

# Designing the Forum to Fit the Fuss: Dispute System Design for the State Trial Courts

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## INTRODUCTION

Court reform is a well-worn topic in discussions about the American legal system. For example: in the 1970s, perceptions of an overly litigious nation ushered in alternative dispute resolution;<sup>2</sup> the decade initiating the “War on Drugs” culminated in the nation’s first drug court in Miami-Dade County in 1989;<sup>3</sup> and mental health courts now appear throughout the “Prozac Nation.”<sup>4</sup> In Quincy, Massachusetts, these waves of innovation have created something like the “flexible and diverse panoply of dispute resolution processes, with particular types of cases being assigned to differing processes (or combinations of processes),”<sup>5</sup> that Frank Sander envisioned at the Pound Conference in 1976.<sup>6</sup> In Quincy, landlords and tenants, particularly those appearing *pro se*, work with trained community mediators prior to presenting their cases before the judge on eviction proceedings. On Thursday afternoons, a judge leads drug court, where convicted addicts follow strict treatment regimes under the surveillance of the

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2. Laura Nader, *Moving On – Comprehending Anthropologies of Law*, in *PRACTICING ETHNOGRAPHY IN LAW* 190, 196 (June Starr & Mark Goodale eds., 2002).

3. Marilyn Roberts, *The Changing Face of Justice: The Evolution of Problem Solving*, 29 *FORDHAM URB. L.J.* 1790, 1805 (2002).

4. See Gary Fields, *In Brooklyn Court, A Route Out of Jail For the Mentally Ill*, *WALL ST. J.*, Aug. 21, 2006, at A1.

5. Frank E.A. Sander, *Varieties of Dispute Processing*, 70 *F.R.D.* 79, 130-31 (1976).

6. See *id.* at 128.

court and probation department.<sup>7</sup> There is not a mental health session at Quincy, but Friday mornings do have domestic violence sessions.<sup>8</sup> These innovations in Quincy are largely attributed to a proactive Presiding Justice and the momentum created by the programs he brought to the courthouse in the 1980s and 90s. In New York, citizen groups in Midtown Manhattan and the Red Hook area of Brooklyn<sup>9</sup> launched courts focused on community justice and similar courts have increased in number under initiatives by Chief Judge Judith Kaye.<sup>10</sup> These “problem solving”<sup>11</sup> courts have received the support of the Conference of State Court Administrations, the Conference of Chief Justices, and the American Bar Association.<sup>12</sup>

Yet these problem solving courts may not be the success stories that the official endorsements they have received may imply. Scholars, judges, and administrators have raised questions about the efficacy, cost, and constitutionality of problem solving courts.<sup>13</sup> This

7. For description of the basic aspects of drug courts, see John S. Goldkamp, *Alternative Approaches to Problem Solving*, 29 *FORDHAM URB. L.J.* 1981, 2002 (2002) (“The [major part of the philosophy] is we are dealing with the root causes of crime; in other words, trying to deal with the problems, not the cases, and thinking about crime the hard way, through root causes, and doing this, trying to implement a mix of justice goals, a combination of reparation, rehabilitation, and deterrence – rehabilitating the individual, addressing those problems, repairing the community, making reparation to the community, and there’s a fundamental role for deterrence in problem-solving courts.”).

8. See generally Pamela M. Casey & David B. Rottman, *Problem-Solving Courts: Models and Trends*, 26 *JUST. SYS. J.* 35, 39-43 (2005) (describing domestic violence courts).

9. See Alex Calabrese, *The Impact of Problem Solving on the Lawyer’s Role and Ethics*, 29 *FORDHAM URB. L.J.* 1892-93, 1911-12 (2002). “The on-site services include youth counseling, which includes individual counseling, group counseling, peer pressure counseling, counseling for substance abuse, counseling to discuss truancy issues, and a mentoring program; they have a marijuana group for adults and for teen-agers; family counseling; anger management – I have to literally read it as a list, because I always forget something – drug and alcohol treatment; a batterers’ program; referrals; Safe Horizon, which was formerly Victim Services, is on-site; job training; mediation; child care; and GED classes.” *Id.* at 1913.

10. Judith S. Kaye, *Problem-Solving Courts: Keynote Address*, 29 *FORDHAM URB. L.J.* 1925, 1925 (2002) (“In my opinion, problem-solving courts are by far the most exciting, most promising recent development in the law.”).

11. Drug courts, mental health courts, domestic violence courts, and community justice centers all come under the umbrella of “problem solving courts,” which are described as courts that focus on the “psychosocial” problems that manifest themselves as recurring cases. See Casey & Rottman, *supra* note 8, at 35.

12. Kaye, *supra* note 10, at 1925-26.

13. See, e.g., Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism, and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 *FORDHAM URB. L.J.* 2063 (2002); Morris B. Hoffman, *The Changing Face of Justice: The Evolution of Problem Solving*, 29 *FORDHAM URB. L.J.* 1790, 1795 (2002) [hereinafter Hoffman, *Changing Face*]; Stephen Kurkjian, *Despite Success, Drug*

enthusiasm followed by fervent criticism has come to typify court reform in the United States.<sup>14</sup> In 1906, Roscoe Pound began an address to the American Bar Association by remarking that “[d]issatisfaction with the administration of justice is as old as law.”<sup>15</sup> Fifty years later, he returned to the same theme.<sup>16</sup> Is there a way for individuals planning problem solving courts, or indeed, any court reform projects, to avoid falling into cycles of reform stalled by criticism?

Judges, attorneys, and community members are bringing Alternative Dispute Resolution (ADR) and problem solving innovations to the courts throughout the country in efforts to make their courts more efficient in meeting perceived societal needs. They have come together in conferences and produced publications discussing the benefits and drawbacks of these court reforms. However, there still seems to be no systematic approach to the creation or assessment of court reforms.

Court reformers may have something to learn from Dispute System Design (“DSD”), a field that has evolved as an approach to organizing ADR and other adjudicatory methods in order to create effective systems for dispute resolution.<sup>17</sup> Unlike ADR, DSD “is an intervention to help clients—families, organizations, communities, nations—deal systematically with a continuing stream of disputes

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*Court has Critics: ‘Lifesaver’ Program Imperiled in Boston*, BOSTON GLOBE, Apr. 30, 2007, at B1.

14. Laura Nader paraphrases an assertion in Jerold Auerbach’s *Justice Without Law* as follows: “[A]lternatives arise in almost every generation in an effort to legitimate a legal system that has failed to achieve justice.” LAURA NADER, *THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS* 137 (2002).

15. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, Address Before the American Bar Association (Aug. 29, 1906), in 8 BAYLOR L. REV. 1, 6 (1956).

16. Both the initial speech and the fifty year reflection are reprinted in *id.* at 1.

17. In his piece on good faith rules in mediation, John Lande begins a helpful discussion of the application of DSD principles to a court ADR program. Lande follows Costantino’s model of a DSD process, focusing in particular on the interests of likely interested shareholders. John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002). This piece will attempt a more focused discussion of the implications and process for applying DSD to a court process, although Lande’s piece serves as a useful example of the potential of the application in a specific area. Similarly, a parallel may be seen between discussions of “deep” mediation, which focuses on the underlying issues that have brought a particular case to court and problem-solving courts’ similar focus. See Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 255 (1981) (describing how a “deeper” version of mediation than that conceived for Maine’s small claims court would attack the likely underlying personal issues in an eviction and theft case rather than attempt to parse the facts as to rent and ownership).

rather than a single episode.”<sup>18</sup> By using the DSD process while considering the unique attributes of the state trial courts, in particular the relevant stakeholders and organizational mission, court reforms can be set up to predict and, one hopes, bypass barriers to innovation that have limited the success court reforms in the past. Through DSD, the forum can be designed to fit the fuss.<sup>19</sup>

William L. Ury, Jeanne M. Brett, and Stephen B. Goldberg first articulated the process of DSD in their book, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (1988), where they describe principles they derived from their experiences designing disputing systems for the coal mining industry. The organizational context of DSD has been further discussed by Cathy A. Costantino and Christina Sickles Merchant<sup>20</sup> and Khalil Z. Shariff, among others.<sup>21</sup> Costantino and Merchant, mediators with experience in system design for labor disputes and in the federal government, argue that matching conflict management systems to the organizations that will use them increases the effectiveness of the system. For Costantino and Merchant, effective DSD empowers stakeholders through a facilitative design process that focuses on organizational culture and creates a system that will build organizational self-knowledge while effectively channeling conflict. Shariff applied the institutional design principles laid out in *The Rational Design of International Institutions*<sup>22</sup> to a case study on the 2001 Bonn Agreement in order to assess the merits of these principles as institutional design process for Afghanistan. Shariff’s focus on the institutional concerns of a public institution will be of particular use in this discussion of court program design because public institutions pose a unique constellation of stakeholders and values for system design.

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18. Deborah M. Kolb & Susan S. Silbey, *Enhancing the Capacity of Organizations to Deal with Disputes*, in NEGOTIATION THEORY AND PRACTICE 315, 315 (J. William Breslin & Jeffrey Z. Rubin eds., 1991).

19. See Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

20. CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS 70 (1996).

21. Khalil Z. Shariff, *Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization*, 8 HARV. NEGOT. L. REV. 133 (2003). Although I will focus on these three pieces, those interested in further research into DSD may also consider KARL A. SLAIKEU & RALPH H. HASSON, CONTROLLING THE COSTS OF CONFLICT: HOW TO DESIGN A SYSTEM FOR YOUR ORGANIZATION (1998) and DAVID B. LIPSKY, EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT (2003).

22. Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT’L ORG. 761 (2001).

This Article will use the structures provided by DSD to propose a process and a list of considerations for reform in the state courts. Although this approach will stay at a level of generality that should allow adaptation to specific situations, recent examples and discussion surrounding the innovation of problem solving courts will be used to help illustrate the tensions that exist in court reform efforts. The author hopes that these recent debates will give life to concerns that have plagued efforts at court reform since Pound's day. The article will begin with a "system analysis" of the state trial courts, which includes a suggested process for a DSD project, the likely stakeholders that should be involved in court reform, and the institutional mission of the courts. Next, the article will turn to the obstacles to effective change in the courts, where court reform literature and the opposition to the problem solving courts will highlight where past reforms have failed and where reformers are likely to encounter resistance. The article will conclude with suggestions for a DSD-inspired court reform project, which should be useful for judges, lawyers, ADR practitioners, and members of the community interested in improving state courts.

The aim of the article is to stimulate discussion of how to thoughtfully evaluate state courts and how to plan appropriate changes where they are found necessary. The intent is to prompt further discussion and research into how best to incorporate the strengths of design theory into the fabric of the evolution of our state courts, both individually and systematically. As Frank Sander noted over thirty years ago, "[t]here seems to be little doubt that we are increasingly making greater and greater demands on the courts to resolve disputes that used to be handled by other institutions of society."<sup>23</sup> It is our responsibility to use the "best practices" developed to support and reinvigorate these institutions.

### I. A SYSTEM ANALYSIS OF STATE TRIAL COURTS

The DSD process begins with self-assessment. Ury, Costantino, Merchant, and Shariff, given their professional roots in ADR, construct the DSD process around an ADR-like interest-based analysis.<sup>24</sup> Throughout the process, the interests of individuals, groups of stakeholders, and the courts shape the outcome of the design project.

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23. Sander, *supra* note 5, at 114.

24. Compare WILLIAM L. URY ET AL., *GETTING DISPUTES RESOLVED* 13-19 (1988) (articulating the strengths of the interest-based approach) with ROGER FISHER & WILLIAM URY, *GETTING TO YES* 41-57 (discussing the appropriate situations for each of interest-based, rights-based, and power-based approaches).

This portion of the article will begin with an overview of the process of DSD articulated by various theorists and will then move into a discussion of how the first step of the process, a thorough self-assessment, might work in the state trial courts.

### 1. *The DSD Process*

A seven-step design process emerges from a distillation of the common aspects of the DSD processes discussed by various theorists. Based on the unique strengths of each scholar's work, this process incorporates self-assessment, design, and strategic implementation.

1. *Self-Assessment*: The design process begins by gathering the relevant stakeholders<sup>25</sup> to diagnose the current system. The diagnosis should include a discussion of the disputants, the types of disputes, frequency of disputes, procedures for resolution of disputes, costs, satisfaction with outcomes, and recurrence of disputes.<sup>26</sup> The diagnosis should also include an assessment of the organization itself, its mission, and potential ways for gathering relevant information.<sup>27</sup> An end result of this process should include resolution as to whether there is a problem with the current situation that can be addressed through system design.<sup>28</sup>

2. *Getting Leadership on Board*:<sup>29</sup> Presenting the findings of the self-assessment to the leadership will facilitate the organizational support, both in terms of attitudes and resources, that will give the design the best chance of success.<sup>30</sup> Focusing on the strategic elements of this stage, Costantino and Merchant argue against a dramatic presentation of the self-assessment and favor creating options for incremental change. They suggest that the proposal point out 1) how the revised system will further the organizational mission, 2) the

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25. See, e.g., COSTANTINO & MERCHANT, *supra* note 20, at xv (“[I]nvolved stakeholders are responsible and accountable for the nature and results of the changes they advocate to improve organizational functioning, particularly with regard to the manner in which conflict is handled.”); LAWRENCE E. SUSSKIND & JEFFREY L. CRUIKSHANK, *BREAKING ROBERT’S RULES* 49-50 (2006).

26. URY ET AL., *supra* note 24, at 24-31.

27. COSTANTINO & MERCHANT, *supra* note 20, at 96-111.

28. This can either be a crisis or simply an idea for how to do things better. COSTANTINO & MERCHANT, *supra* note 20, at 70 (discussing concept of a “presenting problem”); URY ET AL., *supra* note 24, at 65-67.

29. Costantino and Merchant highlight the importance of this intermediate step. COSTANTINO & MERCHANT, *supra* note 20, at 111-16.

30. Although they do not set it out as a separate step, Ury et al. recognize the importance of “focusing on key actors.” URY ET AL., *supra* note 24, at 71-72.

benefits for each of the stakeholders, and 3) possible pitfalls and resistance.<sup>31</sup>

3. *Design*: The actual process of design will build on the principles discussed below, such as the interests of stakeholders, the inclusion of appropriate ADR tools, and mindfulness of appropriate scope and depth of the system.<sup>32</sup>

4. *Training and Resources*: Parties must have the skills and resources to use the new system effectively.<sup>33</sup> Broad education programs to inform users about the new system and specific skills-based training programs should be planned as a precursor to implementation.<sup>34</sup>

5. *Implementation*: Implementation may initially take the form of a pilot program. Costantino and Merchant recommend that innovators “[t]hink big, act small,”<sup>35</sup> they are more likely to succeed by moving slowly and anticipating resistance.<sup>36</sup>

6. *Evaluation*: The metrics for evaluation should be built into the initial design of the program so that data are continuously collected and changes can be made as appropriate.<sup>37</sup> This process will create a cycle of clarifying goals, determining methodology, establishing a baseline, implementing the new system, charting progress, modifying the system, measuring results, and re-clarifying goals.<sup>38</sup> Evaluation can also include establishing effective limits for the system.<sup>39</sup>

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31. COSTANTINO & MERCHANT, *supra* note 20, at 112-13.

32. “The essence of institutional design is not about choosing from a portfolio of ADR mechanisms, but is instead a process of identifying the purposes of the institutions and then deciding on such issues as membership, jurisdiction, and decision making processes that are most likely to help achieve those purposes.” Shariff, *supra* note 21, at 139.

33. URY ET AL., *supra* note 24, at 42, 78. See also COSTANTINO & MERCHANT, *supra* note 20, at 134-149 (discussing ADR education and training in greater detail). For the organizing questions to ask in assessing ADR training and education needs, see *id.* at 140-42.

34. COSTANTINO & MERCHANT, *supra* note 20, at 135.

35. *Id.* at 153. For a detailed discussion of concerns and questions to consider in crafting and implementing a pilot program, see *id.* at 152-67.

36. *Id.* at 74.

37. On the need for data collection against which to evaluate DSD theory, see Lisa B. Bingham, *The Next Step: Research on How Dispute System Design Affects Function*, 18 NEGOT. J. 375 (2002) (advocating partnerships with state bar associations to gather baseline data on dispute resolution in courts and increased transparency and publication of results by private dispute resolution organizations).

38. COSTANTINO & MERCHANT, *supra* note 20, at 170.

39. URY ET AL., *supra* note 24, at 80.

7. *Diffusion*: When the evaluation justifies it, a pilot program may be expanded. This decision should be made carefully with consideration for the limits of the program's effectiveness and potential restrictions on funds.<sup>40</sup>

The discussion that follows will focus on different aspects of these steps; however, this introduction should be a useful overview from beginning to end of a design project.

## 2. *Self-Assessment*

In the DSD process, system design begins with a thorough organizational self-assessment. This is a marked change from the sort of gradual change or *ad hoc* program innovation that typifies court reform.<sup>41</sup> As Costantino and Merchant note, “[d]uring the assessment, critical answers about organizational mission and culture are uncovered, and sources of organizational power are identified, allowing for the development of a design that is congruent with and tailored to the specific organization and its stakeholders.”<sup>42</sup> By including all relevant stakeholders and identifying the organizational mission, state courts can create a self-assessment that will guide the design process.<sup>43</sup>

Including relevant stakeholders is a primary principle for DSD in order to both ensure that the design meets the needs of those who will use it and to increase stakeholder buy-in.<sup>44</sup> As Ury notes, “[a] disputant’s satisfaction depends largely on how much the resolution fulfills the interests that led her to make or reject the claim in the first place.”<sup>45</sup> Costantino and Merchant argue that “there has to be something in [interest-based design] for all the stakeholders—for the

40. *See id.* at 82.

41. For example, Malcolm M. Feeley describes a process of discovery and rediscovery in his assessment of bail reform, which went through waves of intense interest, reform, and lapsed interest. MALCOLM M. FEELEY, COURT REFORM ON TRIAL 42-44 (1983).

42. COSTANTINO & MERCHANT, *supra* note 20, at 96-97.

43. Costantino and Merchant also include an assessment of the organization’s “culture of conflict,” i.e., “how the organization views conflict and how it makes decisions about conflict.” *Id.* at 98. Because this Paper discusses the court’s role as a dispute organizer and not the disputes that occur among personnel in the judiciary, I omit this step here.

44. *See, e.g.*, COSTANTINO & MERCHANT, *supra* note 20, at xv (“[I]nvolved stakeholders are responsible and accountable for the nature and results of the changes they advocate to improve organizational functioning, particularly with regard to the manner in which conflict is handled.”); URY ET AL., *supra* note 24, at 69 (noting that possibilities include “establishing a design committee, engaging in shuttle mediation, and persuading key decision makers or opinion leaders”) (footnote omitted).

45. URY ET AL., *supra* note 24, at 11.

organization itself, for leadership, for employees, for customers, for disputants;" stakeholders must be able to answer the question "what's in it for me?"<sup>46</sup> By focusing on interests in the design process, DSD theorists have drawn on a perceived strength of ADR to increase efficiency in the system by uncovering hidden problems, identifying the issues of greatest concern, and ultimately leading to higher mutual satisfaction.<sup>47</sup> Selection of "relevant stakeholders" requires careful consideration of the people likely to be affected by the design project.<sup>48</sup> In order to gather the relevant stakeholders for court reform, we must look both at regular court users—attorneys, ADR practitioners, judges, court staff, and litigants—and court watchers—the state legislature and governor and the general public.

The following section identifies the interests these stakeholders are likely to hold towards the courts. The discussion relies on arguments made by those representing these interests and is supplemented by an analysis of the benefits different parties obtain from the court system on the theory that they will object to any reform that jeopardizes their perceived entitlement to these benefits. Without dwelling too long on interests that may seem intuitive to readers familiar with the courts, I will briefly describe these interests because they will serve as an important introduction and foundation to the players and values that will likely emerge in the self-assessment process. A design process would customize these parties and supplement the interests articulated to fit the unique situation involved.

Attorneys and judges share an interest in the maintenance of the "values" of the current legal system as well as concerns involving their roles as legal professionals. The legal system values include procedural and substantive due process, the value of precedent as a guarantor of equal treatment, and an accommodation in results between logical rigor<sup>49</sup> and perceived justice in outcomes. Both groups view themselves as trained professionals bound by ethical rules<sup>50</sup> who perform complicated work that must be given appropriate time

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46. COSTANTINO & MERCHANT, *supra* note 20, at 97.

47. See URY ET AL., *supra* note 24, at 13-15; FISHER & URY, *supra* note 24, at 41-57.

48. SUSSKIND & CRUIKSHANK, *supra* note 25, at 23.

49. See generally Lande, *supra* note 17, at 120-21.

50. For discussion on lawyers, see Susan Hendricks, *The Impact of Problem Solving on the Lawyer's Role and Ethics*, 29 FORDHAM URB. L.J. 1892, 1922 (2002); for judges, see Wayne D. Brazil, *Court ADR 25 Years After Pound: Have We Found a Better Way?*, 18 OHIO ST. J. ON DISP. RESOL. 93, 132 (2002).

for completion.<sup>51</sup> Attorneys will want to ensure that changes in procedure do not disadvantage their clients,<sup>52</sup> a concern frequently voiced by defense lawyers in particular.<sup>53</sup> Attorneys in private practice will likely also focus on the importance of creating a steady stream of business and how compensation compares to their expectations.<sup>54</sup> Judges and government lawyers will not want to negatively impact the prestige of their positions or the satisfaction they receive from public service.<sup>55</sup>

ADR practitioners, like attorneys, want to maintain the integrity of their field<sup>56</sup> while expanding the forums for ADR.<sup>57</sup> Consequently, they may see certain court reform efforts as reducing the available funds and “energy for reform” that could otherwise be used for ADR.

Court staff in many ways share the interests of the judges they work with. They want cases to move smoothly through the system, for “justice” to be served, and for the perceived value of their work to continue. Additionally, many members of the court staff may be reluctant to suggest or make changes in court procedures that would require additional training or upset settled practice. To a certain extent these concerns will affect all court stakeholders. Preferably,

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51. Hendricks, *supra* note 50, at 1919. For judges, see Brazil, *supra* note 50, at 129-31; *see also* Lande, *supra* note 17, at 124.

52. For instance, Lisa Schreibersdorf notes:

It is very important to us that our clients who go into a Treatment Court, or DTAP, any program that involves treatment, that they be treated consistently and fairly and that the procedures are basically codified in some way so that when the participants who are setting up the court are no longer involved, that all those rules and regulations and policies and procedures are written down and can be followed by other people. . . . The court should continue even when all of us are no longer here. . . . The other things that are very important are that the clients are fully aware of what is expected of them and that they are fully apprized of what they are expected to do.

Lisa Schreibersdorf, *The Birth of A Problem-Solving Court*, 29 FORDHAM URB. L.J. 1758, 1774 (2002).

53. For more on ethical questions for defense attorneys, see Hendricks, *supra* note 50, at 1919-21. For more on defense counsel interests, see Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73 (1995).

54. Schreibersdorf, *supra* note 52, at 1776.

55. GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 97-130 (2005) (quoting judges who describe their work on problem-solving courts, for example, “in many ways I was able, with complete fidelity to all my principles, to do a better job of being a judge in that context than I ever was doing anything else.” *Id.* at 97).

56. Brazil, *supra* note 50, at 135-41.

57. Lande, *supra* 17, at 125.

court staff would consider instituting procedures that are easy to understand and follow as a way to meet their interests because generally they are the ones that come face-to-face with litigants at the beginning stages of the legal process, when the litigants are likely most emotional, confused, and in need of direction. Further, it is likely that litigants share the court staff's interest in cost effective and "just" outcomes.<sup>58</sup> Litigants want to be treated respectfully during what is almost always a difficult time in their lives. Research indicates that litigants who feel that they have been treated fairly are more supportive of the court system, even if they do not receive their favored outcome.<sup>59</sup>

For non-regular court users, the perception of procedural and substantive justice is an overriding interest in the court system. It is not uncommon for politicians to give considerable attention to crime rates and recidivism figures given that many political careers have begun in District Attorneys' offices. Both the executive, in appointing judges and setting agendas, and the legislature, through the passage of statutes, committee hearings, and public commentary have interests in the court system and how crime or other perceived harms to society are handled.

Like their elected officials, members of the public want courts that seem to be addressing the problems of their communities. At the same time, members of the public want these courts to be procedurally and substantively "fair."<sup>60</sup>

Recent scholarship in restorative justice and the psychological effects of crime has highlighted the importance of the general public's involvement in the administration of justice. A pragmatic outlook

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58. See Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847 (1998); Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 362 (2001) [hereinafter Tyler, *Trust and Law Abidingness*]. Magistrate Judge Wayne Brazil cites a survey conducted by the Federal Judicial Center which indicated that litigants in the Northern District of California in the late 1980s felt that judges were fairer than other adjudicators (such as arbitration or mediation), but for best value overall of cost, fairness, and time, they chose arbitration. Survey reported in Barbara Meierhoefer & Carroll Seron, *Federal Judicial Center, Court-Annexed Arbitration in the Northern District of California* (1988), cited in Brazil, *supra* note 50, at 96-97.

59. Tyler, *Trust and Law Abidingness*, *supra* note 58, at 367-68 (discussing the "myth of self interest").

60. See, e.g., Mark R. Arnold, *Will citizens change the judicial process?*, 60 JUDICATURE 68, 69 (1976) (describing the efforts of court watchers who monitored courtrooms in Roxbury District Court, Massachusetts, to record instances of potential violation of constitutional rights and procedural norms).

suggests that community support is essential for funding and implementation of court reforms. Restorative justice, which focuses on acknowledging and repairing harms to the community, has brought community members into adjudication in more interactive ways than jury duty.<sup>61</sup> The work of social psychologist Tom R. Tyler has also placed increased emphasis on the importance of community perceptions of the court system. Tyler discusses the importance of the community's perception of how well the courts are engaging in procedural justice and how that perception affects the public's law-abidingness and confidence in the court system.<sup>62</sup> The public will often be paying for innovative court programs through their taxes and may be involved in lending community resources such as volunteers and local funding to court efforts.<sup>63</sup> Their participation in the planning will help secure "buy-in" and continued support.

While including the public is important, dispute system designers must be sensitive to including members of various stakeholder groups from "the public." The experience of the Midtown Community Court is illustrative. That court's planners focused on community concerns about "quality of life" problems, such as pick-pocketing, prostitution, and drug use; however, critics later argued that the court was co-opted by small business interests at the expense of the

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61. For further discussion of the role of the community in restorative justice, see, for example Gordon Bazemore & Mara Schiff, *Introduction, in RESTORATIVE COMMUNITY JUSTICE: REPAIRING HARM AND TRANSFORMING COMMUNITIES* 1-4 (Gordon Bazemore & Mara Schiff eds., 2001). A vivid example of a community-based restorative justice program is the Sentencing Circle in Concord, Massachusetts, where trained community members facilitate discussion between juveniles and the victims of their offenses, culminating in the determination of a sanction that will address the harm caused by the juveniles.

62. See Tyler, *Trust and Law Abidingness*, *supra* note 58, at 362 ("I propose and defend empirically the value of a different model, the proactive model of social regulation, that is based upon encouraging and maintaining public trust in the character and motives of legal authorities. The public trust in the police and the courts that is central to this model is sustained by process based policing and process oriented problem solving by the courts. Process is the key issue in each case because public trust in these legal authorities is encouraged only when they make their decisions through procedures that members of the public view as fair.").

63. DAVID ROTTMAN ET AL., *A GUIDE TO COURT AND COMMUNITY COLLABORATION* 2 (1998). Rottman and his co-authors provide a detailed discussion of the various mode through which courts interact with their surrounding communities. See also Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J.L. & POL'Y 63, 65 (2002) ("While drug courts offer drug treatment to offenders, community courts either mandate or provide access to job training, health care, and other social services. The courts routinely have at least one component that allows interaction between sectors of the community and the court. The form of community participation ranges from presence on advisory boards and impact panels to occasional opportunities to voice concerns through town hall meetings.").

former residents of Midtown Manhattan. While it may not be possible or cost-effective to represent every aspect of the community, a designer should, as part of the self-assessment, identify the groups or individuals in the relevant community who should be included.<sup>64</sup>

With these interests in mind, we can identify the following stakeholders and their interests:

Court reformers seem to be cognizant of how important it is to include stakeholders in order to ensure the success of abrupt programmatic change. Manhattan's Midtown Community Court<sup>65</sup> and the multi-door courthouse in Washington, D.C.,<sup>66</sup> both consciously tried to incorporate the views of stakeholders in their reform planning process. At the *Fordham Urban Law Journal's* conference on problem solving courts, participants discussed stakeholder involvement. Lisa Schreibersdorf from the Brooklyn Public Defenders noted that:

[T]he thing I think is most important [. . .] is to understand that everybody has a unique role to play in forming these problem-solving courts, and no court can succeed without the participation of all the important players, and many lesser important but also important players, but particularly the prosecution and the defense.<sup>67</sup>

Charles Grau's work on the failures of past attempts at court reform support this argument. Where designs for reform do not take into account interests of various stakeholders, the success of "planned change" in the courts will likely be limited.<sup>68</sup>

After assembling the stakeholders, the self-assessment should focus on the organization's mission.<sup>69</sup> For state courts, the judicial

64. SUSSKIND & CRUIKSHANK, *supra* note 25, at 23-24.

65. Schreibersdorf, *supra* note 52, at 1786.

66. The planning of this court involved the participation of judges, bar leaders, the D.C. Corporate Counsel, and the U.S. Attorney's office. URY ET AL., *supra* note 24, at 71.

67. Schreibersdorf, *supra* note 52, at 1771.

68. See Charles W. Grau, *The Limits of Planned Change in Courts*, 6 JUST. SYS. J. 84, 96 (1981) ("At both the organizational and systemic levels, webs of interest and power provided significant limits to planned change efforts in Tacoma and Austin. At the organizational level, planned changes in Tacoma threatened to decrease the control subordinates had exercised over their work, to increase the amount of work they performed, and to eliminate the basic nature of their work – counseling. At the systemic level, the planned sentencing reform in Austin threatened prosecutorial hegemony over sentencing, which was reinforced by the interests of the court in maintaining fine revenue, of the judges in promoting career advancement, of the bar in protecting the sentence and plea negotiation process and minimizing clients' sentences, and of the probation department in maintaining the flow of revenue from its caseload.").

69. COSTANTINO & MERCHANT, *supra* note 20, at 48.

| <b>STAKEHOLDER INTERESTS RELEVANT FOR COURT REFORM</b>             |   |
|--|---|
| <i>Stakeholder</i>   | <i>Interest</i>   |
| <b>Regular Court Users</b>   |   |
| Attorneys:<br>· Prosecutors<br>· Defenders<br>· Private<br>· Local | · legal system values:<br>o due process<br>o adherence to precedent<br>· professional concerns:<br>o income<br>o ethics<br>o expertise<br>o clients' legal position |
| Judges   | · legal system values<br>· professional concerns:<br>o reputation for integrity<br>o docket management<br>o "justice"/public service                                |
| ADR practitioners  | · spread of ADR<br>· purity of ADR  |
| Court staff  | · legal system values<br>· ease of administration<br>· uncertainty about change (potential)   |
| Litigants  | · efficiency: cost to "fairness" ratio<br>· opportunity to voice concerns<br>· independence<br>· respectful treatment   |
| <b>Court Watchers</b>  |   |
| State government:<br>· legislators<br>· executive                  | · public perceptions of court system<br>· crime rates<br>· recidivism rates<br>· budget   |
| Public:<br>· groups within the community<br>· public generally     | · perception of fairness<br>· crime rates<br>· recidivism rates   |

mission is the resolution of cases promptly, justly, and in accordance with the laws.<sup>70</sup> This mission includes both procedural and substantive “justice,” as well as pragmatic concerns about budget efficiency. Each aspect is essential to achieving the court’s mission.

In order to obtain the support of the citizenry, courts must have procedures that are perceived to be accessible and universally applied. The mission behind court procedures includes equal opportunity to present one’s case to a neutral adjudicator. Perceptions of how well the court effectuates procedural justice will depend on whether disputants feel they had an actual opportunity to “present their views, concerns, and evidence to a third party” who truly considered their position and treated them with dignity.

Tom Tyler has studied people’s perceptions of the courts through the lens of procedural justice:

[the] literature [on procedural justice] demonstrates that people’s reactions to their personal experiences with social authorities are rooted in their evaluations of the fairness of the procedures that those authorities use to exercise their authority.<sup>71</sup>

In other words, disputant control over the presentation and the dignity of the process itself are important.<sup>72</sup> Focusing on procedural justice may involve more than following the state codes of civil and criminal procedure and may also require thoughtful examination of their underlying values.

Underlying the emphasis on procedural justice may also be the idea that substantively just outcomes will emerge through procedures that give each party equal opportunity. The concern is that outcomes that systematically privilege based on wealth, education,

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70. See, e.g., MASS. CONST. art. XI. (“Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.”). The New York State Unified Court System announces on its website that “The mission of the Unified Court System is to promote the rule of law and to serve the public by providing just and timely resolution of all matters before the courts.” New York State Unified Court System, <http://www.courts.state.ny.us/courts> (last visited on Apr. 14, 2008).

71. Tyler, *Trust and Law Abidingness*, *supra* note 58, at 367.

72. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got to Do with It?* 79 WASH. U. L.Q. 787 (2001), quoted in Lande, *supra* note 17, at 119. See also Tyler, *Trust and Law Abidingness*, *supra* note 58, at 368 (“If authorities use fair procedures, their motives are judged to be more trustworthy.”); URY ET AL., *supra* note 24, at 12.

gender, race, profession, social class, or other non-objective criteria.<sup>73</sup> There is also concern about the outcomes that just “feel wrong.”<sup>74</sup> The substantive outcome of cases must seem “fair” in order for courts to succeed. There is evidence that state trial courts are currently not meeting these aspirations of fairness.<sup>75</sup> Although substantive justice eludes concrete formulation because it relies on personal value judgments, court reformers should include it in their tabulation of court values. Demoralization of court personnel and skepticism of court watchers would likely sink any reform that failed to produce outcomes that were, on average, substantively in line with dominant values of justice.

These ideals must be achieved in a cost-effective and timely manner. State courts handled approximately 100 million cases in 2004.<sup>76</sup> State governments are able to allocate limited funds to the judiciary, and these allocations must cover not only the salaries of those guiding the judicial process, but also must ensure the infrastructure that supports this system. Judges and court administrators live at the mercy of legislative and executive assessments of realistic budgets for the judiciary.<sup>77</sup>

The self-assessment process should guide designers in assembling the relevant stakeholders, surveying their goals and concerns about the courts, and then framing the interests within the mission and culture of the court organization. The DSD process as discussed so far has focused on the aspirational aspects of the design by considering the interests of the stakeholders and the institution. However, the history of court reform confirms DSD’s sensitivity to the strategic

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73. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974); Carrie Menkel-Meadow, *Do the “Haves” Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999).

74. During my court observation in local Massachusetts courts, I have heard at least one judge remark that he was relieved and satisfied that a case given to a jury or adjudicated by another judge “came out right.” Court officers observing sessions have also expressed this concern.

75. See DAVID B. ROTTMAN & RANDALL M. HANSEN, MEETING THE JUSTICE NEEDS OF A MULTICULTURAL SOCIETY, ATLANTA: HOW RECENT COURT USERS VIEW THE STATE COURTS: PERCEPTIONS OF WHITES, AFRICAN-AMERICANS, AND LATINOS, 2-3 (2000), [http://www.flcourts.org/gen\\_public/family/diversity/bin/perceptions2.pdf](http://www.flcourts.org/gen_public/family/diversity/bin/perceptions2.pdf).

76. LAFOUNTAIN ET AL., NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 11 (2006), [http://www.ncsconline.org/D\\_Research/csp/2006\\_files/EWSC-2007 WholeDocument.pdf](http://www.ncsconline.org/D_Research/csp/2006_files/EWSC-2007 WholeDocument.pdf)

77. See, e.g., *Court Officials Blast Patrick’s Budget Cuts*, BOSTON GLOBE, Mar. 14, 2007, at 2B, available at [http://www.boston.com/news/local/massachusetts/articles/2007/03/14/court\\_officials\\_blast\\_patricks\\_budget\\_cuts](http://www.boston.com/news/local/massachusetts/articles/2007/03/14/court_officials_blast_patricks_budget_cuts).

aspects of system design. In order for a reform to succeed, the design must anticipate and plan to overcome obstacles to change.

## II. BARRIERS TO PLANNED CHANGE IN THE COURTS

By bringing together the interested parties and placing the focus on their own concerns and the concerns of the institution, DSD provides a process that is likely to anticipate potential barriers to reform early in the design process. This gives reformers as much flexibility as possible to plan strategically and encourage prudent interest-swaps among the parties in order to secure buy-in.

This Part will first examine some of the short term barriers to the effective implementation of court reform by examining the potential exploitation of the design process, problems in maintaining enthusiasm after implementation, and the difficulty of isolating appropriate means for evaluation. Designers should be aware of these barriers and how the strategic outlook of the DSD process should ease these difficulties.

### 1. *Short Term Challenges: Gaming, the End of Newness, and Evaluation*

Strategic planning during the design process can alleviate some of the burdens that often stifle court reform. Sociologist Malcolm Feeley through his study of the limited successes of bail reform, diversion programs, sentencing reform, and speedy trial provisions has found that the “gaming” of new rules by attorneys and waning enthusiasm for a reform after implementation can prevent reforms from achieving their potential.<sup>78</sup> By using DSD’s design strategies to get stakeholder input and to implement the design in a strategic and thoughtful manner, court reformers should be able to secure more investment in projects that will continue through meaningful evaluation and feedback.

Past court reform efforts can be characterized by failure to consider both stakeholder motivation and the results of change beyond the immediate reform itself. Concerns that the traditional legal system obfuscates procedures and allows strategic exploitation by attorneys are supported by Feeley’s observation that “delay will always be used strategically by attorneys, and . . . any new rules or provisions will also be put to strategic use.”<sup>79</sup> Non-lawyers may also “game” a

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78. See FEELEY, *supra* note 41.

79. *Id.* at 187. For example, defense attorneys will find strategic uses for speedy trial rules. “Setting time limits . . . establishes hurdles through which attorneys

system with incorrectly set incentives. Diversion programs in the 1970s designed to give those facing criminal charges access to drug treatment or job training or placement in lieu of prison time failed to attract participants because many felt that their charges would likely be dropped and therefore saw no benefit in being constrained by the monitoring incorporated in the programs or they “preferred to plead guilty and ‘get it over with’ quickly.”<sup>80</sup> Recent critiques of drug courts reflect similar concerns.<sup>81</sup> Our initial discussion of attorney interests in their professional competence and financial well-being should predict this outcome: new rules and new potential outcomes in the drug courts threaten attorneys’ understanding of their role in the legal system. This antagonism can likely be overcome through early inclusion of key players, like attorneys, in the system design. Shariff suggests that through a proliferation of discussions among institutional members, parties will develop creative options by building a variety of relationships that will enable them to more fully understand the various interests and issues in a system.<sup>82</sup> Participation in the design by representatives from all relevant interest groups should alleviate gaming problems by airing the potential uses of changes in rules or procedures. This should secure attorney buy-in to the process and lessen any incentives to subvert intended reforms.<sup>83</sup>

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must jump but does nothing to alter their incentives to delay. And threatening dismissal for non-compliance may even enhance the use of delay as a strategy since as a group it is defense attorneys who have the most to gain through prolonging their cases.” *Id.* at 183. Although there is no short supply of sources indicating that “if you build it, attorneys will ‘game it,’” John Lande provides a helpful broad discussion. Lande, *supra* note 17, at 122-23.

80. FEELEY, *supra* note 41, at 89.

81. See, e.g., Thompson, *supra* note 63, at 74 (“Participants may gain the benefit of treatment and eventual dismissal of their charges, but, in exchange, they must agree to a much longer involvement with the criminal justice system. During this period of supervision, their activities are scrutinized and they can expect close supervision, whereas in the traditional proceeding, they might have faced fewer controls on their behavior.”).

82. See Shariff, *supra* note 21, at 151 (discussing the diffuse conversations that should occur in the design process).

83. Judge Alex Calabrese makes this argument with respect to problem solving courts: Often when you are considering offering certain programs, you can sit down with the District Attorney’s Office, with the defense lawyers, and say, “This is what we are going to want to do,” and what the defense lawyers will do is advocate for fair sanctions, if there are going to be sanctions; advocate for realistic and proper mandates and then realistic and proper sanctions for failure of the program. So they have a voice not only in the day-to-day operations in the courtroom, but also in planning, and that protects their clients down the road.

Calabrese, *supra* note 9, at 1915.

Feeley voices concern about reforms that are premised on addressing a “crisis” and then fail to maintain steady support and follow-through;<sup>84</sup> this problem should also be remedied by inclusion of stakeholders followed by the strategic implementation of the reform. Feeley notes the temptation of bold “crusades,” which are more effective for mobilization than nuanced approaches, but cautions that “while a crusade may be successful in mobilizing support, it must of necessity overstate the problem and oversimplify the remedy.”<sup>85</sup> Again discussion with stakeholders should flesh out the intricacies of the system and the problems involved by encouraging all points of view. The graduated implementation process suggested by Costantino and Merchant should also both avoid a sense of panacea and protect against innovation fatigue. By breaking development and implementation into small, strategic stages, continuing evaluation and modification of the plan should keep stakeholders involved while reminding them that there is always more to be done.

Indeed, the evaluation itself proves difficult, which suggests that there are challenges that are not addressed directly by DSD theory. Court innovation programs should be mindful to include opportunities for ongoing feedback<sup>86</sup> and opportunities for evaluation *throughout* the program’s life,<sup>87</sup> both to ensure participant buy-in and the appearance of democratic legitimacy. The design challenges of effective evaluation are two fold; motivating thoughtful evaluation and choosing appropriate metrics.

In the field of court reform, Feeley notes that proponents, once they have secured funding, may have little interest in evaluation. They are people who already believe in the program and getting the program up and running must be their priority. Once the program is started, however, they may be reluctant to open the door to potential

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84. See FEELEY, *supra* note 41, at 192.

85. *Id.* at 193.

86. Douglas K. Somerlot & Barry Mahoney, *What are the Lessons of Civil Justice Reform? Rethinking Brookings, the CJRA, RAND, and State Initiatives*, JUDGES’ J., Spring 1998, at 4, 61 (“Continuing communication among and between the advisory groups, the court and staff, and the California Judicial Council was valuable in fine-tuning the programs when needed, in building and maintaining momentum, and in recognizing those who were working to achieve the goals of the programs.”).

87. Feeley notes that “Hawthorne effect [of increased productivity in initial periods of innovation as a result not of the innovation but of the increased attention paid to the study] is at least as applicable to the criminal courts as it is to industry. The result is premature judgment about impact and inadequate attention to problems of institutionalization.” FEELEY, *supra* note 41, at 200.

bad news. Sources of funding also may not want to see that their efforts have failed.<sup>88</sup> Similar observations have already surfaced about the literature on community and problem-solving courts, which tends to be funded and written by reform proponents.<sup>89</sup>

The DSD theorists provide a range of approaches for determining appropriate evaluation metrics. Ury and his co-authors use a broad measure of increased efficiency as the goal for a dispute resolution system. They evaluate the success of a system based on its capacity to reduce transaction costs,<sup>90</sup> increase satisfaction with outcomes,<sup>91</sup> ameliorate or at least preserve relationships,<sup>92</sup> and decrease recurrence of disputes.<sup>93</sup> These aspirations organize the design into a progression of ADR tools with increasing costs, from low-cost mediation and negotiation to, if necessary, a full adjudicative process, with possibilities to “loop-back” to negotiation at various points.<sup>94</sup> Costantino and Merchant’s principles are similar but reflect more attention to organizational culture and stakeholder self-determination by including the need to consider “preventive methods of ADR” and giving “maximum control” to disputants whenever possible.<sup>95</sup> Shariff

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88. *Id.* at 202.

89. *See, e.g.*, Thompson, *supra* note 63, at 63-64 (2002) (“Whereas drug courts have been analyzed and evaluated from a variety of perspectives, a review of the articles addressing community courts reveals a particular slant: They tend to be written by drug court judges, administrators or designers, and thus are usually highly laudatory.”).

90. “All dispute resolution procedures carry transaction costs: the time, money, and emotional energy expended in disputing; the resources consumed and destroyed; and the opportunities lost.” URY ET AL., *supra* note 24, at 11.

91. “A disputant’s satisfaction depends largely on how much the resolution fulfills the interests that led her to make or reject the claim in the first place.” *Id.* Perceived “fairness” of the resolution *and* the dispute resolution procedure also likely influence satisfaction. Ury points to opportunity to express oneself, control over shaping and then accepting/rejecting final resolution, and behavior of any third parties as factors in a user’s perception of fairness. *Id.* at 12.

92. *Id.*

93. *Id.* (discussing the importance of “whether a particular approach produces durable resolutions”).

94. *Id.* at 52, 62 (“loop-backs”). A table ranking these is in text. *But see id.* at 63 (“Adding a procedure may lead disputants to treat earlier steps as pro forma” and ease of increase in costs may lead to escalation).

95. Costantino and Merchant’s six principles are: 1) Develop guidelines for whether ADR is appropriate; 2) Tailor the ADR process to the particular problem; 3) Build in preventive methods of ADR; 4) Make sure that disputants have the necessary knowledge and skill to choose and use ADR; 5) Create ADR systems that are simply to use and easy to access and that resolve disputes early, at the lowest organizational level, with the least bureaucracy; 6) Allow disputants to retain maximum control over choice of ADR method and selection of neutral whenever possible. COSTANTINO &

provides the most flexible framework by setting the measure for a design by the fit between objectives and results.<sup>96</sup>

Focus on organizational culture and objectives as a benchmark for evaluation proves to be less helpful here because the courts themselves are unsure about how to measure success. The question of evaluation, and consequently mission, for court programs has not found a clear answer in the century of court reform since Pound's ABA presentation. Judge Wayne D. Brazil notes the lack of empirical evaluations on the utility of ADR,<sup>97</sup> and Professor Sander and his colleagues are now working on the development of a "receptivity index" to see where mediation has spread and speculate on why.<sup>98</sup> Problem-solving court advocates and critics frequently call for more and better evaluation yet are in disagreement about what should be measured and how. Some studies have focused on the sorts of efficiency metrics advocated by Ury and his co-authors, including costs,<sup>99</sup> recidivism,<sup>100</sup> and retention rates in treatment programs.<sup>101</sup>

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MERCHANT, *supra* note 20, at 121. Principles 1) and 2) share Ury and Shariff's concerns about applying ADR uniformly and/or inappropriately. 4) Highlights the general need for training and education that we have discussed as a process principle. 5) appears to be an adoption of Ury's scheme for low-to-high cost procedures with multiple entry points.

96. Shariff, *supra* note 21, at 139. This flexibility has allowed us to incorporate many of Shariff's principles into our discussions of process design for courts, including provisions for appropriate scope and jurisdiction, regular review, and diffuse deliberation. *See id.* at 157.

97. Brazil, *supra* note 50, at 118-19.

98. Frank E.A. Sander, *Developing the MRI (Mediation Receptivity Index)*, 22 OHIO ST. J. DISP. RESOL. 599 (2007).

99. *See, e.g.,* Anne Swern, *The Birth of a Problem-Solving Court*, 29 FORDHAM URB. L.J. 1758, 1765-66 ("At the time, I don't think he realized, although it has been proven true, that the equal amount of time spent in a drug treatment facility as compared to, say, prison is far, far cheaper and far, far more effective. . . . basically our graduates represent about \$22 million of cost savings, DTAP graduates. We have almost 600 of them. The cost savings is, by and large, corrections cost savings because, as everybody in this audience I hope knows, it costs \$69,000 a year to house an inmate in Rikers Island for a year, and then thereafter it costs about \$34,000 to house an inmate upstate. So those two years of City and State corrections time amounts to almost \$80,000—coupled with the cost of recidivism, the cost of health care, the cost of public assistance, and the contribution of workers who are paying taxes, amounts to almost \$22 million for our graduates.").

100. *Id.* at 1768. "Basically, at three years out, it was 48 percent of those who went to state prison for two years were arrested for any offense, as compared to 23 percent arrested for any offense who had been graduated from DTAP. We just got the five-year recidivism, and it's 56 percent versus 30 percent." *But see* Hoffman, *Changing Face*, *supra* note 13, at 1798 ("The people who went into Drug Court had a one-year re-arrest recidivism rate of fifty-three percent, compared to the one-year recidivism rate of traditional drug defendants of fifty-eight percent. That five percent difference was within the margin of error of that study. . ."). Even the seemingly straight-forward efficiency measures run into difficulties at the limits of our understanding of

The Report of the “Monan Commission”<sup>102</sup> on the management of the Massachusetts courts builds on the efficiency metric by applying a “corporate-like”<sup>103</sup> strategic analysis to the functioning of the state court system, leading it to call for an identification of leadership, benchmarks and performance goals not only for employees but also for courthouses. While these numbers may be appealing, especially to outside evaluators like legislators, they do not capture the entirety of expectations for the courts.<sup>104</sup> Judge Alex Calabrese from Red Hook summarizes the problem: “Unfortunately, it is difficult to evaluate the Red Hook Community Justice Center. I say, “You know, if you were there every day, you know it is a success.””<sup>105</sup> Tyler’s discussion of the importance not only of effectiveness but of its perception<sup>106</sup> suggests that both of these measures—efficiency and the more ephemeral “feeling” of success—will be part of the appropriate measure.

Combining these aspects of court success returns us to the mission of the court discussed in Part I. Roselle R. Wissler, in her

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addiction and mental health treatment. See, Michael Rempel, *What Works and What Does Not*, 29 FORDHAM URB. L.J. 1930, 1931 (2002) (“Immediately you see that the recovery process tends to involve extensive relapses. And for any type of problem-solving court, that in turn raises the question of second chances: How many second chances are appropriate for the population you’re working with? Are there types of third or fourth chances that are appropriate?”).

101. “[T]he retention rate for those facing the stiffest sentences is the best. For example, DTAP offenders are retained at one year at eighty percent. Now, if you look at voluntary admissions to drug treatment, in the early days—in 1973, one of the first studies was done—thirteen percent of the people after a year remained in treatment after that year.” Swern, *supra* note 99, at 1787.

102. J. DONALD MONAN ET AL., THE VISITING COMMITTEE ON MANAGEMENT IN THE COURTS, REPORT TO CHIEF JUSTICE MARSHALL (Mar. 2003), <http://www.commoncause.org/atf/cf/{FB3C17E2-CDD1-4DF6-92BE-BD4429893665}/monan%20report.pdf>. [hereinafter MONAN COMMISSION]. The commission is known as the “Monan Commission” after its chair Father J. Donald Monan. I would like to thank Judge John Cratsley for drawing my attention to the role of this report in the Massachusetts judiciary.

103. Managerial vocabulary also appears in evaluations of the problem solving courts. “Indeed, much of the language of benchmarking, collaborative program design, and teamwork that we see in the drug courts is drawn from experience in the corporate sector.” Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 865 (2000).

104. Writing in the context of court-connected ADR, Judge Brazil argues that an evaluation should allow all benefits to be measured, not just efficiency, despite pressure from legislatures or judges with that mindset. Brazil, *supra* note 50, at 121-23.

105. Alex Calabrese, *Question and Answer*, 29 FORDHAM URB. L.J. 1923, 1923-24 (2002).

106. Tyler, *Trust and Law Abidingness*, *supra* note 58, at 361.

impressive review of dispute resolutions system effectiveness,<sup>107</sup> notes three groupings for the most common criteria suggested for the effective evaluation of these systems:

- 1) Quality of Proceedings: including measures of procedural fairness, opportunities for party participation and outcome determination, procedural thoroughness, [neutral] impartiality and respectfulness, and lack of pressure to settle;
- 2) Quality of Outcomes: including fairness of agreement, comprehensiveness and finality of the resolution of the dispute, impact of resolution and process on participants, interested third parties, and the community; and
- 3) Efficiency of Proceedings: including time and cost for parties and dispute resolution staff.<sup>108</sup>

Although these categories were developed with mediation in mind, they thoroughly document the angles of analysis raised by all of the DSD theorists discussed above, as well as the aspects of “mission” identified earlier. By integrating Tyler’s insights into the importance of “public” or community perception, we arrive at the first two columns of the figure below, which illustrates the aspects of success against which reform should be evaluated.<sup>109</sup>

While the chart above combines the interests of the parties and what seems to be the mission of the court, it does not feature some of the hallmarks of the judiciary as we may know it. The focus on interests of the stakeholders has caused many to temporarily overlook the law itself. By focusing on individual and institutional interests throughout the design process, it can be assumed that all those involved will represent the various and competing interests with all of their subtleties and internal conflicts. In order for court reform to succeed, the result must match people’s expectations of due process, which includes adherence to law. How should courts deal with the

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107. For the scope of her research, 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, 658 n. 66 (2001).

108. *Id.* at 658-59.

109. This approach is advocated by Judge Brazil, who argues for the importance of evaluating court-connected ADR according to both objective and subjective perceptions of whether the program has improved the administration of justice. Brazil, *supra* note 50, at 99. *But see* Richard C. Reuben, *The Democratic Legitimacy of Government-Related Dispute Resolution*, DISP. RESOL. MAG., Winter 2006, at 23, 25 (“In my view, democratic theory would suggest the answers to these fundamental dilemmas [involving democracy, due process, and consistency] again may be ascertained by reference to the autonomy value- that is, the capacity for mediation to foster true and meaningful autonomy for the parties in the resolution of their disputes.”).

| METRIC FOR EVALUATION OF COURT REFORM   |   |   |                  |
|---|---|---|------------------|
|   | Firsthand Experience:<br><i>Satisfies the Parties</i> | Perception by Observers:<br><i>Appears "Fair"</i> | Legal Standards* |
| <b>Procedural Justice:</b><br>· Control of outcome<br>· Neutral arbiter<br>· Respectful<br>· Standard |   |   |                  |
| <b>Substantive Justice</b><br>· Comprehensive<br>· Agreeable to parties<br>· Equitable                |   |   |                  |
| <b>Efficiency</b><br>· Cost<br>· Time<br>· Finality   |   |   |                  |

balance between the particular, which gets emphasized in DSD, and the systemic?

## 2. Long Term Challenges: The Underlying Due Process Tension

The tension between particularized justice—what is fair on a given set of facts—and systemic justice—what creates law that applies equally to all—underlies the difficulties in court reform. Each aspect of court reform design must measure itself against the delicate balance of these values found in the adversary system. The courts create justice for individuals and for society, an underlying tension that must be acknowledged in any effort at court reform and which is not accounted for in the design tools offered by DSD. Chief Judge Judith Kaye noted that a resistance to change is particularly pronounced in the people most likely to be involved in court reform: “Lawyers and judges are, moreover, a group that is especially wedded to precedent and tradition. We make a virtue of our imperviousness to change—we call it stability. We are scathingly critical of what we have, yet at the same time we are resolutely opposed to any change.”<sup>110</sup> Feeley also calls our attention to the need for historical sensitivity to the courts and the problems they address. “A historical perspective shows that many problems have long histories and stem from deep-seated and insoluble tensions, and that the typical stance

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110. Kaye, *supra* note 10, at 1927-28.

of others is to resist and adapt, not to embrace reforms.”<sup>111</sup> Appreciating the gradual nature of change in the courts due to the fundamental concerns at the heart of the judicial process suggests an additional framework for a successful court.

Although ADR and DSD theorists, most of whom have legal backgrounds, have steadily acknowledged that the law bounds the realm of possible outcomes, “the law” is not included in the design process or the metrics for success. Ury and his co-authors acknowledge that certain disputes or values have a “public interest” that must trump party self-determination in certain cases.<sup>112</sup> More broadly, the interests that guide the design process are bounded by “rights” and “power” dynamics in the theoretical model depicting where the design process occurs.<sup>113</sup> At the same time, Shariff’s suggestion that institutions “vest control over decisions in those most interested and affected by them”<sup>114</sup> runs into the same concern that we encounter with Costantino’s similar principle, namely that this does not provide for the public interest (in decided cases and in procedural and substantive justice) that any court program must engage.

The role of law and due process in non-traditional courtroom forums for dispute resolution has threaded alongside the development of ADR.<sup>115</sup> It must continue to guide those interested in applying DSD principles to courts. These short- and long-term barriers to change must be addressed in order for reformed courts to meet the intricate and profound mission to which they aspire.

#### CONCLUSION

The lower courts are a paradox. The limited jurisdiction courts are described as invisible, neglected by the bar, scholars and the citizenry, and at the same time as the only judicial experience for most who enter the court system. . . . They are applauded for being flexible and informal, and chided for failing to fulfill the forms and techniques of due process. They are recognized to be

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111. FEELEY, *supra* note 41, at 192-93.

112. “In at least some cases, then, rights-based court procedures are preferable, from a societal perspective, to resolution through interests-based negotiation.” The classic example is the end of segregation in the schools, which would not have occurred without imposition of a decision and precedent by the federal courts. URY ET AL., *supra* note 24, at 17.

113. *See id.* at 9.

114. Shariff, *supra* note 21, at 152.

115. Frank Sander discussed some concerns in his ABA presentation. *See, e.g.*, Sander, *supra* note 5, at 113, 120, 127, 132. Owen Fiss’s classic, *Against Settlement*, develops this line of argument. Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

responsive to local community situations and needs and criticized for their variability.<sup>116</sup>

Susan Silbey's observation emphasizes both the importance and the challenges of court reform for the state trial courts. The need to balance the particular with the general in each case supports our traditional respect for due process, both in procedures and in the justice of substantive outcomes. While interest-based design and strategic implementation can overcome many challenges of court reform, DSD has yet to explicitly address how to ensure the protection of this balance, suggesting the need for new tools or at least a new approach for design in courts.

The traditional DSD tools offer some possibilities. A new "institution check" may figure as part of the self-assessment, provoking stakeholders to decide whether the problem they seek to ameliorate is a problem with the system, subject to DSD, or a problem with the substantive law, which would suggest pursuing a legislative route.<sup>117</sup> This would address concerns about stretching the courts beyond their appropriate breadth and would ensure democratic accountability for changes that appropriately belong to the political branches.

Stakeholder input by legal professionals should also alleviate due process concerns. As discussed in Part I, legal professionals have an interest in preserving the integrity of the system they serve. With legal professionals seated at the design table, procedural justice should be well-represented. Indeed, the experience of the Monan Report in Massachusetts bears out this conclusion. The Commission included not only public leaders in academia and business, but leaders of judiciary and practicing lawyers.<sup>118</sup> While the resulting Report employed management terminology from the business world, it clearly addressed the themes that resonate with a legal audience by referring to Massachusetts's proud tradition of quality judicial decision-making and the public's demand for "reasonably priced, quick, [and] courteous justice."<sup>119</sup>

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116. Susan S. Silbey, *Making Sense of the Lower Courts*, 6 JUST. SYS. J. 13, 13 (1981).

117. This concern has been suggested in the context of the problem solving courts. See, e.g., Carl Baar, *What the Data Shows*, 29 FORDHAM URB. L.J. 1827, 1831 (2002) ("And so I am very concerned about the drug courts in New York State because the drug laws are so draconian and the political ability to implement drug courts is directly related to the unwillingness to campaign to modify those laws, which means, in effect, that drug courts can be in a position to do net widening, to actually be more coercive, because they are not reducing the existing coercive criminal penalties.").

118. MONAN COMMISSION, *supra* note 102, at 5.

119. *Id.* at 4.

In addition to relying on the stakeholders listed in Part I to ensure the stability of the due process balance, a DSD process for courts might include a stakeholder assigned to represent “due process” *per se*. This person would be charged with comparing design proposals to the protections offered by traditional adjudication to ensure that due process is not sacrificed. He or she could also brainstorm design components that would provide similar protections. A “law check” might be added as an intermediate design step that occurs both before “Getting Leadership on Board” and between “Design” and “Implementation.” This would involve scrutinizing the proposed reform against the existing state of the law and the procedures applied in the courts. Similarly, the third column of the evaluation grid proposed in Part II may be used to remind the design team of this essential ingredient and ensure its continued relevance throughout evaluation and modification of the reform program.

By bringing the courts’ mission and the tensions in planned court reform to the fore in a context of strategic discussion and planning, DSD provides the opportunity for realistic improvement in the dispute processing that occurs in our state trial courts. At the same time, the tensions that appear in court reform provide helpful guideposts for DSD generally and suggest the potential for further dialogue among DSD and ADR professionals, judges, attorneys, and others working in the “traditional” legal system. This article has attempted a beginning to this dialogue by sketching how DSD theory may be applied to known aspects of reform in state courts. It has raised potential concerns with the DSD process, but also potential benefits that planned change may hold for individual courts and state court systems. It is a framework that, with development by stakeholders and customization, may provide the tools needed most for these crucial public institutions.

| <b>A DESIGN PROCESS FOR STATE COURTS</b> |  |
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| 1. Self Assessment                       | <ol style="list-style-type: none"> <li>1. Assemble stakeholders</li> <li>2. Discussion of court mission</li> <li>3. Assess current legal options and protections</li> <li>4. Decide between court reform and legislative change</li> </ol>   |
| 2. Get Leadership on Board               | <ol style="list-style-type: none"> <li>1. The more support by senior judges, including presiding judges and state Chiefs, the better.</li> <li>2. Anticipate opposition and plan incremental change</li> </ol>   |
| 3. Design                                | <p>Include consideration of:</p> <ol style="list-style-type: none"> <li>1. Stakeholder interests</li> <li>2. Court mission</li> <li>3. Scope and depth of reform project</li> <li>4. Legal backdrop</li> <li>5. Plan for evaluation and feedback for improvement</li> <li>6. Financial and other resource constraints</li> </ol>   |
| 4. Skills and Resources                  | <ol style="list-style-type: none"> <li>1. What skills must court personnel and court users have for the new program? How can this training be accomplished?</li> <li>2. What additional resources must be produced/acquired?</li> <li>3. What general education must be provided for the judiciary, court users, and court watchers to understand and appreciate the new program?</li> </ol> |
| 5. Implementation                        | Consider beginning with a small pilot program  |
| 6. Evaluation                            | <ol style="list-style-type: none"> <li>1. How well does the program satisfy parties, court watchers, and the law?</li> <li>2. What does each of these constituencies think of the program's procedural, substantive, and cost-benefit merits?</li> </ol>   |
| 7. Diffusion                             | <ol style="list-style-type: none"> <li>1. How well will diffusion ensure equal treatment across the jurisdiction?</li> <li>2. Can it be supported by current resources?</li> <li>3. What will needed to support expansion, including personnel, "innovation energy," and funds?</li> </ol>   |