connectivity are to those in the legal profession, that's not the reality for all of society. There is significant—and meaningful—overlap between *pro se* litigants and those who are not “connected.”

The International Monetary Fund (IMF) has observed that technological advances have made the largest contribution to widening income inequality across the world in recent years.⁶ Simply stated, the haves have access to technology, and the have nots often cannot get it. As the IMF reported:

Most everyone will benefit from technological advancements . . . except, of course, those without access to computers or interactive televisions. Information access requires four conditions: knowing that the information or information service is available, owning or having access to the equipment necessary to connect to the information source (e.g., computer, television, telephone, software, modem), gaining access to the information service (e.g., afford cable or online charges), and knowing how to operate the necessary hardware and software (e.g., be “computer literate”). A deficiency in any one of these areas inhibits access.⁷

As of August 18, 2013, the New York Times reported that roughly 20 percent of American adults—around 60 million people—did not have access to the Internet at home, work, school, or by mobile device.⁸ The Washington Post, citing a study released by Pew Internet & American Life Project, reported that “[a]bout 15 percent of Americans older than 18 don’t use the Internet” and “[a]n additional 9 percent use it only outside the home.”⁹

Disproportionately present among those who do not use the Internet are adults without high school diplomas, adults over 65, and minority adults. Further, familiarity with and access to technology may depend on the geographic location of litigants. According to a 2011 Census survey by the Clarion Ledger, Mississippi is the “least-wired” state in the country: approximately 41 percent of Mississippians have no access to the Internet at all.¹⁰ The prevalence of *pro se* litigants already poses a problem for the justice system, but adding a technology barrier magnifies the cost and challenge to our courts.

The number of *pro se* litigants has long been on the rise. At the federal level, civil *pro se* cases account for 27.9 percent—almost one-third—of the total civil filings for the period ending September 30, 2012.¹¹ Federal appellate courts have faced a 49 percent increase in *pro se* appeals in recent years.¹² State courts also face a staggering increase in *pro se* filings. The percentage of *pro se* litigants in California state courts, for example, rose from one percent in 1971 to almost 75 percent by 2005.¹³

The New York experience demonstrates not only the prevalence of *pro se* litigants, but that a large percentage of those *pro se* litigants are low-income, if not indigent. “Each year, more than 2.3 million New Yorkers navigate civil legal proceedings without the benefit of counsel.”¹⁴ In 2010, 2011, and 2012, 1.2 million low-income New Yorkers had “multiple civil legal problems involving essential needs and were forced to navigate the State’s legal system without a lawyer.”¹⁵ The Legal Services Corporation estimates that no more than 20 percent of poor persons with civil legal needs are able to get assistance.¹⁶

Impact on the Justice System

When litigants appear *pro se*, there are significant system costs in the form of lost efficiency and delayed opportunities for early resolution or settlement.¹⁷ Because courts must divert resources to *pro se* litigants, overall efficiency and the quality of justice suffer. And that lack of efficiency is exacerbated by cuts in funding to legal aid and to the justice system’s public defenders, who frequently provide the lubricant that the wheels of justice require. For example, in 2012, staff attorneys at legal aid programs in Minnesota closed 33,940 cases.¹⁸ The justice system undoubtedly functions better when these cases are resolved, especially if they are resolved short of full scale litigation. But the efforts of legal services organizations cannot stem the tide of unmet needs for legal services. A recent study of the Minnesota courts concluded:

Low income respondents face a bewildering and paper-intensive social services network, whose administrative and eligibility requirements are often incomprehensible or contradictory. Navigating confusing and, at times, hostile bureaucracies overwhelms many, particularly those who are disabled, illiterate, or from different cultures. The magnitude and volume of problems facing the poor exceed the diminishing capacity of their provider network.¹⁹

Courts and advocates have tried to increase access to technology to reduce the justice gap, but technology does not necessarily address the access needs of the poor and underserved members of our community.

In some aspects, electronic case management or “e-filing” is not much different from online shopping. For example, in Minnesota and some other states, a person can go online to pay traffic tickets or plead guilty to minor criminal charges. But what about the millions who have to go to court in person, because they do not have consistent or reliable access to computers with the technology needed to make use of modernized

methods of delivering justice? Among these millions are the homeless or highly mobile populations who may also lack the training or familiarity with how to use the technology, even if they do find access to it.

While the disparity in access to justice is in itself troubling, the problems go deeper than leaving *pro se* litigants without assistance in matters that involve shelter, health-care, and safety; this disparity also affects the quality of justice for all litigants. When clients appear in civil matters without representation, resources of time and money get diverted and efficiencies are lost. Resolution of matters before litigation or settlement before trial is less likely. Costs rise and the justice gap widens.

Strategies to Increase Access to Technology for All

There is no reason to believe that the volume of *pro se* litigants will decrease, or that court systems will not continue to embrace technological advances that enable them to operate more efficiently. Accordingly, courts and those who use them—including lawyers, government, and businesses—must focus on practical solutions that transform increased use of technology from a handicap for indigent *pro se* litigants into an advantage. Technology must serve as a means of closing rather than widening the justice gap.

Imagine the potential economic benefits if, in addition to investing in civil legal services, the justice system committed to increasing access to technology to allow *pro se* litigants to more effectively and efficiently navigate the court system.²⁰ Several groups have made progress on addressing how technology may work to expand access to justice. The Legal Services Corporation (LSC), in conjunction with several other organizations,²¹ formed a group responsible for planning a Summit on the Use of Technology to Expand Access to Justice (Tech Summit).²² In 2013, the Tech Summit identified five strategies to effectively find technology solutions to the rise of *pro se* litigants. The strategies include:

1. -Create unified “legal portals” in each state that direct persons needing legal assistance to the most appropriate form of assistance and guide self-represented litigants through the entire legal process via an automated triage process.
2. -Deploy sophisticated document-assembly applications to support the creation of legal documents by both legal services providers and litigants that link the document-creation process to the delivery of legal information and limited-scope legal representation.
3. -Take advantage of mobile technologies to reach more persons more effectively.

4. -Apply business process analyses to all access-to-justice processes to make them as efficient as practicable.
5. -Develop “expert systems” to assist lawyers and other service providers.²³

Availability of online resources is growing; some state law libraries have such resources as forms, sample briefs, and legal advice for *pro se* litigants in areas such as unemployment insurance.²⁴ Federal district courts provide that non-Electronic Case Files (“ECF”) filers are entitled to paper copies of electronically-filed documents.²⁵ Additionally, some federal district courts permit a *pro se* non-prisoner to elect to receive service of documents and notice of electronic filings via the court’s electronic filing system to the extent and in the manner authorized in Federal Rules of Civil Procedure and the court’s filing procedures.²⁶

If court systems can begin implementing even a few of these strategies, low-income *pro se* litigants will have more meaningful access to the courts, resulting in more efficient resolution of civil matters.

Smart Investments Pay Significant Dividends in Justice Terms and More Widely

Increasing access to justice costs money. Those in charge of the government pocket-book are too frequently heard to say that we cannot afford to spend more money on the courts. They are wrong. The fact is, we can’t afford to not spend more on our justice systems. Several studies have demonstrated that underfunding the courts, resulting in inefficient, slow, and clogged judicial processes, actually costs states and their economies billions of dollars a year.²⁷

The Washington Economics Group, Inc. (“WEG”) conducted one such study for the Florida State Bar in 2009.²⁸ WEG’s Florida study concluded that the state experienced a \$9.9 billion loss due to a backlog of real property/mortgage foreclosure cases alone, as well as “\$7.2 billion in indirect and induced costs to the state’s economy.”²⁹ The Micronomics Group prepared additional studies with similar conclusions. Its 2009 study in the County of Los Angeles reported \$15 billion in economic losses attributable to litigation uncertainty, and \$30 billion in lost revenue to the county because of cuts to court funding and delays.³⁰ By contrast, when courts are fully funded, there are fewer delays, business owners are confident that contracts will be enforced, and opportunities for economic development improve.³¹

Investments in legal aid and public defender resources have a similar positive payback. Those organizations play a critical role in bridging the gap between the unrepresented and the courts. And in doing so, they provide a significant economic benefit. One study has shown that there is a return of “more than six dollars for every one dollar of funding for civil legal services.”³² These benefits surfaced in a variety of ways: receipt of nearly \$458 million in federal benefits, which then provide an economic stimulus of \$679 million, and the generation of nearly 6,800 jobs resulting from economic activity made possible by legal services to indigent clients.³³ The anticipated economic benefit, factoring in future value and assuming stable economic multiplier effects, is greater than \$1.5 billion.³⁴

Conclusion: Investing In Courts and Legal Services Is Both Ethical and Economically Smart

What would modern-day due process look like if Gideon had been unable to submit his handwritten certiorari petition? That is not a rhetorical question. When large numbers of citizens are denied meaningful access to the justice system, society as a whole suffers.

As lawyers, judges, and members of the justice system, we have an obligation to urge significant investment in programs that increase access to technology for *pro se* litigants. *Pro se* litigants need to have more tools to participate in justice. The solution does not have to involve slowing down the technological advances that help court systems operate more efficiently; greater access to technology and access to trained advocates will go a long way. It is the right thing to do.

It should be enough that inequality in access to technology denies equal justice, but if we require an incentive rooted in self-interest, we need only look to the economic impact of a justice system that does not operate fairly and efficiently. By limiting meaningful access to the courts, we are shooting ourselves in the economic foot. Making technology work for all participants in the justice system benefits all sectors of society. Doing the right thing is, in this case, also doing the smart and efficient thing, yielding a return on investment that benefits us all.

Endnotes

1. *Gideon v. Wainwright*, 372 U.S. 335, 338 n.1 (1963).
2. See generally Eric J. Magnuson et al., *The Economics of Justice*, DRI THE VOICE OF THE DEFENSE BAR (July 2014).

3. Eric J. Magnuson & Michael W. Kaphing, *Ethical Issues on Appeal in a Technological World*, FOR THE DEFENSE, Nov. 2013, at 19 (citations omitted).
4. *Id.*
5. Eric J. Magnuson & Samuel A. Thumma, *Prospects for and Problems Encountered with Technological Changes in Appellate Court Review: Visioning the Appeal of the Future*, J. APP. PRAC. & PROCESS (forthcoming 2014).
6. *Technology Widening Rich-Poor Gap*, IMF SURVEY MAGAZINE (Oct. 10, 2007), <http://www.imf.org/external/pubs/ft/survey/so/2007/res1010a.htm>.
7. Tim C. Mazur, *Information Technology*, MARKKULA CENTER OF APPLIED ETHICS, available at <http://www.scu.edu/ethics/publications/iie/v6n1/homepage.html> (last visited Sept. 19, 2014).
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12. Nina Ingwer VanWormer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 989 (2007).
13. Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 376 (2004-05).
14. *The Case for Court-Based Document Assembly Programs: A Review of the New York State Court System's "DIY" Forms*, 41 FORDHAM URB. L.J. 1189, 1189-90 (2014).
15. *The Task Force to Expand Access to Civil Legal Services in New York's 2013 Report to Chief Judge Lippman*, NY COURTS, 1-2 (2013) [hereinafter *The Task Force*], http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceReport_2013.pdf.
16. James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J. LAW & TECH. 241, 243 (2012).

17. See *The Task Force*, *supra* note 15, Executive Summary at 2 (“The Task Force has documented that when New Yorkers appear in civil matters in court without representation, litigation and other costs are higher and the opportunity to resolve disputes without litigation or to settle cases expeditiously is lost.”).

18. *Minnesota Supreme Court Legal Services Advisory Committee, FY13 Annual Report*, MN COURTS, 2 (Nov. 14, 2013), http://www.mncourts.gov/Documents/0/Public/administration/LSAC_Annual_Report_FY13.pdf.

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22. *Id.*

23. *Id.*

24. See, e.g., MINNESOTA STATE LAW LIBRARY, <http://mncourts.libguides.com/content.php?pid=545777> (last visited Sept. 19, 2014).

25. See, e.g., *CM-ECF User Guide for United States District Courts, District of New Jersey*, US COURTS, 13 (May 1, 2013), <http://www.njd.uscourts.gov/sites/njd/files/CMECFUserGuide.pdf>.

26. *Id.*

27. Magnuson, *supra* note 2, at 12-15.

28. *Id.*

29. *Id.* (citing The Washington Economics Group, Inc., *The Economic Impacts of Delays in Civil Trials in Florida’s State Courts Due to Under-Funding, Prepared for The Florida Bar* (Feb. 9, 2009), available at [http://www.floridabar.org/TFB/TFBResources.nsf/0/1C1C563F8CAFFC2C8525753E005573FF/\\$FILE/Washington-Group.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/0/1C1C563F8CAFFC2C8525753E005573FF/$FILE/Washington-Group.pdf?OpenElement).)

30. *Id.* at 15 (citing Roy Weinstein & Stevan Porter, *Economic Impact on the County of Los Angeles and the State of California of Funding Cutbacks Affecting the Los Angeles Superior Court*, MICRONOMICS.COM (Dec. 2009), available at http://www.micronomics.com/articles/LA_Courts_Economics_Impact.pdf).

31. *Id.* at 16-17.

32. See *The Task Force*, *supra* note 15, Executive Summary at 3.

33. *Id.*

34. *Id.*