

Human-Centered Civil Justice Design

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ABSTRACT

This Article introduces a novel approach to improving the civil justice system, referred to as *human-centered civil justice design*. The approach synthesizes insights and practices from two interdisciplinary strands: human-centered design thinking and dispute system design. The approach is rooted in human experiences with the processes, systems, people, and environments that members of the public encounter when navigating the civil justice system and how these experiences interact with the entangled web of hardships and legal adversities they face in the everyday.

Human-centered civil justice designers empathize with the intended beneficiaries and stakeholders of the civil justice system, seeking to deeply understand those served and to partner with these communities to create innovative solutions stemming from people's actual needs, concerns, and experiences. Civil justice designers develop this understanding by engaging in perspective-taking through immersion, interviews, observation, and, more generally, empirical and psychological inquiry. They seek to understand stakeholders' perspectives and experiences before narrowing and identifying the civil justice problems to be solved. These designers ideate and brainstorm a range of desirable human-centered solutions before winnowing them down based on feasibility and financial viability.

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Human-centered civil justice design harnesses psychological and behavioral science to understand how members of the public experience the civil justice system and their encounters with legal officials. The public's needs, aspirations, concerns, and experiences of justice are the root of human-centered civil justice design.

Throughout this process, designers harness pilots to develop insight from stakeholders on the causes, conditions, and nature of civil justice problems. These pilots are empirically tested with randomized controlled trials (RCTs) to explore their system-wide effects before interventions are adopted. The approach accommodates the reality of a dynamic civil justice system that seeks to promote diverse process values that are at times in tension, such as efficiency and promoting human dignity.

After introducing human-centered civil justice design, the Article applies this approach by first evaluating the design process by which the 2015 amendments to the Federal Rules of Civil Procedure were developed and then discussing implications for civil procedure rulemaking and managerial judging.

Table of Contents

INTRODUCTION	747
I. TOWARD HUMAN-CENTERED CIVIL JUSTICE DESIGN	753
A. Developing Human-Centered Civil Justice Design.....	756
1. Human-Centered Design Thinking	756
2. Dispute System Design	758
3. Human-Centered Civil Justice Design	759
B. Psychological Science on Experiences of Justice	763
1. Procedural Justice	763
a. Antecedents of Procedural Justice	764
b. Attributes of Procedural Justice	766
c. Consequences of Procedural Justice	769
2. Distributive Justice.....	771
C. Harnessing Experiences of Justice in Human-Centered Civil Justice Design	772
II. 2015 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE CHIEF JUSTICE'S 2015 YEAR-END REPORT	775
A. The 2015 Amendments: Rulemaking in Need of Redesign	775
B. The Chief Justice's 2015 Year-End Report: Extolling Efficient Justice.....	783
III. APPLYING HUMAN-CENTERED CIVIL JUSTICE DESIGN	789
A. Human-Centered Civil Procedure Rulemaking.....	790
B. Human-Centered Managerial Judging	799
CONCLUSION	803

INTRODUCTION

A hospital in St. Louis invites a team of human-centered designers to improve emergency rooms by capturing the patient experience.¹ One of these designers puts himself in a patient's shoes and goes through the emergency room process from admission to examination while video-recording the entire ordeal, developing an understanding of the experience in a way no doctor, nurse, or hospital administrator could possibly have explained.² The team gains the perspective of a patient encountering and navigating the emergency room and learns that, while hospital administrators think of the emergency room in terms of insurance verification, triaging, and efficiencies, patients experience the process as a mix of fear, frustration, anger, boredom, and anxiety provoked by an unfamiliar situation where one feels uninformed and lost.³ The team concludes that the hospital can reconcile medical and efficiency concerns with empathy for the patient perspective, insights that ultimately yield an innovative program in which human-centered designers work with the hospital to improve the patient experience.⁴

Another human-centered design team explores ways to communicate the value of all forms of positive interaction with children in the first five years of their lives⁵ to low-income families who often have less access to advice on how to engage with babies and toddlers.⁶ These designers immerse themselves in low-income communities, interviewing parents and observing existing child-development programs.⁷ By empathizing with parents, the team learns that, when parenting advice is limited to encouraging parents to read books with their children, many parents who are uncomfortable reading aloud forgo engagement with their babies and toddlers.⁸ After extensive interviews with parents, child-development experts, and pediatricians, the team develops a campaign that celebrates everyday moments as learning opportunities to connect and engage with children—learning opportunities that strengthen the foundation of a child's brain

1. This example is adapted from a story IDEO CEO Tim Brown recounts in TIM BROWN & BARRY KATZ, *CHANGE BY DESIGN: HOW DESIGN THINKING TRANSFORMS ORGANIZATIONS AND INSPIRES INNOVATION* 50–53 (2009) [hereinafter BROWN & KATZ, *CHANGE BY DESIGN*].

2. *See id.* at 51.

3. *See id.* at 52.

4. *See id.* at 52–53.

5. This example is adapted from an example discussed in IDEO.ORG, *THE FIELD GUIDE TO HUMAN-CENTERED DESIGN* 71–73 (2015) [hereinafter IDEO, *FIELD GUIDE TO HUMAN-CENTERED DESIGN*].

6. *See* BROWN & KATZ, *CHANGE BY DESIGN*, *supra* note 1, at 52–53.

7. *See* IDEO, *FIELD GUIDE TO HUMAN-CENTERED DESIGN*, *supra* note 5, at 71–73.

8. *See id.* at 73.

development—and materials that later form the foundation of a successful public-health campaign based on the principle that “all parents want to be good parents.”⁹

Prior felony convictions for nonviolent offenses, like shoplifting and simple drug possession, disqualify many low-income Americans from housing, employment, and student aid.¹⁰ California allows people with these convictions to convert them from felonies to misdemeanors,¹¹ but the process is complex and often requires participants to seek the help of a legal-aid provider or public defender.¹² Because of this, a human-centered design team (Code for America) explores how to “help the helpers.”¹³ Closely collaborating with the San Francisco Public Defender’s Office, this Code for America team creates an online platform that allows participants to complete the pre-screening process online on their computers or mobile devices before meeting in-person with a legal-aid provider.¹⁴ The human-centered design team builds a “Clear My Record” tool, allowing legal-aid providers to reclassify convictions more easily,¹⁵ which helps low-income Americans lift legal restrictions that threaten their physical and mental well-being.¹⁶

What these examples have in common is human-centered design thinking, an approach that seeks to solve seemingly intractable social problems with human-centered solutions.¹⁷ Originally harnessed to

9. See *id.* at 72.

10. See Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634–58 (2006); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 590–605 (2006); Katheryn K. Russell, “Driving While Black”: Corollary Phenomena and Collateral Consequences, 40 B.C. L. REV. 717, 728–30 (1999); George Lipsitz, “In an Avalanche Every Snowflake Pleads Not Guilty”: The Collateral Consequences of Mass Incarceration and Impediments to Women’s Fair Housing Rights, 59 UCLA L. REV. 1746, 1754–66 (2012).

11. See California Proposition 47, The Reduced Penalties for Some Crimes Initiative (2014); *Share My Story*, MYPROP47, <http://myprop47.org/share-my-story/> (last visited Mar. 19, 2017).

12. See Jazmyn Latimer et al., *Public Defenders and Legal Aid use Clear My Record to change non-violent criminal records*, CODE FOR AMERICA, https://www.codeforamerica.org/stories/public-defenders-and-legal-aid-use-technology-to-help-people-change-their-non-violent-criminal-records_ (last updated May 19, 2016).

13. See *id.*

14. See *id.*

15. See *id.*

16. See *id.*

17. See *infra* Part II, notes 150–236 and accompanying text; BROWN & KATZ, CHANGE BY DESIGN, *supra* note 1, at 3–4; IDEO, FIELD GUIDE TO HUMAN-CENTERED DESIGN, *supra* note 5, at 9–14; Paul Brest, Nadia Roumani & Jason Bade, *Problem Solving, Human-Centered Design, and Strategic Processes*, STANFORD PACS (2015), <http://pacscenter.stanford.edu/wp-content/uploads/2015/09/Download-the-full-article->

create technological innovations, such as the Apple iPod, human-centered design is now being successfully applied to promote good governance and a vibrant civil society, and to address challenges in areas such as health, poverty, education, equality, and economic development.¹⁸ The approach begins with the belief that all problems are solvable and that the people who face these problems in everyday life hold the key to solving them.¹⁹ Human-centered designers empathize with stakeholder communities, seeking to deeply understand those served and to partner with these stakeholder communities to create innovative solutions rooted in people's actual needs, concerns, and experiences.²⁰ Human-centered designers develop an understanding of these experiences by engaging in perspective-taking through immersion, interviews, observation, and, more generally, empirical and psychological inquiry. The aspiration of human-centered design thinking is to advance the continued growth and improvement of institutions by fostering the experiences of stakeholders in a desirable, feasible, and viable way, thereby promoting human achievement and flourishing.

This Article introduces a novel approach to improving the civil justice system, referred to as *human-centered civil justice design*.²¹ The approach synthesizes insights and practices from two interdisciplinary strands: human-centered design thinking and dispute system design.²² The approach is rooted in human experiences with the processes, systems, people, and environments encountered when navigating the civil justice system and how these experiences interact with the entangled web of hardships and legal adversities people face in the everyday.²³ To begin, human-centered civil justice designers empathize and immerse themselves with intended beneficiaries and stakeholders (e.g., parties, lawyers, judges, and members of the public) through observation and interviews to uncover their needs and experiences, embracing and identifying those needs in order to determine stakeholders' interests and goals before narrowing and identifying the problems to be solved. These designers ideate and brainstorm a range of

here.pdf; Tim Brown, *Design Thinking*, HARV. BUS. REV. (2008), <https://hbr.org/2008/06/design-thinking>.

18. See *infra* Part II, notes 151–237 and accompanying text; BROWN & KATZ, CHANGE BY DESIGN, *supra* note 1, at 3–4; Brest et al., *supra* note 17, at 4.

19. See *infra* Part II, notes 151–237 and accompanying text; IDEO, FIELD GUIDE TO HUMAN-CENTERED DESIGN, *supra* note 5, at 9.

20. See *infra* Part II, notes 150–236 and accompanying text.

21. See *infra* Part I.A.

22. See *infra* Part I.A.

23. See *infra* Part I.A. For a discussion of the human-centered design approach to problem solving, see Brest et al., *supra* note 17.

human-centered solutions before winnowing them down based on feasibility and financial viability.

Throughout this process, designers harness pilots and prototypes to develop insight from stakeholders regarding the causes, conditions, and nature of civil justice problems. These pilots and prototypes are empirically tested with randomized controlled trials (RCTs) to explore the system-wide effects of any proposed intervention. Human-centered civil justice accommodates the reality of our dynamic civil justice system and seeks to reconcile and promote diverse process values that are at times in tension with each other, such as efficiency and promoting both the opportunity to participate and human dignity.²⁴

Further, human-centered civil justice designers draw from psychological and behavioral science on how members of the public experience the civil justice system and their encounters with court officials, including psychological science on procedural justice and distributive justice. Justice researchers have demonstrated that experiences of injustice erode the public's beliefs about the legitimacy of the civil justice system, whereas experiences of justice foster beliefs about legitimacy.²⁵ Indeed, decades of research reveals that a sense of justice powerfully influences compliance with legal decrees,²⁶ cooperation with legal authorities,²⁷ and engagement in other pro-social,²⁸ participatory,²⁹ and democratic behaviors.³⁰ These plural effects

24. See *infra* Part I.A. See generally Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights - Part I*, 6 DUKE L.J. 1153, 1171–77 (1974).

25. See *infra* Part I.C.2; see, e.g., Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 379–80 (2006) [hereinafter, Tyler, *Psychological Perspectives on Legitimacy*]; Kristina Murphy et al., *Nurturing Regulatory Compliance: Is Procedural Justice Effective When People Question the Legitimacy of the Law?* 3 REG. & GOVERNANCE 1, 2–5 (2009).

26. See *infra* Part I.C.2; see, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 161–69 (Princeton Univ. Press 2006).

27. See *infra* Part I.C.2; see, e.g., Betsy Stanko et al., *A Golden Thread, a Presence Amongst Uniforms, and a Good Deal of Data: Studying Public Confidence in the London Metropolitan Police*, 22 POLICING & SOC'Y 317, 318–20 (2012); Tom R. Tyler et al., *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365, 365–74 (2010).

28. See *infra* Part I.C.2; see, e.g., David De Cremer & Daan Van Knippenberg, *How do Leaders Promote Cooperation? The Effects of Charisma and Procedural Fairness*, 87 J. APPLIED PSYCHOL. 858, 858–60 (2002).

29. See *infra* Part I.C.2; see, e.g., David De Cremer & Tom R. Tyler, *Managing Group Behavior: The Interplay Between Procedural Justice, Sense of Self, and Cooperation*, 37 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 151, 185–93 (2005).

30. See *infra* Part I.C.2; see, e.g., E. ALLEN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 61–172 (Melvin J. Lerner ed., Plenum Press 1988) [hereinafter LIND & TYLER, *SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE*]; Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L. REV. 637, 643–44 (2014).

nourish a vibrant American democracy.³¹ The public's experiences of justice are, therefore, central to human-centered civil justice design. These designers also draw from research on how altering features of rules, processes, and dispute resolution facilitates pro-social behavior, cooperation, and intergroup harmony, thereby allowing humans to achieve their full potential and to flourish.

After introducing the theory of human-centered civil justice design, the Article applies this framework to consider both the rulemaking process by which the 2015 amendments to the Federal Rules of Civil Procedure were designed and implications for managerial judging.³² Unlike the three examples elaborated at the outset of the Article, the problem-solving process that designed recent amendments to the Federal Rules of Civil Procedure was not human-centered.³³ Although lawyers were surveyed for their general impressions of courts,³⁴ members of the public who navigate the federal civil justice system were not surveyed about their experiences. Moreover, the highest-quality empirical evidence collected during the rulemaking process—case-specific data collected by the Federal Judicial Center (FJC)—revealed that many lawyers' abstract impressions were divorced from the actual, concrete evaluations of lawyers the FJC surveyed after litigating particular cases. The causes, conditions, and nature of the problem ostensibly addressed—costs and delays in the federal civil justice system—were left ill-defined, resulting in sweeping rule amendments proposed to solve vaguely defined problems. These amendments were not empirically tested before being proposed, let alone piloted or evaluated.³⁵ Despite the mainly negative public comments offered during the notice and comment process, the amendments were ultimately enacted.³⁶ Unsurprisingly, the rulemaking process has been sharply criticized.³⁷ Scholars have called for improvements to the civil justice design process to ensure that rulemaking adequately addresses problems in the future.³⁸

In marked contrast to how these rules were designed, human-centered civil procedure rulemaking would seek to infuse the rulemaking

31. See *infra* Part I.C; see, e.g., Tyler, *Psychological Perspectives on Legitimacy*, *supra* note 25, at 375–400 (reviewing psychological literature on legitimacy and concluding that “the exercise of authority via fair procedures legitimates that authority, and encourages voluntary deference”).

32. See *infra* Part III.

33. See *infra* Part I.A, notes 66–90 and accompanying text.

34. See *infra* Part I.A, notes 66–90 and accompanying text.

35. See *infra* Part I.A, notes 66–90 and accompanying text.

36. See *infra* Part I.A, notes 66–90 and accompanying text.

37. See *infra* Part III.A, notes 276–308 and accompanying text.

38. See Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L.J. 1559, 1596 (2015).

process with a vision in which diverse stakeholders and court users experience the civil justice system as truly just.³⁹ This Article discusses three recommendations:⁴⁰ (1) stakeholder experiences of justice should be systematically evaluated when cases close on the federal docket with case-specific, online surveys; (2) civil justice designers should conduct pilots and randomized controlled trials (RCTs) that examine the impact of rule changes on stakeholder experiences of justice; and (3) given the recent amendments to the Federal Rules of Civil Procedure, civil justice designers should empirically evaluate how the interplay of amendments affects diverse stakeholders and the public's experiences of justice.

After discussing the implications of human-centered civil justice design on civil procedure rulemaking, the Article then turns to managerial judging. In his 2015 year-end report, Chief Justice Roberts applauded these amendments, which emphasize and enlarge the scope of managerial judging by federal judges,⁴¹ as marking “significant change in the future conduct of civil litigation.”⁴² He lauded a new legal culture in which judges would serve as managerial judges who “place a premium on prompt and efficient justice.”⁴³ The Chief Justice's call for a change in legal culture may alter the beliefs, values, and discourses adopted by managerial judges.⁴⁴ In this regard, the Chief Justice's remarks reflect a monist theory of value, exalting efficient justice while excluding more capacious forms of justice—including procedural justice—and the other plural process values that the civil justice system seeks to sustain.⁴⁵ Troublingly, the Chief Justice exalted the value of efficiency—reducing discovery costs and delays in civil justice—without regard to people's actual experiences of justice.⁴⁶

39. See *infra* Part III.B.

40. See *infra* Part III.A.

41. See *infra* Part I.B, notes 91–137 and accompanying text; Chief Justice Roberts, *2015 Year-End Report on the Federal Judiciary*, SUPREME COURT 1, 9–10 (2015) [hereinafter *2015 Year-End Report*], <http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

42. See *infra* Part II.B, notes 91–137 and accompanying text; *2015 Year-End Report*, *supra* note 41, at 5.

43. See *2015 Year-End Report*, *supra* note 41, at 11; *infra* Part II.A, notes 66–90 and accompanying text.

44. See *infra* Part III.B.

45. See *infra* Part II.B, notes 205–37 and accompanying text. See generally Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights - Part I*, *supra* note 24, at 1171–77 (elaborating on procedural values, including deterrence values, effectuation values, and dignity and participation values).

46. See *infra* Part II.B; *2015 Year-End Report*, *supra* note 41, at 6–7, 11 (“The amendments . . . identify techniques to expedite resolution of pretrial discovery disputes, including conferences with the judge *before filing formal motions* in aid of discovery. Such conferences can often obviate the need for a formal motion—a well-timed scowl

Human-centered managerial judging, however, would encourage federal judges to infuse their managerial practices with considerations of procedural justice to promote favorable experiences. An important criterion of human-centered managerial judging is the degree to which the public experiences their interactions with judges and case management as infused with fairness, justness, and legitimacy. Achieving this aim will require developing new and skillful means to foster these salutatory experiences, including training in perspective taking, compassion, and openness to the perspectives of the parties who come before the court. By promoting experiences of justice, human-centered managerial judging not only advances the aims that the federal civil justice system already seeks to achieve, but it also reconciles tension between values of efficient justice and procedural justice, rather than wishing away such tension.

The remainder of the Article proceeds as follows. Part I introduces the theme of human-centered civil justice design and presents psychological research on experiences of justice, including procedural justice and distributive justice. Part II discusses the rulemaking process of the 2015 amendments and the Chief Justice's year-end report. Part III discusses the implications of this research and human-centered civil justice design on the rulemaking process and managerial judging.

I. TOWARD HUMAN-CENTERED CIVIL JUSTICE DESIGN

Over the past decade, two powerful approaches to innovating and designing effective institutions have emerged: *human-centered design*⁴⁷ and *dispute system design*.⁴⁸ When woven together, these approaches offer a novel way forward for solving vexing problems and challenges within the civil justice system. This Article refers to the synthesis of these two approaches as *human-centered civil justice design*.⁴⁹

While a human-centered approach to civil justice design is novel, human-centered approaches in general have been lauded and adopted in other fields. Human-centered design has roots in the humanistic

from a trial judge can go a long way in moving things along crisply.”) (emphasis added); MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* (Russell Sage Found. 1979).

47. See BROWN & KATZ, *CHANGE BY DESIGN*, *supra* note 1, at 39–62; IDEO, *FIELD GUIDE TO HUMAN CENTERED DESIGN*, *supra* note 5, at 9–14; Brest et al., *supra* note 17, at 2–5; Brown, *supra* note 17, at 86–92; STEVE HILTON ET AL., *MORE HUMAN: DESIGNING A WORLD WHERE PEOPLE COME FIRST* 1–41 (PublicAffairs 2016).

48. See NANCY H. ROGERS ET AL., *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* (Wolters Kluwer Law & Bus. 2013); LISA BLOMGREN AMSLER, JANET MARTINEZ & STEPHANIE SMITH, *DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT* (Stanford Univ. Press, forthcoming 2016).

49. I refer to the synthesis of these two approaches as *human-centered civil justice design*.

psychology movement of the mid-twentieth century,⁵⁰ with Abraham Maslow, Carl Rogers, and Rollo May among the most influential founding theorists.⁵¹ Humanistic psychology⁵² moved psychology from the era of traditional Freudian psychotherapy and behaviorism to client-centered therapy.⁵³ Traditional psychotherapy, which client-centered therapists view as “coercive, manipulative, authoritarian, and inefficient,” assumes that the therapist is “superior” to the patient and has more of a role in the patient’s development than the patient himself, while client-centered therapy reflects that “the center of the therapeutic process must reside in the client.”⁵⁴ Client-centered therapists “embrace[] a philosophy of respect for, and partnership with, people receiving services.”⁵⁵ The founders of these client-centered approaches also believed that the behaviorism prevalent in the early twentieth century (advanced by John Watson and B.F. Skinner) stemmed from a diminished and reductionist model of human nature.⁵⁶ Maslow and Rogers (among other humanistic theorists) emphasized a holistic or multilayered understanding of psychological phenomena and searched for the necessary and sufficient conditions that enabled humans to grow, self-actualize, seek fulfillment, and reach the highest levels of human functioning.⁵⁷

This human-centered approach has since taken root in disciplines other than psychology, including education, medicine, and business. The student-centered or learner-centered approach to education “acknowledges that the success of education depends on how much a student is learning, and it acknowledges that the teacher’s success

50. See Donald Moss, *The Roots and Genealogy of Humanistic Psychology*, in KIRK J. SCHNEIDER, J. FRASER PIERSON & JAMES F.T. BUGENTAL, *THE HANDBOOK OF HUMANISTIC PSYCHOLOGY: THEORY, RESEARCH, AND PRACTICE* (Kirk J. Schneider et al. eds., 2015); see, e.g., Frances K. Stage et al., *Creating Learner-Centered Classrooms: What Does Learning Theory Have To Say?*, in 26(4) ASHE-ERIC HIGHER EDUC. REP. 35 (Jonathan D. Fife ed., 1998) (tracing the development of the student-centered approach in education to the development of humanistic psychology).

51. See, e.g., Abraham H. Maslow, *Self-actualizing People: A Study of Psychological Health*, in DOMINANCE, SELF-ESTEEM, SELF-ACTUALIZATION: GERMINAL PAPERS OF A.H. MASLOW (R. J. Lowty ed., 1973); CARL ROGERS, *CLIENT-CENTERED THERAPY: ITS CURRENT PRACTICES, IMPLICATIONS, AND THEORY* (1951); ROLLO MAY, ERNEST ANGEL & HENRI F. ELLENBERGER, *EXISTENCE: A NEW DIMENSION IN PSYCHIATRY AND PSYCHOLOGY* (1958); FREDERICK S. PERLS, *EGO, HUNGER, AND AGGRESSION* (1969).

52. See, e.g., ROGERS, *supra* note 51.

53. See ANTHONY BARTON, *THREE WORLDS OF THERAPY: AN EXISTENTIAL-PHENOMENOLOGICAL STUDY OF THE THERAPIES OF FREUD, JUNG, AND ROGERS* 177 (1974).

54. *Id.*

55. MARY C. LAW, *CLIENT-CENTERED OCCUPATIONAL THERAPY* 3 (SLACK 1998).

56. See JOHN B. WATSON, *BEHAVIORISM* (People’s Inst. 1924); B.F. SKINNER, *BEYOND FREEDOM AND DIGNITY* (1971).

57. See Moss, *supra* note 50, at 13.

depends on how well the . . . teaching style and the student's learning style fit."⁵⁸ Patient-centered medicine aims "to integrate the conventional understanding of disease with each patient's unique experience of illness,"⁵⁹ as contrasted with a traditional disease- or physician-centered approach, by which "physicians ascertain the patient's complaints . . . within their own frame of reference."⁶⁰ Similarly, human-centered design in the business context may be referred to as "empathic" design,⁶¹ "participatory" design,⁶² or "user-centered" design.⁶³ Human-centered design in this context involves "all people potentially affected by a design," such as a new product or system, in order to arrive at the best final design, as contrasted with a traditional design approach that prioritizes the designers' expertise above the experiences of the end-user.⁶⁴ Finally, in the legal context, attributes of this human-centered approach can be found in client-centered lawyering.⁶⁵

58. Stage et al., *supra* note 50, at ix. Prominent student-centered educational theorists include Albert Bandura who developed a theory of self-efficacy. *See generally* Albert Bandura, *Self-Efficacy: Toward a Unifying Theory of Behavioral Change*, 84 PSYCHOL. REV. 191 (1977); Albert Bandura, *Perceived Self-Efficacy in Cognitive Development and Functioning*, 28 EDUC. PSYCHOLOGIST 117 (1993). Jean Piaget and his theory of social constructivism. *See generally* JEAN PIAGET, SCIENCE OF EDUCATION AND THE PSYCHOLOGY OF THE CHILD (1970); JEAN PIAGET, THE PSYCHOLOGY OF INTELLIGENCE (1951); JEAN PIAGET, THE CONSTRUCTION OF REALITY IN THE CHILD (1954). Lev Vygotsky and his theory of social constructivism. *See generally* LEV VYGOTSKY, THOUGHT AND LANGUAGE (1962). Howard Gardner and his theory of multiple intelligences. *See generally* HOWARD GARDNER, FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES (1983); Howard Gardner & Thomas Hatch, *Multiple Intelligences Go to School: Educational Implications of the Theory of Multiple Intelligences*, 18 EDUC. RESEARCHER 4 (1989).

59. MOIRA STEWART ET AL., PATIENT-CENTERED MEDICINE: TRANSFORMING THE CLINICAL METHOD 23 (SAGE Publications, Inc., 1995); *see also* Joseph B. Levenstein et al., *The Patient-Centred Clinical Method: A Model for the Doctor-Patient Interaction in Family Medicine*, 3 FAMILY PRACTICE 24, 25 (1986); JH Levenstein, *The Patient-Centered General Practice Consultation*, 5 S. AFR. FAM. PRAC. 276, 278 (1984).

60. STEWART ET AL., *supra* note 59, at 24.

61. *See, e.g.*, Dorothy Leonard & Jeffrey F. Rayport, *Spark Innovation Through Empathic Design*, HARV. BUS. REV. 102 (1997), <https://hbr.org/1997/11/spark-innovation-through-empathic-design>.

62. *See generally* Yoram Reich et al., *Varieties and Issues of Participation and Design*, 17 DESIGN STUD. 165 (1996).

63. *See generally* Shana Smith et al., *A KE-LSA Approach for User-Centered Design*, 24 J. INTELLIGENT MANUFACTURING 919 (2013).

64. Reich et al., *supra* note 62, at 165–66.

65. *See generally* Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ L. REV. 501 (1990); Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006).

A. *Developing Human-Centered Civil Justice Design*

This section turns first to human-centered design thinking, then to dispute system design, and last synthesizes these two frameworks into an approach referred to as human-centered civil justice design.

1. Human-Centered Design Thinking

Human-centered design thinking provides a framework for designing *with* communities affected by problems, allowing designers to deeply understand the people that they seek to serve when creating solutions stemming from the community's needs.⁶⁶ The approach is bottom-up, rather than top-down, and begins with the premise that the people who confront problems are the ones who hold the key to answering them.⁶⁷ Designers closely observe how people behave; how features and cues within environments affect thoughts, emotions, and behaviors (i.e., psychological experiences); and the meaning people make from the environments and the processes they encounter.

The approach integrates and reconciles three overlapping criteria: *desirability* (i.e., what meets stakeholders' needs and aspirations), *feasibility* (i.e., what is technologically possible within the foreseeable future), and *viability* (i.e., what is financially sustainable).⁶⁸ The approach begins with humans—their needs, aims, and fears—and uncovers what is desirable, imbuing innovation and problem-solving with a human-centered ethos. The approach requires a thorough empirical understanding, through direct observation, of what people need in their lives and what they like or dislike about particular practices and institutions.⁶⁹ Human-centered design seeks to create a range of options

66. See BROWN & KATZ, *CHANGE BY DESIGN*, *supra* note 1, at 39-40; IDEO, *FIELD GUIDE TO HUMAN CENTERED DESIGN*, *supra* note 5, at 9; Brest et al., *supra* note 17, at 3; Brown, *supra* note 17, at 86.

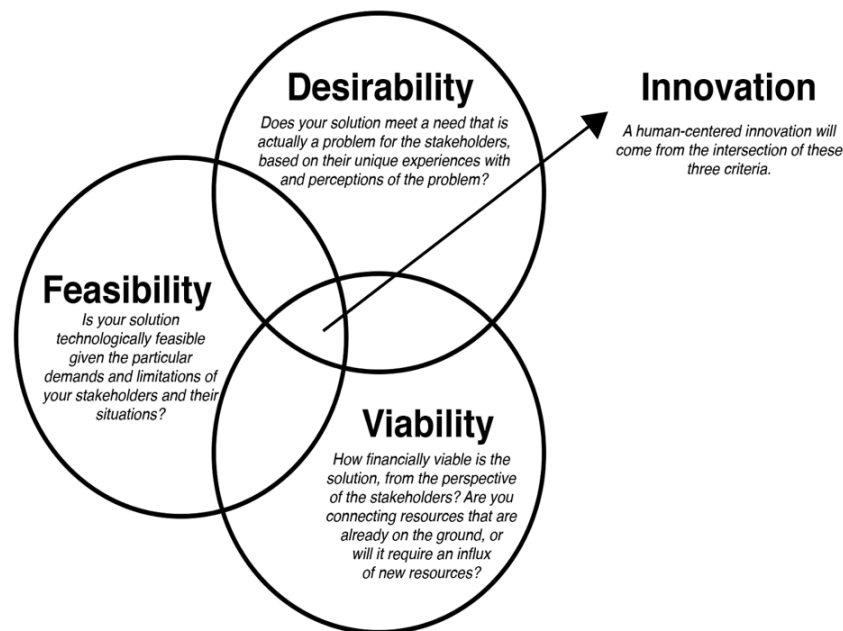
67. See, e.g., MARGARET GERTEIS ET AL., *THROUGH THE PATIENT'S EYES: UNDERSTANDING AND PROMOTING PATIENT-CENTERED CARE* 5 (1993) (describing patient-centered medicine as “an approach that consciously adopts the patient’s perspective”); Stage et al., *supra* note 50, at 35 (describing Jean Piaget’s social constructivist approach to education as “student-centered” because it emphasizes that teachers must involve students in the process of learning so that students can “construct their own meanings”); BARTON, *supra* note 53, at 177 (describing client-centered therapy as an approach that assumes that “the center of the therapeutic process must reside in the client”).

68. See BROWN & KATZ, *CHANGE BY DESIGN*, *supra* note 1, at 18; IDEO, *FIELD GUIDE TO HUMAN CENTERED DESIGN*, *supra* note 5, at 13-14.

69. See BROWN & KATZ, *CHANGE BY DESIGN*, *supra* note 1, at 43-44; IDEO, *FIELD GUIDE TO HUMAN CENTERED DESIGN*, *supra* note 5, at 22. For example, empathic user-centered design in business has helped companies determine customer needs, sometimes before a customer is even able to articulate what his or her need is, through processes of observation and prototyping. See Leonard & Rayport, *supra* note 61, at 104-06.

that are technologically feasible in meeting human needs⁷⁰ and examines feasible alternatives for solutions that are financially viable.⁷¹

Figure 1: Human-Centered Design Thinking



Human-centered design thinking moves through three overlapping spaces when designing an intervention: *inspiration*, *ideation*, and *implementation*.⁷² Inspiration is the opportunity that motivates the search for solutions.⁷³ The *inspiration* stage entails identifying key beneficiaries and stakeholders (i.e., people and institutions that contribute to problems or solutions) and learning their experiences through direct observation, ethnography, surveys, psychological studies, and other forms of perspective-taking.⁷⁴ After designers identify

70. See BROWN & KATZ, CHANGE BY DESIGN, *supra* note 1, at 18–19;

71. *Id.* at 18–19.

72. These are overlapping spaces rather than sequential stages of a lockstep methodology. See *id.* at 64. The reason for the iterative, nonlinear nature is that design thinking is fundamentally an exploratory process; it will invariably make unexpected discoveries. See Brest et al., *supra* note 17, at 26.

73. See BROWN & KATZ, CHANGE BY DESIGN, *supra* note 1, at 16 ; IDEO, FIELD GUIDE TO HUMAN CENTERED DESIGN, *supra* note 5, at 29.

74. See, e.g., Leonard & Rayport, *supra* note 61, at 104 (describing empathic user-centered design as a process that involves “gathering, analyzing, and applying information gleaned from observation in the field”); FRANK R. RITTER ET AL.,

stakeholders, they narrow the number of needs the specific project will address. Next, in the *ideation* stage, designers translate these insights and generate, develop, and test ideas, always considering the criteria of desirability, feasibility, and viability.⁷⁵ Finally, in the *implementation* stage, designers develop the best ideas into a concrete plan of action.

Throughout this process, designers engage in prototyping with scaled-down, less expensive, and adjustable versions of the solution. Prototyping early may inspire new ideas and give designers new insights from beneficiaries. When brainstorming solutions, prototyping refines ideas to ensure that they are desirable, feasible, and viable. Pilots help test aspects of solutions and assumptions. These potential interventions may be tested in RCTs before full-scale adoption. At the implementation stage, pilots will be more complete, expensive, and complex—potentially indistinguishable from the final intervention. Designers continually and systematically evaluate how these interventions perform.⁷⁶ This technique accords with intuitions about best practices in problem solving: carefully defining and understanding the problem to be solved, designing solutions to solve the problem, evaluating the solutions before adoption, implementing a solution, and observing and learning from any proposed intervention.

2. Dispute System Design

Dispute system design, the applied art and science of designing the means to prevent, manage, learn from, and resolve streams of conflict,⁷⁷ offers important lessons. First, dispute system designers should aim to design a dispute resolution system that is fair and just while also considering the efficiencies of the system for the institution and participants. Dispute system design recognizes that there are important, albeit at times divergent, process values to reconcile and balance. Second, dispute system design seeks to engage all stakeholders, including participants, when designing and implementing a dispute

FOUNDATIONS FOR DESIGNING USER-CENTERED SYSTEMS: WHAT SYSTEMS DESIGNERS NEED TO KNOW ABOUT PEOPLE 4 (2014) (advocating a theory of systems design that includes “[r]eflection and experimentation with potential users of the system . . . throughout the design and development process”).

75. BROWN & KATZ, *CHANGE BY DESIGN*, *supra* note 1, at 16; IDEO, *FIELD GUIDE TO HUMAN CENTERED DESIGN*, *supra* note 5, at 75.

76. For example, a hallmark of student-centered education is that it is “dynamic” and “responsive.” STUDENT-CENTERED LEARNING: NINE CLASSROOMS IN ACTION 188 (Bill Nave ed. 2015) (“Student-centered teaching is not relying on a script; rather, it is incorporating the underpinnings of good teaching in a multitude of lessons that may be swapped out, modified, built upon, and even scrapped at the last moment. It is making changes in response to feedback, assessment, and instinct.”).

77. See AMSLER ET AL., *supra* note 48, 1–17.

system. Third, the system should both consider and seek prevention of disputes and include multiple and appropriate rights-based and interest-based process options. Fourth, a dispute system should ensure flexibility and choice in the sequence-of-process options accessible and match the design with the available resources.⁷⁸ Finally, such systems should be accountable, transparent, and capable of evaluation. Dispute system design proceeds through several stages: first, taking design initiative; second, assessing the current situation; third, formulating a dispute system; fourth, implementing the design; and fifth, evaluating and revising the design.⁷⁹ These lessons have been applied in the context of internal grievance systems within business organizations, though more recently dispute system design has been applied to develop court-annexed Alternative Dispute Resolution (ADR) procedures.⁸⁰

3. Human-Centered Civil Justice Design

Human-centered civil justice design synthesizes these two approaches into a powerful framework to improve our civil justice system. It aspires to promote a civil justice system that is experienced by the public as “just, speedy, and inexpensive,”⁸¹ and to prevent “wicked problems,” including unintended consequences stemming from ill-crafted system design changes.⁸² Civil justice designers realize these aspirations by harnessing the best practices of human-centered design and dispute system design. These best practices include: (1) uncovering

78. *See id.*

79. *See* ROGERS ET AL., *supra* note 48, at 16; AMSLER ET AL., *supra* note 48, Chapter 4 “System Design Practice.”

80. *See* Deborah Thompson Eisenberg, *What We Know and Need to Know About Court-Annexed Dispute Resolution*, 67 S.C. L. REV. 245, 247 (2015) (“The second generation of ADR research should focus not on *whether* courts should use ADR but on *how* mediation and other ADR processes should be conducted. Which ADR program characteristics and mediator interventions are correlated with the positive results for the parties and judiciary? How do different demographic groups fare in mediation as compared to trial?”) (emphasis in original); *see, e.g.*, Lorig Charkoudian, *Impact of Alternative Dispute Resolution on Responsibility, Empowerment, Resolution and Satisfaction with the Judiciary: Comparison of Self-Reported Outcomes in District Court Civil Cases*, STATE JUSTICE INST. 1 (2014), <http://www.courts.state.md.us/macro/pdfs/reports/impactadrondistrictcivilcases2014report.pdf>; *see* MD. ADR RESEARCH, *Statewide Evaluation of ADR in Maryland: Articles and Publications*, <http://www.marylandadrresearch.org/publications> (last visited Mar. 20, 2017).

81. FED. R. CIV. P. 1.

82. *See* Horst W. J. Rittel & Melvin M. Webber, *Dilemmas in a General Theory of Planning*, 4 POL’Y SCI. 155, 161 (1973) (“[Y]ou may agree that it becomes morally objectionable for the planner to treat a wicked problem as though it were a tame one, or to tame a wicked problem prematurely, or to refuse to recognize the inherent wickedness of social problems.”); Richard Buchanan, *Wicked Problems in Design Thinking*, 8 DESIGN ISSUES 5, 15–16 (1992).

the public's varied needs, goals, and concerns to identify the causes, conditions, and nature of problems and the extent to which the existing civil justice system departs from the public's needs and aspirations; and (2) iterating and conducting pilots of proposed civil justice interventions before formally redesigning the civil justice system.

First, in the *inspiration* stage, human-centered civil justice designers would seek to empathize with the many beneficiaries and stakeholders of the civil justice system, conferring on them standing, dignity, and respect by ensuring that their needs, goals, and concerns are heard and considered.⁸³ These beneficiaries and stakeholders include parties, lawyers, judges, court administrators, and members of the public.⁸⁴ In examining the way in which people experience justice as well as the justiciable hardships people face, civil justice designers would uncover the needs, concerns, and goals of stakeholders (which may conflict), as well as the meaning people make of experiences in the civil justice system.⁸⁵ This understanding may be collected through observation,

83. This approach has been successful in the medical context. A traditional patient-centered model of treatment consists of six interconnected components that make doctors partners with their patients in diagnosis and treatment: (1) exploring both the disease and illness experience; (2) understanding the whole person; (3) finding common ground regarding management; (4) incorporating prevention and health promotion; (5) enhancing the patient-doctor relationship; and (6) being realistic. STEWART ET AL., *supra* note 59, at 25. For example, a doctor who practices patient-centered care will involve patients in the decisionmaking process, make sure patients feel fully informed, treat patients' physical discomfort, and provide emotional support. GERTEIS ET AL., *supra* note 67, at 5–11. Studies suggest that there is a relationship between patient-centered care and positive patient outcomes, which may also be related to a patient's (1) trust; (2) "adherence to recommended treatment"; and (3) "continuity with health care providers." Mark Meterko et al., *Mortality Among Patients with Acute Myocardial Infarction: The Influences of Patient-Centered Care and Evidence-Based Medicine*, 45 HEALTH SERVS. RES. 1188, 1189 (2010).

84. Each of these populations will have different perspectives that will cast light when learning the needs and concerns of the public and the way in which our civil justice design is experienced. Amartya Sen has reasoned about the importance of including the "impartial spectator," when addressing justice dilemmas, which in this context I take as including impartial, non-party members of the public who may have previously or who may in the future encounter and navigate the civil justice system. See AMARTYA K. SEN, *THE IDEA OF JUSTICE* 44–46 (Harvard Univ. Press 2009).

85. One way in which we come to know the idea of justice is by observing justice and injustice in the world around us. See Aristotle, *Physics*, in 8 GREAT BOOKS OF THE WESTERN WORLD 259, 259 (W. D. Ross trans., 1952) ("When the objects of an inquiry, in any department, have principles, conditions, or elements, it is through acquaintance with those that knowledge, that is to say scientific knowledge, is attained."); see also John Locke, *An Essay Concerning Human Understanding*, in 35 GREAT BOOKS OF THE WESTERN WORLD 93, 121 (W. D. Ross trans., 1952) ("All ideas come from sensation or reflection."); George Berkeley, *A Treatise Concerning the Principles of Human Knowledge* in 35 GREAT BOOKS OF THE WESTERN WORLD 401, 413 ("[T]he existence of an idea consists in being perceived."); David Hume, *A Treatise of Human Nature*, in 35 GREAT BOOKS OF THE WESTERN WORLD 449, 457 ("When we entertain, therefore, any

interviews, surveys, focus groups, deep immersion within communities, and psychological and behavioral studies of stakeholder experiences.⁸⁶

Next, in the *ideating* stage, human-centered civil justice designers would involve stakeholders at multiple points in the design process, including brainstorming, evaluating, and piloting. This pluralism allows diverse perspectives to emerge and ensures that any civil justice intervention is balanced among the many process values promoted by the civil justice system. Finally, human-centered civil justice design would be optimistic and humble, creating pilots in the *implementation* stage and testing these interventions with RCTs before integrating civil justice interventions more broadly.

By engaging in this iterative, bottom-up, pluralistic, and incremental process, human-centered civil justice designers can better avoid the wicked system problems and unintended consequences that befall less reflective design processes. RCTs offer an important benefit for civil justice designers who seek to isolate the causal effects of their system design interventions—and the mechanisms that undergird these effects. In this regard, piloting and the implementation of incremental design changes with RCTs would reveal whether interventions truly address human needs and aspirations—examining gaps between law in the books and law in action⁸⁷—without unintentionally creating wicked system problems that diminish experiences of justice, unreasonably increase costs or delays, or frustrate access to justice.⁸⁸

suspicion that a philosophical term is employed without any meaning or idea (as is but too frequent), we need but enquire, from what impression is that supposed idea derived? And if it be impossible to assign any, this will serve to confirm our suspicion.”).

86. This approach can help design teams define and understand problems in a way that the beneficiaries and stakeholders may not be able to articulate. For example, in the business context, a consulting group observed consumers who carried both cell phones and beepers and realized that the consumers were using the combination as a way to screen calls—they would give special beeper codes to people whose calls they wanted to screen. From that observation, the consultants were able to realize a consumer “need for filtering capabilities on cell phones.” Leonard & Rayport, *supra* note 61, at 106.

87. See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910); Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 457–59 (1930). This process of piloting and revising is crucial to any student-centered or learner-centered approach in education, for example. Because a student-centered approach seeks to tailor educational processes based on empirical and theoretical knowledge of students’ cognitive development and individual learning styles, student-centered educators must open themselves up to feedback from students and must be willing to adjust their processes when they realize that their pedagogical techniques are not working for students. STUDENT-CENTERED LEARNING: NINE CLASSROOMS IN ACTION, *supra* note 76, at 186–88.

88. See Rittel & Webber, *supra* note 82, at 162 (“With wicked problems, . . . any solution, after being implemented, will generate waves of consequences over an extended—virtually an unbounded—period of time. Moreover, the next day’s consequences of the solution may yield utterly undesirable repercussions which outweigh

The goal of human-centered civil justice design is to guide in the ceaseless, compassionate evolution of a civil justice system that benefits humanity. It applies psychological and behavioral research on human needs, limitations, capabilities, and potential in the design of the civil justice system.⁸⁹ The approach focuses on human beings, their interactions with one another within the civil justice system, their experiences with the processes, systems, and environments they encounter when navigating the civil justice system, and how these experiences interact with the entangled web of hardships and legal adversities they face in the everyday. Civil justice designers investigate how humans respond to features of the civil justice system in particular contexts.⁹⁰ This information serves as the basis for predicting the probable effects of design alternatives and proposing system design recommendations. Civil justice designers also harness pilots and RCTs to test and incrementally apply design recommendations. When pilots and RCTs reveal the causal effects of a design change, an innovation may be more broadly adopted. Civil justice designers monitor and evaluate the influence of improvements to ensure the intended aims and benefits manifest in particular contexts. Given that the civil justice system is dynamic, prior interventions may reveal the need for subsequent interventions. In this way, human-centered civil justice design is a ceaseless process that facilitates experiences of justice and addresses legal needs that interact with social, financial, and environmental circumstances to threaten human well-being. This ceaseless process of design promotes human flourishing and nourishes democratic institutions.

Human-centered civil justice design incorporates psychological science on experiences of justice, a theme to which the Article now turns.

the intended advantages or the advantages accomplished hitherto. In such cases, one would have been better off if the plan had never been carried out.”).

89. In this way, human-centered civil justice design shares much in common with the human factors approach in engineering and design. *See generally* MARK S. SANDERS & ERNEST J. MCCORMICK, *HUMAN FACTORS IN ENGINEERING AND DESIGN* (7th ed., McGraw-Hill 1993).

90. *See* Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1237 (1931) (“The belief in the worthwhileness of grouping cases and legal situations into narrower categories than has been the practices in the past. This is connected with the distrust of verbally simple rules—which so often cover dissimilar and non-simple fact situations.”).

B. *Psychological Science on Experiences of Justice*

As a desire for justice is a fundamental human need,⁹¹ psychological science and behavioral research on how humans experience justice drives human-centered civil justice design and complements the humanistic tradition of studying philosophies of justice. Whereas philosophies of justice contemplate societal justice from a normative perspective, as exemplified by the luminous philosophies of Plato and Aristotle at the dawn of Western civilization,⁹² psychological research examines the subjective experiences of humans affected in the everyday by situations, contexts, and institutions. The psychological study of justice examines questions such as: (1) What do people consider just and unjust, why, where, when, and under what conditions? (2) What are the consequences of experienced justice and injustice? (3) How do people, groups, societies, and cultures differ from one another on these dimensions? (4) How do justice conflicts arise and amplify between groups, and how can these conflicts be peacefully resolved?⁹³ The Article now turns to a review of psychological science that reveals how humans experience procedural justice and distributive justice.

1. Procedural Justice

Psychological research on procedural justice examines how people experience fairness, including how they experience procedural rules and treatment by legal officials.⁹⁴ Over the past several decades, researchers have demonstrated that experiences of procedural justice influence not only satisfaction with how disputes are handled, but also the degree to

91. See John E. Ellard, Annelie Harvey & Mitchell J. Callan, *The Justice Motive: History, Theory, and Research*, in HANDBOOK OF SOCIAL JUSTICE THEORY AND RESEARCH 127, 127 (Clara Sabbach & Manfred Schmitt eds., 2016); Leo Montada & Jurgen Maes, *Justice and Self Interest*, in HANDBOOK OF SOCIAL JUSTICE THEORY AND RESEARCH, *supra*, at 109.

92. See generally Plato, *The Republic "Books I-V"*, in 7 GREAT BOOKS OF THE WESTERN WORLD 295 (W. D. Ross trans., 1952); Aristotle, *Nicomachean Ethics*, in 9 GREAT BOOKS OF THE WESTERN WORLD 339, 377 (W. D. Ross trans., 1952) ("[W]e call those acts just that tend to produce and preserve happiness and its components for the political society.").

93. See Mario Gollwitzer & Jan-Willem van Prooijen, *Psychology of Justice*, in HANDBOOK OF SOCIAL JUSTICE THEORY AND RESEARCH, *supra* note 91, at 61, 61.

94. See Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in HANDBOOK OF JUSTICE RESEARCH IN LAW 65, 65–69 (Joseph Sanders & V. Lee Hamilton eds., 2001); see generally LIND & TYLER, SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE, *supra* note 30 (synthesizing research on procedural justice).

which the public views legal officials as legitimate and accepts and adheres to legal decisions.⁹⁵

Procedural justice researchers have investigated civil processes in an effort to enhance the public's experiences within the civil justice system and to improve compliance with judicial decrees. For example, researchers have examined the public's perception of different civil legal procedures—trial, mediation, arbitration, and negotiation—and have investigated the extent to which litigants experience them as fair and accept the substantive decisions derived from these legal procedures.⁹⁶ This research has consistently revealed that procedural justice influences people's impressions of fairness as strongly—if not more so—as substantive outcomes.⁹⁷ While the public desires favorable outcomes, the public also demands fair procedures and fair treatment.⁹⁸

a. Antecedents of Procedural Justice

Researchers have elaborated several theories on why, and the conditions under which, procedural justice powerfully affects people's thoughts, feelings, and behavior.

The *relational model of authority* and the *group-value model* posit that people care about their relationships and standing with authorities and groups who make decisions that affect them.⁹⁹ Dignified and respectful treatment by authorities affects feelings of standing, self-worth, and beliefs about one's social identity and whether the social groups to which one belongs are valued. Procedural justice, therefore, has intrapersonal psychological implications for feelings of inclusion in or alienation from society. This research also reveals interpersonal and

95. See Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103, 128 (1988) [hereinafter Tyler, *What is Procedural Justice?*].

96. See Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know From Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 644–73 (2002); Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS Redress Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 405–25 (2001); Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 149–61 (2011); Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211, 211–49 (2004); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473, 477–79 (2008).

97. See Tyler & Lind, *supra* note 94, at 71.

98. See Kees Van den Bos, *What is Responsible for the Fair Process Effect?*, in HANDBOOK OF ORGANIZATIONAL JUSTICE 273, 273–300 (Jerald Greenberg & Jason A. Colquitt eds., 2005); Hollander-Blumoff, *The Psychology of Procedural Justice*, *supra* note 96, at 132.

99. See Tyler & Lind, *supra* note 94, at 75–77.

intergroup psychological consequences of fair treatment: fair treatment communicates whether authorities regard social groups as members who truly belong in a community. Finally, the relational model of authority and the group-value model connect with the normative and philosophical position that promoting human dignity and respect is an important end of social institutions, including our civil justice system. As such, research on procedural justice can be harnessed to advance human dignity as well as respectful and cooperative interactions between individuals and groups within society, and to nourish our democratic institutions and norms.

Secondly, *fairness heuristic theory* connects uncertainty management with fairness. This theory posits that, especially under conditions of uncertainty where there is a risk of exploitation, people rely upon their evaluations about the fairness of procedures to understand the trustworthiness of decision-makers and the fairness of outcomes.¹⁰⁰ Evaluations about the fairness of procedures help people manage and resolve uncertainty, operating much like heuristics.¹⁰¹ Relatedly, the *uncertainty hypothesis*¹⁰² predicts that conditions of uncertainty strengthen the fair-process effect. When people are unable to compare their results with the results of others, they feel an even more pronounced influence of procedural justice.¹⁰³

Finally, the *moral-mandates model* posits that people use deeply held ethical and moral principles when gauging the justness of procedures and treatment.¹⁰⁴ For example, people believe that decision-makers have a moral obligation to act justly, morally, and ethically.¹⁰⁵ A

100. See Kees van den Bos & E. Allan Lind, *Uncertainty Management by Means of Fairness Judgments*, in 34 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1, 21–34 (Mark P. Zanna ed., 2002).

101. See *id.*

102. See Kees Van den Bos, *Uncertainty Management: The Influence of Uncertainty Salience on Reactions to Perceived Procedural Fairness*, 80 J. PERSONALITY & SOC. PSYCHOL. 931, 931–41 (2001).

103. See Kees Van den Bos, E. Allan Lind, Riel Vermunt & Henk A.M. Wilke, *How Do I Judge My Outcome When I Don't Know the Outcome of Others?: The Psychology of the Fair Process Effect*, 5 J. PERSONALITY & SOC. PSYCHOL. 1034, 1035 (1997).

104. See Linda J. Skitka & David A. Houston, *When Due Process is of No Consequence: Moral Mandates and Presumed Defendant Guilt or Innocence*, 14 SOC. JUST. RES. 305, 308–09 (2001); Kjell Tornblom and Riel Vermunt, *Towards Integrating Distributive Justice, Procedural Justice, and Social Resource Theories*, 20 SOC. JUST. RES. 312, 317–18 (2007); Russell Cropanzano, Barry Goldman & Robert Folger, *Deontic Justice: The Role of Moral Principles in Workplace Fairness*, 24 J. ORGAN. BEHAV. 1019, 1019–23 (2003).

105. See Tyler & Lind, *supra* note 94, at 75–76; Gerald S. Leventhal, *What Should Be Done with Equity Theory? New Approaches to the Study of Fairness in Social Relationships*, in SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH 27, (Kenneth J. Gergen, Martin S. Greenberg & Ronald G. Wells eds., 1980).

sharp discrepancy between one's own moral or ethical standards and a decision-maker's behavior may violate a moral mandate and lead to outrage and other negative experiences.¹⁰⁶

b. Attributes of Procedural Justice

Over the past decade, psychological research has illuminated several attributes that shape evaluations of procedural justice,¹⁰⁷ including procedural-fairness and treatment-fairness (or interactional justice) dimensions, attributes to which the Article now turns.

Experiences of procedural justice are shaped by whether parties are afforded a voice and an opportunity to be heard, whether they are afforded a neutral and trustworthy decision maker, and whether they are treated with dignity.¹⁰⁸ As a conceptual matter, these features form a "positively interrelated cluster of procedural criteria,"¹⁰⁹ that are independent but can be advanced simultaneously.

John Thibaut and Laurens Walker first articulated the importance of voice.¹¹⁰ Allowing disputants to voice their perspectives improves evaluations about the fairness of proceedings.¹¹¹ In the four decades

106. See Skitka & Houston, *supra* note 104, at 323–324; Tornblom & Vermunt, *supra* note 104, at 318; Cropanzano et al., *supra* note 104, at 1019.

107. See Tyler, *What is Procedural Justice?*, *supra* note 95, at 128.

108. See Tyler & Lind, *supra* note 94, 74–81; Hollander-Blumoff, *supra* note 96, at 138–46; Steven L. Blader & Tom R. Tyler, *A Four-Component Model of Procedural Justice: Defining the Meaning of a Fair Process*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 747, 747–49 (2003); see generally TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002) (describing attributes of procedural justice).

109. Tyler, *What is Procedural Justice?*, *supra* note 95, at 131.

110. See Laurens Walker et al., *Reactions of Participants and Observers to Modes of Adjudication*, 4 J. APPLIED SOC. PSYCHOL. 295, 295–310 (1974).

111. These attributes of procedural justice have a long and hallowed history in Western thought. For example, Aeschylus, the Greek poet born around year 525 B.C., in *Eumenides* narrates a discussion between Goddess Athena and the Chorus of Furies, in which the Furies aim to deprive Orestes of voice at his trial before the judges of Delphi. To which, Athena sharply replies:

Ye would seem just, yet work iniquity. . . Furies: How? Tell me that! Thou art not poor in wisdom. Athena: Wrong shall not triumph here by force of oaths. Furies: Question him then and give a righteous judgment . . . Athena: Sir, what has thou to answer touching this? Tell me thy land, thy lineage and all Thy griefs; and then *speak in thine own defence*, If that thou look'st for judgment; for that cause Harbourest at my hearth; all rites performed, A grave appellant, like Ixion old. *Come, to all this make me your clear reply.*

Aeschylus, *Eumenides*, in 5 GREAT BOOKS OF THE WESTERN WORLD 81, 85–86 (W. D. Ross trans., 1952) (emphasis added). Similarly, Euripides, the Greek poet born around year 480 B.C., in Hippolytus, narrates a tragic sequence after King Theseus rashly asks Poseidon to curse death on his beloved son Hippolytus without first offering Hippolytus

since, this “voice effect” has been well documented. When people feel that they have been permitted to fully and fairly discuss their situations, even when there is little chance of influencing the final outcome, they are more likely to feel that an ultimate decision is fair.

Some have cautioned that this phenomenon can be manipulated to result in empty trappings of fairness: a legal official might purport to listen while having no intention of considering a disputant’s perspective.¹¹² While research suggests that the “voice effect” turns on the degree to which the public believes that a legal official will meaningfully consider the voices and views presented, this double-edged sword of procedural justice remains.¹¹³ Experiences of fairness are also influenced by the opportunity to present one’s case. In several studies, the extent to which disputants believed that they had an opportunity to present their case significantly predicted their experience of procedural justice after decisions were made.¹¹⁴

Neutrality also influences experiences of procedural justice.¹¹⁵ Perceptions of neutrality are shaped by whether judges act honestly and in an unbiased manner and derive decisions from facts and evidence in a consistent manner.¹¹⁶ Rebecca Hollander-Blumoff has described the attribute of neutrality as requiring honest, impartial, and objective judges who actively prevent their own personal biases and values from skewing their decisions. Relatedly, trustworthiness is engendered when legal officials are truly motivated to be fair to members of the public and others in one’s social group.¹¹⁷ In short, whether the public experiences

procedural justice to defend himself against false charges, to which Goddess Artemis warns, “But thou alike in [Poseidon’s] eyes and in mine hast shewn thy evil heart, in that thou hast forestalled all proof or voice prophetic, has made no inquiry, nor taken time for consideration, but with undue haste cursed thy son even to the death.” Euripides, Hippolytus, in 5 GREAT BOOKS OF THE WESTERN WORLD, *supra*, 225, 235 (emphasis added).

112. See Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 188–93 (2005); Ronald L. Cohen, *Procedural Justice and Participation*, 38 HUM. REL. 643, 643–63 (1985).

113. See David De Cremer & Tom R. Tyler, *The Effects of Trust in Authority and Procedural Fairness on Cooperation*, 92 PSYCHOL. SCI. 639, 639–49 (2007); MacCoun, *supra* note 112, at 192–93.

114. See Tyler, *What is Procedural Justice?*, *supra* note 95, at 121.

115. See J.S. Mill, *Utilitarianism*, in 43 GREAT BOOKS OF THE WESTERN WORLD 445, 466 (W. D. Ross trans., 1952) (“A tribunal, for example, must be impartial, because it is bound to award, without regard to any other consideration, a disputed object to the one of two parties who has the right to it.”).

116. See Tyler & Lind, *supra* note 94, at 75–76.

117. See *id.* at 76.

civil justice as just turns, in part, on the perceived neutrality and trustworthiness of legal officials.¹¹⁸

Moreover, experiences of procedural justice are strongly shaped by whether legal officials treat members of the public with dignity and respect.¹¹⁹ Respectful and dignified treatment sends a powerful signal about one's status as an equal and participating member of the community with standing, which in turn imbues trust in legal officials and results in voluntary compliance with law.¹²⁰ These psychological processes mutually reinforce one another and lead to a virtuous cycle of cooperation between legal officials and members of the public.

Turning to a related conceptual framework, Gerald Leventhal has advanced a model of procedural justice with six criteria, including consistency, bias suppression, accuracy, correctability, representativeness, and ethicality.¹²¹ With regard to *consistency*, procedures should be applied consistently across persons and over time. As to *bias suppression*, the personal self-interest, biases, and preconceptions of decision-makers should not influence how disputes are resolved. With regard to *accuracy*, decisions should be based on accurate information. *Correctability* implies the existence of opportunities to seek decision modifications, including the right to appeal. As to *representativeness*, the concerns and values of all important stakeholders and groups affected by a decision should be reflected in the dispute resolution process. Finally, with regard to *ethicality*, the decision-making processes should be comparative with high moral and ethical standards. Thus, collectively, we can see the key attributes of procedural justice:

Table 1 - Attributes of Procedural Justice

• Process control (voice and an opportunity to be heard)
• Neutral decision-maker (bias suppression)
• Trustworthy decision-maker
• Treating persons with dignity and respect (standing)

118. See Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 48–50 (2007).

119. See Blader & Tyler, *supra* note 108, at 749.

120. See Tom R. Tyler, *Public Trust and Confidence in Legal Authorities: What do Majority and Minority Group Members Want from the Law and Legal Institutions?*, 19 BEHAV. SCI. & LAW 215, 233–35 (2001).

121. See Leventhal, *supra* note 105, at 21–35.

-
- Consistency across persons and time
-
- Predicated on accurate information
-
- Correctability
-
- Representativeness
-
- Ethicality
-

While each of these attributes shapes experiences of procedural justice, they rarely operate independently; instead, they combine to constitute gestalt experiences of procedural justice. These attributes can be simultaneously promoted to design a justice system experienced as just.¹²²

c. Consequences of Procedural Justice

Experiencing the civil justice system as procedurally just shapes subsequent thoughts, feelings, and behaviors.¹²³ When people believe that they have experienced fair process, they tend to view that process as just and legitimate, regardless of whether it produces an outcome that favors them or not.¹²⁴ This phenomenon, which has been described as the “fair process effect,”¹²⁵ includes the influence of experiences of procedural justice on psychological phenomena, including perceptions of fairness, outcome satisfaction, acceptance of legal decrees, satisfaction with the handling of a dispute, and subsequent behavior.¹²⁶

Emotions may operate as either a cause or a consequence of how one experiences procedural injustice. For example, on the one hand, negative evaluations of procedures may engender anger and negative emotions; on the other, negative emotions may result in negative evaluations of procedures. The *affective model of justice reasoning* (AMJR) posits that, when a decision generates strong negative emotions,

122. See Tyler, *What is Procedural Justice?*, *supra* note 95, at 131. For a discussion on how litigants experience tradeoffs between procedural justice and the direct cost of procedures borne by the public, see Victor D. Quintanilla, *Taboo Procedural Tradeoffs: Examining How the Public Experiences Tradeoffs Between Procedural Justice and Cost*, 15 NEV. L.J. 882, 883–927 (2015).

123. See Van den Bos et al., *supra* note 98.

124. See Walker et al., *supra* note 110, at 298–301; Stephen LaTour et al., *Some Determinants of Preference for Modes of Conflict Resolution*, 20 J. CONFLICT RESOL. 319, 319–56 (1976); Pauline Houlden et al., *Preference for Modes of Dispute Resolution as a Function of Process and Decision Control*, 14 J. EXPERIMENTAL SOC. PSYCHOL. 13, 13–30 (1978).

125. See Walker et al., *supra* note 110, at 295–310.

126. See Van den Bos, *supra* note 98, at 277–78.

people will engage in biased information processing, seeking out information that confirms their negative evaluations while disregarding evidence to the contrary.¹²⁷

Research has demonstrated that procedural justice has important downstream effects on behavior as well. In the legal context, procedural justice promotes acceptance of legal decisions and compliance with law.¹²⁸ For example, in criminal proceedings, procedural justice decreases recidivism.¹²⁹ Relatedly, organizational behavior researchers have shown that procedural justice within business organizations promotes pro-social and cooperative workplace behavior, elevates commitment to organizations and institutions, and dampens strife and conflict in workplaces. Organizational justice researchers have demonstrated that procedural justice promotes organizational citizenship behavior, job satisfaction, and the acceptance of supervisor directives and company policies. Conversely, when employees are denied procedural justice, they are less likely to cooperate with supervisors and more likely to engage in overt and covert disobedience and antisocial behaviors.¹³⁰

Finally, research has revealed that experiences of procedural injustice threaten, erode, and destabilize intrapersonal, interpersonal, and group-based motivations and bonds vital to democracy and vibrant communities. On an intrapersonal level, experiences of procedural injustice increase stress and aggression, sapping trust in the legitimacy of institutions. On an interpersonal and group-based level, procedural injustice erodes cooperation and tolerance within groups and communities. On a societal level, procedural injustice erodes beliefs about the importance of the rule of law and destabilizes beliefs about the importance of universal values and norms requiring that all people be

127. See Elizabeth Mullen, *The Reciprocal Relationship Between Affect and Perceptions of Fairness*, in *DISTRIBUTIVE AND PROCEDURAL JUSTICE, RESEARCH & SOCIAL APPLICATIONS* 15, 16 (Kjell Tornblom & Riel Vermunt, Ed. 2007) (According to the “Affective Model of Justice Reasoning (AMJR) . . . affect and perceptions of justice should be considered to have a reciprocal relationship.”).

128. See E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 *ADMIN. SCI. Q.* 224, 224–51 (1993); Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 115, 115–91 (1992); Jonathan Jackson et al., *Why Do People Comply with the Law? Legitimacy and the Influence of Legal Institutions*, 52 *BRIT. J. CRIMINOLOGY* 1051, 1062 (2012); Tyler, *Psychological Perspectives on Legitimacy*, *supra* note 25, at 375–400.

129. See Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 *L. & SOC’Y REV.* 163, 180–85, 192–95 (1997); Denise C. Gottfredson et al., *How Drug Treatment Courts Work: An Analysis of Mediators*, 44 *J. RES. CRIME & DELINQ.* 3, 3 (2007).

130. Lind et al., *supra* note 128, at 224–51.

treated with human dignity. In contrast, procedural justice facilitates cooperation, pro-social citizenship behavior, and demonstrations of civic virtue, encouraging people to contribute to public goods.

These downstream implications of procedural justice are deeply significant to a vibrant, robust democracy. Procedural justice shapes the degree to which the public perceives legal officials—judges, mediators, and courts—as legitimate. This wellspring of legitimacy, in turn, affects the public’s willingness to accept decrees and voluntarily comply with law. Our democracy requires both voluntary compliance with law and cooperation with authorities.¹³¹ Therefore, procedural justice contributes to the perceived legitimacy of our civil justice system¹³² and sustains democratic norms and the legal institutions of our democracy. For this reason, human-centered civil justice design harnesses the theories, methods, and best evidence available on procedural justice when evaluating the public’s experience of civil justice.

2. Distributive Justice

While procedural justice influences experiences of justice, distributive justice shapes these experiences as well. Psychological research on distributive justice examines experiences of justice that relate to the allocation of socially desirable or undesirable phenomena.¹³³ Issues of distribution may arise whenever something desirable is scarce, such that not everyone can have what they need or want, or whenever something undesirable cannot be avoided by all. For example, this research examines experiences of justice that relate to the allocation of socially desirable goods, including allocations of rights, honor, wealth,

131. See Tyler, *Psychological Perspectives on Legitimacy*, *supra* note 25, at 379; Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC’Y REV. 513, 535 (2003); Andrew V. Papachristos et al., *Why do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders*, 102 J. CRIM. L. & CRIMINOLOGY 397, 435–38 (2012); Jackson et al., *supra* note 128, at 1058–64; De Cremer & Tyler, *supra* note 113, at 639–41; Steven L. Bidder et al., *Procedural Justice and Retaliation in Organizations: Comparing Cross-nationally the Importance of Fair Group Processes*, 12 INT’L J. CONFLICT MGMT. 295, 304–09 (2001); David De Cremer et al., *Managing Cooperation via Procedural Fairness: The Mediating Influence of Self-other Merging*, 26 J. ECON. PSYCHOL. 393, 401–03 (2005).

132. See LIND & TYLER, *SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE*, *supra* note 30, at 72–73; Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 PSYCHOL. PUB. POL’Y & L. 78, 78–79 (2014); Shestowsky, *supra* note 30, at 643–44.

133. See MORTON DEUTSCH, *DISTRIBUTIVE JUSTICE: A SOCIAL-PSYCHOLOGICAL PERSPECTIVE* (1st ed. 1985); Gollwitzer & van Prooijen, *supra* note 93, at 68.

and other benefits (or socially undesirable phenomena, such as pollution and harms).¹³⁴

Rather than measuring outcomes based on their absolute favorability, people evaluate outcomes based on their consistency with principles of outcome fairness, including principles of equity, equality, and need.¹³⁵ Equity may be considered normatively appropriate in workplace settings, whereas equality and need may be considered more appropriate in other interpersonal settings. The equality principle connotes that socially desirable goods are distributed equally regardless of one's relative contributions, whereas the principle of need intimates that resources should be distributed to those who need them most. The principle of need, for example, may be normatively appropriate and ethically preferred in interactions with people who are unable to provide for themselves, such as children and the elderly.

Conflicts may emerge when people differ in their endorsement of these distributive justice principles.¹³⁶ Even when people agree on the superordinate value underlying a distribution (e.g., equity, equality, need), they may disagree on the criteria used to specify these values.¹³⁷ That is, when implementing a superordinate distributive value, civil justice designers may need to engage in human-centered design when selecting and elaborating the criteria representing that value.

C. *Harnessing Experiences of Justice in Human-Centered Civil Justice Design*

Human-centered civil justice is rooted in human experience, needs, beliefs, concerns, and the adversities that people encounter in the everyday. Understanding how members of the public encounter, navigate, and experience the civil justice system allows designers to create civil processes, systems, and environments that promote human flourishing. To accomplish this purpose, civil justice designers draw on psychological science concerning both procedural justice and distributive justice. These dimensions interact and combine holistically to form experiences of justice.¹³⁸

134. See Guillermina Jasso et al., *Distributive Justice*, in HANDBOOK OF SOCIAL JUSTICE THEORY AND RESEARCH, *supra* note 91, at 201, 201–18.

135. See Karen A. Hegtvéd & Karen S. Cook, *Distributive Justice: Recent Theoretical Developments and Applications*, in HANDBOOK OF JUSTICE RESEARCH IN LAW, *supra* note 94, at 93, 93–125.

136. See DEUTSCH, *supra* note 133, at 1–6.

137. See *id.*

138. See Joel Brockner & Batia M. Wiesenfeld, *An Integrative Framework for Explaining Reactions to Decisions: Interactive Effects of Outcomes and Procedures*, 120 PSYCHOL. BULL. 189, 189 (1996); Van den Bos, *supra* note 102, at 931–41; Kjell Y. Tornblom & Riel Vermunt, *An Integrative Perspective on Social Justice: Distributive*

By cultivating civil processes, systems, and environments that promote stakeholders' experiences of justice, human-centered designers' efforts yield intrapersonal, interpersonal, group-based, and societal-level benefits. Justice experiences that emerge from the interaction of procedural and distributive justice smooth and shape social interactions and foster cooperation between individuals, between individuals and groups, and among members of society. A concern for justice serves a wide variety of intrapersonal and interpersonal needs and promotes cooperation and reciprocity within and between groups and communities.¹³⁹

With regard to interpersonal needs, the belief in a just world serves an existential function: human psychology is such that people yearn to believe that the world is a just place, where everyone receives what he or she deserves, and where everyone deserves what he or she receives.¹⁴⁰ In this way, an interpersonal concern for justice contributes to a sense of meaning in what people do and in the things that happen to people.¹⁴¹

A concern for justice serves intrapersonal- and group-based needs as well by establishing positive relationships with others and leading to harmony within groups, including encouraging trust, reciprocity, and cooperation between individuals and among group members.¹⁴² Justice helps to regulate conflicts between individuals and conflicts between groups and communities. For example, absent a sense that authority figures and decision-makers are just, compliance with dispute resolution is merely an instrumental decision, one based on an egoistic decision of whether compliance would be personally desirable.¹⁴³ In contrast, the normative validity of law is closely linked to a sense of justice, which engenders normative compliance, restorative justice, and acceptance of the results of conflict resolution.¹⁴⁴

Moreover, when judicial officials behave so as to grant the public experiences of justice, this ethical behavior has a powerful influence on legal officials *themselves*. Social psychological research has revealed that how people act influences their attitudes and beliefs, illuminating a

and Procedural Fairness Evaluations of Positive and Negative Outcome Allocations, 12 SOC. JUST. RES. 39, 39–40 (1999).

139. See Mario Gollwitzer et al., *Victim Sensitivity and the Accuracy of Social Judgments*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 975, 975–84 (2012); Gollwitzer & van Prooijen, *supra* note 93, at 62–77.

140. See Ellard et al., *supra* note 91, at 130–31.

141. See *id.*

142. See Gollwitzer & van Prooijen, *supra* note 93, at 62–77.

143. See Tyler & Lind, *supra* note 94, at 65–69.

144. See *id.*

counterintuitive insight: *the primacy of behavior on attitudes*.¹⁴⁵ Indeed, Lee Ross and Thomas Gilovich conclude, “. . . one of the most consistent and remarkable findings in the behavioral science literature over the past century is that people’s behavior is often more predictive of their attitudes than their attitudes are of their behavior.”¹⁴⁶ When legal officials act in a way that seems consistent with a particular belief and value, they are inclined to endorse that belief and value. This primacy of behavior on attitudes and beliefs results from the psychological dynamic of cognitive dissonance and dissonance reduction.¹⁴⁷ This powerful insight is a foundation of cognitive-behavioral therapy, one of the most successful forms of psychological and behavioral therapy.¹⁴⁸

Facilitating experiences of justice has intrapersonal, interpersonal, relational, and group-based effects on legal officials themselves. The more legal officials behave in a way that provides dignified and respectful treatment to all members of the public, especially members from disadvantaged groups, the more legal officials will believe and value the social identities and social groups to which all belong. The more legal officials provide procedural justice and interactional justice to all members of society, the more legal authorities will regard all social groups as truly participating in and belonging to our democratic society. The more legal officials behave in a way that provides all people dignified and respectful treatment, the more legal officials will believe

145. See generally THOMAS GILOVICH & LEE ROSS, *THE WISEST ONE IN THE ROOM: HOW YOU CAN BENEFIT FROM SOCIAL PSYCHOLOGY’S MOST POWERFUL INSIGHTS* 101–30 (2015).

146. *Id.* at 108; see also Gary L. Wells & Richard E. Petty, *The Effects of Overt Head Movements on Persuasion: Compatibility and Incompatibility of Responses*, 1 *BASIC & APPLIED SOC. PSYCHOL.* 219, 219–30 (1980); John T. Cacioppo et al., *Rudimentary Determinants of Attitudes: II. Arm Flexion and Extension Have Differential Effects on Attitudes*, 65 *J. PERSONALITY & SOC. PSYCHOL.* 5, 5 (1993); Jesse Chandler & Norbert Schwarz, *How Extending Your Middle Finger Affects Your Perception of Others: Learned Movements Influence Concept Accessibility*, 45 *J. EXPERIMENTAL SOC. PSYCHOL.* 123, 123–24 (2009).

147. See GILOVICH & ROSS, *supra* note 145, at 112; LEON FESTINGER, *THE THEORY OF COGNITIVE DISSONANCE* (1957); Michael I. Norton et al., *The IKEA Effect: When Labor Leads to Love*, 22 *J. CONSUMER PSYCHOL.* 453, 453–60 (2012).

148. See JEFFREY M. SCHWARTZ & SHARON BEGLEY, *THE MIND AND THE BRAIN: NEUROPLASTICITY AND THE POWER OF MENTAL FORCE* (2003) (“By the mid-1980s, cognitive therapy was being used more and more in combination with behavioral therapy for OCD, and it seemed naturally compatible with a mindfulness-based perspective. . . . [A] cognitive-behavioral approach, infused with mindful awareness, could be marshaled against the disease, and if successful therapy were accompanied by changes in brain activity, then it would represent a significant step toward demonstrating the causal efficacy of mental activity on neural circuits.”).

that promoting human dignity and human worth are important values of the civil justice system.¹⁴⁹

As such, civil justice designers draw on psychological science regarding justice to enhance their understanding and evaluation of legal processes, legal institutions, and conflict resolution. They ensure that legal processes and institutions are experienced as just, in part to engender legal structures with normative validity, which reduces the likelihood that people will decide, after egoistic calculations, not to comply with the outcomes of legal processes. Moreover, civil justice designers seek to create legal processes and institutions experienced as just to sustain pro-social behavior, cooperation, and intergroup harmony, thereby allowing humans to achieve their full potential and democracy to flourish. Finally, designers draw upon psychological research on how and why disputes emerge and ways of resolving conflict to encourage institutions and structures that engender peaceful resolutions of disputes.¹⁵⁰

Having elaborated the theory of human-centered civil justice design, the Article next introduces the rulemaking process that designed the 2015 amendments to the Federal Rules of Civil Procedure and Chief Justice Roberts's 2015 year-end report in which he lauds the amendments and their implications on managerial judging.

II. 2015 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE CHIEF JUSTICE'S 2015 YEAR-END REPORT

A. *The 2015 Amendments: Rulemaking in Need of Redesign*

A survey conducted by the Institute for Advancement of the American Legal System (IAALS) of members of the American College

149. As the Talmud states, "One should always occupy himself with Torah and good deeds, [even if] it be not for their own sake, for out of good work misapplied in purpose there comes [the desire to do it] for its own sake." *Babylonian Talmud: Tractate Sanhedrin 105b*, http://www.come-and-hear.com/sanhedrin/sanhedrin_105.html (last visited Mar. 20, 2017). I credit Lee Ross and Thomas Gilovich for finding this quote and sharing the wisdom in this Babylonian Talmud.

150. For another day, I leave the twilight between an objectively just civil justice system and a civil justice system experienced by all stakeholders as just. While I will not gainsay the importance of this distinction, the approach I have elaborated is an *incremental* one. If all stakeholders agree that the civil justice system is just, that it embraces the needs, concerns, and desires of present and future generations, then a human-centered designer would doubtless turn to other societal problems. Those who contend that *their* vision of justice system is the most just, even if stakeholders do not agree, and regardless of whether the system would be experienced as just to stakeholders now or in the future, embellish an enigma.

for Trial Lawyers (ACTL) catalyzed the 2015 amendments.¹⁵¹ The survey suggested that ACTL lawyers believed the “civil justice system is not broken, [but] it is in serious need of repair” and “litigation in general and discovery in particular are too expensive.”¹⁵² Given these concerns, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference asked the Advisory Committee on the Civil Rules to hold a conference evaluating the costs and delays of civil litigation within the federal civil justice system.¹⁵³ The Advisory Committee voted to hold a Civil Litigation Review Conference to discuss costs and delays, and tasked the Federal Judicial Center (FJC) with conducting empirical studies on federal civil litigation to examine costs.¹⁵⁴ This Civil Litigation Review Conference, held at Duke University School of Law in May 2010, assembled judges, lawyers, legal scholars, and interest groups.¹⁵⁵

Before the conference, the FJC researched federal litigation costs¹⁵⁶ and prepared reports examining costs in federal civil cases, revealing a

151. See John G. Koeltl, *Progress in the Spirit of Rule 1*, 60 DUKE L.J. 537, 538 (2010); *Interim Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery & the Institute for the Advancement of the American Legal System*, AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 3 (2008), http://iaals.du.edu/sites/default/files/documents/publications/interim_report_final_for_web.pdf [hereinafter *Interim Report*]; see also *Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery & the Institute for the Advancement of the American Legal System*, AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., 2 (2009), http://www.uscourts.gov/sites/default/files/final_report_on_the_joint_project_of_the_actl_task_force_on_discovery_and_the_iaals_1.pdf [hereinafter *Joint Report*] (summarizing results, and stating “In short, the survey revealed widely-held opinions that there are serious problems in the civil justice system generally.”).

152. *Interim Report*, *supra* note 151, at 3–4; see also *Preserving Access and Identifying Excess: Areas of Convergence and Consensus in the 2010 Conference Materials*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., 5 (2010), http://www.uscourts.gov/sites/default/files/iaals_preserving_access_and_identifying_excess_0.pdf.

153. See Koeltl, *supra* note 151, at 538–39.

154. See *id.*; Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 767 (2010) [hereinafter Lee & Willging, *Defining the Problem of Cost*].

155. See Koeltl, *supra* note 151, at 538–39; see also *2010 Civil Litigation Conference*, U.S. COURTS, <http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil> (last visited Mar. 14, 2017).

156. See Emery G. Lee III & Thomas E. Willging, *Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules*, FED. JUDICIAL CTR. (2009) [hereinafter Lee & Willging, *Case-Based Civil Rules Survey*], [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf); see also Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis: Report to the Judicial Conference Advisory Committee on Civil Rules*, FED. JUDICIAL CTR., 2–4 (2010) [hereinafter Lee & Willging, *Multivariate*

wide divergence between the impressions of many ACTL lawyers and the costs actually associated with litigating in federal court.¹⁵⁷ The FJC conducted a case-based study of litigation costs in closed federal civil cases from the last quarter of 2008 and surveyed more than 2,000 attorneys of record.¹⁵⁸ This study revealed that in cases where one or more kinds of discovery are reported, median litigation costs were \$15,000 for plaintiffs and \$20,000 for defendants, meaning that half of all attorneys reported costs below these median amounts.¹⁵⁹

The FJC's study also revealed the ratio of discovery costs to total costs:¹⁶⁰ plaintiffs' attorneys reported a median of 20 percent, and defendants' attorneys reported a median of 27 percent.¹⁶¹ The FJC also asked attorneys to report what ratio of discovery costs to litigation costs made them uncomfortable.¹⁶² For both sets of attorneys, these actual median cost ratios were well below what those attorneys thought troubling.¹⁶³ Finally, researchers concluded that the monetary stakes in particular cases (i.e., potential liability) represent the single-best

Analysis], [http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/\\$file/costciv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf); Thomas E. Willging & Emery G. Lee III, *In Their Words: Attorney Views About Costs and Procedures in Federal Civil Litigation*, FED. JUDICIAL CTR. 1–2 (2010) [hereinafter Willging & Lee, *In Their Words*], [http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/\\$file/costciv3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/$file/costciv3.pdf).

157. See Lee & Willging, *Defining the Problem of Cost*, *supra* note 154, at 770–71; see also Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies & Functions*, 90 OR. L. REV. 1085, 1103 (2012); *Report to the Chief Justice of the U.S. on the 2010 Conference on Civil Litigation*, JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES AND THE COMM. ON RULES OF PRACTICE AND PROCEDURE, 3 n.2 (2010) [hereinafter *Report to the Chief Justice of the U.S. on the 2010 Conference*], http://www.uscourts.gov/sites/default/files/report_to_the_chief_justice.pdf.

158. See Lee & Willging, *Case-Based Civil Rules Survey*, *supra* note 156, at 35–36. The study excluded large categories of cases from the study because they generally do not involve discovery, including prisoner civil rights and habeas corpus cases.

159. See *id.*

160. See *id.* at 28.

161. See Lee & Willging, *Defining the Problem*, *supra* note 154, at 779–80; Lee & Willging, *Case-Based Civil Rules Survey*, *supra* note 156, at 38–39, tbls. 6 & 7.

162. See Lee & Willging, *Case-Based Civil Rules Survey*, *supra* note 156, at 40.

163. See *id.* The FJC's estimate is generally consistent with previous studies. The Columbia Project study from the 1960s estimated that discovery accounted for between 19 and 36 percent of litigation costs. See WILLIAM A. GLASER, *PRETRIAL DISCOVERY & THE ADVERSARY SYSTEM* 180 tbl.43 (1968). The Civil Litigation Project in the 1970s found that, in ordinary cases, 16.7 percent of attorney time was spent in discovery. See David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 91 tbl.3 (1983). In the 1990s, the Rand Corporation found that in cases lasting longer than 270 days, discovery consumed a little over one-third (36 percent) of attorney work hours. See James S. Kakalik, Deborah R. Hensler, Daniel F. McCaffrey, Marian Oshiro, Nicholas M. Pace & Mary E. Vaiana, *Discovery Management: Further Analysis of the Civil Reform Justice Act Evaluation Data*, B.C. L. REV. 613, 641–50 (1998).

predictor and cost driver.¹⁶⁴ Taken together, the FJC's analysis reveals that high discovery costs are not pervasive. Instead, discovery costs escalate only in a subset of complex federal litigation cases with large potential monetary judgments.¹⁶⁵ The FJC's studies reveal that, in actual litigated cases, most attorneys believed that discovery costs were generally proportionate to their clients' stakes.

While the FJC surveyed attorneys who litigated specific cases and investigated facts and impressions linked to those specific cases, several lawyers organizations—the American Bar Association (ABA), the National Employment Lawyers Association (NELA), and the ACTL—surveyed their members for general impressions about the federal civil justice system.¹⁶⁶ A majority of ABA members expressed satisfaction with the federal system.¹⁶⁷ Many believed the rules provide a sound framework for the conduct of civil litigation and that, in general, counsel agree on the scope and timing of discovery.¹⁶⁸

Unlike the ABA, NELA is comprised primarily of plaintiff-side employment lawyers,¹⁶⁹ many of whom expressed that the federal rules were not conducive to securing a “just, speedy, and inexpensive determination of every action.”¹⁷⁰ In addition, many NELA members believed that federal courts have grown increasingly hostile to employment claims, that rules are applied inconsistently,¹⁷¹ that their

164. See Lee & Willging, *Defining the Problem of Cost*, *supra* note 154, at 771–72; Lee & Willging, *Multivariate Analysis*, *supra* note 156, at 5, 7.

165. *Id.*

166. Two of these surveys were administered by the FJC and surveyed members of the American Bar Association and National Employment Lawyers Association. The Institute for Advancement of Legal Studies conducted a survey of the American College of Trial Lawyers. See generally Lorna G. Schofield, *ABA Section of Litigation Member Survey on Civil Practice: Detailed Report*, ABA SECTION OF LITIGATION (2009), http://www.uscourts.gov/sites/default/files/aba_section_of_litigation_survey_on_civil_practice_0.pdf; Rebecca M. Hamburg & Matthew C. Koski, *Summary of Results of Federal Judicial Center Survey of NELA Members*, NAT'L EMP'T LAWYERS ASS'N (2009), http://www.uscourts.gov/sites/default/files/nela_summary_of_results_of_fjc_survey_of_nela_members.pdf.

167. About half of the ABA respondents surveyed represent primarily defendants, about a quarter represent primarily plaintiffs, and the remaining quarter represent plaintiffs and defendants about equally. See Schofield, *supra* note 166, at 5, 7–8 (“Sixty-three percent of respondents agree that the Rules, as written, are conducive to meeting the goal of a ‘just, speedy, and inexpensive determination of every action,’ and 61% agree that the Rules are adequate as written.”).

168. See Schofield, *supra* note 166, at 42 (“About 67% of all lawyers disagree that the Rules need a major overhaul . . .”), 75 (“Approximately 60% of plaintiffs’ lawyers, 66% of mixed practice lawyers, and 68% of defense lawyers believe that counsel agree on the scope and timing of discovery in a majority of cases.”).

169. See Hamburg & Koski, *supra* note 166, at 3, 4.

170. FED. R. CIV. P. 1; see Hamburg & Koski, *supra* note 166, at 4, 25.

171. See Hamburg & Koski, *supra* note 166, at 4, 130.

opponents abuse discovery in almost every case, and that sanctions designed to curb discovery are seldom imposed.¹⁷²

In contrast to the ABA and NELA, the surveyed ACTL members primarily defend large, complex cases.¹⁷³ Many of these attorneys believed that “litigation is too expensive.”¹⁷⁴ IAALS’s report concluded that the American civil justice system, including the federal system, is “in serious need of repair.”¹⁷⁵

As the FJC revealed, ABA, NELA, and ACTL members differed markedly in their overall satisfaction with the federal rules.¹⁷⁶ Specifically, ABA members were much more satisfied with the federal rules than were members of NELA or ACTL.¹⁷⁷ Moreover, the three groups differed when answering the prompt: “discovery is abused in almost every case.”¹⁷⁸ This question, among others, was likely interpreted in different ways because of the differing stances between plaintiffs and defendants.¹⁷⁹ Nevertheless, none of these lawyer organizations agreed that “the rules must be revised in their entirety and rewritten.”¹⁸⁰

After these surveys were collected, the Duke Conference was held,¹⁸¹ which consisted of 11 panels over two days to discuss aspects of civil litigation, including pleadings, discovery, e-discovery, and

172. *See id.* at 6, 11, 30.

173. *See Joint Report, supra* note 151, at 2 (“Twenty-four percent represent plaintiffs exclusively, 31 percent represent defendants exclusively and 44 percent represent both, but primarily defendants. About 40 percent of the respondents litigate complex commercial disputes, but fewer than 20 percent litigate primarily in federal court . . .”).

174. *See Interim Report, supra* note 151, at 4 (“85 percent thought that litigation in general and discovery in particular are too expensive.”).

175. *See id.* at 3 (“Although the civil justice system is not broken, it is in serious need of repair. The survey shows that the system is not working; it takes too long and costs too much.”).

176. *See generally* Emery G. Lee III & Thomas E. Willging, *Attorney Satisfaction with the Federal Rules of Civil Procedure: Report to the Judicial Conference Advisory Committee on Civil Rules*, FED. JUDICIAL CTR. (2010) [hereinafter Lee & Willging, *Attorney Satisfaction*], [http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/\\$file/costciv2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf).

177. *See id.* at 13 fig.1.

178. *Id.* at 18; *see also id.* at 15 fig.5.

179. *See id.* at 8 (citing Jack B. Weinstein, *What Discovery Abuse? A Comment on John Setear’s The Barrister and the Bomb*, 69 B.U. L. REV. 649, 654–55 (1989) (cataloguing five forms of discovery abuse)). The difference observed between plaintiff- and defendant-side attorneys may also be shaped by self-serving biases. *See, e.g.*, George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135 (1993); Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conduct*, 51 ORG. BEHAV. & HUM. DECISION PROCESSES 176 (1992).

180. *See Lee & Willging, Attorney Satisfaction, supra* note 176, at 6, Figure 2.

181. *See Koeltl, supra* note 151, at 542.

settlement.¹⁸² Several themes emerged, including the need for more active judicial case management, greater cooperation among counsel, and concerns with e-discovery.¹⁸³ After the conference, the Advisory Committee prepared a report for the Chief Justice, stating “there was no demand at the Conference for a change to the rule language [of Rule 26(b)]; there is no clear case for present reform.”¹⁸⁴ Importantly, no consensus was forged on the nature of the cost or delay problems associated with federal litigation or the need for rule amendments to address these concerns.¹⁸⁵

Nevertheless, the Chief Justice prompted the chair of the Advisory Committee to engage in rulemaking with the information presented at the conference.¹⁸⁶ Judge John G. Koeltl was tasked with carrying through this work, focusing on three main goals: (1) proportionality in discovery, (2) cooperation among lawyers, and (3) early and active case management.¹⁸⁷ The Advisory Committee solicited more studies from

182. *See id.*

183. *See id.*; *see generally* Fabio Arcila Jr., *Plausibility Pleading as Misprescription*, 80 BROOK. L. REV. 1487, 1489 (2015) (noting that conference participants wanted to focus on education of judges so that they could properly exercise discretion in case management, especially with regards to pleadings); Lonny Hoffman, *Rulemaking in the Age of Twombly and Iqbal*, 46 U.C. DAVIS L. REV. 1483, 1518 (2013) (discussing the Duke Conference’s focus on pleadings); Julia M. Ong, *Another Step in the Evolution of E-Discovery: Amendments of the Federal Rules of Civil Procedure Yet Again?*, 18 B.U. J. SCI. & TECH. L. 404, 421–22 (“[The] general consensus that amendments need to be made to the Federal Rules of Civil Procedure to specifically address the outstanding issues concerning e-discovery.”).

184. *Report to the Chief Justice of the U.S. on the 2010 Conference*, *supra* note 157, at 8; *see also* Koeltl, *supra* note 151, at 543 (“The panel on discovery did reach a consensus that there are tools available in the current Federal Rules of Civil Procedure to deal with discovery abuse.”).

185. *Compare* Koeltl, *supra* note 151, at 543 (“A central issue for the discovery panel was whether discovery abuse exists and, if so, what should be done about it. As already noted, the empirical research by the Federal Judicial Center tended to indicate that in most cases attorneys were satisfied with the amount and proportionality of discovery, although other surveys indicated more dissatisfaction with the state of discovery. The division of views on the incidence of abusive discovery [was] reflected . . . Carrington, meanwhile, notes that complaints about the costs of discovery have existed for decades and may be due in part to laudable efforts to provide access to the courts for people who deserve to have their rights vindicated.”), *with Report to the Chief Justice on the 2010 Conference*, *supra* note 157, at 5 (“One recurring question is the extent to which new or amended rules are needed as opposed to more frequent and effective use of the existing rules . . . Conference participants noted that many of the problems that exist could be substantially reduced by using the existing rules more often and more effectively.”); *see also* Honorable Craig B. Shaffer, *The “Burdens” of Applying Proportionality*, 16 SEDONA CONF. J. 55, 67 (2015) (pointing to the common ‘myth’ that discovery costs are the largest driver of litigation cost).

186. *See* Burbank & Farhang, *supra* note 38, at 1594 n.131.

187. *See* Memorandum from Hon. David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civil Procedure, to Hon. Jeffrey S. Sutton, Chair, Standing Comm. on Rules of Practice and Procedure 4 (May 8, 2013), <http://www.uscourts.gov/file/14696>.

the FJC and held a mini-conference in October 2012 to receive additional input from lawyers, judges, and law professors.¹⁸⁸

In 2013, the Advisory Committee, with the approval of the Standing Committee, published proposals for public comment to amend Rule 1, Rule 16, Rule 26, and Rule 84 that contradicted the earlier summary the Advisory Committee provided to the Chief Justice in 2010.¹⁸⁹ Legal scholars have critiqued these amendments as anti-private enforcement.¹⁹⁰ In large part, the amendments themselves mirror the proposals of defense-oriented interest groups, based on examples of Arizona and Oregon state court procedures.¹⁹¹ Yet attorneys who practice in Arizona and Oregon state courts believed that litigation costs in their own state systems were also too expensive.¹⁹² Indeed, many of these lawyers believed that their own state systems do not work well and rated only a slight preference for their state court procedures.¹⁹³

188. See *Agenda*, CIVIL RULES COMM. 77 (Apr. 11-12, 2013), <http://www.uscourts.gov/file/15484>.

189. Compare *Report to the Chief Justice on the 2010 Conference*, *supra* note 156, at 8 (“[T]here was no demand at the Conference for a change to the rule language; there is no clear case for present reform.”), and Koeltl, *supra* note 150, at 543 (“The panel on discovery did reach a consensus that there are tools available in the current Federal Rules of Civil Procedure to deal with discovery abuse.”), with Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, COMM. ON THE RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 1, 264 (2013), <http://www.hib.uscourts.gov/news/archives/attach/preliminary-draft-proposed-amendments.pdf>.

190. See Burbank & Farhang, *supra* note 38, at 1592–93.

191. See *Reshaping the Rules of Civil Procedure for the 21st Century: The Need for Clear, Concise, and Meaningful Amendments to Key Rules of Civil Procedure*, LAWYERS FOR CIVIL JUSTICE DRI i, xi (2010), http://www.uscourts.gov/sites/default/files/reshaping_the_rules_for_the_21st_century_0.pdf (“Against this background we propose a new Rule 26(b)(1): Scope in General. The Scope of discovery is limited to any nonprivileged matter that would support proof of a claim or defense and must comport with the proportionality assessment required by Rule 26(b)(2)(C).”) (emphasis added); *Survey of the Arizona Bench & Bar on the Arizona Rules of Civil Procedure*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., 26–27, 29–42 (2010) [hereinafter *Arizona Rules of Civil Procedure*], http://iaals.du.edu/sites/default/files/documents/publications/survey_arizona_bench_bar2010.pdf (discussing the Arizona Rules of Civil Procedure’s presumptive limits on discovery); *Survey of the Oregon Bench & Bar on the Oregon Rules of Civil Procedure*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., 31–43 (2010) [hereinafter *Oregon Rules of Civil Procedure*], http://iaals.du.edu/sites/default/files/documents/publications/survey_oregon_bench_bar2010.pdf (discussing restrictions on discovery under the Oregon Rules of Civil Procedure); Rebecca Love Kourlis, Jordan M. Singer & Natalie Knowlton, *Reinvigorating Pleadings*, 87 DENV. U. L. REV. 245, 266–67 (2010) (“The Oregon Supreme Court has repeatedly reaffirmed the state’s commitment to fact pleading.”).

192. See *Arizona Rules of Civil Procedure*, *supra* note 190, at 44, fig.44; *Oregon Rules of Civil Procedure*, *supra* note 190, at 54, fig.51.

193. See *Arizona Rules of Civil Procedure*, *supra* note 190, at 37, fig.35.

The amendments were readied for notice and comment and received over 2,300 public comments, a remarkable number.¹⁹⁴ Many hundreds of comments were critical of the proposals.¹⁹⁵ Nevertheless, the proposed amendments were altered only slightly¹⁹⁶ before the Advisory Committee, Standing Committee, and Judicial Conference approved them.¹⁹⁷

When taken together and viewed holistically as a system of civil justice design, this rulemaking process can and should be substantially improved. To begin, the community assembled at the Duke Conference was divided when defining the causes, conditions, and nature of the problems of cost and delay in the system.¹⁹⁸ Indeed, the high-quality, case-specific data prepared by the FJC contradicted the general impressionistic concerns of ATLA attorneys.¹⁹⁹ Moreover, the public who engages with this system and the judges who manage it were not surveyed about their experiences,²⁰⁰ which is a critical step in any human-centered design approach to defining and evaluating the nature of a problem.²⁰¹ Finally, the scant evidence available on the proposed

194. See *Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS.GOV, <http://www.regulations.gov/#!docketDetail;D=USC-RULES-CV-2013-0002> (last visited Mar. 21, 2017) (showing 2,356 comments received on the proposed amendments).

195. See Joe Palazzolo & Jess Bravin, *Businesses Win Lawsuit Curbs with New Rules: Change could help companies in their battle against consumer litigation*, WALL ST. J. (Mar. 22, 2016); see also Tony Mauro, *Lawyers Spar over Discovery Rules; Litigation costs at center of debate*, NAT'L L.J., Feb. 24, 2014, at 1; Rebecca L. Shult, *2,000+ Public Comments Submitted Responding to Proposed Changes to FRCP*, LEXOLOGY (Apr. 21, 2014), <http://www.lexology.com/library/detail.aspx?g=dd0982a2-7c5a-4001-8380-648939119c8a>.

196. See Memorandum from Hon. David G. Campbell, *supra* note 187, at 4..

197. See *id.*

198. See Koeltl, *supra* note 151, at 543; See Lee & Willging, *Defining the Problem of Cost*, *supra* note 154, at 771–72.

199. See Lee & Willging, *Defining the Problem of Cost*, *supra* note 154, at 771–72.

200. See Hon. Paul W. Grimm, *The State of Discovery Practice in Civil Cases: Must the Rules Be Changed to Reduce Costs and Burdens, Or Can Significant Improvements Be Achieved Within the Existing Rules?*, 12 SEDONA CONF. J. 47, 47 n.2 (2011) (“Interestingly, there do not appear to have been any recent surveys of judges to learn their perceptions regarding any shortcomings in the civil litigation system; their views with respect to suggested changes that should be adopted; or their opinions regarding how well they fulfill their obligations to manage the pretrial process, including prompt resolution of discovery disputes Given the central importance that all the lawyer surveys . . . place on active involvement of judges in and management of the pretrial process, it would be highly instructive to see what the judges are thinking on these issues.”).

201. Indeed, there is considerable reason to believe that the public’s concern with cost and time is of a different class than those elaborated. See FEELEY, *supra* note 46 (discussing the public’s concern in misdemeanor court with outlaying costs of securing counsel and the opportunity cost (if any) of not using an attorney, the loss of work time associated with mounting a case, and the cost of continuances and court appearances,

amendments suggested that the solutions were at best inadequate and at worst ill-advised.²⁰² There was no empirical testing or piloting of the proposed solutions in advance, nor were there RCTs to evaluate their effect on stakeholders or the dynamics of the federal civil justice system.

Recently, Burbank and Farhang have characterized the amendments as “a partisan project”²⁰³ carried out by a political institution where some interests counted more than empirical evidence. They call for improvements of the process to ensure that it is adequate for the future.²⁰⁴

B. The Chief Justice’s 2015 Year-End Report: Extolling Efficient Justice

Chief Justice Roberts’s 2015 year-end report is significant.²⁰⁵ In his report, the Chief Justice interpreted the recent amendments and called for a change in legal culture oriented toward prompt and efficient justice.²⁰⁶ These amendments—Fed. R. Civ. P. 1, 16, 26(b)(1), 37(e), 84—reshape how the Federal Rules of Civil Procedure will be construed, alter the discovery available to parties, and impact access to the federal civil justice system.²⁰⁷ The Chief Justice began his remarks by characterizing the problem that the amendments were designed to address: “while the federal courts are fundamentally sound, in many cases civil litigation has

which result in lost work time, stress, and attorneys’ fees); Emery G. Lee III, *Law Without Lawyers: Access to Civil Justice and the Cost of Legal Services*, 69 U. MIAMI L. REV. 499, 503 (2015) (“In sum, the Little Guy’s problem is the increasing cost of civil litigation; he is being priced out of the market for legal services. The Big Guy’s problem is too much information and, thus, too much discovery.”).

202. For example, though the amendments are based upon Oregon and Arizona state rules, attorneys who practice in these states continue to lament excessive cost and delay in their own state systems.

203. Burbank & Farhang, *supra* note 38, at 1596. Many other scholars have criticized either the rulemaking process or the result. See, e.g., Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083 (2015); A. Benjamin Spencer, *The Forms Had A Function: Rule 84 and the Appendix of Forms as Guardians of the Liberal Ethos in Civil Procedure*, 15 NEV. L. J. 1113 (2015).

204. See Burbank & Farhang, *supra* note 38, at 1596.

205. See *2015 Year-End Report*, *supra* note 41.

206. See generally Trevor Gillum, *The Convergence Awakens: How Principles of Proportionality and Calls for Cooperation are Reshaping the E-Discovery Landscape*, 23 U. MIAMI INT’L & COMP. L. REV. 741 (2016) (discussing Roberts’s focus on “speedy, fair, efficient justice”); Clare Kealey, *Discovering Flaws: An Analysis of the Amended Federal Rule of Civil Procedure 37(e) and Its Impact on the Spoliation of Electronically Stored Evidence*, 14 RUTGERS J.L. & PUB. POL’Y 140 (2016) (noting Roberts’s endorsement of the amendments as marking a significant change); Symposium, *Recent Trends in Discovery in Arbitration and in the Federal Rules of Civil Procedure*, 34. REV. LITIG. 705 (2015) (commenting on Roberts’ support of meaningful change following the revisions).

207. See *2015 Year-End Report*, *supra* note 41, at 4–5.

become too expensive, time-consuming, and contentious, inhibiting effective access to the courts.”²⁰⁸ He then stated that the conference had identified the need for procedural reforms that would “engage judges in early and active case management,” “encourage greater cooperation among counsel,” “focus discovery . . . on what is truly necessary to resolve the case,”²⁰⁹ and address new problems associated with electronically stored information. The Chief Justice applauded the amendments, remarking that the amendments “mark significant change, for both lawyers and judges, in the future conduct of civil trial,”²¹⁰ and that “we must engineer a change in our legal culture that places a premium on the public’s interest in speedy, fair, and efficient justice.”²¹¹ The year-end report is significant for a second reason: federal district

208. *Id.* at 4. Although Chief Justice Roberts cites the Duke University School of Law 2010 Civil Litigation Conference to support this articulation of the problem, the Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure offered a notably different perspective. See *Report to the Chief Justice on the 2010 Conference*, *supra* note 157. Indeed, the Advisory Committee summarized the Federal Judicial Center’s empirical data at the Duke Conference proceedings by noting that “[b]oth FJC studies showed that in many cases filed in the federal courts, the lawyers handling the cases viewed the discovery as reasonably proportional to the needs of the cases and the Civil Rules as working well. The FJC studies support the conclusion that the cases raising concerns are a relatively small percentage of those filed in the federal courts, but the numbers and the nature of these cases deserve close attention.” *Id.* at 3. Moreover, a report issued by the Institute for the Advancement of the American Legal System reveals that, within the sample of cases selected, 65 percent of the civil cases were resolved in one calendar year, almost 40 percent less than six months, and only 35 percent of cases expended more than one year. See INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS 4 (2009). The duration of the case was strongly predicted by the nature of the suit, with more complex commercial matters and environmental litigation taking longer to resolve.

209. 2015 Year-End Report, *supra* note 41, at 5.

210. *Id.* at 5. While the rule changes mark significant change, the empirical data presented at the Duke Conference revealed that the vast majority of attorneys were generally satisfied with the prior formulation of the rules. Indeed, the American Bar Association surveyed over 3,000 attorney members, which included lawyers practicing on the plaintiff-side, defense-side, and private and public law. Over 60 percent agreed that the rules were adequate as *previously* written, over 53 percent believed that the rules required only *minor* adjustment. Indeed, the ABA surveys reveal that a minority of attorneys (25 percent), largely defense-side, believed that the rules needed to be fundamentally rewritten. See *Civil Procedure in the 21st Century—Some Proposals*, SPECIAL COMM. ON THE FUTURE OF CIVIL LITIG. OF THE AM. BAR ASS’N SECTION OF LITIG. 1, 2 (2010), http://www.uscourts.gov/sites/default/files/aba_litigation_section_civil_procedure_in_the_21st_century_0.pdf; see also Schofield, *supra* note 166, at 32 fig.3.0, 41 fig.3.9. Indeed, the vast majority of ABA attorneys (67.2 percent) rejected the proposition that the “rules must be reviewed in their entirety and rewritten to address the needs of today’s litigants.” Schofield, *supra* note 165, at 42 fig.3.10; see also Lee & Willging, *Attorney Satisfaction*, *supra* note 176, at 6–7 (finding that no party group in any of the surveys net agreed that the rules should be overhauled).

211. 2015 Year-End Report, *supra* note 41, at 11.

courts now cite the report as guidance on how to apply the newly amended rules.²¹²

Regarding Rule 16, Chief Justice Roberts emphasized the “crucial role of federal judges in engaging in early and effective case management.”²¹³ While Rule 16 had already required courts to engage in case management,²¹⁴ amended Rule 16 now requires judges to use case management tools earlier in the process, with a preference for in-person interactions with parties, and empowers judges with more hands-on control over case management. Further, while Rule 16 had required judges to meet with lawyers after filing of a complaint to confer about case needs and to develop a management plan, amended Rule 16 shortens the deadline for these meetings by thirty days and extends the preference for face-to-face meetings between judges and lawyers “before filing motions in aid of discovery.”²¹⁵ Troublingly, the Chief Justice noted that these face-to-face encounters “often obviate the need for a formal motion—a well-timed scowl from a trial judge can go a long way in moving things along crisply.”²¹⁶ While the Chief Justice may have made this quip in jest, his discussion neglected the importance of providing experiences of procedural justice to parties appearing in face-to-face interactions before the court.

Rule 1 was previously the interpretive guide for construing all other Federal Rules of Civil Procedure and remained untouched in its original form since 1967.²¹⁷ Chief Justice Roberts stressed that amended Rule 1 now makes “express the obligation of judges and lawyers to work cooperatively *in controlling the expense and time demands of litigation*.”²¹⁸ Chief Justice Roberts underscored that Rule 1 was amended by only eight words, but that judges and practitioners “must take [these words] to heart.”²¹⁹ Rule 1 now directs that the Federal Rules

212. See Joan Summy-Long v. Pa. State Univ., No. 1:106-cv-1117, 2016 WL 74767, at *8 (M.D. Pa. Jan. 7, 2016); Merrill Reuter, M.D., v. Physicians Casualty Risk Retention Group, No. 16-80581-CV-MARRA/MATTHEWMAN, 2017 WL 395242, at *2 (S.D. Fl. Jan. 27, 2017); Roberts v. Clark County School Dist., 312 F.R.D. 594, 603–04 (D. Nev. 2016); Adam N. Steinman, *The End of an Era? Federal Civil Procedure after the 2015 Amendments*, 66 EMORY L.J. 1, 44 (2016) (discussing the fact that federal courts will be called upon to interpret the rules and that special attention should be paid to anything, such as Chief Justice Roberts’s report, that would be likely to influence federal judges’ decisions).

213. 2015 Year-End Report, *supra* note 41, at 7.

214. See Fed. R. Civ. P. 16; Fed. R. Civ. P. 16 (1983) (amended 1987).

215. See 2015 Year-End Report, *supra* note 41, at 7; see also Fed. R. Civ. P. 16 (amended 2015).

216. *Id.*; cf. FEELEY, *supra* note 46.

217. See Quintanilla, *Taboo Procedural Tradeoffs*, *supra* note 122, at 886.

218. 2015 Year-End Report, *supra* note 41, at 7.

219. *Id.* at 6.

“should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”²²⁰ According to the Chief Justice, the new passage means “lawyers . . . have an affirmative duty to work together, and with the court, to achieve *prompt and efficient resolutions of disputes*.”²²¹ The Chief Justice’s remarks, however, omit discussion of any responsibility to ensure that disputes are resolved justly. Nor do the remarks speak to the unsettling tradeoffs between achieving a just result and reducing costs to the court or adversaries that the lawyers and parties may be forced to make.²²²

Turning to Rule 26(b) and proportionality, the Chief Justice elaborated that “the pretrial process must provide the parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery.”²²³ Amended Rule 26(b) now explicitly incorporates proportionality and cost-benefit balancing when defining the scope of discovery.²²⁴ As such, Rule 26(b) now permits defendants to argue that a claimant’s discovery falls beyond the scope of discovery because “the burden or expense of proposed discovery outweighs its likely benefit.”²²⁵ Indeed, Rule 26(b) makes proportionality an integral part of the scope of discovery: “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense *and proportional to the needs of the case*”²²⁶

The Chief Justice notes that this proportionality “assessment may, as a practical matter, require the active involvement of a neutral arbiter—the federal judge—to guide decisions respecting the scope of discovery.”²²⁷ “Judges must be willing to take on a stewardship role, managing their cases from the outset rather than allowing parties alone to

220. *Id.* at 6 (emphasis in original); see also Fed. R. Civ. P. 1 (amended 2015).

221. 2015 Year-End Report, *supra* note 41, at 6 (emphasis added).

222. See Quintanilla, *Taboo Procedural Tradeoffs*, *supra* note 122 at 915–918, 924.

223. 2015 Year-End Report, *supra* note 41, at 7.

224. See Fed. R. Civ. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.”) (amended 2015).

225. 2015 Year-End Report, *supra* note 41, at 6.

226. *Id.* (emphasis added).

227. *Id.* at 7. Although the scope of Rule 26(b) has been altered ostensibly to curb discovery abuse, survey data collected by the Federal Judicial Center revealed that most attorneys surveyed do not believe that discovery is abused in almost every case in federal court. See Lee & Willging, *Case-Based Civil Rules Survey*, *supra* note 156, at 71, fig.45.

dictate the scope of discovery and the pace of litigation.”²²⁸ Federal judges are now much more likely to be called to resolve disagreements about the scope of discovery earlier in the process and in face-to-face encounters with parties. Increasingly, these encounters will turn on the conflict between a defendant’s interest in reducing the costs and burdens of discovery and a claimant’s interest in collecting evidence to be heard on the merits of a dispute.²²⁹

Given the emphasis the Chief Justice placed on cost and delay reduction in civil discovery, when judges engage in this proportionality analysis, will they be more sensitive to immediate costs of civil discovery in the case at bar than long-term benefits cumulated across civil cases to maintain a well-functioning civil justice system? If short-term costs of civil discovery consistently loom larger than long-term benefits, might this impair the perceived neutrality of federal judges, given the potential for a systematic bias and skew in favor of defendants?²³⁰

Last, Chief Justice Roberts discussed an amendment that eliminated Rule 84, which had—since 1967—referenced an appendix containing civil litigation forms designed to provide lawyers and unrepresented litigants examples of proper pleading.²³¹ He noted that, “over the years since their publication, many of those forms have become antiquated or obsolete,”²³² and explained that the Administrative Office of the United States Courts assembled a group that replaced the outdated forms with modern versions, directing the public to *pro se* forms. These federal forms, including Form 11 (Pleading a Complaint), were not solely used by *pro se* parties however. Federal courts have cited the forms in published cases since 1967 as exemplars of the liberal ethos of pleading and access to the federal judicial form that applied to uncounseled and counseled claimants alike.

228. 2015 Year-End Report, *supra* note 41, at 10.

229. Moreover, the year-end report elides one of the drivers of costs in discovery—“respondents tended to view business models in many law firms as one source of unnecessary expense in discovery.” See Lee & Willging, *Attorney Satisfaction*, *supra* note 176, at 9. If these business models are one of the primary drivers of costs in discovery, then the satellite litigation that may emerge by altering the default rules of discovery may ultimately and ironically drive up the billable hours expended in discovery in cases where discovery disputes may have been resolved by informal means.

230. Psychological and behavioral research has revealed that losses often loom larger than gains of comparable size. See, e.g., Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOL. 341, 343–44 (1984); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981).

231. See 2015 Year-End Report, *supra* note 41, at 8–9.

232. *Id.* at 9.

Absent these civil forms as procedural safe harbors, federal judges will have increased discretion to resolve whether pleadings are sufficient and proper under the rules, including, for example, at the pleading stage when resolving motions to dismiss. The Chief Justice's remarks emphasize using this discretion to reduce costs and time. Yet these are lowest of the lofty aims cast within these civil forms that guide our civil justice system and which federal courts should consider when adjudicating procedural disputes.

Unfortunately, the Chief Justice elides many of the difficulties and contested issues that entangle these particular amendments, including the tension between prompt and efficient justice and a more capacious understanding of justice and the diverse process values achieved by the civil justice system. To begin, the Chief Justice bases his remarks on the premise that the conference "confirmed that . . . in many cases civil litigation has become too expensive, [and] time-consuming" ²³³ Yet the FJC's case-specific research contradicted the more general impressionistic survey data of attorneys, discrediting the factual premise that *most* civil litigation is too expensive and time-consuming. ²³⁴

Further, the Chief Justice bases his call for reengineering legal culture change on "the public's interest in speedy, fair, and efficient justice." ²³⁵ The public, however, was neither surveyed nor interviewed before or after the conference about whether they desired cheaper and faster justice. ²³⁶ This failure to consult the public and to meaningfully understand their needs and experiences is compounded by the Chief Justice's omission to caution that, when managing federal cases, federal judges should be concerned about the public's experiences of justice and satisfaction with the federal civil justice system. Indeed, the year-end report neglects discussion of the care needed to balance efficient justice and procedural justice. ²³⁷

This gap between the nature of the problems debated at the conference and the solutions ultimately adopted is troubling. As of yet, the dynamic, system-wide effects of these changes have not been evaluated on court-user experiences. How will the public experience the coupling of earlier and more active managerial judging with the Chief

233. *Id.* at 4.

234. *See supra* Part I.A.

235. *2015 Year-End Report*, *supra* note 41, at 11.

236. *See* David K. Kessler, *The More You Know: How 360-Degree Feedback Could Help Federal District Judges*, 62 RUTGERS L. REV. 687 (2010); *cf.* Barbara Billingsley, Diana Lowe & Mary Stratton, *Civil Justice System and the Public: Learning from Experiences to find Practices that Work*, CAN. FORUM ON CIVIL JUSTICE 1, 5–6 (2006), <http://www.cfcj-fcjc.org/sites/default/files/docs/2006/cjsp-learning-en.pdf>.

237. *See 2015 Year-End Report*, *supra* note 41, at 11; *supra* Part II.B; Quintanilla, *Taboo Procedural Tradeoffs*, *supra* note 122 at 928–29.

Justice's call for managerial judges to carry out efficient justice? In short, there is considerable need for a feedback mechanism that examines the extent to which these significant changes to the federal procedural rules, including the enlarged role of managerial judges, promote the public's experiences of fairness and justice.

III. APPLYING HUMAN-CENTERED CIVIL JUSTICE DESIGN

Human-centered civil justice design begins with the belief that all people who encounter, engage with, and experience the civil justice system are the ones who hold the key to innovating and addressing the civil justice system's most vexing problems.²³⁸ The environments people encounter and their interactions with others within the civil justice system shape these experiences,²³⁹ which, in turn, affect people's thoughts, emotions, behaviors, needs, desires, hopes, and fears, and the meaning they make when navigating the civil justice system.²⁴⁰

Human-centered civil justice design has important implications for civil procedure rulemaking. The approach would infuse the rulemaking process with a human-centered ethos and the vision of a civil justice system experienced as truly just, one that meets the needs and demands of the American public. Courts should strive for a human-centered approach that designs a civil justice system experienced as fair, legitimate, and just.²⁴¹ In this section, the Article elaborates upon three recommendations rooted in the principle that stakeholder experiences of justice should be systematically measured before and after rule changes.

In addition to civil procedure rulemaking, human-centered civil justice design has important implications for managerial judging. The 2015 amendments mark significant change in pretrial litigation, both emphasizing and reconfiguring the role of federal judges as managerial and requiring earlier and more active live, in-person case management. When engaging in this case management, courts make pretrial decisions affecting the scope of litigation, the theories of liability and defenses on which the plaintiff and defendant are able to mount evidence, and, hence, the likelihood of summary judgment and settlement.²⁴² Chief Justice Roberts calls for federal judges to harness this new discretion with the aim of achieving efficient justice. This call elides the importance of

238. *See supra* Part I.A.

239. *See supra* Part I.A.

240. *See supra* Part I.A. The process is recursive. For example, people's thoughts, emotions, and behaviors, felt within these environments, shape their experiences of justice.

241. *See supra* Part I.A.

242. *See infra* Part II.B.

infusing managerial judging with procedural justice and seeking to foster experiences of justice.

A. *Human-Centered Civil Procedure Rulemaking*

As described in Part II.A., the rulemaking process that devised the 2015 amendments so lacked empirical evidence that the basis for these amendments has been called into doubt.²⁴³ While the Advisory Committee gathered a community of jurists, lawyers, law professors, and interest groups at the Duke Conference, those assembled were deeply divided when defining problems in the federal system and on any need for rulemaking to resolve these problems.²⁴⁴ In this regard, the FJC compiled case-specific data that contradicted the general impressionistic survey data of ATLA members largely representing defense interests in complex litigation cases—data that were apparently the catalyst for the rulemaking process.²⁴⁵

Rulemakers failed to survey federal judges, let alone the members of the public, whose cases wound through the federal civil justice system.²⁴⁶ Further, the proposed 2015 amendments were not empirically tested by any method before being promulgated.²⁴⁷ Due in part to these infirmities, Professors Steven Burbank and Sean Farhang have called for innovations to ensure that the process is adequate in the future.²⁴⁸

There is a pressing need for human-centered design in federal civil procedure rulemaking. Our legal culture should reflect an ethic that seeks to promote the public's experience of justice, openly reconcile plural process values, and address diverse stakeholder concerns. Judges and court administrators should cultivate a legal culture that values the

243. See generally Suja A. Thomas & Dawson Price, *How Atypical Cases Make Bad Rules: A Commentary on the Rulemaking Process*, 15 NEV. L. J. 1141 (2014); see also Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683 (1998); Will Rhee, *Evidence-Based Federal Civil Rulemaking: A New Contemporaneous Case Coding Rule*, 33 PACE L. REV. 60 (2013); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529 (2001); Carl Tobias, *Discovery Reform Redux*, 31 CONN. L. REV. 1433, 1440 (1999); Thomas D. Rowe, Jr., *A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Discovery*, 69 TENN. L. REV. 13, 14 (2001).

244. See Koeltl, *Progress in the Spirit of Rule 1*, *supra* note 151, at 542.

245. See *id.* at 539–40.

246. See *id.*

247. See generally *id.*; see also BARBARA BILLINGSLEY, DIANA LOWE & MARY STRATTON, *CIVIL JUSTICE SYSTEM AND THE PUBLIC: LEARNING FROM EXPERIENCES TO FIND PRACTICES THAT WORK* 5–6 (2006), for a discussion of a Canadian civil justice system project, which began by noting the irony between recognizing the need for public participation yet never surveying the public.

248. See generally Burbank & Farhang, *supra* note 38.

justice delivered by informal practices and formal procedures.²⁴⁹ Courts should evaluate how these practices and procedures shape the experiences of those navigating the civil justice system.²⁵⁰

This section proposes three recommendations for a more human-centered form of rulemaking. First, designers should evaluate the experiences of all stakeholders (i.e., parties, lawyers, and judges) on a case-specific basis with online surveys.²⁵¹ Second, before any amendment is promulgated, iterations, pilots, and RCTs should be employed to examine intended and unintended effects of such a change on diverse stakeholders. Third, after enactment, stakeholder experiences should be closely monitored and evaluated to study its effects.

Regarding the first recommendation, after each case closes on the federal docket, all stakeholders²⁵² would receive anonymous online surveys administered by the FJC²⁵³ and keyed to CM-ECF docket categories collecting basic demographic and dispute information.²⁵⁴ The survey would examine parties' experiences of procedural justice, including experiences with the formal rules and informal practices applied in their case.²⁵⁵ Moreover, it would examine the quality of their

249. See generally Bettina Lange, *The Emotional Dimension in Legal Regulation*, 29 J. LAW & SOC. 197 (2002).

250. See David B. Rottman, *Procedural Fairness as a Court Reform Agenda*, 44 COURT REV. 32, 32 (2007), <http://www.proceduralfairness.org/~media/Microsites/Files/procedural-fairness/Rottman.ashx> ("Procedural fairness . . . is the organizing theory for which 21st-century court reform has been waiting."); see also Elizabeth Chamblee Burch, *Calibrating Participation: Reflections on Procedure Versus Procedural Justice*, 65 DEPAUL L. REV. 323, 343–356 (2016) (noting that participation, rather than outcome, is the key driver to perceptions of justice); see generally DEBORAH A. ECKBERG & MARCY R. PODKOPACZ, 4TH JUDICIAL DIST. OF THE STATE OF MINN., FAMILY COURT FAIRNESS STUDY (2004), for a discussion of a participant survey, which found that if participants experienced fair treatment they were more likely to comply with undesirable court orders.

251. See Billingsley, Lowe & Stratton, *supra* note 236, at 7 (discussing how successful a survey directed at the civil justice system is when including participants).

252. See Kessler, *supra* note 236, at 689 (recommending "'upward' feedback from parties appearing before the judge and court personnel, 'horizontal' feedback from judges' peers on the district court, and 'downward' feedback from appellate judges").

253. The Federal Judicial Center has the expertise to administer such surveys. See, e.g., Lee & Willging, *Case-Based Civil Rules Survey*, *supra* note 156, at 35–36.

254. For similar examples of public perception, see Rebecca Love Kourlis & Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Judicial Accountability*, 90 JUDICATURE 200, 207 (2007) (noting that the dissemination of judicial performance evaluations "enhances public trust and confidence").

255. At present, the U.S. courts do not collect contact information (i.e., e-mail, phone numbers) for parties who are represented by counsel. The present proposal would require an adjustment of this policy so that surveys could be administered to all members of the public who appear as parties in filed cases. A similar recommendation has been made, albeit for the purpose of performance evaluation of judges. See generally Rebecca Love Kourlis & Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. U. L. REV. 7 (2008). The present recommendation is related, but has a different purpose: the surveys would primarily serve as a means to evaluate the

interactive experiences with district court judges, magistrate judges, other court officials,²⁵⁶ lawyers, and opposing parties.²⁵⁷ Next, the survey would assess their experience of distributive justice, including the extent to which the legal outcome is fair and legitimate.²⁵⁸ The survey would include an evaluation of each party's satisfaction with case management, the cost and time associated with civil justice, and the final resolution. By way of example, Donna Stienstra and Professors Nancy Welsh and Bobbi McAdoo have developed an excellent survey instrument that examines judicial practices in settlement sessions.²⁵⁹ Moreover, the National Center for State Courts (NCSC) has designed and made available a tool that measures experiences of access and fairness, which state courts use for annual assessments.²⁶⁰

These dimensions of justice—procedural and distributive—incorporated into the human-centered surveys converge to shape a more fundamental and holistic experience of justice. These justice questions would be tested, validated, and shown to be psychologically and physiologically meaningful²⁶¹—survey responses which reflect

effectiveness of the civil justice system in realizing experiences of justice. Cf. Kevin S. Burke, *A Court and a Judiciary that Is as Good as Its Promise*, 40 COURT REV. 4, 6 (2003), <http://aja.ncsc.dni.us/courtrv/cr41-2/CR41-2Burke.pdf>.

256. See Tina Nabatchi, Lisa Blomren Bingham & David H. Good, *Organizational Justice and Workplace Mediation: A Six-Factor Model*, 18 INT'L J. CONFLICT MGMT. 148, 152 (suggesting that surveys of interactions with mediators would provide a fuller picture of parties' experiences) (2007).

257. See *id.* at 152–53 (noting that earlier studies were failures for not capturing interactions with opposing parties and calling for a separate focus on disputant-disputant relations).

258. See generally Hegtvædt & Cook, *supra* note 135.

259. See Nancy Welsh, Donna Stienstra & Bobbi McAdoo, *The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions*, in THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION 73–78 (Tania Sourdin & Archie Zariski eds., 2013); see also Nancy Welsh, *Magistrate Judges, Settlement, and Procedural Justice* (Feb. 12, 2016) (unpublished manuscript) (on file with author).

260. See *Trial Court Performance Measures*, COURTOOLS, <http://www.courttools.org/Trial-Court-Performance-Measures.aspx> (last visited Mar. 22, 2017); Douglas Denton, *Procedural Fairness in the California Courts*, 44 COURT REV. 44, 51–52 (2007), <http://www.proceduralfairness.org/~media/Microsites/Files/proceduralfairness/Denton.ashx>; David B Rottman, *Trust and Confidence in the California Courts: A Survey of the Public and Attorneys, Part I: Findings and Recommendations*, NAT'L CTR. FOR STATE COURTS (2005), http://www.courts.ca.gov/documents/4_37pubtrust1.pdf; Steve Leben, *Considering Procedural-Fairness Concepts in the Courts of Utah*, PROCEDURALFAIRNESS.ORG (2011), <http://www.proceduralfairness.org/Resources/~media/Microsites/Files/proceduralfairness/Utah%20Courts%20and%20Procedural%20Fairness%202009-2011.ashx>. See also RSI/ABA Model Mediation Surveys, RESOLUTION SYSS. INST., <http://www.aboutrsi.org/publications.php?sID=12>.

261. See generally Eliot Smith, *Research Design*, in HANDBOOK OF RESEARCH METHODS IN SOCIAL AND PERSONALITY PSYCHOLOGY 27 (Harry T. Reis & Charles M. Judd eds., 2000).

experiences of injustice would correlate with stress responses reflected on galvanic skin responses, EEG, and cardiovascular activity. Finally, while these surveys would measure the experiences of parties after cases close on the CM-ECF docket, in appropriate instances civil justice designers should also measure the experiences of non-party members of the public. These impartial members of the public are stakeholders who may have prior contact with the civil justice system and will have an interest in the future of the civil justice system.²⁶²

Under this proposal, lawyers and judges would also receive an anonymous online survey when each case closes. The lawyers' survey would collect basic information and essential information about the dispute and stakes. Lawyers would rate their experience of justice and satisfaction on the same dimensions as parties: case management, cost, time, and final dispute resolution. Lawyers would then rate the cooperation and professionalism of opposing counsel, and the professionalism of the judge.²⁶³ Moreover, the survey would assess the cost and time actually expended, much like the FJC's case-specific survey prepared for the Advisory Committee.²⁶⁴ On the judges' survey, each judge would be asked to rate his or her perception of the justice experienced by the parties (i.e., procedural and distributive justice). Judges would rate the lawyers' professionalism and indicate their satisfaction with case management and the time associated with managing the case. On an aggregate and anonymous basis, the FJC could make this survey data available to rulemakers, court administrators, legal scholars, and the public.

262. See discussion, *supra* note 84 (citing AMARTYA SEN, *THE IDEA OF JUSTICE* at 44–46).

263. While this proposal entails case-specific surveys, several scholars have proposed annual performance evaluations of federal judges by lawyers. See, e.g., Kourlis & Singer, *supra* note 255, at 202; Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 105–113 (1995); Kessler, *supra* note 236, at 689. Moreover, several state courts have regular evaluations, albeit as part of their performance review programs. See, e.g., *Judicial Performance Review*, HAW. STATE JUDICIARY, http://www.courts.state.hi.us/courts/performance_review/judicial_performance_review.html (last visited Mar. 23, 2017); see, e.g., *Performance Evaluations 1996–Present*, ALASKA JUDICIAL COUNCIL, <http://www.ajc.state.ak.us/retention/rethist.html> (last visited Mar. 23, 2017); see also AM. BAR ASS'N GUIDELINES FOR THE EVALUATION OF JUDICIAL PERFORMANCE WITH COMMENTARY app. T (2005) http://www.americanbar.org/content/dam/aba/publications/judicial_division/aba_blackletterguidelines_jpe_wcom.authcheckdam.pdf (last visited Mar. 23, 2017).

264. See Lee & Willging, *Case-Based Civil Rules Survey*, *supra* note 156, at 35–36.

Table 2 - Human-Centered Surveys of Parties, Lawyers, and Judges

Parties	Lawyers	Judge
<u>Case Information</u> Party identified Opposing party identified Lawyers identified Judge identified * Demographic information of party represented * CM-ECF docket category * CM-ECF docket sheet * Final procedure * Final disposition	<u>Case Information</u> Party identified Opposing party identified Lawyers identified Judge identified * Demographic information of party represented * CM-ECF docket category * CM-ECF docket sheet * Final procedure * Final disposition * Stakes of dispute * Approximate cost charged * Approximate hours expended	<u>Case Information</u> Parties identified Lawyers identified Judge identified * Demographic information of party represented (if listed case is a federal civil rights matter and available) * CM-ECF docket category * CM-ECF docket sheet * Final procedure * Final disposition
<u>Procedural Justice</u> Parties rate their experience of procedural justice: * Overall fairness of process 1) Fairness of formal procedures 2) Fairness of case management 3) Ratings on quality of party interactions with: * Judge * Court personnel * Party's counsel * Opposing counsel * Opposing parties	<u>Procedural Justice</u> Lawyers rate their experience of procedural justice: * Overall fairness of process 1) Fairness of formal procedures 2) Fairness of case management 3) Ratings on quality of lawyer interactions with: * Judge * Court personnel * Opposing counsel (e.g., cooperation, professionalism)	<u>Procedural Justice</u> Judges rate each party's experience of procedural justice: * Overall fairness of process 1) Fairness of formal procedures 2) Fairness of case management 3) Ratings on quality of party interactions with: * Judge * Court personnel * Opposing counsel (e.g., professionalism).
<u>Distributive Justice</u> Parties rate their experience of distributive justice: * Overall fairness of dispute resolution 1) Fairness of outcome 2) Outcome satisfaction	<u>Distributive Justice</u> Lawyers rate their experience of distributive justice: * Overall fairness of dispute resolution 1) Fairness of outcome 2) Outcome satisfaction	<u>Distributive Justice</u> Judges rate each party's experience of distributive justice: * Overall fairness of dispute resolution 1) Fairness of outcome 2) Outcome

		satisfaction
<u>Overall satisfaction</u> Parties rate their overall satisfaction with: <ol style="list-style-type: none"> 1) Process of dispute resolution 2) Case management 3) Cost expended 4) Time to resolution 	<u>Overall satisfaction</u> Lawyers rate their overall satisfaction with: <ol style="list-style-type: none"> 1) Process of dispute resolution 2) Case management 3) Cost expended to resolve dispute 4) Time to resolution of dispute 	<u>Overall satisfaction</u> Judges rate their overall satisfaction with: <ol style="list-style-type: none"> 1) Process of dispute resolution 2) Case management 3) Cooperation and professionalism of counsel 4) Resources expended to resolve dispute 5) Time expended to resolve dispute

These human-centered surveys offer important benefits. As Judge Kevin Burke, a leading proponent of procedural justice reform, has aptly said, “what you measure is what you care about. For courts to build public trust and enhance the legitimacy of judicial decision making, there must be a willingness to commit to measuring procedural fairness.”²⁶⁵ To begin, these surveys would allow designers to more systematically evaluate the experiences of the public when identifying problems within the civil justice system.²⁶⁶ The case-specific nature of the proposal offers a deeper assessment of diverse stakeholder experiences, revealing needs, aspirations, and concerns in particular contexts. Impressionistic surveys about general attitudes toward the civil justice system do none of this.

Surely the public and judges are stakeholders of the federal civil justice system, yet neither was surveyed before the rulemaking process culminating in the 2015 amendments. With the exception of the FJC’s case-specific surveys, all other surveys gleaned only lawyers’ general impressions about the civil justice system. In contrast, these proposed surveys, linked to CM-ECF dockets and particular cases, would allow an assessment of the kind and magnitude of any civil justice problem, and reveal the classes of cases in which the problem surfaces.

The case-specific nature of the proposed surveys would allow an interlocking examination of the degree to which the perspectives and

265. See Kevin S. Burke, *A Vision for Enhancing Public Confidence in the Judiciary*, 95 JUDICATURE 251, 253 (2012), <http://www.amjudges.org/conferences/2013Annual/EducationMaterials/Burke-A-Vision-for-Enhancing-Public-Confidence-in-Judiciary.pdf>. See also www.proceduralfairness.org (procedural fairness for judges and courts).

266. For similar surveys with exceptional results, see Kessler, *supra* note 236, at 688 (highlighting the advantages of upward, horizontal and downward feedback). This system works in the business world, and it should work here as well. “[W]hat works elsewhere will work for judges: providing judges with more information about how they are performing their jobs is likely to help judges change their behavior in desirable ways.” *Id.*

experiences of diverse stakeholders converge or diverge. Regarding convergence, parties and lawyers would be asked to rate the extent to which they experienced procedural and distributive justice, and judges would be asked to rate the extent to which the parties experienced both dimensions of justice. The surveys, therefore, would examine the empathic accuracy of judges when predicting the public's experiences of justice and the extent to which the justice evaluations of parties and their lawyers converge or diverge.²⁶⁷

The surveys may also find potential convergence and divergence by having judges rate the lawyers' professionalism and lawyers rate the judge's professionalism and case management. These data would allow for feedback and continual improvement of the civil justice system and ensure that it is operating as theorized in an accountable, transparent way. Above all, awareness that a wide swath of litigants experience a particular rule or practice as unjust should prompt discussion of whether an intervention, such as altering a procedural rule or process, is warranted.²⁶⁸ Relatedly, if a wide swath of parties, lawyers, and judges experience a particular rule or practice as just and fair, then this feedback mechanism should serve as a cautionary note against engaging in significant change.²⁶⁹

The second recommendation proposes iterations, pilots, and RCTs before adoption and would examine the intended and unintended effects

267. See WILLIAM ICKES, EVERYDAY MIND READING: UNDERSTANDING WHAT OTHER PEOPLE THINK AND FEEL 271–298 (2003); Anjali Krishnan et al., *Somatic and Vicarious Pain are Represented by Dissociable Multivariate Brain Patterns*, ELIFE (June 14, 2016), <https://elifesciences.org/content/5/e15166>; Christine Ma-Kellams & Jennifer Lerner, *Trust Your Gut or Think Carefully? Examining Whether an Intuitive, Versus a Systematic, Mode of Thought Produces Greater Accuracy*, 111 J. PERSONALITY & SOC. PSYCHOL. 674, 675 (2016); Christopher Bergland, *The New Science of Empathic Accuracy Could Transform Society*, PSYCHOL. TODAY (July 23, 2016), <https://www.psychologytoday.com/blog/the-athletes-way/201607/the-new-science-empathic-accuracy-could-transform-society>.

268. See generally SEN, THE IDEA OF JUSTICE, *supra* note 84, at 21–25, 26 (“The contrast that is involved here is between seeing institutional reforms in terms of their role in taking us toward transcendental justice (as outlined by Nagel), and assessing them in terms of the improvement that such reforms actually bring about, particularly through the elimination of what are seen as cases of manifest injustice (which is an integral part of the approach presented in this book).”).

269. Another variant for this proposal would be to survey stakeholders immediately before a decision is reached in their case. That is, these surveys would examine the dimensions of procedural and interactive justice *ex ante* before a substantive decision has been reached. In this variation, the stakeholders' ratings of procedural justice and overall satisfaction would not be influenced by the decision reached in the dispute. While this variation may allow the purest assessment of their perspectives on the procedural handling of the dispute, it would offer only a partial view of their experience with the civil justice system.

of that change on diverse stakeholder experiences.²⁷⁰ In this regard, the 2015 amendments were not empirically evaluated before adoption, nor was it clear that the nature and extent of the problems being addressed by these amendments (i.e., costs and delays) were sufficiently understood to properly intervene through trans-substantive rulemaking, given the case-specific survey data revealing that these problems did not occur in the vast majority of federal cases.²⁷¹

In marked contrast, these human-centered surveys provide several important dependent measures to compare treatment and control conditions when conducting pilots and RCTs. Importantly, the effect of any proposed change could be examined across diverse stakeholders on a case-specific basis. For example, civil justice designers would have the means to evaluate whether a proposed trans-substantive change resolves the problem identified, without having deleterious effects in particular classes of cases or among particular categories of litigants.²⁷²

The third recommendation calls for stakeholder experiences to be closely monitored and evaluated after an amendment is enacted.²⁷³ Federal court administrators and officials should discern the operation and effects of formal changes on the public's experiences when encountering and navigating the federal civil justice system. This systematic evaluation moves beyond impressionistic accounts of civil justice toward an empirical, human-centered understanding of whether and how recent designs affect the quality of justice.²⁷⁴

The movement toward human-centered rulemaking is preferable to the current rulemaking process. Human-centered civil justice design is vital because judges and court administrators are stewards of our democracy, access to justice, and the rule of law—stewards who safeguard the legitimacy of our civil justice system.²⁷⁵ The public's day-

270. See Part I.A.3. This proposal echoes back to a proposal advanced several decades ago by one of the scholars who pioneered research on procedural justice. See Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 L. & CONTEMP. PROBS. 67, 83–84 (1988), <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3967&context=lcp>.

271. See *supra* Part II.A.

272. See Thomas & Price, *supra* note 243, at 1156–57; Rittel & Webber, *supra* note 82, at 165.

273. See ROGERS ET AL., *supra* note 48, at 319–56; AMSLER ET AL., *supra* note 48, at Chapter 4, System Design Practice (“Build a process for adjusting the design based upon performance.”).

274. See PHILIP SELZNICK, *A HUMANIST SCIENCE* 32 (Stanford Univ. Press 2008).

275. For several classics that speak to this lesson, see Lon L. Fuller and Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 367–69 (1978); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 755–56 (1982).

to-day interactions with judges and courthouse personnel shake or strengthen the public's trust in courts and faith in democratic institutions.²⁷⁶ Some have lamented the unelected nature of federal judges, deriding the federal judiciary as impaired by the counter-majoritarian difficulty and a democratic deficit.²⁷⁷

Human-centered design and surveys of stakeholders offer a middle way—feedback for courts and officials to learn the perspective of stakeholders, an evaluative tool that would increase the democratic sensitivity of court officials to the experiences of those who encounter, navigate, and experience the civil justice system. Illuminating a more ecologically accurate depiction of how court users and stakeholders experience the civil justice system in particular cases and including these diverse voices, human-centered design offers a more participatory and democratic form of deliberation in the rulemaking process and could be engaged in a manner that would more effectively reconcile the plural values that the system seeks to promote.²⁷⁸

Finally, the movement toward human-centered rulemaking reflects a humble, incremental mind-set, one more likely to prevent and avoid “wicked system problems.”²⁷⁹ For example, when problems are ill-defined or poorly understood, proposed solutions fail to grasp the nature of causes, conditions, and linked web of systems involved. As such, these solutions may exacerbate the problem or create a host of more severe problems. By being human-centered, empathizing with the perspectives of diverse stakeholders, iterating with pilots and RCTs, and deliberately adopting mechanisms to learn, evaluate, and receive feedback from court users and stakeholders, human-centered civil justice designers foster a more effective, just, legitimate, resilient, and sustainable civil justice system.

276. See Burke, *supra* note 265, at 254.

277. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346 (2006); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–18 (2d ed. 1986) (“[W]hen the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of representatives of the actual people of the here and now . . .”). See also LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

278. See Martha Minow & Joseph William Singer, *In Favor of Foxes: Pluralism as Fact and Aid to the Pursuit of Justice*, 80 B.U. L. REV. 903, 905–06 (2010).

279. See Rittel & Webber, *supra* note 82, at 155–69; Buchanan, *supra* note 82, at 20–21.

B. *Human-Centered Managerial Judging*

The recent amendments to the Federal Rules of Civil Procedure require earlier and more active live, in-person case management.²⁸⁰ Taken together, the amendments to Rule 1, Rule 16, and Rule 26(b) enlarge the power of federal judges to engage in managerial judging.²⁸¹ In his 2015 year-end report, Chief Justice Roberts extolled a reengineered legal culture in which judges exercise this power earlier in the process to guard against the cost of discovery and delays.²⁸² This call for a legal culture oriented toward efficient justice is in tension with human-centered civil justice design. While federal judges should be efficient when engaging in case management, their aim should include ensuring that their interactions with the parties are infused with fairness and procedural justice and that their pretrial decisions promote experiences of justice.

Managerial judging, which describes the replacement of dispassionate and impartial judging with a more active, managerial stance,²⁸³ began first in the context of pretrial discovery and with the need for an adjudicator to decide conflicts between parties who requested

280. See Memorandum from Judge David G. Campbell, Chair, Advisory Comm. on the Fed. Rules of Civil Procedure to Judge Jeffrey Sutton, Chair, Standing Comm. on the Rules of Practice and Procedure, Re: Proposed Amendments to the Federal Rules of Civil Procedure 2 (June 14, 2014), http://www.uscourts.gov/sites/default/files/st09-2014-add_0.pdf (“What is needed can be described in two words—cooperation and proportionality—and one phrase—sustained, active, hand-on judicial case management.”); United States Courts, *Civil Rules 2015—Overview*, YOUTUBE (Dec. 21, 2015), www.youtube.com/watch?v=lsz0cr8xkRE; 2015 Year-End Report, *supra* note 41; see also E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986).

281. See Fed. R. Civ. P. 1 (rules “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding”) (emphasis added); Fed. R. Civ. P. 16(b) (“The district judge . . . must issue a scheduling order: . . . (B) after consulting with the parties’ attorneys and any unrepresented parties at a scheduling conference [by telephone, mail, or other means] . . . (2) The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served within the complaint or 60 days after any defendant has appeared . . . (3)(B) The scheduling order may: (v) direct that before moving for an order relating to discovery, the movant must request a conference with the court”) (emphasis added); Fed. R. Civ. P. 26(b)(1) (“Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case . . .”); see generally Rowe, *supra* note 243.

282. See *supra* Part II.B.

283. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376 (1982); Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding A Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981); Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669 (2010).

discovery and those who withheld discovery.²⁸⁴ When engaging in active case management, judges make pretrial decisions that affect the course, timing, and scope of litigation²⁸⁵ and the theories of liability and defenses on which the plaintiff and defendant are able to collect evidence during discovery.²⁸⁶ Judges also regularly meet with parties in chambers to encourage settlement whether as negotiators, mediators, or planners.²⁸⁷ Judges engage in bureaucratic logics of efficiency, speed, cost, calendars, and disposition statistics, with their decisions often being outcome dispositive.²⁸⁸

The 2015 amendments to the Federal Rules of Civil Procedure are an inflection point that heightens the powers of managerial judges, requiring federal courts to engage in even earlier and more active case management and emphasizing live, in-person meetings with the parties.²⁸⁹ Not only may courts now require parties to engage in a live, in-person meeting with the judge before filing a motion in aid of discovery, but Rule 26(b) now affirmatively defines the scope of discovery with proportionality determinations and cost-benefit balancing, meaning that in most disputes, judges will serve as active case managers who define the scope of discovery with these cost-benefit considerations in mind.²⁹⁰ Amended Rule 1 provides federal courts a new lever to demand that the parties comply with the court in advancing the speedy and inexpensive resolution of disputes.²⁹¹ Finally, in addition to this enlarged power, federal judges have wide discretion when carrying out their managerial role and interacting with parties and their lawyers. The standards and norms that apply when engaging in this managerial role are often highly subjective and ill-defined.²⁹²

284. See Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules—And the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191 (2007).

285. See Resnik, *supra* note 283, at 378; Gensler, *supra* note 283, at 671.

286. See Resnik, *supra* note 283, at 378; Gensler, *supra* note 283, at 671.

287. See Resnik, *supra* note 283, at 378; Gensler, *supra* note 283, at 671.

288. See Rowe, *supra* note 284, at 193–202.

289. See Fed. R. Civ. P. 16.

290. See Fed. R. Civ. P. 26(b) (“Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering . . . whether the burden or expense of the proposed discovery outweighs its likely benefit.”); *2015 Year-End Report*, *supra* note 41, at 10 (“Judges must be willing to take on a stewardship role, managing their cases from the outset rather than allowing parties alone to dictate the scope of discovery and the pace of litigation.”).

291. See Fed. R. Civ. P. 1 (Rules “should be . . . employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”) (emphasis added).

292. See Resnik, *supra* note 283, at 426. For example, the Federal Courts Study Committee noted that, “[t]here are no standards for making these ‘managerial’ decisions, the judge is not required to provide a ‘reasoned justification,’ and there is no appellate

Judith Resnik presciently cautioned against many of the hazards of this managerial power in her now canonical article *Managerial Judges*.²⁹³ As Resnik warned, case management affords judges greater power with no circumscribing constraints.²⁹⁴ Active case management occurs out of public view, off record, and judges are not obligated to offer written decisions;²⁹⁵ in addition, the ubiquity of settlements means interim decisions are often unreviewable, as settlements are rarely appealable. In its less pernicious form, prior decisions by judges in the pretrial process may shape their later judgments.²⁹⁶ In its more pernicious form, managerial judging places district judges in frequent and close contact with attorneys and parties, which may rouse strong feelings of liking or disliking, and thus provoke biased decision-making.²⁹⁷

Despite these warnings, some legal scholars and jurists support broad managerialism and advocate for even greater managerial powers than the present rules of civil procedure allow. These writers agree that today's judges *need* managerial powers in order to respond to the volume and complexity of modern litigation.²⁹⁸ Steven Baicker-McKee argues that the prevalence of settlements is justification for increasing managerialism, as it allows judges to have a meaningful role in

review. Each judge is free to consult his or her own conception of the importance and merit of a case and the proper speed with which it should be disposed. This, in turn, promotes arbitrariness." Larry Kramer, *Report to the Federal Courts Study Committee on the Role of the Federal Courts and their Relationship to the States*, 1 FED. COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 1, 55 (1990), [http://www.fjc.gov/public/pdf.nsf/lookup/fcscvol1.pdf/\\$file/fcscvol1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/fcscvol1.pdf/$file/fcscvol1.pdf); see generally Peterson, *supra* note 263.

293. See Resnik, *supra* note 283; Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 617–18 (2014) ("Rather than rely on evidence of guilt in the individual case at hand, misdemeanor courts sort defendants based largely upon records of prior encounters.").

294. See Resnik, *supra* note 283, at 378, 425.

295. See *id.*

296. See *id.* at 426–31; Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 43 (Harold J. Berman ed., 2d ed. 1971) ("[N]onadversarial systems are objectionable because the decision-maker may reach a conclusion at an early stage and . . . adhere to that conclusion in the face of conflicting considerations later developed."); see also Craig A. Anderson, *Belief Perseverance*, ENCYC. OF SOC. PSYCHOL. (Roy F. Baumeister & Kathleen D. Vohs eds. 2007); RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980); Charles G. Lord, Less Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979); Barbara O'Brien, *Prime Suspect: An Examination of Factors That Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 PSYCHOL. PUB. POL'Y & L. 315 (2009).

297. See FEELEY, *supra* note 46, at 241–43; see Resnik, *supra* note 282, at 427.

298. See Steven Baicker-McKee, *Reconceptualizing Managerial Judges*, 65 AM. U. L. REV. 353 (2015); see also Hon. D. Brooks Smith, *The Managerial Judge and Y2K Litigation*, 18 REV. LITIG. 403 (1999).

promoting just, speedy, and inexpensive trials, and advocates for reform that makes managerial powers mandatory rather than permissive.²⁹⁹ Researchers have pointed to non-class mass tort claims and other complex cases as exemplars of the needs served by managerial judging.³⁰⁰ Alvin Hellerstein argues that without the proactive and creative application of managerial powers early in cases, tort claims brought by the 9/11 responders would have taken years to resolve and may still be ongoing.³⁰¹ Supporters of broad managerial authority argue that Professor Resnick's criticisms are overstated and unrealistic, and, to the extent that they are legitimate, can be cured by a variety of smaller interventions.³⁰²

The Chief Justice's remarks are disconcerting as they complicate this debate surrounding managerial judging. In the main, the Chief Justice defines what judicious management will entail: efficient justice. Yet when courts engage in managerial judging, they should ensure that the public experiences dispute-handling procedures as fair and should adopt practices that afford litigants respect and promote experiences of justice. For example, as Judge Susan Gauvey has explained,³⁰³ judges should consider both the medium and the message, with the aim of treating all litigants with dignity and respect. While courts are unable to control whether any given litigant will ultimately receive a favorable decision, courts should nonetheless afford litigants with meaningful process that makes dispute resolution less painful—meaningful process that is experienced as just.

In this regard, Judge Kevin Burke and Judge Steven Leben of the American Judges Association have crafted a white paper offering several excellent recommendations.³⁰⁴ In each case at bar, judges should explain the process and their judicial orders in understandable language so that litigants, witnesses, and jurors understand what to expect.³⁰⁵ At the start of the docket, moreover, judges can explain the ground rules—what will

299. Baicker-McKee, *supra* note 298.

300. See generally Alvin K. Hellerstein, et. al., *Managerial Judging: The 9/11 Responders' Tort Litigation*, 98 CORNELL L. REV. 127 (2012); see also Barry R. Schaller, *Managerial Judging: A Principled Approach to Complex Cases in State Court*, 68 CONN. B.J. 77 (1994).

301. Hellerstein, *supra* note 300, at 60–61.

302. See Baicker-McKee, *supra* note 298.

303. See Hon. Susan K. Gauvey, *Delivering Justice The Medium Is the Message Too*, 40 ABA LITIG. J. 2 (2014).

304. See Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 COURT REV. 4, 22–25 (2007), <http://proceduralfairness.org/~media/Microsites/Files/procedural-fairness/CR44-1-2.ashx>; see also Denton, *supra* note 259, at 47–48 (incorporating copy of Conference of State Court Administrators' Resolution 6 "In Support of AJA White Paper on Procedural Fairness" passed in 2008).

305. See Burke & Leben, *supra* note 304, at 20.

happen, why certain cases will be heard first, why litigants or defendants may be limited in what they can say in time or scope—and the need for and significance of the procedures used.³⁰⁶ Finally, judges should engage in active listening, and do their utmost to truly consider all sides and to signal that they are considering each side's point of view.³⁰⁷ Humanizing the process in these ways will diminish experiences of injustice by ensuring that parties feel the judicial forum is neutral and trustworthy, one that treats them with dignity and respect. If neglected, these experiences may diminish the perceived effectiveness of the civil justice system and undermine the aim of effectuating rights and delivering compensatory justice.

These practices nourish the federal judges who engage in case management *themselves*. When managerial judges afford parties with dignified and respectful treatment, they will be more inclined to believe that promoting human dignity and human worth are important values of the civil justice system. The more managerial judges provide procedural justice and interactional justice to all members of society, the more they will regard all social groups as truly belonging to our democratic society. As explained when elaborating on the primacy of behavior on attitudes, civil justice designers must be cautious about requiring legal officials to act consistent with bureaucratic logics of efficient justice that deny experiences of justice, as this behavior will enervate and erode beliefs about the value of human worth and human dignity.

CONCLUSION

We began with three illustrations of human-centered design thinking. In the first, designers created an innovative program collaborating with a hospital to discover hundreds of opportunities to better reconcile medical and efficiency concerns with empathy for patient perspectives and experiences.³⁰⁸ The second resulted in a messaging campaign celebrating everyday moments as learning opportunities that strengthen the foundation of a child's brain development and later formed the foundation of a successful public-health campaign.³⁰⁹ In the third, human-centered designers developed an online program for legal-aid providers to reclassify nonviolent felonies into misdemeanors, thereby eradicating a previously unaddressed legal barrier with major health, social, and financial consequences on people's

306. *See id.*

307. *See* Nancy Welsh et al., *supra* note 259, at 73–78.

308. *See* BROWN & KATZ, *CHANGE BY DESIGN*, *supra* note 1, at 155–77.

309. *See* IDEO, *FIELD GUIDE TO HUMAN-CENTERED DESIGN*, *supra* note 5, at 71–73.

day-to-day lives.³¹⁰ In each of these examples, human-centered designers addressed seemingly intractable social problems by empathizing with stakeholder communities, deeply understanding those served, and partnering with these communities to design solutions rooted in people's actual needs, aspirations, and concerns.

This Article drew on insights and lessons in both human-centered design thinking and dispute system design to synthesize a novel approach, human-centered civil justice design. Human-centered civil justice design begins with empathizing with intended beneficiaries, stakeholders, and court users to uncover their needs and experiences with interviews, observation, immersion, and other forms of perspective taking. Civil justice designers ideate and brainstorm a range of desirable options before winnowing them based upon feasibility and financial viability. Pilots and prototypes are harnessed to gather insight from stakeholders about the causes, conditions, and nature of problems. Human-centered designers aspire to empirically test these pilots with RCTs to explore the intended and unintended system-wide effects of any intervention. The public's needs, aspirations, concerns, and experiences of justice are the root of human-centered civil justice design.

The Article introduced a form of human-centered civil procedure rulemaking that seeks to infuse the rulemaking process with a vision in which diverse stakeholders and court users experience the civil justice system as truly just. The approach is predicated on the experiences of members of the public who encounter and navigate through the civil justice system. Three recommendations were proposed: (1) stakeholder experiences of justice (i.e., procedural and distributive) should be systematically evaluated when cases close on the federal docket; (2) civil justice designers should conduct pilots and RCTs to examine the impact of rule changes on stakeholder experiences of justice before adopting significant changes; and (3) civil justice designers should empirically monitor how changes to the civil justice system affect stakeholder experiences of justice as a feedback mechanism.

The Article also discussed the recent amendments to the Federal Rules of Civil Procedure, which chart a new course in the ongoing civil justice experiment with managerial judging. In this new course, rather than prioritizing efficient justice and neglecting more capacious forms of justice, federal judges should harness psychological science on justice to promote the plural ends of the civil justice system. Managerial judges should consider the many advantages of a procedurally just system, while at the same time considering the sundry disadvantages of a procedurally unjust system when navigating ways of realizing cost and

310. See Latimer, *supra* note 12, at 15.

time efficiencies. Judges must be vigilant about the quality of their managerial judging, not simply the quantity or speed of cases processed. This human-centered approach to managerial judging is deeply consistent with the ends of a flourishing democracy and with the ethos and ethics of the many federal judges who aspire to treat all members of the public with dignity and respect and who believe in delivering meaningful access to justice.

In closing, the human-centered design movement has inspired hundreds of members of the public to give freely of their time, energy, skills, and insights to find ways to improve federal, state, and local government.³¹¹ This energy directed toward the common good—and the human-centered ethos that imbues the movement’s innovations—holds the promise of catalyzing a new era of civil justice design. In this era, civil justice design will truly empathize with the beneficiaries and users of the civil justice system, seeking to learn their needs and potentiality, and to understand their perspectives. In this era, we will aspire to promote human dignity and human fulfillment and to design the continual growth, justness, and achievement of our democratic institutions.

As an epilogue, when I first began this Article, human-centered civil justice design represented theory. While writing this article, I successfully taught two hundred 1L law students how to put into practice human-centered design to promote access to justice. The curriculum was designed to help law students understand the values that guide our profession, including a commitment to the rule of law, access to justice, and public service, and to put into practice empathy for those affected by the civil justice system. They learned the perspective of affected members of the community and were matched with legal-aid partners,

311. For example, “Hackathons,” or social coding events, that have traditionally focused on bringing together tech innovators to use tech design to solve business-related problems, are now proliferating into the legal sector with a focus on improving how people experience the civil justice system. For example, the University of Seattle School of Law hosted the first “Social Justice” hackathon event in November, 2015. *Law School Hosts Social Justice Hackathon to Bridge Services Gap*, SEATTLE U. SCH. OF L. (Oct. 22, 2015), <https://law.seattleu.edu/newsroom/2015-news/law-school-hosts-social-justice-hackathon-to-bridge-services-gap>. Today, A2J Hackathons are proliferating around the country. See generally Allen Rodriguez, *Legal Hackathons: Innovation Labs for the Legal Industry*, L. TECH. TODAY (Oct. 23, 2015), <http://www.lawtechnologytoday.org/2015/10/legal-hackathons-innovation-labs-for-the-legal-industry>. On a national level, the Legal Services Corporation held a summit in 2013 on how to utilize technology to increase access-to-justice for low-income households. LSC subsequently prepared a report identifying five components for using technology to meet these needs. See Heidi Alexander, *Hackaccess to Justice: ABA Journal’s Hackathon Competition Comes to Boston*, L. TECH. TODAY (July 10, 2014), <http://www.lawtechologytoday.org/2014/07/hackaccess-to-justice-aba-journals-hackathon-competition-comes-to-boston/>.

including Indiana Legal Services, the United States District Court for the Southern District of Indiana, Neighborhood Christian Legal Clinic, and the Indianapolis Legal Aid Society. Students met and worked with their community partners to help deliver legal services more effectively by creating human-centered access-to-justice innovations. These students found the access-to-justice service-learning projects deeply rewarding. These 1L students grew not only as individuals, but working together in teams, they grew as future members of the legal profession.³¹² Their collective efforts are revitalizing access to justice in Indiana; having a ripple effect for people with unmet legal needs, stakeholders, and civil society across our community; and revealing the promise and potential of a human-centered approach to civil justice design.

312. Human-centered design thinking has taken root within the law school curriculum. Across the country and in law schools abroad, law-student teams are working with stakeholders to develop legal apps, websites, help desks, and other access-to-justice programs. See Tanina Rostain, Roger Skalbeck & Levin G. Mucahy, *Thinking Like a Lawyer, Designing Like an Architect: Preparing Students for the 21st Century Practice*, 88 CHI.-KENT L. REV. 743 (2013) (“Among legal service providers, apps to increase access to justice hold great promise . . . Legal access apps, which straddle the line between published information and individual representation, have the potential to help people who cannot afford representation to solve a broad range of legal problems.”); Dan Jackson, *Human-Centered Legal Tech: Integrating Design in Legal Education*, 50 L. TEACHER 92 (2016) (“As the legal profession begins in earnest to deploy digital technology in service and information delivery, greater number of law schools are including technology instruction in their curricula.”); PAUL MAHARG, TRANSFORMING LEGAL EDUCATION: LEARNING AND TEACHING THE LAW IN THE EARLY TWENTY-FIRST CENTURY 88 (2007) (“[T]he curriculum must be more in terms of the human relations dealt with and less, as largely now, in terms of the logical concepts of the conventionally trained legal mind.” quoting Herman Oliphant memo to Dean Harlan F. Stone commenting on the work of the American Law Institute). See, e.g., *Commission on the Future of Legal Services*, AM. BAR ASS’N, https://www.americanbar.org/groups/centers_commissions/commission-on-the-future-of-legal-services.html (last visited Mar. 24, 2017); Margaret Hagan, *Design Thinking and Law: A Perfect Match*, L. PRACTICE TODAY (Jan. 2014), http://www.americanbar.org/content/newsletter/publications/law_practice_today_home/lpt-archives/2014/january14/design-thinking-and-law.html; Latimer, *supra* note 12; Tina Rosenberg, *Legal Aid With a Digital Twist*, N.Y. TIMES, June 1, 2016, <http://nyti.ms/1RLMW8t>; *CourtBot*, CODE FOR AMERICA, <https://www.codeforamerica.org/products/court-bot> (last visited Mar. 24, 2017) (“Court Bot gives residents easy-to-understand information about resolving citations and timely reminders about upcoming court dates.”); NULAWLAB, <http://www.nulawlab.org> (last visited Mar. 24, 2017); *Legal Innovation Lab*, GENSLER, <https://www.gensler.com/research-insight/research/legal-innovation-lab> (last visited Mar. 24, 2017); LEGAL DESIGN JAM, <http://legaldesignjam.com/> (last visited Mar. 24, 2017); CYLAB USABLE PRIVACY & SEC. LAB, <http://cups.cs.cmu.edu/> (last visited Mar. 24, 2017). One day, these future lawyers will draw upon these skills to improve the civil justice system.