

Accessing Justice in Hybrid Courts: Addressing the Needs of Low-Income Litigants in Blended in-Person and Virtual Proceedings

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ABSTRACT

The COVID-19 pandemic forced courts across the country to close their doors to in-person proceedings. Courts had to quickly adopt remote technologies that they ignored for years to keep courts operational. As courts have re-opened, courts have maintained hybrid court processes recognizing the benefits that hybrid courts offer for judicial efficiency. However, due to the speed with which courts adopted new hybrid court models they were often developed haphazardly. As they continue to evolve, states have left significant discretion in the design to individual courts and often individual judges, creating inconsistencies in the process. Lawyers and judges have been able to quickly adopt their practices to utilize these new hybrid court systems. Yet, eighty to ninety percent of cases have at least one unrepresented party, often of low-income. Low-income unrepresented litigants make up the lion's share of individuals utilizing the civil legal system, and they seem to have been left out of the equation as the hybrid court models have been developed. Despite the fact that low-income litigants make up the majority of litigants in the civil justice system, the hybrid courts recently designed have made it more difficult for these unrepresented litigants to access the court system. Hybrid court models have been around since the early 1990s, and models developed just prior to the pandemic focused on increasing access to justice for low-income individuals. Courts need to take a step back and carefully consider how to evolve their hybrid court models using information gathered from the pre-pandemic models, the current models, and the benefits and difficulties that have been realized from these models. Hybrid court models that are consistent, with a well explained process, combined with an option to opt-out of the technological components when they create barriers, as well as accessible

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locations with the available technology and assistance necessary can assure that low-income litigants are not barred from the “new” courthouse doors.

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I. INTRODUCTION

In 2022, thanks to Court TV, the world had a front row seat to the new hybrid court models of the civil justice system.¹ The defamation trial of Johnny Depp

1. *Court TV to Bring Cameras into the Court Room for Johnny Depp Amber Heard Defamation Trial*, CISION (Apr. 5, 2022), <https://www.prnewswire.com/news-releases/court-tv-to-bring-cameras-into-the-court-room-for-johnny-depp-amber-heard-defamation-trial-301518199.html>; *Depp v. Heard*, COURT TV, <https://www.courtstv.com/trials/depp-v-heard-2022/> (last visited Apr. 13, 2023).

versus Amber Heard took place in the Fairfax County Courthouse in Virginia, yet everyone could watch from the comfort of their homes.² The high end cameras placed by Court TV were able to capture different angles of the parties, witnesses, lawyers, and even the judge in the courtroom.³ Due to the advanced courtroom technology in the Fairfax County Court, viewers also had the opportunity to observe the witnesses who appeared in court remotely from across the world.⁴ Television viewers could see the judge and lawyers seamlessly transition from in-person testimony to witnesses on Zoom, sharing exhibits and questioning witnesses without any delay or technical difficulties.⁵ The hybrid court model limited delays when rebuttal and impeachment witnesses were not within the jurisdiction.⁶ Counsel for Mr. Depp was able to quickly call Kate Moss as a rebuttal witness, despite the fact that she was located in Gloucester, England.⁷ Video screens at counsel table with screen sharing capabilities allowed lawyers to directly observe remote witnesses, easily question them, and share exhibits when necessary.⁸ Even though the jury was in-person in the court room, they too had direct access to witness testimony regardless of the location of the witness.⁹ The lawyers had no difficulties presenting their case to the court and jurors: witnesses were prepared and able to log into Zoom; exhibits were prepared for remote submission as well as in-person submission; and the lawyers were prepared to ask questions to remote witnesses in a manner similar to in-person witnesses without any difficulties with remote audio and video participation.¹⁰ The Fairfax County

2. *Depp v. Heard*, COURT TV, *supra* note 1. See also Claire Lampen et al., *Amber Heard Has Settled With Johnny Depp*, CUT, <https://www.thecut.com/2022/07/amber-heard-and-johnny-depp-defamation-suit-what-to-know.html> (last visited Apr. 13, 2023).

3. *Depp v. Heard*, COURT TV, *supra* note 1.

4. See *Introduction to CMTS*, FAIRFAX CNTY. COURTHOUSE, https://www.fairfaxcounty.gov/informationtechnology/sites/informationtechnology/files/assets/court-technology/pdf/ctmstrainingguide_introduction.pdf (last visited Apr. 13, 2023).

5. See *43 - Depp v. Heard: Travis McGovern*, COURT TV, <https://www.courtvtv.com/title/43-depp-v-heard-travis-mcgovern/> (last visited Apr. 13, 2023). See also ZOOM, <https://zoom.us/about> (last visited Apr. 13, 2023).

6. See also Emily Yahr, *Day 3 at Depp-Heard Trial: Therapist Testifies; a Witness Gets Booted*, WASH. POST (Apr. 14, 2022), <https://www.washingtonpost.com/arts-entertainment/2022/04/14/depp-heard-trial-day-3-testimony/>.

7. Travis M. Andrews, *Kate Moss, Johnny Depp Testify as Trial Winds Down*, WASH. POST (May 25, 2022), <https://www.washingtonpost.com/arts-entertainment/2022/05/25/johnny-depp-trial-kate-moss/>. See Julia Jacobs, *Kate Moss Denies Johnny Depp Pushed Her Down Stairs in Testimony*, N.Y. TIMES (May 25, 2022), <https://www.nytimes.com/2022/05/25/arts/kate-moss-johnny-depp-trial.html>.

8. *Introduction to CMTS*, *supra* note 4.

9. See also *Depp v. Heard*, COURT TV, *supra* note 1. Malcolm Connolly, Depp's bodyguard, testified from the UK via teleconference; Sterling Jenkins, Travis McGovern, and Jack Whigham all testified via teleconference as well. See *id.*

10. *Introduction to CMTS*, *supra* note 4. These materials provided by the Fairfax County Courthouse include images of the Evidence Presentation station, which includes laptops, document cameras, and mobile devices, with access at the bench, attorney tables, podium, and witness stand. Attorneys can plug their mobile devices or laptops into the system, which enables them to display the exhibits selectively to the jury, witnesses, and gallery, annotate them, and print them on demand. At the bench, the judge and clerk can manage the evidence exhibits, control the volume of displays, and work the phone, cameras and other systems. *Id.*

Court model includes technology tools such as large and individual monitors so that in-person participants had better views of body language, assisting the jury in making credibility determinations.¹¹ This hybrid court model seamlessly and effortlessly worked to address the legal matter presented by the lawyers on behalf of their clients. The Depp/Heard courtroom integrated the use of remote technologies for some witnesses while still having a significant contingent of participants appear in-person, demonstrating the ease of use of hybrid courts and the technology that the COVID-19 pandemic pushed courts to adopt.¹²

It is really no surprise that the Depp/Heard hybrid court trial was so successful. While most courts throughout the country had only recently shifted to hybrid court models, the development of the Fairfax County hybrid court model began well before the COVID-19 pandemic, adopting advanced technology within its courtrooms back in 2008.¹³ The Fairfax hybrid court model continued to develop throughout the pandemic, expanding to include mobile technology in the court, creating the smooth court process that it is today.¹⁴ The development of this model took significant time and thought. Additional factors contributed to the seamless nature of this proceeding in particular: Depp and Heard had highly paid lawyers with significant access to and experience utilizing the technological tools required for the court proceeding; the lawyers and other participants were well versed in the hybrid court process and procedures; witnesses had access to the technology necessary to remotely participate; and the litigants had the means to be able to spend significant time in preparation for the trial.

Not all hybrid courts models are created equal and most post-pandemic versions of them hinder accessibility to the average litigant. Eighty to ninety percent of all civil trials have at least one unrepresented litigant.¹⁵ Often times, unrepresented litigants are low-income Americans.¹⁶ Approximately 50 million Americans have

11. *Id.* A significant concern relating to the use of videoconferencing for trials is the potential loss of the ability of judges and jurors to view non-verbal cues such as body language and demeanor which a relied upon to judge credibility. See TAYLOR BENNINGER ET AL., STAN. CRIM. JUST. CTR., VIRTUAL JUSTICE? A NATIONAL STUDY ANALYZING THE TRANSITION TO REMOTE CRIMINAL COURT 17 (2021), <https://law.stanford.edu/wp-content/uploads/2021/08/Virtual-Justice-Final-Aug-2021.pdf>.

12. Hybrid court models vary significantly in design, making defining “hybrid court” difficult. In its simplest form, a hybrid court is one where “technology can be used to help move cases through some aspects of the resolution process, while other steps are handled by the court staff.” Hybrid courts can include a mix of human involvement and automation and utilization of technologies in the court process. See JOINT TECH. COMM., NAT’L CTR. STATE CTS., JTC RESOURCE BULLETIN: ODR FOR COURTS 1, 3 (2017), <https://cdm16501.contentdm.oclc.org/digital/collection/tech/id/909>.

13. Zack Quaintance, *Will COVID-19 Cause Long-Term Tech Changes for Courts?*, GOV’T TECH. (Sept. 2020), <https://www.govtech.com/public-safety/Will-COVID-19-Cause-Long-Term-Tech-Changes-for-Courts.html>.

14. *Id.*

15. ALICIA BANNON & JANNA ADELSTEIN, BRENNAN CTR. JUST., THE IMPACT OF VIDEO PROCEEDINGS ON FAIRNESS AND ACCESS TO JUSTICE IN COURT 10 (Sept. 10, 2020).

16. *Id.*

incomes below 125% of the poverty threshold.¹⁷ Of these low-income households, 71% have experienced at least one civil legal problem in the past year.¹⁸ Hybrid court models can hinder low-income litigants' ability to access the courts and ignoring this is not an option. These models rely on individuals having access to stable internet connections and technology tools, with the knowledge and ability to utilize them. Unfortunately, low-income individuals often do not have access to the internet or technology tools necessary for participation as they fall within the digital divide.¹⁹ When a hybrid court is not accessible to low-income individuals, the justice gap grows.²⁰

For example, in stark contrast to the Depp/Heard trial, the same seamless hybrid trial did not occur in the child custody case of Greg and Joy.²¹ Joy, a low-income litigant, was seeking a transfer of her child custody case from Pennsylvania to New York. Joy and Greg, the parents of one minor child, Michael, obtained an original court order from Pennsylvania and, as such, Pennsylvania had continuing jurisdiction over the custody case.²² However, Joy wanted to move the case to New York as she and Michael primarily resided there for the past five years and had only limited contact with Greg. Michael's teachers, doctors, and friends, potential witnesses in a custody matter, all resided in New York. It was becoming more difficult for Joy to travel back and forth for custody proceedings in Pennsylvania as she no longer had the ability to pay for travel.

Joy was scheduled for a jurisdictional hearing before the judge in Pennsylvania. The Pittsburgh-based judge scheduled the non-jury hearing to occur in a hybrid fashion.²³ This alleviated the costs associated with Joy's travel to the proceeding.

17. LEGAL SERVS. CORP., *THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 1, 8 (2022), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [hereinafter Justice Gap (2022)].

18. *Id.*

19. Emily A. Vogels, *Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption*, PEW RSCH. CTR. (June 22, 2021), <https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/>. The digital divide includes issues of access relating to “technology, telecommunications/broadband availability, economics, information access, and information literacy . . . it can refer to a gap in access to technology (usually the Internet), skills, usage, and information/digital literacies.” Loisa von Wiegen & Shannon M. Oltmann, *A Different Democratic Divide: How the Current US Online Court Record System Exacerbates Inequality*, 112 L. LIBR. J. 257, 267–268 (2020); NAT'L CTR. STATE CTS., *REMOTE HEARINGS AND ACCESS TO JUSTICE* 4 (2022), https://www.ncsc.org/_data/assets/pdf_file/0018/40365/RRT-Technology-ATJ-Remote-Hearings-Guide.pdf [hereinafter Remote Hearings and Access to Justice].

20. Justice Gap (2022), *supra* note 17, at 7 (The justice gap is defined as the “difference between the civil legal needs of low-income Americans and the resources available to meet those needs.”).

21. As the director and supervising attorney of Duquesne University School of Law's Family Law Clinic, this story is representative of the cases that the clinic encountered during the pandemic with the new hybrid court models. Names and facts have been changed to protect anonymity.

22. See 23 PA. CONS. STAT. § 5422. When a Pennsylvania court makes a child custody determination, they maintain jurisdiction until either a court of Pennsylvania determines that the child or child and parent no longer has a significant connection with the Commonwealth, or a court of another state determines that the child, parents and ones acting as parents do not reside in Pennsylvania. *Id.*

23. See Order, Sup. Ct. of Pa., *In Re: General Statewide Judicial Emergency*, No. 553 Judicial Administration Docket (June 21, 2021) [hereinafter Sup. Ct. of Pa. Order No. 553]. See also Order, Sup.

The judge ordered Joy to appear remotely for the hearing from New York. Greg had the option to appear in-person or remotely. In preparation for the proceeding, Joy and Greg received an order with a Microsoft Teams link, a deadline for the filing of pre-trial statements, as well as a note to forward exhibits to the court and opposing party via email prior to the hearing. While the order provided that the parties were to complete these tasks prior to the hearing, the order did not provide instructions specifically explaining how the parties were supposed to submit these items. When Joy emailed her pre-trial statement and exhibits to the court and Greg prior to the hearing, she titled each document according to what it was. However, the court staff replied indicating that Joy's exhibit titles were confusing and asked her to instead re-save and re-send them with titles such as "Exhibit A," "Exhibit B," etc. Joy completed this task and submitted exhibits A through S via email. Both times she had to do this in a number of emails as the exhibit attachments were too large to send all at once. The court staff acknowledged receipt of the re-sent exhibits.

During the hearing, Joy attempted to utilize her exhibits, however, the judge was missing exhibits A through G from the electronic file. When Joy explained that she had an email from the court staff confirming receipt of the exhibits, the judge offered to let Joy share the exhibits via screen sharing. Unfortunately, Joy was participating in the proceeding via smartphone and she could not figure out how to get the exhibits to the judge during the proceeding. She had no choice but to move forward and not submit the exhibits. The judge ultimately ruled in favor of Greg and retained jurisdiction of the case in Pennsylvania. The judge made this decision because the costs due to travel, an issue Joy raised during the case, could be alleviated with this "new" hybrid court model.

Significant research is dedicated to eliminating the justice gap and developing methods to assist those, like Joy, with the greatest need.²⁴ This includes identifying the hurdles that low-income individuals face in accessing the justice system and identifying potential solutions.²⁵ Technology, such as the applications utilized

Ct. of Pa., *In Re: General Statewide Judicial Emergency*, No. 533 Judicial Administration (Mar. 25, 2020). Currently, aside from the requirement that judges be available in their respective chambers, the court is permitted to use discretion in deciding which proceedings are remote, hybrid, or in-person. *See* Order, Sup. Ct. of Pa., *In Re: 5th Judicial District (Allegheny County) - Declaration of Judicial Emergency*, No. 23 WM 2020 (Aug. 30, 2021) [hereinafter Sup. Ct. of Pa. Order Allegheny County].

24. *See* Justice Gap (2022), *supra* note 17. *See also* Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1816–19 (2001). "Commissions, conferences, committees, and task forces" have been dedicated to creating recommendations to close the justice gap. This includes reducing legal fees, limited service models such as hotlines, increasing pro bono services, and allowing nonlawyers to provide legal services. *Id.* *See also* REBECCA L. SANDEFUR, AM. BAR FOUND., *ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES STUDY* 4–6 (2014), https://www.americanbarfoundation.org/uploads/cms/documents/sandefur_accessing_justice_in_the_contemporary_usa_aug_2014.pdf. A large body of the research on eliminating the justice gap requires determination of the needs of low-income individuals and where they seek services. *Id.*

25. *See* Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 *S.C. L. REV.* 443, 448–49 (2016) (describing that due to the perception that matters are not legal, low-income individuals often seek assistance for their legal matters from non-legal resources such

in hybrid courts, are recognized as a means to assist with closing the justice gap, addressing the costs and hurdles experienced by low-income litigants.²⁶ Prior to the COVID-19 pandemic, hybrid court models emerged as a potential solution.²⁷ Access to justice advocates studied the initial hybrid court models, such as the immigration court model developed in the 1990s.²⁸ Immigration courts used videoconferencing for detention hearings, requiring remote participation by detainees for appearances in court, a practice that continues to be utilized today.²⁹ From this starting point, yet still prior to the pandemic, more expansive hybrid court models developed focusing on the needs of low-income litigants in addressing their legal matters.³⁰ These initiatives alleviated some of the barriers experienced by low-income litigants when addressing their civil legal needs.³¹ They could attend court from their homes without the need to incur costs for childcare or travel, or the loss of income due to taking time off from work.³² Prior to 2020, the hybrid court models offered tangible benefits in assisting with access to justice.

However, just as carefully designed hybrid courts with an eye to benefitting low-income litigants were developing, COVID-19 required courts to close their doors.³³ Prior to the pandemic, few courts had moved towards adopting hybrid court models. During COVID-19, courts swiftly adopted various technology

as libraries, social service agencies, and churches) [hereinafter *Legal Needs of the Public*]; James David Greiner et al., *Self-Help, Reimagined*, 92 IND. L.J. 1119, 1121 (2017).

26. James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 246–56 (2012) (describing in detail technology advancements and strategies that assist with accessing justice in the court system including, by example, legal websites, interactive remote assistance programs, automated document assembly, web-services, and social media tools); Tanina Rostain, *Techno-Optimism & Access to the Legal System*, 148 J. AM. ACAD. ARTS & SCIS. 93, 95 (2019). The author identifies apps, legal kiosks, and self-help technologies as among the many options with the potential to eliminate the barriers to obtaining legal help, acknowledging that technological illiteracy or lack of access to these resources must be addressed, potentially through third-party non-lawyer intermediaries. *Id.*

27. See Amy J. Schmitz, *Expanding Access to Remedies Through E-Court Initiatives*, 67 BUFF. L. REV. 89, 115–17 (2019). Exemplifying pre-pandemic hybrid court models can be seen in the launch of Texas' online dispute resolution program in 2018. This program includes an online negotiation portal program for small claims and if unresolved the parties may move on to an in-person court proceeding. *Id.*

28. Matt Reynolds, *Courts Attempt to Balance Innovation with Access in Remote Proceedings*, AM. BAR ASS'N (Feb. 1, 2021), <https://www.abajournal.com/magazine/article/courts-attempt-to-balance-innovation-with-access-in-remote-proceedings>. See also Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 945 (2015) (Federal immigration courts implemented the use of remote technology in the 1990s “to discontinue the practice of immigration judges traveling to courtrooms in jails and prisons that housed immigrants awaiting hearings, and can now conduct them from the traditional courtroom with the prosecutor, interpreter, and any respondent’s counsel.”); Cabral et al., *supra* note 26, at 278–92.

29. Eagly, *supra* note 28, at 945.

30. See Schmitz, *supra* note 27, at 104–20.

31. *Id.* at 157–58.

32. See Andrew C. Budzinski, *Reforming Service of Process: An Access-to-Justice Framework*, 90 U. COLO. L. REV. 167, 177 (2019) (discussing the difficulties that low-income litigants face in obtaining service in order to move forward with their legal matter, often resulting in litigants dropping the matter).

33. Reynolds, *supra* note 28.

platforms to maintain court functionality.³⁴ Unlike, the hybrid court models for immigration hearings and other pre-COVID-19 models which were established, the quick shift to virtual courts and the new hybrid court models were haphazard. The hybrid court models of today are extremely variable and, in most cases, leave the utilization of the model completely within the discretion of individual courts and judges.³⁵

Hybrid courts and technological tools, themselves, did not present issues for Joy. Instead, it was the failure to develop a model with serious consideration of how the hybrid courts could be successfully utilized to increase access to justice, while diminishing any difficulties.³⁶ It is necessary to take a step back. Models developed pre-COVID-19 provide significant guidance for hybrid court model development when considered in conjunction with what is known about the needs, difficulties, and solutions sought by low-income litigants when addressing their civil legal needs.³⁷

Hybrid court models must be designed with an eye to guaranteeing that low-income litigants can effectively utilize and access the courts to assure the justice gap does not grow. The evolution of hybrid court models, the benefits offered, and difficulties experienced in utilizing hybrid court models, all contribute to determining how to address the needs of low-income litigants within hybrid court models. This Article explores: the evolution of hybrid courts in Part II; the difficulties presented by and benefits of hybrid courts in Part III; and Part IV will explore methods to assure hybrid courts are accessible to all litigants. Hybrid court models that are consistent, with an understandable process, provide an opportunity to opt-out of the technology aspects when they present hurdles to access, and that are easily accessible offer a hybrid court design that does not hinder access to justice for low-income litigants and may help alleviate the justice gap.

34. David Freeman Engstrom, *Post-COVID Courts*, 68 UCLA L. REV. DISC. 246, 255–57 (2020).

35. Remote Hearings and Access to Justice, *supra* note 19; *Judges: Expect Hybrid Trial System After the Pandemic*, AM. BAR ASS'N (June 7, 2021), <https://www.americanbar.org/news/abanews/aba-news-archives/2021/06/post-pandemic-trials/>. See also *How Courts Embraced Technology, Met the Pandemic Challenge, and Revolutionized Their Operations*, PEW RSCH. CTR. (Dec. 1, 2021), www.pewtrusts.org/en/research-and-analysis/reports/2021/12/how-courts-embraced-technology-met-the-pandemic-challenge-and-revolutionized-their-operations.

36. See Remote Hearings and Access to Justice, *supra* note 19, at 7 (seeking to remind courts in California that “access considerations require creative and inclusive practices beyond a blanket requirement for litigants to participate in hearings remotely,” access available technologies is only once consideration); Alicia L. Bannon & Douglas Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 NW. U. L. REV. 1875, 1889–92 (2021) (noting “the other side of the remote court experience is that it has generated substantial hurdles for individuals on the wrong side of the digital divide, due to a lower access to technology and internet access for low-income individuals, and a lack of technological literacy when access is available”). See Vogels, *supra* note 19 (“Roughly a quarter of adults with household incomes below \$30,000 a year (24%) say they don’t own a smartphone. About four-in-ten adults with lower incomes do not have home broadband services (43%) or a desktop or laptop computer (41%). And a majority of Americans with lower incomes are not tablet owners.”); BANNON & ADELSTEIN, *supra* note 15.

37. BANNON & ADELSTEIN, *supra* note 15.

II. EVOLUTION OF VIRTUAL AND HYBRID COURTS

Hybrid court models have no singular definition. Often individuals assume that it is simply taking an in-person court process and making it remote in some fashion, similar to Joy's experience. Government Technology³⁸ defines hybrid courts as a model that "brings together both in-person and remote participants and must ensure that individuals connecting from smartphones at home and groups joining from often acoustically-unfriendly courtrooms can all see and hear each other."³⁹ Others view hybrid court models as semi-automated online dispute resolution (ODR) programs utilizing artificial intelligence and technology tools to solve simple legal matters.⁴⁰ Regardless of the definition adopted, as Snorri Ogata, Chief Information Officer for the Los Angeles County Superior Court, shared with Government Technology: "hybrid hearings are more than just putting up cameras and letting people talk, there's a whole system around it."⁴¹

Hybrid court models and the use of platform technologies have been around longer than most would assume.⁴² This may be surprising given how reluctant most state trial courts were to adopt technology as a regular part of their court process prior to the COVID-19 pandemic.⁴³ In the earliest iterations, hybrid courts were used in criminal bail proceedings and immigration matters dealing with deportation.⁴⁴ Following these initial hybrid court models, expansion occurred to include small claims, traffic cases, and other limited legal issues with the goal of creating additional access to the courts for low-income unrepresented litigants.⁴⁵

Courts were not immune from the shutdown caused by COVID-19 that affected businesses, educational institutes, and public locations.⁴⁶ This resulted in

38. See *About Us*, GOV'T TECH., https://www.govtech.com/about?promo_code=footer (last visited Apr. 13, 2023).

39. Julie Pattison-Gordon, *Los Angeles County's Journey to the Hybrid Courtroom*, GOV'T TECH. (Oct. 4, 2021), <https://www.govtech.com/public-safety/los-angeles-countys-journey-to-the-hybrid-courtroom>.

40. Schmitz, *supra* note 27, at 146–55.

41. See Pattison-Gordon, *supra* note 39.

42. Shari Seidman Diamond et al., *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 878 (2010).

43. Reynolds, *supra* note 28. See Mark A. Cohen, *Lawyers and Technology: Frenemies or Collaborators?*, FORBES (Jan. 15, 2018), <https://www.forbes.com/sites/markcohen1/2018/01/15/lawyers-and-technology-frenemies-or-collaborators/?sh=2cbfbccb22fl>.

44. See Seidman Diamond et al., *supra* note 42 (describing that closed-circuit television was utilized in Illinois as early as 1972 and in Pennsylvania in 1978. By the mid to late 90s, 17 states utilized some form of video conferencing and by 2002 over half of the states had some form of video conferencing); Eagly, *supra* note 28.

45. See generally Avital Mentovich et al., *Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality*, 71 ALA. L. REV. 893 (2020) (study of over 5,000 of Michigan's asynchronously conducted online traffic court proceedings, which included the use of text messaging and emails, found this court process effective when compared to solely in-person hearings, especially considering that it increased access to the courts for a number of individuals).

46. See State of N.Y. Exec. Chamber, No. 202, Exec. Order: Declaring a Disaster Emergency in the State of New York (Mar. 7, 2020); Commw. of Pa., Off. of the Governor, Order of the Governor of the Commonwealth of Pennsylvania for Individuals to Stay Home (Mar. 23, 2020); Pa. Dep't of Health, Order of the Secretary of the Pennsylvania Department of Health to Stay at Home (Mar. 23, 2020); Sup.

courts having to quickly develop remote operating procedures to continue to keep the justice system moving forward.⁴⁷ Courts moved quickly from primarily in-person proceedings pre-COVID-19 to 100% remote virtual hearings during the initial months of the pandemic.⁴⁸ As courts reopened following initial shutdowns, hybrid court models remained, becoming the new primary means of court proceedings.⁴⁹

These post-shutdown models are a mix of fully remote initial proceedings to hybrid trials with witnesses appearing via platform technology like Zoom while litigants appear in person.⁵⁰ Today, individual courts and judges have significant discretion for the development of hybrid.⁵¹ The swift adaptation during COVID-19 and the significant discretion given to courts did not allow for the same considerations that developed the pre-COVID-19 hybrid courts. By taking a step back to review the pre-COVID-19 hybrid courts, what occurred during the initial months of COVID-19, and the developments of today, general principles can be gleaned for creating hybrid court processes that assure access to the courts is protected for all individuals.

A. Hybrid Court Models Pre-COVID-19

Prior to the 1990s, no court utilized a hybrid court model in a widespread matter.⁵² However, in the 1990s, Federal Immigration Courts implemented a hybrid court process, utilizing platform technologies (videoconferencing) for deportation hearings when immigrants were in detention centers.⁵³ The immigration courts used platform technologies as a means to have detainees appear virtually in the immigration court, while the remaining hearing participants appeared in person for the immigration deportation proceeding.⁵⁴ Ultimately Congress codified this hybrid court model, permitting immigration courts to utilize the model as necessary.⁵⁵ The purpose of the hybrid court was to expedite the process by

Ct. of Pa., W. Dist., Emergency Order of Statewide Judicial Administration applicable from May 1, 2020, through June 1, 2020, Nos. 531 and 532 Judicial Administration Docket (Apr. 28, 2020).

47. Quaintance, *supra* note 13 (quoting Rita Reynolds, chief technology officer for the National Association of Counties: “the vast majority of American courts did not have practices or in some cases the physical technology to go remote . . . many courts have been set up for some time to conduct functions remotely on occasion – particularly in instances of proceedings that involve juveniles or other sensitive participants – the rate at which they have utilized technology in this way is minimal.”).

48. *Judges: Expect Hybrid Trial System After the Pandemic*, *supra* note 35. See generally Sean C. Pierce et al., *What to Expect from Trial Practice in the New Normal*, 64 DRI FOR DEF. 1, 14 (Mar. 2022).

49. Remote Hearings and Access to Justice, *supra* note 19. See *Judges: Expect Hybrid Trial System After the Pandemic*, *supra* note 35 (discussing how lawyers have to adapt to litigating in a hybrid manner as this is the “new normal” for courts post-pandemic.).

50. *Id.*

51. See Reynolds, *supra* note 28.

52. See Seidman Diamond et al., *supra* note 42, at 877.

53. Eagly, *supra* note 28, at 945.

54. *Id.*

55. See 8 U.S.C. §1229(b)(2)(A) (“The proceeding may take place—(i) in person, (ii) where agreed to by the parties, in the absence of the alien, (iii) through video conference, or (iv) subject to subparagraph (B), through telephone conference.”). See also 8 C.F.R. §1003.25(c) (1997) (“An Immigration

assisting overburdened immigration courts, create judicial flexibility, reduce costs, and improve courtroom safety.⁵⁶ This method became widely accepted and in 2012 immigration judges held over 134,000 hearings via this hybrid court process.⁵⁷ Although there was not a correlation between higher deportation rates and the utilization of the hybrid process, litigants were less engaged in the “adversarial process.”⁵⁸ Litigants are deterred due to the process feeling less real or formal, logistical and technical problems like poor video feeds, challenges with remote interpreters, and the inability of the unrepresented to file necessary documents or raise necessary claims/defenses.⁵⁹ Even the attorneys involved felt that the process “dehumanized” their clients.⁶⁰

Similar studies examined the use of hybrid court models for bail hearings in Cook County, Illinois starting in the 1990s.⁶¹ In this hybrid model, defendants participated in the proceeding via closed circuit television from prison while the other participants, such as the prosecuting attorney and judge, were in-person at the courtroom.⁶² Legislation encouraged these hybrid proceedings in Illinois as a means to reduce safety concerns caused by in-person proceedings, lower transportation costs, and reduce potentially frivolous bail requests.⁶³ However, there were concerns regarding poor technology and connectivity, difficulties with defense preparation and presentation, as well as the fact the proceedings were informal and brief.⁶⁴

As hybrid courts expanded, the process of developing courtrooms capable of hybrid proceedings also expanded.⁶⁵ Federal courts were amongst the first to become technologically enhanced.⁶⁶ This was a unified process and updates to federal courtrooms across the country occurred incorporating: monitors in the courtroom for the judge, lawyers, litigants, witnesses, and juries to view; monitors that would allow annotations on exhibits; evidence cameras to scan live documents into electronic ones for shared viewing; connections for laptops or other technological devices; printers; video cameras; video conferencing platforms;

Judge may conduct hearings through video conference to the same extent as he or she may conduct hearings in person. An Immigration Judge may also conduct a hearing through a telephone conference, but an evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or, where available, through a video conference, except that credible fear determinations may be reviewed by the Immigration Judge through a telephone conference without the consent of the alien.”)

56. See Eagly, *supra* note 28, at 935.

57. *Id.* at 934.

58. *Id.* at 937.

59. *Id.* at 941.

60. *Id.* at 941, 972, 980.

61. Seidman Diamond et al., *supra* note 42, at 878.

62. *Id.* at 833–85.

63. *Id.* at 878.

64. *Id.* at 884–85.

65. Quaintance, *supra* note 13.

66. Judge Herbert B. Dixon Jr., *The Basics of a Technology-Enhanced Courtroom*, THE JUDGES' JOURNAL, ABA (Nov. 1, 2017), https://www.americanbar.org/groups/judicial/publications/judges_journal/2017/fall/basics-technologyenhanced-courtroom/.

and an integrated controller.⁶⁷ In federal court, hybrid courtrooms permit remote witness testimony and occasionally remote participation by lawyers, judges, litigants and interpreters.⁶⁸ State systems have been developing similar technologies, however, not with the same level of uniformity.⁶⁹ In 2008, during a court expansion in Fairfax County, Virginia, the county sought to incorporate advanced technological tools in the majority of the courtrooms.⁷⁰ This was a significant improvement, and mirrors a number of advancements that the federal court system adopted.⁷¹ The Fairfax County hybrid courtroom was effective for the remote witnesses and evidence of the Depp/Heard trial.⁷²

With more technologically savvy courtrooms and the knowledge gained from the immigration and bail court studies, hybrid court models continued to develop. However, the design focus of these models shifted away from replicating the court experience remotely to models designed to assist low-income litigants in accessing the courts.⁷³ For example, Michigan created a hybrid court model to assist individuals in addressing traffic citations.⁷⁴ The model utilized a technology platform for mobile devices.⁷⁵ The portal permitted communication between all participants in the process: lawyers; judges; and litigants to resolve outstanding citations.⁷⁶ Similarly, Ohio developed a platform to address tax disputes and small claims.⁷⁷ The Ohio model permitted online negotiations and communications between participants such as litigants and court mediators.⁷⁸ The design of this system allows participants to upload documents and review settlement proposals to resolve their matters.⁷⁹ New York City developed a hybrid process that allowed tenants to file housing code violation claims against their landlord.⁸⁰ This hybrid court model also provided assistance with negotiations between the parties.⁸¹ These models allowed for low-income litigants to address their needs virtually on

67. *Id.* The federal court system also adopted a uniform case management system, PACER. *See About Us*, PACER, <https://pacer.uscourts.gov/about-us> (last visited Apr. 13, 2023).

68. *See, e.g., Courtroom Technology*, U.S. CT. FED. CLAIMS, <https://www.uscfc.uscourts.gov/courtroom-technology> (last visited Apr. 13, 2023). In the Federal Claims courts, each courtroom contains two to four large screen monitors for judges, witnesses, counsel tables, and lecterns. *See Technology in the Courtroom*, U.S. DIST. CT. FOR THE DIST. OF MASS., <https://www.mad.uscourts.gov/attorneys/courtroom-technology.htm> (last visited Apr. 13, 2023).

69. Dixon Jr., *supra* note 66.

70. Quaintance, *supra* note 13.

71. *Id.* In Fairfax County during COVID-19, they expanded their available technologies, like iPads that could be taken to holding cells to facilitate criminal proceedings and, for civil matters, expanded video conferencing and technology platforms to allow individuals to participate. *Id.*

72. *See Depp v. Heard*, COURT TV, *supra* note 1.

73. Schmitz, *supra* note 27, at 105–07.

74. *Id.*

75. *Id.*

76. *Id.* at 106–09.

77. *Id.* at 109.

78. *Id.*

79. *Id.*

80. *Id.* at 109–15.

81. *Id.* at 114–15.

technology readily accessible to them, such as smartphones, allowing them to only have to appear in person for simple proceedings when absolutely necessary.⁸²

One of the most recent pre-COVID-19 hybrid court models came from Utah.⁸³ In 2018, Utah developed an online dispute resolution (ODR) program designed to handle small claims disputes, where the amount in question is below \$11,000.⁸⁴ The goal of this program was to increase accessibility to the system as well as to decrease the timeframe in addressing these matters.⁸⁵ The program launched in September 2018 and by April 2019 there were 1,021 cases filed in the ODR pilot program.⁸⁶ This is a multi-step formalized hybrid process, from remote initial document preparation and remote question and answer response prompts, to in-person *de novo* review requests.⁸⁷ The Utah ODR program provides the parties with some education and advice about the information that is necessary to either prove or defend against the claims in the case.⁸⁸ Then, the automated system prompts the litigant to answer a number of triage questions.⁸⁹ The system uses easy to follow graphics that help them to navigate the process.⁹⁰ A facilitator (non-lawyer) is a key component to the process, providing individuals assistance in navigating their matter.⁹¹ Information conveyed to the facilitator is confidential and the facilitator can: explain the process; set deadlines; help prepare trial document summaries (similar to a pre-trial statement) if parties are unable to resolve their matter using ODR; answer questions from the parties via a confidential chat room; provide limited legal guidance; and provide other assistance as needed.⁹² There are five steps in this process: (1) “education and evaluation” involving preliminary screening and informing users of their claims and potential defenses, (2) “communication,” where parties are communicated with and are given the chance to communicate with one another, (3) “facilitation and trial preparation” process where the ODR facilitator assists parties with any issues in preparing for trial if necessary and is also responsible for creating the Trial Preparation Document which outlines the claims, defenses, facts, and evidence the parties agree on, (4) “adjudication” where an assigned judge conducts an in-person or online trial, and (5) “post judgment” phase, and offers additional

82. *See id.*

83. *Id.* at 117–19. *See also* Julianne Dardanes, *When Accessing Justice Requires Absence from the Courthouse: Utah’s Online Dispute Resolution Program and the Impact it Will Have on Pro Se Litigants*, 21 PEPP. DISP. RESOL. L.J. 141, 143–44 (2021).

84. *See* Deno Himonas, *Utah’s Online Dispute Resolution Program*, 122 DICKINSON L. REV. 875, 881 (2018).

85. *Id.*

86. *See* Dardanes, *supra* note 83, at 151.

87. *Id.* at 154–55.

88. *Id.*

89. *Id.*

90. *See* Himonas, *supra* note 84, at 882.

91. *See* Dardanes, *supra* note 83, at 157–58.

92. *Id.*

information and tools regarding appeals, motions to enforce the agreements, supplemental orders, and information about how to collect a judgment.⁹³ If the parties are not satisfied and do not settle, they can request de novo review by the court, either in person or virtually.⁹⁴ The process is not a lengthy one: beginning with the plaintiff registering with the online program within seven days of filing a claim; the defendant registering within fourteen days; the facilitator is assigned within seven days of registration and will establish timelines and deadlines for information sharing; and finally if the court does not receive notice of settlement, the court will schedule a date for trial within seven to twenty-one days.⁹⁵ The Utah system is mandatory but does permit an opt-out option if utilizing the ODR system would create an undue hardship.⁹⁶

Development of these pre-COVID-19 hybrid court models tended to be uniform in addressing specific legal issues. The significant research on the difficulties and concerns that these hybrid court models revealed provides guidance for development of more effective hybrid models.⁹⁷ Indeed, the more recently pre-pandemic adopted models rethought the online process, focusing on conscientious design with the goal of aiding in closing the justice gap.⁹⁸

B. Completely Remote—COVID-19 Courts

The abrupt adoption of remote courts began with state of emergency declarations requiring court closures in March 2020.⁹⁹ This was easier for some courts than others, with many issuing blanket continuances and suspending timetables.¹⁰⁰ Six months into the pandemic, some courts' backlogs were growing exponentially and other matters required immediate court action due to safety risks,

93. *Id.* at 154–59.

94. *Id.* at 158–59.

95. *Id.* at 152–59.

96. *Id.* at 153.

97. *See id.* at 151. *See generally* Oladeji M. Tihamiyu, *The Impending Battle for the Soul of ODR: Evolving Technologies and Ethical Factors Influencing the Field*, 23 CARDOZO J. CONFLICT RESOL. 75 (2022). The author identifies not only the Utah program as an example of alternative ODR processes, but also a program in Franklin County, Ohio which found that 94% of users preferred ODR and that ODR allowed parties to have greater autonomy throughout the proceedings and avoid default judgments that are more common in the absence of such alternatives. *Id.* at 132. The author also discusses the use of ODR programs in family law. *Id.* at 133–34.

98. *See* Maximillian A. Bulinski & J.J. Prescott, *Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency*, 21 MICH. J. RACE & L. 205, 215–16 (2016). *See also* Greiner et al., *supra* note 25, at 1138–39 (pre-COVID-19 hybrid court models include ones to assist with debt collection defense resulted in low-income litigants eliminating debts which are likely to weigh on their already taxed “bandwidth”).

99. Sarah Mervosh et al., *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> (last updated Apr. 20, 2020).

100. *See Coronavirus and the Courts: Links to State Court Covid-19 Websites*, NAT'L CTR.STATE CTS., <https://www.ncsc.org/newsroom/public-health-emergency> (last visited Apr. 13, 2023) [hereinafter *Coronavirus and the Courts*]; Raleigh D. Kalbfleisch, *The Impact of the COVID-19 Pandemic on Legal Services*, DCBA BRIEF, <https://www.dcba.org/mpage/v33-Raleigh-D-Kalbfleisch> (last visited Apr. 13, 2023).

leaving no other option but for courts to turn to adopt remote proceedings as a means to move the matters forward.¹⁰¹

In contrast to the hybrid court models developed leading up to the pandemic, these models developed on an *ad hoc* basis.¹⁰² Unfortunately, the swift adaptation of remote and hybrid proceedings resulted in a lack of uniformity, lack of research, and potentially the creation of poorly conceived hybrid court models. Platform technologies such as Microsoft Teams and Zoom appeared to be reasonable solutions for court proceedings.¹⁰³ These platforms allowed courts to continue to hear cases via videoconferencing where all participants, including lawyers, litigants, the judge, jurors, and witnesses, joined the platform from separate remote locations to participate in the trial.¹⁰⁴ Courts had to develop methods to share documents and exhibits using programs like Google Drive; develop email protocols for court communications; and expand electronic filing methods so that individuals could file necessary court documents.¹⁰⁵ The majority of courts did not have hybrid court models or the technological tools needed prior to the pandemic.¹⁰⁶ Because they were unprepared for a pandemic, courts changed methods frequently, which led to difficulties for litigants utilizing the new systems due to

101. See Reynolds, *supra* note 28 (describing that San Diego had a backlog of 20,000 criminal cases and over 50,000 civil matters by September 2020 and New York state had over 100,000 criminal cases and a million civil matters pending by October of 2020); JANA HRDINOVA ET AL., DRUG ENF'T & POL'Y CTR., DOCUMENTING CHALLENGES (AND DOCUMENTS) AS OHIO COURTS RESPOND TO COVID-19, OHIO STATE PUB. L. WORKING PAPER NO. 541 (2020), <https://ssrn.com/abstract=3574733>. See generally Kalbfleisch, *supra* note 100.

102. See *Coronavirus and the Courts*, *supra* note 100. From the beginning of the pandemic, the Conference of Chief Justices and the Conference of State Court Administrators established a rapid response team staffed by the National Center for State Courts to provide a series of resources discussing the early impacts and responses to COVID-19 as well as resources pertaining to state-by-state pandemic responses, and guiding principles for post-pandemic court technology. *Id.*

103. See Victor A. Afanador, *Technology for Trial Attorneys During the Advent of Hybrid and Virtual Trials*, N.J. LAWYER MAG., June 2021, at 26–27 (describing how courts began to issue “best practices” for court proceedings on how to handle everything from the format of the proceeding to electronic evidence practices).

104. See generally Freeman Engstrom, *supra* note 34. See, e.g., *Ben Crump Wins Historic \$411 Million Verdict in Zoom Trial*, PRNEWswire (Oct. 6, 2020), <https://www.prnewswire.com/news-releases/ben-crump-wins-historic-411-million-verdict-in-zoom-trial-301146704.html> (discussing how a civil rights and personal injury lawyer was able to try a jury trial successfully on Zoom winning over \$400,000,000 for the client).

105. Freeman Engstrom, *supra* note 34, at 250–51. See also JOINT TECH. COMM., NAT'L CTR. STATE CTS., JTC QUICK RESPONSE BULLETIN: STRATEGIC ISSUES TO CONSIDER WHEN STARTING VIRTUAL HEARINGS (2020) (the Joint Technology Committee (JTC) was established by the National Center for State Courts (NCSC), Conference of State of Court Administrators (COSCA), and National Association for Court Management (NACM) and provides reports and recommendations for best practices that focus on the effective running of state courts). See generally *Ben Crump Wins Historic \$411 Million Verdict in Zoom Trial*, *supra* note 104.

106. See *Coronavirus and the Courts*, *supra* note 100. See also Justice Gap (2022), *supra* note 17, at 13–14.

confusion and inconsistencies.¹⁰⁷ When the processes were no longer straightforward and easy to understand, low-income litigants had difficulty navigating them.¹⁰⁸

Some courts saw these difficulties and developed trainings and guides for using the platform technology and navigating the new court processes.¹⁰⁹ Fairfax County Judge John Tran took an active role in assuring that other court members and lawyers were able to utilize the remote court model by providing trainings.¹¹⁰ If litigants had difficulties with the remote log-in or technical difficulties, Judge Tran would create “work-arounds” utilizing other methods to assure that litigants could actively participate in the process.¹¹¹ When interviewed, Judge Tran noted one key component to a successful hybrid model is the importance of uniformity in the process so that litigants can come into any courtroom and know what to expect, having access to the “fact-finder” and, ultimately, justice.¹¹²

Throughout the pandemic, COVID-19 surges and variants caused ongoing changes to court processes and technology impacting the ability to have uniformity, often resulting in differing procedures in each courtroom.¹¹³ As surges passed, courts seemed to settle on hybrid court models keeping some proceedings and aspects of trial online, while other portions of the process moved forward in-person.¹¹⁴ It appears that the technological adaptations made during COVID-19 court

107. Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORNELL J.L. & PUB. POL’Y 331, 339 (2016). See also JOINT TECH. COMM., *supra* note 105.

108. Zoe Tillman, *Going to Court Without a Lawyer Was Always Hard the Pandemic Has Made It Much Harder.*, BUZZFEED NEWS (May 15, 2020), <https://www.buzzfeednews.com/article/zoetillman/coronavirus-courts-closed-civil-court-legal-help> (describing how a generally simple process of rescheduling a hearing became almost impossible for the unrepresented litigant when they could not find the correct number, unit, or method of reaching the court to reschedule).

109. See Quaintance, *supra* note 13. See also Stephanie Francis Ward, *Judge John Tran Spearheaded Adoption of Tech to Facilitate Remote Hearings and Helped Train Lawyers*, AM. BAR ASSOC. (Feb. 1, 2021), <https://www.abajournal.com/legalrebels/article/judge-john-tran-spearheaded-adoption-of-tech-to-facilitate-remote-hearings-and-helped-train-lawyers>; TEX. ACCESS TO JUST. COMM’N, TIPS FOR SELF-REPRESENTED LITIGANTS: ZOOM HEARINGS AND BASIC COURT PROCESSES AND PROCEDURES (2020).

110. See generally Sharon Nelson & Jim Calloway, *Remote Litigation Tips: A View from the Bench with Judge John Tran*, LEGAL TALK NETWORK (Jan. 20, 2022), <https://legaltalknetwork.com/podcasts/digital-edge/2022/01/remote-litigation-tips-a-view-from-the-bench-with-judge-john-tran/>.

111. *Id.*

112. *Id.*

113. 2020 COVID-19 State Restrictions, Re-openings, and Mask Requirements, NAT’L ACAD. STATE HEALTH POL’Y (Jan. 11, 2021), <https://nashp.org/2020-covid-19-state-restrictions-re-openings-and-mask-requirements/>. See also *Courts Using Videoconference Software*, PERKINS COIE (June 25, 2020), <https://www.perkinscoie.com/en/news-insights/courts-using-videoconference-software.html>.

114. 2020 COVID-19 State Restrictions, Re-openings, and Mask Requirements, *supra* note 113. See also N.M. FIRST JUD. DIST. CT., FIRST JUDICIAL DISTRICT PLAN TO RESUME COURT OPERATIONS (2022), <https://www.nmcourts.gov/wp-content/uploads/2022/04/March-1-2022-Revised-Reopening-Plan-3.pdf>; ADMIN. OFF. PA. CTS. & PA. CONF. STATE TRIAL JUDGES, REMOTE PROCEEDINGS TASK FORCE: CONTINUED USE OF ADVANCED COMMUNICATION TECHNOLOGY (ACT) FOLLOWING THE TERMINATION OF JUDICIAL EMERGENCIES (2021) (discussing planning associated with moving forward with a hybrid court model) [hereafter Continued Use of ACT].

closures are here to stay in some format.¹¹⁵ This creates a cause for concern as the swift changes took steps backwards from the thoughtful process of development exercised in pre-COVID-19 models, seemingly unconcerned with the digital divide and other hurdles low-income litigants face when accessing the court.

C. *Expansion of Hybrid Courts*

As stay-at-home orders lifted and courts began to re-open to the public, most courts across the country moved from the fully virtual court model of the COVID-19 emergency operations to a hybrid court model.¹¹⁶ As established pre-COVID-19, hybrid hearings are more than setting up cameras and letting people talk while located outside of the physical courtroom.¹¹⁷ But looking for a uniform hybrid model, similar to the model utilized by the immigration courts since the 1990s, will result in frustration.¹¹⁸ Most court rules, to the extent that they exist, defer to trial courts and individual judicial discretion in determining what hybrid court model is appropriate, often on a courtroom-by-courtroom basis.¹¹⁹

The design of these new models did not have the same consistency and considerations as the pre-COVID-19 models. Some courts modeled their operations on the Fairfax County model in the Depp/Heard trial, creating hybrid court proceedings by utilizing remote technologies throughout the trial while retaining a significant in-person component.¹²⁰ Other courts have limited the use of this hybrid process to pre-trial proceedings or simple hearings, even allowing litigants and lawyers to proceed with a case remotely by video-conferencing or telephone.¹²¹ These models include remote online alternative dispute resolution,

115. Reynolds, *supra* note 28 (exploring, in part, the difficulties of mass adoption of utilization of video platforms for low-income individuals could be seen in the educational issues which arose when low-income students did not have access to the necessary technological tools to effectively attend school remotely during the pandemic). See Justice Gap (2022), *supra* note 17, at 35 (highlighting concerns of the continued use of technology platforms for court proceedings because of the difficulties that low-income Americans had with the mass adoption of technology).

116. See *Judges: Expect Hybrid Trial System After the Pandemic*, *supra* note 35; Pattison-Gordon, *supra* note 39; *Coronavirus and the Courts*, *supra* note 100 (exemplified by review of the state court COVID-19 websites, the initial move to remote technology platforms for continuation of court proceeding were only designed as a band-aid to assure that the court operations did not come to a complete halt during the pandemic not as a means to developing a new court model).

117. Pattison-Gordon, *supra* note 39 (discussing recommendations for the use of advanced communication technologies (ACT) in civil, criminal, family, juvenile, orphans' court, and minor court proceedings).

118. Eagly, *supra* note 28, at 945–47 (discussing the successful use of televideo use in immigration cases leading to Congress authorizing this technology in all immigration proceedings).

119. See, e.g., Telephonic & Videoconference Hearings Rule, W. Va. R. Prac. & P. Fam. Ct. 18 [hereinafter W. Va. Rule 18].

120. See David Adkins, *Program Offers Remote Court Access to Domestic Violence Victims Using Pandemic-Inspired Technology*, W.VA. PUB. BROAD. (Aug. 20, 2021) (on file with author).

121. See, e.g., *Information Concerning Oral Arguments in the Supreme Court and Court of Appeals*, NEB. JUD. BRANCH, <https://supremecourt.nebraska.gov/administration/nebraska-judicial-branch-emergency-status-information/appellate> (last visited Apr. 13, 2023). See also Pattison-Gordon, *supra* note 39 (noting that lawyers like the cost and time savings associated with virtual often opting for this option for initial proceedings).

e-filing, preliminary proceedings, remote witness testimony, even remote jury selection.¹²²

The different types of existing models and approaches can be seen just from taking a small sampling of how courts throughout the United States approached implementing hybrid courts during the pandemic. For example, the Pennsylvania Supreme Court required all judges to return to their courtrooms as of July 6, 2021.¹²³ Simultaneously with the entry of this order, the Administrative Offices of Pennsylvania Courts created a task force to investigate the continued use of Advance Communication Technology (ACT).¹²⁴ The report issued by the task force made a number of suggestions to judges to consider in determining whether to continue utilizing ACT to create hybrid court models.¹²⁵ One recommendation includes: “Judges should establish and distribute their operating procedures for proceedings being conducted by ACT.”¹²⁶ In Allegheny County, Pennsylvania, the Family Court took this advice to heart, resulting in each of the fifteen (15) family court judges having individual and differing operating procedures for utilizing ACT in their courtrooms.¹²⁷ Some of the judges conduct every proceeding fully remotely and others offer hybrid litigation models with some steps in the litigation taking place fully remotely and others taking place in-person.¹²⁸ This hybrid court model was the very type of court model that Joy found herself in. This model causes mass confusion resulting in low-income litigants being effectively barred from the court due to the lack of consistent information regarding the individual court processes.

In West Virginia, Family Court Rule 18 provides:

The court may conduct any hearing, including an evidentiary hearing, telephonically or by videoconference, and may permit any witness to testify or be deposed by such methods. In telephonically conducted proceedings the official record shall be made in the manner prescribed by the court. Videoconference proceedings shall be conducted in accordance with the requirements established by the Supreme Court of Appeals.¹²⁹

122. Remote Hearings and Access to Justice, *supra* note 19, at 2–3. See *How Courts Embraced Technology*, *supra* note 35.

123. Sup. Ct. of Pa. Order No. 553, *supra* note 23. In pertinent part, the Order dated June 21, 2021, states: “Effective July 6, 2021, operation of the Unified Judicial System shall return to pre-pandemic status. All courtrooms, adjacent judicial facilities, chambers, and offices within the Unified Judicial System shall be full opened and staffed by judges and other personnel.” *Id.*

124. Continued Use of ACT, *supra* note 114, at 1–2.

125. *Id.*

126. *Id.* at 6.

127. See *Family Division Judicial Directory & Operating Procedures*, FIFTH JUD. DIST. OF PA., <https://www.alleghencourts.us/family/judicial-directory-operating-procedures/> (last visited Apr. 13, 2023) (providing each judge’s different remote hearing procedures which frequently changed). This is due in part to the lack of uniform rules or processes for when a judge schedules remote, hybrid, or in-person proceedings in Pennsylvania. See Sup. Ct. of Pa. Order Allegheny County, *supra* note 23.

128. See *Family Division Judicial Directory & Operating Procedures*, *supra* note 127.

129. W. Va. Rule 18, *supra* note 119.

While West Virginia has a Family Court Rule specifically addressing telephonic and videoconference hybrid court models, it provides significant discretion to the individual judge in how to develop a hybrid court model.¹³⁰ Despite this, Cabell County, West Virginia, developed a uniform hybrid court model for domestic violence cases.¹³¹ The court allows the party seeking protection to appear for court remotely while the defendant appears in-person.¹³² When appearing remotely, the petitioner must attend the proceeding from the local domestic violence advocate center.¹³³ At the advocacy center, the petitioner has a secure location with a good internet connection, support for technical difficulties that may arise during the hearing, and support for the individuals utilizing the process by having advocates readily available to address the needs of domestic violence survivors.¹³⁴ This model assures access by having a uniform process for domestic violence matters, while also providing the necessary technology tools to participate effectively in this process.

The Cabell County hybrid court model also exemplifies that the hybrid court model can be successful in different socio-economic environments. Cabell County has approximately 100,000 residents and the median household income is approximately \$40,000 per year.¹³⁵ This is a significant difference from Fairfax County, Virginia, the location of the Depp/Heard trial. Fairfax County, Virginia has approximately 1.2 million residents and a median household income of approximately \$130,000 per year.¹³⁶

In Los Angeles, California, during the pandemic the courts began to outfit their courtrooms with technology, including custom designed videoconferencing platforms, in order to continue the work of the courts.¹³⁷ As courts reopened, Los Angeles courts maintained the hybrid court model.¹³⁸ The blended court model (with in-person and remote participants) was more than judges with laptops and Zoom accounts.¹³⁹ This process required: hard wiring courtrooms; assuring

130. *Id.*

131. Adkins, *supra* note 120. Given the very small size of the Family Court in Cabell County, where there is only one entrance, exit, elevator, and a small waiting room, the hybrid court model allows individuals seeking protection to seek the assistance of the court from alternative locations to maximize safety, comfort, and access. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* See also Chris Dickerson, *New Supreme Court Project to Promote Safety in Domestic Violence, Sexual Assault Cases*, W. VA. REC. (Aug. 18, 2021), <https://wvrecord.com/stories/606757922-new-supreme-court-project-to-promote-safety-in-domestic-violence-sexual-assault-cases>. Survivors have the option of going to Branches Domestic Violence Shelter office or CONTACT Rape Crisis Center in Huntington. *Id.* See also W. Va. Rule 18, *supra* note 119.

135. *QuickFacts Fairfax County, Virginia; Cabell County, West Virginia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/fairfaxcountyvirginia,cabellcountywestvirginia/PST045221> (last visited Apr. 13, 2023).

136. *QuickFacts Cabell County, West Virginia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/cabellcountywestvirginia> (last visited Apr. 13, 2023).

137. Pattison-Gordon, *supra* note 39.

138. *Id.*

139. *Id.*

cameras and microphones were able to capture what was occurring in-person; assuring security; and assuring smooth technology transitions were in place so that evidence, testimony, and advocacy could all be maintained in this hybrid model.¹⁴⁰ To meet these needs, the Los Angeles courts developed a tailored videoconferencing platform with features designed to manage dozens of participants, including muting capabilities, hearing reminder notices, and more.¹⁴¹ However, this hybrid model was not without faults. There were fees associated with utilizing the platform and the fee to connect with audio was less expensive than connecting with video.¹⁴² This disincentivized utilizing the video features and low-income individuals could only afford the audio option.¹⁴³ There were also significant problems with audio and video quality due to the high volume of utilization in the courts and county, with over 5,000 participants a day.¹⁴⁴ This led to the court having to adopt a commercial videoconferencing platform, which also required trainings for all of the 585 courtrooms and associated staff being brought up to speed on the uses of this new platform.¹⁴⁵ As the court discovered equity issues, further adaptations to the hybrid model continued, such as adaptations to assure individuals with hearing disabilities could successfully participate and adaptations necessary as not all individuals have the same comfort level in utilizing the technology tools.¹⁴⁶ The key to the Los Angeles hybrid court model is that it is constantly evolving to address concerns observed regarding individuals' ability to successfully address their legal needs.

Allegheny County, Pennsylvania, Cabell County, West Virginia, and Los Angeles County, California utilize distinct approaches to the hybrid court model. In Allegheny County, Pennsylvania, hybrid court proceedings are at the discretion of each judge.¹⁴⁷ While West Virginia permits judicial discretion in the utilization of hybrid court models, Cabell County universally adopted a uniform model for domestic violence cases addressing one of the most sensitive and necessary court processes.¹⁴⁸ Finally, Los Angeles County's hybrid court model is one of constant evolution to discover what works best.¹⁴⁹ The differences between these hybrid court models convey one clear theme: expansion is occurring and varies state by state, county by county and often courtroom by courtroom. In comparing the models, when the model varies courtroom by courtroom, inconsistencies make it difficult for participants to effectively utilize the system, while with models that are consistent by legal problem there is the potential for an effective and accessible hybrid model.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *See* Sup. Ct. of Pa. Order No. 553, *supra* note 23.

148. Adkins, *supra* note 120.

149. Pattison-Gordon, *supra* note 39.

Expansion of hybrid court models continues to grow as does the research regarding the limitations they present and the benefits that they offer.¹⁵⁰ In fact, grants and funding sources are also growing to help courts develop these hybrid court models.¹⁵¹ However, in addition to funding for development, courts need to step back to evaluate the hybrid courts developed pre-COVID-19 and the research available. The haphazard approach taken by some courts will only increase an inability for low-income individuals to access the courts and the justice gap will grow.

III. THE DIFFICULTIES AND BENEFITS PRESENTED IN HYBRID COURT MODELS

Hybrid courts can place a significant strain on access to justice, creating additional barriers in an already difficult system for low-income individuals to navigate.¹⁵² When evaluating the uses of hybrid court models, it is important to consider that low-income unrepresented litigants are not outliers to the system. Rather, they constitute the lion's share of litigants utilizing the justice system.¹⁵³ Fifty million Americans have incomes below 125% of the poverty guidelines, meaning that for a household of four the total household income is approximately \$33,125 or below.¹⁵⁴ Seventy-four percent of low-income households experienced at least one civil legal problem in 2021.¹⁵⁵ This likely "grossly underestimates" the actual need as it only accounts for individuals that have completed the full intake process at a Legal Services Corporation (LSC) funded service provider.¹⁵⁶

150. See *Hybrid Hearings Improvement Initiative*, NAT'L CTR. STATE CTS., <https://www.ncsc.org/consulting-and-research/areas-of-expertise/access-to-justice/remote-and-virtual-hearings/hybrid-hearings> (last visited Apr. 13, 2023).

151. *Id.* The National Center for State Courts has developed an improvement initiative where it will award grants for one-year projects to increase hybrid court models across the United States. *Id.*

152. See Lynda B. Munro & Nicole M. Riel, *Our Virtual Reality: Facing the Constitutional Dimensions of Virtual Family Court*, 54 FAM. L. Q. 245, 259–60 (2021) (noting elements of in-person proceedings that cannot be replicated virtually, and discussing how forcing some litigants to use online platforms fosters feelings of anger, disorientation, or disassociation and disadvantages those who lack the access to technologies).

153. BANNON & ADELSTEIN, *supra* note 15.

154. Justice Gap (2022), *supra* note 17 (statistic based off of 2021 census data); OFF. ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, 2021 POVERTY GUIDELINES (2021), <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines/prior-hhs-poverty-guidelines-federal-register-references/2021-poverty-guidelines>.

155. Justice Gap (2022), *supra* note 17, at 8. LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6 (2017) [hereinafter Justice Gap (2017)].

156. Justice Gap (2022), *supra* note 17. Legal Services Corporation publishes reports regarding the unmet civil legal needs of low-income individuals in the United States. This report provides information relating to the needs of low-income Americans and the hurdles they encounter in accessing the civil justice system. The 2022 report is unique from prior reports as it provided insights regarding "potential barriers to getting legal help, the role of the COVID-19 pandemic, and key differences between low-income Americans and those with higher incomes." *Id.* at 18.

Prior to the pandemic, there was a significant gap in access to justice between low-income litigants, often unrepresented, and represented litigants of means.¹⁵⁷ It is foolhardy to believe that the issues that low-income Americans faced in the civil justice system have evaporated through a shift move to remote technologies and hybrid court models as the “new normal” for the justice system.¹⁵⁸ Most believe this swift change in court operations compromised access to justice.¹⁵⁹ In fact, LSC reported in 2022 that 1.9 million low-income individuals sought assistance for their legal needs from a LSC funded organization in 2021, a significant rise from LSC’s 2017 report when providers received 1.7 million requests.¹⁶⁰ This is a concerning trend that suggests that the new court models developed during the pandemic did not assist with closing the justice gap, as nearly 200,000 more individuals sought assistance following the first year of the COVID-19 pandemic.

Yet, as seen by the pre-COVID hybrid courts that focused on assisting low-income litigants, similar to Utah’s ODR program, hybrid court models can improve low-income litigants’ access to the courts.¹⁶¹ Developing models to maximize the known benefits while diminishing the difficulties presented by hybrid courts will help in creating accessible models.

A. *Difficulties that Exist Within Hybrid Court Models*

Developing effective hybrid court models requires careful consideration of the potential pitfalls while concentrating on the benefits they provide.¹⁶² Throughout the development of hybrid courts, from pre-COVID-19 models to current models, the difficulties presented have come into focus. Hybrid courts initially developed for the immigration and bail hearings, revealed problems with determining credibility and perceptions of the court process.¹⁶³ As court processes turned fully remote during the initial months of the COVID-19 pandemic, additional difficulties presented with issues such as virtual jury selection and technology accessibility.¹⁶⁴ While the research by the Stanford Criminal Justice Center found that virtual proceedings saved time and cost, many clients lacked internet or devices to access necessary technology, and quality technology was

157. *Id.*; Justice Gap (2017), *supra* note 155. See generally DOCUMENTING THE JUSTICE GAP IN AMERICA, LEGAL SERVS. CORP. (2009), https://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

158. Justice Gap (2022), *supra* note 17.

159. BENNINGER ET AL., *supra* note 11, at 39.

160. Justice Gap (2022), *supra* note 17; Justice Gap (2017), *supra* note 155.

161. See Dardanes, *supra* note 83, at 143–44.

162. See generally John Zeleznikow, *The Challenges of Using Online Dispute Resolution for Self Represented Litigants*, 23 J. INTERNET L. 3 (2020).

163. See Eagly, *supra* note 28; Seidman Diamond, *supra* note 42.

164. See generally Nina J. Ginsberg, *From the President: The Perils of Virtual Trials*, CHAMPION (May 2020), at 5; BENNINGER ET AL., *supra* note 11, at 150–51.

even less accessible to some which caused parties difficulty hearing, seeing, and comprehending proceedings in which their liberty was at stake.¹⁶⁵

1. Courtrooms' Lack of Adequate Technology

From the courts' perspective, there have been significant costs associated with the expansion of hybrid court models as courtrooms must have updated technology for the model to be successful.¹⁶⁶ Often, courts did not have cameras on their computers or technology within the courtroom to effectively run a hybrid proceeding.¹⁶⁷ Initially, Los Angeles courts charged fees for individuals to utilize the hybrid court model, which varied based on whether individuals joined the proceeding by audio or, through the higher costing video.¹⁶⁸ This hindered participation until the Los Angeles Courts equalized the costs between using audio or video and offered fee waivers for individuals that could not afford the costs.¹⁶⁹ Other courts utilized funds that they received from the federal government during COVID-19 to outfit courtrooms and courthouses with the necessary technology to proceed with hybrid court proceedings.¹⁷⁰ It is unclear, however, the costs associated with maintaining these technologically advanced hybrid courtrooms and how courts will allocate those costs.

Aside from concerns regarding the costs in assuring that courts have the appropriate technology to run a hybrid court proceeding, they must also be able to accommodate a variety of participants. Specifically, hybrid courts and the use of technology can significantly disadvantage some individuals, such as low-income litigants. Low-income litigants already experience hurdles when trying to access traditional in-person court models.

2. Traditional Barriers to Accessing Courts In Person Persist

Low-income litigants face difficulties that litigants who can afford to hire counsel do not.¹⁷¹ Indeed, ninety-two percent of low-income Americans do not get "any or enough legal help" for their civil legal problems.¹⁷² Of the 1.9 million low-income individuals that have sought assistance from civil legal aid providers in 2021, only one out of two were able to receive any form of assistance.¹⁷³ Low-income individuals suffered disproportionately from the effects of the COVID-19

165. See generally BENNINGER ET AL., *supra* note 11.

166. Quaintance, *supra* note 13; Remote Hearings and Access to Justice, *supra* note 19; BENNINGER ET AL., *supra* note 11. See Afanador, *supra* note 103 (estimating that costs associated with creating a hybrid courtroom range from \$9,000 to \$13,000 to set up one courtroom).

167. See Afanador, *supra* note 103.

168. Pattison-Gordon, *supra* note 39.

169. *Id.*

170. BENNINGER ET AL., *supra* note 11.

171. Justice Gap (2022), *supra* note 17, at 61, 64 ("73% of higher-income Americans are confident in their ability to find a lawyer they could afford while only 45% of low-income Americans say the same.").

172. *Id.* at 7.

173. *Id.*

pandemic and often did not receive any or enough legal assistance for their legal matters.¹⁷⁴ Particularly concerning is that thirty-three percent of low-income Americans experienced COVID-19 related civil legal issues directly impacting their daily lives.¹⁷⁵ Overall, ninety-seven percent of low-income individuals had income maintenance issues related to COVID-19, ninety-six percent of individuals had education issues related to COVID-19, and ninety-four percent of individuals had housing issues, but did not receive any or enough legal assistance.¹⁷⁶ These COVID-19 related civil legal issues included income matters (unemployment related issues), education proceedings (inability to access education due to the technology required for virtual learning), and housing challenges (eviction and other housing instability related matters).¹⁷⁷ Regardless of the severity of the legal issue, the matter itself has a significant (often negative) impact on low-income individuals when compared to higher-income Americans.¹⁷⁸

The inability to afford counsel is often assumed to be the greatest hurdle that low-income individuals face when trying to address their civil legal needs.¹⁷⁹ This is only one of the financial hurdles that low-income litigants face.¹⁸⁰ Other financial concerns include the ability to miss a day of work, afford childcare costs, or afford travel costs associated with getting to the courthouse.¹⁸¹

Further complicating a low-income litigant's ability to address a legal matter is their "available bandwidth."¹⁸² Basic needs such as shelter, food for their family, transportation issues, paying bills, assuring employment and having enough income must come first for low-income individuals.¹⁸³ These daily needs take significant amounts of energy to address.¹⁸⁴ Often, this leaves low-income individuals without the energy to address their legal issues.¹⁸⁵ The COVID-19 pandemic has further complicated low-income litigants' available bandwidth.¹⁸⁶ In

174. *Id.* at 53.

175. *Id.* at 11.

176. *Id.* at 53.

177. *Id.* at 11.

178. *Id.*

179. *See Legal Needs of the Public*, *supra* note 25. *See also* Rhode, *supra* note 24, at 1788 (estimating it would take three to four billion dollars to meet the legal need of low-income Americans in 2001 given that as of 2001, "only about one legal aid lawyer or public defender for every 4,300 persons below the poverty line as opposed to a ratio of one lawyer for every 380 Americans in the population generally.").

180. *See Legal Needs of the Public*, *supra* note 25 (discussing difficulties facing low-income individuals such as identification of legal issues to issues directly relating to being an individual with low-income).

181. *See* Budzinski, *supra* note 32, at 177.

182. Greiner et al., *supra* note 25, at 1128 (discussing a study which that "exposes how the poor spend an inordinate amount of energy, attention, and mental bandwidth dealing with their impoverished state" such as food scarcity, lack of shelter, and lack of employment or low pay employment).

183. *Id.*

184. *Id.*

185. *See id.* (noting in particular that low-income litigants' energy is further compromised by feelings of anxiety and threat when faced with a legal problem, often resulting in paralyzing emotions for some litigants).

186. Justice Gap (2022), *supra* note 17, at 27.

fact, the pandemic has had a disproportionate and devastating impact on low-income Americans, beyond the direct health impacts.¹⁸⁷ Specifically, for households with income below \$25,000 a year, twenty-three percent lost employment income, eighteen percent were behind on their housing payments, twenty-six percent did not always have enough food to eat, and thirty-six percent experienced anxiety.¹⁸⁸ These additional challenges create even less bandwidth available to address civil legal matters.

Often, low-income litigants face difficulties in handling the procedural portion of the legal process.¹⁸⁹ Procedural hurdles include filing the necessary documentation, following the appropriate timeframes and deadlines, and otherwise abiding by the requirements of the court process.¹⁹⁰ Access to the courts “does not mean access only during proceedings,” but also “to documents and materials provided throughout a trial.”¹⁹¹ Even if a litigant is able to overcome the procedural legal hurdles, the substantive legal issues present problems.¹⁹²

Hybrid court models further complicate these barriers to accessing justice.¹⁹³ For example, to prove the substantive legal issues, low-income litigants may now need to present their evidence remotely, necessitating access to the technological tools to create electronic documents for remote witnesses.¹⁹⁴ Mundane aspects of the court process such as how to address the court and who speaks when, create additional hurdles.¹⁹⁵ Compounding the difficulty of navigating court proceedings, low-income litigants often experience anxiety and even shame when having to utilize the court to resolve matters.¹⁹⁶ This anxiety and fear of the mundane does not dissipate in hybrid court proceedings; in fact, it is likely worse due to the need to navigate the technological components of the court process. The legalese that courts often utilize in court proceedings, in part, contributes to these difficulties, and now hybrid court models also include complicated vocabulary related to

187. *Id.* at 65. Higher income households were less likely than low-income households to have a COVID-19 pandemic-related legal problem.

188. *Id.*

189. *See* Budzinski, *supra* note 32, at 183–84.

190. *See* Deborah L. Rhode et al., *Access to Justice Through Limited Legal Assistance*, 16 NW. J. HUM. RTS. 1, 18–19 (2018) [hereinafter *Limited Legal Assistance*]. *See generally* NATALIE ANNE KNOWLTON ET AL., CASES WITHOUT COUNSEL: RESEARCH ON EXPERIENCES OF SELF-REPRESENTATION IN U.S. FAMILY COURT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (2016), https://iaals.du.edu/sites/default/files/documents/publications/cases_without_counsel_research_report.pdf (finding that among the 128 self-represented litigants sampled in this empirical study, there was overarching uncertainty and lack of understanding in respondents navigating the court system and ensuring that all necessary forms, filings, and paperwork that might affect the outcome of their case are submitted).

191. Von Wiegen & Oltmann, *supra* note 19, at 259.

192. *See* Greiner et al., *supra* note 25.

193. *Id.* at 1126.

194. *Id.*

195. *Id.* at 1130.

196. *Id.*; J.J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 VAND. L. REV. 993, 2007–08 (2017) (noting that anxiety of the formalities is exacerbated by the fear of speaking to the court, combined with the “fear of about the outcome . . . stigma, confusion, and shame.”). *See also* KNOWLTON ET AL., *supra* note 190, at 45.

technology.¹⁹⁷ Vocabulary issues particularly complicate the process when individuals with hearing problems, individuals with disabilities, and those for whom English is not their first language attempt to utilize hybrid court systems.¹⁹⁸ Language barriers, combined with the use of interpreters through a virtual or hybrid setting, can be very difficult.¹⁹⁹ Often, interpretation requires video and not just audio to be effective.²⁰⁰ Accordingly, it is critical to assure that individuals have access to both, therefore assuring that technology does not hinder effective use of the court process.²⁰¹

3. Disparities Due to the Digital Divide

One of the greatest barriers that low-income litigants face in accessing courts with hybrid models is the digital divide. The United States has made strides to assure that low-income Americans have access to the internet, digital devices, and technology resources.²⁰² However, a large contingent of individuals continue to not have access, or stable and consistent access, to online and remote resources, especially in low-income and remote areas.²⁰³ This digital divide impedes the ability of low-income individuals to access digital content and information technology.²⁰⁴ In 2020, in the initial months of the COVID-19 pandemic, the Federal Communications Commission (FCC) issued a report on the digital divide and access to broadband across the country.²⁰⁵ The FCC concluded that more than eighteen million people did not have access to broadband in the United States.²⁰⁶ However, a dissenting statement submitted by Commissioner Jessica Rosenworcel noted that this number is underreported suggesting, based on other studies, it is likely that the number of individuals without broadband

197. See Remote Hearings and Access to Justice, *supra* note 19, at 12.

198. See generally Matthew R. Davison, *No Ordinary Process: The Flaws in Illinois Courts' Use of Remote Video Technology in Mental Health Trials*, 30 ANNALS HEALTH L. & LIFE SCI. 137 (2021). See also Pattison-Gordon, *supra* note 39; BANNON & ADELSTEIN, *supra* note 15; Remote Hearings and Access to Justice, *supra* note 19.

199. See Remote Hearings and Access to Justice, *supra* note 19, at 12–13.

200. See *id.*

201. *Id.* See also BANNON & ADELSTEIN, *supra* note 15, at 10 (noting the significant need for training to assure that hybrid court models are accessible to marginalized communities and non-English speaking individuals while also assuring that the technology supports multiple languages).

202. COUNCIL OF ECONOMIC ADVISERS ISSUE BRIEF, MAPPING THE DIGITAL DIVIDE 1 (Council of Econ. Advisers ed., 2015), https://obamawhitehouse.archives.gov/sites/default/files/wh_digital_divide_issue_brief.pdf.

203. *Id.* at 1–6.

204. Peter K. Yu, *The Algorithmic Divide and Equality in the Age of Artificial Intelligence*, 72 FLA. L. REV. 331, 333–35 (2020) (discussing the ability to access information technology, which is defined as defined as the use of computers, storage, networking, and the process of creating, storing, and securing forms of electronic data).

205. See generally FED. COMM'NS. COMM'N, 2020 BROADBAND DEPLOYMENT REPORT (2020) (detailing how the digital divide has continued to narrow as more Americans than ever before have access to high-speed broadband but persists particularly in rural areas and Tribal lands).

206. *Id.* at 52.

could range from forty-two million to 162 million.²⁰⁷ The Pew Research Center reported in 2021 that approximately fifty-seven percent of households with less than \$30,000 of annual household income have access to broadband internet at home, eighty-seven percent of households with income of \$50,000 to \$75,000 have home broadband, and ninety-two percent of households with income above \$75,000 per year have broadband internet at home.²⁰⁸ According to the same survey, twenty-seven percent of households with annual incomes less than \$30,000 rely on smartphones to access the internet.²⁰⁹ In contrast, only six percent of households with incomes above \$50,000 have to rely on smartphones for their internet access.²¹⁰ Compounding the existing divide is that thirty-four percent of low-income households had difficulties paying for their internet service during COVID-19.²¹¹ Further, the digital divide remains worse in rural areas.²¹² According to the Pew Research Center survey, three-in-ten rural Americans reported having no broadband connection at home despite a nine percentage point rise in broadband adoption since 2016.²¹³

A hybrid court system is reliant on individuals being able to access stable internet and technological tools throughout the court process.²¹⁴ Not having a reliable internet connection at home or only utilizing a smartphone to access the internet poses a significant threat to a litigant's participation in a hybrid court process.

Accordingly, the digital divide is an important consideration for the development of effective hybrid court models.²¹⁵ Especially as these technologies advance, litigation tools and trial support methods created for hybrid court proceedings are generally only available to individuals who can afford the costs associated with hiring and utilizing these services.²¹⁶ For example, even when a low-income household has broadband or other home internet available (such

207. *Id.* at 52–53.

208. *Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/#panel-2ab2b0be-6364-4d3a-8db7-ae134dbc05cd> (reporting on how Americans have accessed the internet and broadband for over the past fifteen years). The Pew Research Center is an organization that conducts research on public issues through demographic research, media analysis, social science research and public opinion polling. *See About*, PEW RSCH. CTR., <https://www.pewresearch.org/about/> (last visited Apr. 13, 2023).

209. *Id.*

210. *Id.* *See also* Colleen McClain, *Thirty-four Percent of Lower-income Home Broadband Users Have Had Trouble Paying for Their Service Amid COVID-19*, PEW RSCH. CTR. (June 3, 2021), <https://www.pewresearch.org/fact-tank/2021/06/03/34-of-lower-income-home-broadband-users-have-had-trouble-paying-for-their-service-amid-covid-19/>.

211. McClain, *supra* note 210.

212. FED. COMM'NS. COMM'N, *supra* note 205, at 18.

213. *See* Vogels, *supra* note 19. *See also* BENNINGER ET AL., *supra* note 11, at 27, 70 (noting that even when rural communities have access to broadband, the connectivity issues impact sound and video, making participation in a hybrid court model ineffective and it creates a negative impression of access to the courts and justice).

214. *See* BENNINGER ET AL., *supra* note 11.

215. *See* Afanador, *supra* note 103.

216. *See id.* at 27.

as a smartphone), their internet speed is unlikely to be the same as an attorney or judge.²¹⁷ Further, in rural areas audio and video connections can be slow and at times are not able to support the requirements to effectively utilize videoconferencing platforms.²¹⁸ Issues such as these often lead low-income individuals to prefer utilizing the audio feature of the platform technology alone.²¹⁹ The digital divide impacts more than just litigants involved in the process, it also can impact low-income witnesses.²²⁰ Witnesses with internet instability can have the same difficulties utilizing the videoconferencing technology used by the courts. How a litigant or witness accesses the proceeding, via video or audio, can impact how the fact finder views their credibility.²²¹ Studies have consistently revealed that jurors find remote witnesses to be less credible than witnesses that appear in-person, irrespective of audio-visual connectivity.²²² The connectivity can only compound jurors' views on the credibility of remote witness testimony.²²³

Additionally, empathy, engagement, and the potential for implicit bias of the court, jury, and other litigation participants can be impacted by internet and platform connectivity issues.²²⁴ Videoconferencing platforms can cause the testimony to be less engaging.²²⁵ Concerns regarding empathy and engagement are not solely the result of the type of audio-visual connection that the individual has with the court.²²⁶ Often these issues can arise due to the set-up of the video equipment being utilized for the videoconferencing platform.²²⁷ An individual appearing remotely may not understand how to set up the camera or, if connecting with a smartphone camera, they may have to hold the phone in order to have the video capture their face.²²⁸ Subtle nuances like screen direction can impact the perception of the testimony.²²⁹ It is not just the perceptions of the court, but also the

217. See Remote Hearings and Access to Justice, *supra* note 19, at 7–8.

218. BENNINGER ET AL., *supra* note 11, at 77.

219. Pattison-Gordon, *supra* note 39 (noting a survey from Los Angeles, California that reported that upwards of 50% of litigants preferred to phone in, utilizing audio only, due in part to low-tech connectivity issues and the court charges for utilizing the video features).

220. Andrews, *supra* note 7 (exemplifying that while litigants are in person a number of the witnesses attended trial remotely).

221. BENNINGER ET AL., *supra* note 11 (discussing the unintended impact that videoconferencing can have on credibility determinations due to distracting elements of the defendant based on camera placement and angle, emphasizing facial cues and features that reflect negatively, and preventing participants from making eye contact, which trigger feelings of distrust in an observer such as the jury or judge).

222. Munro & Riel, *supra* note 152, at 256.

223. BANNON & ADELSTEIN, *supra* note 15.

224. See Susan A. Bandes & Neal Feigenson, *Empathy and Remote Legal Proceedings*, 51 SW. L. REV. 20, 29–31 (2021) (describing a self-represented immigrant was sobbing during the proceeding and this went completely unnoticed by the court, which directly impacted the litigant's ability to effectively present their testimony).

225. See *id.*

226. See *id.*

227. See *id.*

228. See *id.*

229. See *id.*

perceptions of a jury, individual witnesses, or litigants that are of concern.²³⁰ Participants in the process may be disoriented and not be able to understand what is occurring in the proceeding.²³¹

The location where individuals connect to the hybrid court also can create potential perception issues in best case scenarios and in worst case scenarios can create safety concerns.²³² When victims of domestic violence participate in a proceeding remotely there are concerns regarding the perpetrator discovering where they are located based on the environmental clues from the background of where they appear for the proceeding.²³³ Technology and online case management providers have developed recommendations for lawyers regarding the preparation of remote court spaces, such as assuring the background is tidy and professional.²³⁴ In fact, a number of ethics opinions discuss specific protocols that have to be observed to protect client privacy and assure professionalism when dealing with the court. These same “professional remote locations” are not necessarily a viable option for low-income litigants.²³⁵ Most low-income individuals have to utilize an informal and even personal location to participate remotely, such as their home living room.²³⁶ Over forty percent of witnesses remotely participating by platform technology do not have a quiet space available.²³⁷ When the witness is in the lowest income bracket, this percentage rises to fifty-eight percent.²³⁸ Interruptions are frequent, coming in the form of children, if individuals cannot afford child care, or other individuals, if there are roommates.²³⁹ When other people are in the home, it can also raise questions as to who is in the room and whether coaching is occurring of the remote participant.²⁴⁰ Potentially even more important than coaching is the private nature of some proceedings, such as

230. Munro & Riel, *supra* note 152, at 259–60 (discussing the judge’s use of physical demeanor to aid in credibility determinations of witnesses being impacted by the small screen utilized by video conferencing technology).

231. *Id.* at 260.

232. *Id.* at 251.

233. *Id.* at 252.

234. Laurie Webb Daniel & Philip George, *Twin ABA Ethics Opinion Cover What You Need to Know About Remotely Practicing Law*, ABA J. MAG. (May 15, 2021), <https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/practice/2021/twin-aba-ethics-opinions-cover-what-you-need-to-know-about-remotely-practicing-law/>.

235. Sharon Miki, *Video Conferencing for Lawyers: How to Conference Like a Pro*, CLIO, <https://www.clio.com/blog/video-conferencing-for-lawyers/> (last updated July 20, 2021). *See also* Daniel & George, *supra* note 234.

236. Davison, *supra* note 198, at 17. *See also* Justice Gap (2022), *supra* note 17, at 7.

237. Davison, *supra* note 198, at 163.

238. *Id.*

239. Munro & Riel, *supra* note 152, at 248–51. *See also* BENNINGER ET AL., *supra* note 11, at 38 (noting the lack of private spaces with reliable technology for sensitive matters such as the ones that face low-income litigants (housing, education, health) is of particular concern when utilizing a hybrid court model).

240. Munro & Riel, *supra* note at 152, at 258. *See also* Haley Benson, *Abuse Just out of Frame: The Impact of Online Dispute Resolution on Domestic Violence*, 2022 J. DISP. RESOL., 83, 92–93 (2022) (discussing scenarios where a perpetrator of domestic violence was caught during a court proceeding sitting in the same room with the victim as the victim testified about the abusive situation).

domestic violence or family related cases, where it can be difficult for the witness or litigant to answer personal questions while others are present in their location.²⁴¹ For mental health proceedings, the remote court creates barriers for individual litigants because the matters are both sensitive and difficult.²⁴² Finally, what the court or jury sees in the background of the video of a participant's remote location can also impact its perceptions.²⁴³ Is the room neat or messy, does it have expensive or inexpensive furniture, are there pictures of family around? All impact the impressions of the viewers about the remote witness or litigant.²⁴⁴

4. Decreased Formality Presents Risks

Further, some scholars have discussed how the current hybrid court models are "informalized to a dangerous degree."²⁴⁵ Even courts have expressed concerns about the informal nature of some proceedings.²⁴⁶ Without being in the physical court building, the gravity of the situation can be lost on the litigants, witnesses, and even at times the court.²⁴⁷ Some courts have gone as far as creating remote hearing guides specifically for self-represented litigants.²⁴⁸ These guides typically remind litigants and witnesses of the necessity for professional behavior and conduct.²⁴⁹ Informalities also give the impression to litigants that their matter is not being seriously addressed, over sixty percent of litigants are concerned about the ability for a fair and impartial hybrid proceeding.²⁵⁰

These informalities can lead to difficulties in understanding the process, especially for unrepresented low-income litigants and witnesses.²⁵¹ Informalities extend to the design of the hybrid court processes.²⁵² While a number of states have not yet enacted specific rules of procedure for hybrid court models, in the states that have, individual courts and judges often have leeway to determine the use of platform technology and the hybrid court process is left to their

241. Remote Hearings and Access to Justice, *supra* note 19, at 8.

242. Davison, *supra* note 198, at 161.

243. Munro & Riel, *supra* note 152, at 258.

244. Bandes & Feigenson, *supra* note 224.

245. Davison, *supra* note 198, at 159 (noting that more informality leads to conclusions that a party's demeanor is lessened, unstable connections or atypical distractions can undermine accuracy of the court reporter in taking testimony, or directly affect the ability to scrutinize whether clear and convincing evidence has been provided).

246. Munro & Riel, *supra* note 152, at 248–51.

247. *Id.* at 255.

248. *Id.* at 248.

249. *Id.*

250. Pierce et al., *supra* note 48 (discussing concerns regarding impact of the loss of the formalities of a court proceeding, including concerns regarding remote juries and witnesses are paying attention or surfing the internet).

251. BENNINGER ET AL., *supra* note 11.

252. See generally HYBRID HEARINGS IMPROVEMENT INITIATIVE, NAT'L CTR. STATE CTS. (2022), https://www.ncsc.org/__data/assets/pdf_file/0032/78719/Hybridone-pager.pdf (discussing an initiative by the National Center for State Courts to assist trial courts in addressing the informalities in the hybrid court models they utilize).

discretion.²⁵³ Given what we know about low-income individuals' available bandwidth to address their legal needs, having courts without uniform processes and procedures creates barriers to even entering the hybrid court process.

The inconsistencies and informalities of the process lead to logistical issues, which are compounded by the digital divide, making it difficult for low-income litigants to effectively present a case in a hybrid setting. Practical problems that occur in hybrid courts include: knowing the appropriate steps for a hybrid process; preparing the necessary paperwork for trial in advance; developing a method to submit exhibits and sharing exhibits with remote participants; and developing a plan to smoothly present a case without running into technological or procedural difficulties.²⁵⁴ Knowing what we know about the difficulties low-income litigants face when utilizing the court system, such as available bandwidth and problems with the mundane aspects of court, these logistical issues with hybrid courts, if unaddressed, could pose additional hurdles for low-income individuals to overcome.²⁵⁵ In assuring that low-income litigants are not disadvantaged by a hybrid court process, one of the key components is assuring that the information and process is provided to the litigant ahead of time so that they have an opportunity to prepare and understand the process that they are about to engage in.²⁵⁶

B. Benefits of Hybrid Court Models

1. Expedited Communication with the Court

With the ongoing development of hybrid court models, from the immigration court model in the 1990s through the completely remote process of the early COVID-19 courts, to the models of today, potential benefits from adopting hybrid court models have become clear. Just as immigration and bail courts recognized, hybrid court models save on time and cost for the court and lawyers.²⁵⁷ Following the initial months of the pandemic and the court closures, remote and hybrid court

253. W. Va. Rule 18, *supra* note 119; Sup. Ct. of Pa., Hon. Kim B. Clark, *In Re: Fifth Judicial District Request for Emergency Judicial Order*, No. 23 WM 2020 (Aug. 26, 2021) (requesting the continued use of ACT in court proceedings). *See also* Sup. Ct. of Pa. Order Allegheny County, *supra* note 23 (permitting the continued use of ACT as to be determined by each individual judge); REPORT OF JOINT SUBCOMMITTEE ON POST-COVID-19 JUDICIAL OPERATIONS, MD. JUDICIARY 1, 17–20 (2022), <https://online.flippingbook.com/view/545032313/> (recommending in part that for cases where there is judicial discretion on the use of ACT that the court take into account various considerations such as type of litigant, need for credibility determinations, etc.); RECOMMENDED REMOTE AND IN-PERSON HEARINGS IN ARIZONA STATE COURTS IN POST-PANDEMIC WORLD, AZ. SUP. CT. 1, 8 (2022), <https://www.azcourts.gov/courtservices/Court-Services-Home/Remote-Appearances> (discussing the need for differing procedures court by court due to the specific considerations of geographic locations of the court).

254. BENNINGER ET AL., *supra* note 11.

255. Greiner et al., *supra* note 25.

256. *See* Remote Hearings and Access to Justice, *supra* note 19.

257. Eagly, *supra* note 28; Seidman Diamond et al., *supra* note 42. *See, e.g.,* Judges: Expect Hybrid Trial System After the Pandemic, *supra* note 35.

models assisted with alleviating the backlog created by closures.²⁵⁸ Hybrid courts allow for lawyers to appear virtually for a ten minute status conference when in the past it would have required upwards of two hours with travel to the court, getting through security, and waiting for the case to be called (often arriving early just in case the court was ahead of schedule).²⁵⁹ Further, benefits to the court and lawyers include accessibility to witnesses that would otherwise have difficulties appearing in court.²⁶⁰ With the appropriate infrastructure, hybrid court models are an effective way for courts and lawyers to move matters to resolution.²⁶¹

2. Expanded Access to the Justice System and Legal Services

Further, hybrid court models provide significant benefits to litigants, particularly low-income litigants, trying to access the justice system.²⁶² In fact, hybrid court models with remote accessibility and advance technology tools are well-recognized as a potential solution to assisting low-income individuals, helping to close the justice gap.²⁶³ Even legal aid providers are finding that these models also help with extending services to low-income individuals outside of urban areas.²⁶⁴ Hybrid court models allow legal aid providers to reach low-income litigants in rural areas, and in some circumstances they are able to provide representation for the litigant in court as well.²⁶⁵

Pro bono attorneys and legal aid attorneys are assumed to be the most helpful solution by providing full representation. However, this is not the most sought out nor the primary resource low-income litigants utilize.²⁶⁶ LSC's 2022 report indicated that thirty-nine percent of low-income litigants that spoke to an attorney were seeking representation, while the remaining sixty-one percent were seeking some form of limited services.²⁶⁷ When seeking assistance in the form of full

258. Remote Hearings and Access to Justice, *supra* note 19.

259. Nelson & Calloway, *supra* note 110.

260. *Id.*

261. Lisa C. Wood, Essay, *Ode to Virtual Litigation, The Perfect Storm: Antitrust in a Time of Crisis*, 34 ANTITRUST 38, 39 (2020) (discussing how the embracing of hybrid court models by lawyers could alleviate some of their availability restrictions potentially making their services less expensive and more affordable to low-income individuals). See also Davison, *supra* note 198, at 142 (noting that individuals are willing to utilize technology to address legal matters at an increasing rate; in 2020, 64% of individuals were willing to utilize technology compared to 43% of individuals that were willing to utilize the same in 2014).

262. Danielle Linneman, *Online Dispute Resolution for Divorce Cases in Missouri: A Remedy for the Justice Gap*, 2018 J. DISP. RESOL. 281, 284 (2018) (discussing the benefits of creating a hybrid process with online tools that would assist low-income individuals with their divorce matters, offering the litigant the ability to gain information, legal worksheets and forms, and a basic understanding of their legal options to make more informed decisions about their matter).

263. David Hodson, *The Role, Benefits, and Concerns of Digital Technology in the Family Justice System*, 57 FAM. CT. REV. 425, 432 (2019). See also Nick Rishwain, *How Courts Can Increase Access to Justice by Adopting Better Technology*, 36 GPSOLO 40, 41–44 (2019).

264. BANNON & ADELSTEIN, *supra* note 15.

265. *Id.* at 23.

266. Greiner et al., *supra* note 25. See also Justice Gap (2022), *supra* note 17.

267. Justice Gap (2022), *supra* note 17, at 46.

representation, or at a minimum extended services, LSC-funded organizations could only assist with twenty-one percent of these requests.²⁶⁸ Of low-income litigants who spoke to an attorney: fifty-nine percent only sought legal advice; thirty-five percent sought assistance with filling out forms/filings; thirty percent sought help with a negotiation; and twenty-eight percent sought help with communication with opposing counsel.²⁶⁹ When individuals sought these types of brief or advice based services from LSC-funded organizations, the organizations were only able to assist with fifty-one percent of these matters.²⁷⁰ In fact, LSC reported that of the low-income litigants that sought assistance from a lawyer, twenty-four percent only sought direction to online or other self-help related materials.²⁷¹ This demonstrates that unbundled legal services, or limited legal services, and self-help materials are the most sought after services by low-income litigants for assistance with their civil legal issues.²⁷²

There are a number of differing models of unbundled legal service programs.²⁷³ These programs range from hotlines where litigants can call from the comfort of their home and receive advice to in-person legal clinics staffed by law students with a supervising attorney who provides advice, prepares legal documents, and provides some limited court appearances.²⁷⁴ Programs that provide advice and some assistance with legal document preparation are very effective and the litigants who utilize them have more positive outcomes.²⁷⁵ As of 2018, programs such as these assisted over 3.7 million individuals and these individuals found the services effective, especially when it combined legal advice with some document preparation.²⁷⁶ Due to the success of these programs, some states have sought to expand this service model by allowing non-lawyer paraprofessionals, such as paralegals, to assist individuals in a limited capacity.²⁷⁷

268. *Id.* at 72.

269. *Id.* at 46.

270. *Id.* at 72.

271. *Id.* at 46.

272. See generally SELF-REPRESENTED LITIGATION NETWORK, BRINGING THE ACCESS TO JUSTICE PIECES TOGETHER (2021), https://www.srln.org/system/files/attachments/SRLN2021.about_.pdf (estimating that more than 30 million people appear without legal representation each year, and a sampling of courts report that 75% of cases have at least one self-represented litigant) [hereinafter Self-Represented Litigation Network]. The Self-Represented Litigation Network is an organization, consisting of approximately 3,000 individuals, working to address challenges in developing self-help resources to help close the justice gap. See *id.*

273. *Limited Legal Assistance*, *supra* note 190, at 4. Unbundled legal services provide a client with assistance by a lawyer on a discrete legal task, the lawyer does not provide full representation. *Id.*

274. *Id.* at 5. See generally D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901 (2013).

275. *Limited Legal Assistance*, *supra* note at 190, at 18.

276. *Id.* at 5.

277. David Luban, *Optimism, Skepticism, and Access to Justice*, 3 TEX. A&M L. REV. 485, 508 (2016) (discussing a Washington state pilot program allowing licensed limited technicians to provide limited-purpose legal services and be trained in legal specialties that do not require a generalist law background). See also Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S.C. L. REV. 429, 433 (2016) (discussing how paraprofessionals in

Self-help materials also vary significantly.²⁷⁸ User-friendly print guides that take the litigant step-by-step through the process that they are facing is one form.²⁷⁹ These materials can often be found at locations that are easy for a low-income litigant to visit, such as libraries, social service organizations, local magistrates, or churches.²⁸⁰ These locations provide a significant resource for low-income individuals from the self-help materials themselves to technology and internet connections.²⁸¹

Combining the two most sought solutions, technology has found a solid footing in legal service solutions.²⁸² There are online self-help materials, with the same information as print materials or that are more elaborate with guided flow charts that can be found on court websites or websites of other legal aid providers.²⁸³ There are also some technological tools that mirror limited legal service models.²⁸⁴ The tools may guide individuals through an automated document preparation process or walk unrepresented litigants through the steps necessary to be successful with their legal matter.²⁸⁵ A prime example of this is the Utah ODR small claims program. The Utah Program combines technology based tools to triage the issue, educate the litigant in the steps of the process while also providing self-help information with “you are here” graphics, that helps litigants prepare and advocate to address their issues.²⁸⁶ Through a series of question and answer prompts, low-income litigants are able to utilize the program to prepare necessary documentation and if the litigant gets stuck in the process a real-time facilitator is available to assist.²⁸⁷ Incorporating the most sought after legal assistance of self-help materials and limited legal services as part of the hybrid process significantly benefits low-income litigants aiding them in accessing the courts.

some instances are more effective than lawyers in providing services for low-income litigants on issues of employment, housing, and welfare benefits).

278. Greiner et al., *supra* note 25, at 1123 (defining self-help materials that offer step-by-step guides are often the most utilized legal assistance services utilized by low-income litigants).

279. *Id.* (stressing the need for self-help materials to be user-friendly to a lay individual in order for them to effectively advance their case).

280. *Id.* at 1121; *Legal Needs of the Public*, *supra* note 25, at 448 (discussing that low-income litigants resist taking their issues to lawyers, often resorting to self-help and non-legal resources).

281. *See* Greiner et al., *supra* note 25, at 1121.

282. *See* Schmitz, *supra* note 27, at 104 (discussing the benefits of utilizing technology platforms for online resolutions and e-courts, ultimately assisting access to justice, in part because online platforms assist with alleviating anxiety and shame that are experienced by low-income litigants allowing participation from a more comforting location).

283. Michele Statz et al., “*They Had Access, but They Didn’t Get Justice*”: *Why Prevailing Access to Justice Initiatives Fail Rural Americans*, 28 *GEO. J. ON POVERTY L. & POL’Y* 321, 339 (2021).

284. *Id.*

285. Cabral, *supra* note 26, at 251. *See also* Statz et al., *supra* note 283.

286. *See* Himonas, *supra* note 84.

287. *See* Dardanes, *supra* note 83.

3. Cost and Time Savings

Additionally, hybrid models have the potential for cost and time savings that benefit low-income litigants, potentially even more so than the benefits experienced by lawyers and the courts.²⁸⁸ As previously discussed, cost and time are significant hurdles to low-income litigants accessing the court system.²⁸⁹ Often, the time that it takes to travel for short court proceedings, such as motions or arguments, takes a greater toll on low-income individuals.²⁹⁰ There are costs associated with the travel itself such as public transportation costs, tolls, gas, and parking costs.²⁹¹ Moreover, low-income litigants experience additional costs associated with the court proceeding such as: loss of income from taking time off from work; finding child care; or the other non-monetary costs associated with having to go into the courthouse such as anxiety experienced by having to “appear” in court.²⁹² The costs for low-income individuals to assure that witnesses can come to court are also not insubstantial. The easier it is for witnesses to attend the proceeding, the more likely that they will be willing testify.²⁹³ It is often difficult to secure the necessary available time of witnesses such as teachers, extended family out of state, or other individuals necessary for the low-income litigant to be successful in presenting their case. Having a hybrid process can provide assistance by limiting the time that witnesses have to be available to testify.²⁹⁴ This is particularly relevant for costs associated with low-income witnesses as they experience the same hurdles in attending court that low-income litigants face when it comes to travel and other costs associated with appearing in-person.²⁹⁵ Hybrid court models can help eliminate these costs experienced by low-income litigants.

4. De-escalation of Contentious Proceedings

In addition to the benefits of lowering the tangible and intangible costs that low-income litigants experience when accessing the courts, hybrid court models

288. See Bulinski & Prescott, *supra* note 98.

289. CHARLES L. OWEN ET AL., ACCESS TO JUSTICE: MEETING THE NEEDS OF SELF-REPRESENTED LITIGANTS, INST. OF DESIGN & CHICAGO-KENT COLL. L. 15 (2001), <https://www.courts.ca.gov/documents/BTB24-Precon1G-1.pdf>.

290. BENNINGER ET AL., *supra* note 11, at 120–22 (discussing the efficacy and benefits that having simple proceedings or pre-trial action take place on online as part of a hybrid court model). See also *Judges: Expect Hybrid Trial System After the Pandemic*, *supra* note 35 (discussing predictions that oral arguments and a mix of in-person and virtual witnesses will continue post-pandemic due to the benefits of reducing the time associated with court proceedings.).

291. See BANNON & ADELSTEIN, *supra* note 15.

292. *Id.* at 9.

293. Hon. Samuel A. Thumma & Marcus W. Reinkensmeyer, *Post-Pandemic Recommendation: COVID-19 Continuity of Court Operations During a Public Health Emergency Workgroup*, 75 SMU L. REV. F. 1, 45 (2022).

294. See Remote Hearings and Access to Justice, *supra* note 19.

295. See *Judges: Expect Hybrid Trial System After the Pandemic*, *supra* note 35. See also *The Future of Courts – Hybrid and Virtual Courts*, ZOOM, <https://explore.zoom.us/en/future-of-courts/> (last visited Apr. 13, 2023) [hereinafter *The Future of Courts*].

can also assist with decreasing the often contentious nature of particular proceedings.²⁹⁶ These types of proceedings are ones that impact the critical needs of low-income unrepresented individuals, such as child custody, domestic violence, issues that relate to health, and other issues that directly impact daily life.²⁹⁷ In looking back to the hybrid court models developed pre-COVID-19, such as New York City's tenant program for housing code violations, it is apparent that hybrid courts can benefit low-income individuals by assisting them in addressing matters more efficiently, submitting their complaints in a simplified manner with an interactive process.²⁹⁸

The benefits to the courts, lawyers, low-income litigants, and even legal aid providers provide good reasons for hybrid court models to remain prevalent. Developing hybrid court models focusing on the benefits can be significant in providing access to the courts if developed in a manner that assures the hybrid process is just as available to the Joys as it is to the Depps of the world.

IV. STEPS TO ASSURE HYBRID COURTS ARE ACCESSIBLE

Given the benefits that hybrid courts have to offer low-income litigants, it is particularly concerning that poorly conceived COVID-19 hybrid courts offered decreased access.²⁹⁹ The one size fits all remote courts models adopted during the initial months of COVID-19 were a means to provide a solution to the emergency situation created when courts closed to in-person operations.³⁰⁰ This did not provide significant time for consideration and evaluation of these models prior to implementation.³⁰¹ Now that nearly all courts have adopted hybrid court models as they shift away from the initial fully remote models, it is time to step back and give the hybrid models proper consideration to assure they do not hinder access to justice. As courts moved to the current hybrid models, some are haphazard like

296. Remote Hearings and Access to Justice, *supra* note 19, at 2 (arguing a hybrid court process would be particularly advantageous for individuals with contentious matters when given the option to participate remotely or having a combination of remote and in-person process). *See also The Future of Courts*, *supra* note 295.

297. *See* Remote Hearings and Access to Justice, *supra* note 19.

298. *See* Schmitz, *supra* note 27, at 114–15.

299. Remote Hearings and Access to Justice, *supra* note 19, at 7–8 (recognizing that ineffective hybrid models can have significant repercussions against particular individuals, such as limited English-speaking litigants). *See also* Justice Gap (2022), *supra* note 17.

300. *See Coronavirus and the Courts*, *supra* note 100. *See also* Jamiles Lartey, *The Judge Will See You on Zoom, But the Public is Mostly Left Out*, THE MARSHALL PROJECT (April 13, 2020), <https://www.themarshallproject.org/2020/04/13/the-judge-will-see-you-on-zoom-but-the-public-is-mostly-left-out> (District Court Judge Keva Landrum from New Orleans, Louisiana, on the shift to fully remote trials stated, “[t]his was the first time we’ve done Zoom proceedings, and we rolled it out fast.”).

301. Davison, *supra* note 198, at 141 (exemplifying the swift adoption of platform technology as a solution to court closures due to the COVID-19 pandemic, in the beginning months of the pandemic, Michigan had logged in 500,000 hours of online proceedings between March and July 2020 and New Jersey held 31,000 virtual proceedings with 262,000 individual litigants by June 2020 compared to the limited use pre-pandemic).

the Allegheny County, Pennsylvania model, some are more uniform similar to the Cabell County, West Virginia domestic violence court model, while others are like Los Angeles, County, California's model of trial and error.³⁰²

A. Ensure Courts Use Formalized Hybrid Processes Consistently

Pre-pandemic hybrid courts were making a significant impact in assisting to closing the justice gap, such as Utah's and Michigan's ODR programs.³⁰³ These pre-pandemic hybrid court models can be viewed as potential templates for post-pandemic expansion of hybrid court models. From these templates, as well as consideration of the benefits and difficulties observed during COVID-19's swift move to embrace technology, and a review of the current models of today, provides a path forward.³⁰⁴ By careful and thoughtful hybrid court development it is possible to limit the difficulties posed by hybrid court models while maximizing the benefits for unrepresented low-income litigants.³⁰⁵ Courts must engage a diverse array of stakeholders inside and outside of the judicial system for court development, including those most likely to suffer if remote proceedings go poorly.³⁰⁶

As courts become more advanced in their utilization of technology, there are concerns that those with the technology tools and knowledge are at an advantage over those who do not have the necessary tools and knowledge.³⁰⁷ Yet, as individual courts and judges seem to have complete discretion in the development of the hybrid courts of today, they are informally designed at best, haphazard at worst. Normalizing the informal nature of the fully remote COVID-19 courts in new hybrid court models will add to the barriers experienced by low-income individuals and, unfortunately, move away from the beneficial pre-COVID-19 models.³⁰⁸ In Illinois, for example, the state carries out its role in advocating at mental health trials as part of its police powers.³⁰⁹ Because the proceedings carry with them the heightened risk of depriving a person of their physical liberty, Illinois law

302. Cf. Davison, *supra* note 198.

303. See Dardanes, *supra* note 83 (in fact, it is predicted that the Utah ODR program could expand beyond small claims assisting with larger claims where more is at stake once the system is smoothed out). See also Bulinski & Prescott, *supra* note 98 (forecasting that through the creation of online case resolution systems, courts can reduce costs for themselves and litigants expanding to address the "most common cases: civil infractions, minor warrants, and low-level misdemeanors," which are disproportionately costly for poor, disabled, and minority individuals).

304. Benjamin P. Cooper, *Preliminary Thoughts on Access to Justice in the Age of COVID-19*, 56 GONZAGA L. REV. 227, 234–38 (2021).

305. Douglas Keith & Alicia Bannon, *Principles for Continued Use of Remote Court Proceedings*, BRENNEN CTR. FOR JUST. (Sept. 10, 2020), <https://www.brennancenter.org/our-work/research-reports/principles-continued-use-remote-court-proceedings>. See also Bannon & Keith, *supra* note 36.

306. See Bannon & Keith, *supra* note 36 (encouraging courts to provide extra support for self-represented litigants, including technical support.).

307. Dixon Jr., *supra* note 66.

308. See Davison, *supra* note 198, at 140.

309. *Id.* at 158–59.

provides a specific statutory framework for when and how that may occur.³¹⁰ While the courts have stressed that these safeguards “are not mere technicalities,” critics of these procedures described them as “informalized to a dangerous degree.”³¹¹ As research continues to develop regarding hybrid court models’ impact on low-income individuals, it is clear that focus and priority must be given to assuring that the steps of the court process are consistent within the individual court system, well publicized, and easily accessible.³¹²

Existing self-help materials are often well publicized, easily accessible, and describe specific legal proceedings.³¹³ Low-income individuals seek online and print self-help materials when seeking to address their legal needs.³¹⁴ Often, low-income litigants are able to successfully utilize self-help materials as they utilize step-by-step instructions to approach a uniform legal process and ultimately resolve their legal issues.³¹⁵ Pre-COVID-19 hybrid models, such as the Utah ODR process, focused on having a similar step-by-step uniform process for litigants to address their matter comparable to low-income individuals use of self-help materials.³¹⁶ This allowed participants to move to resolution through a set procedure with informational material available to assure successful utilization of the system.³¹⁷ A primary component of pre-pandemic hybrid court models included contemporaneous explanations of the process to utilize these tools and ultimately the hybrid court process.³¹⁸ The Michigan traffic citation ODR program was widely published and clear, making it easy for respondents to avoid defaulting on their citations, providing access in ways similar to successful

310. *Id.*

311. *Id.* at 157, 159.

312. Bannon & Keith, *supra* note 36. *See also* Justice Gap (2022), *supra* note 17 (discussing knowledge barriers, attitudinal barriers, and cost barriers that contribute to low-income individuals not seeking legal assistance). A lack of knowledge of hybrid models, beliefs regarding hybrid court models, and cost of and access to reliable technology can all hinder access to hybrid courts in the same manner that these barriers currently impede individuals seeking to address their legal matters. Addressing these barriers are a key component to assure hybrid court models do not hinder access to justice for low-income individuals.

313. *See* Self-Represented Litigation Network, *supra* note 272.

314. Greiner et al., *supra* note 25.

315. *See* Thumma & Reinkensmeyer, *supra* note 293.

316. *See* Himonas, *supra* note 84.

317. Dardanes, *supra* note 83, at 155–58. There is a significant level of formality, structure, and informational material to support the Utah system allowing for active participation by all litigants including those of low-income. At the Education and Evaluation stage, the system helps educate plaintiffs on what information is important to their claim through a series of triage questions; the defendant is asked how they would like to respond to the claim where the system takes the defendant through additional questioning to glean more information or further explain the situation; and the facilitator is present to assure that the participants have knowledge of and understand the steps that they are to participate in. *Id.*

318. Press Release, North Carolina Judicial Branch, North Carolina Court System Launches Free, Online Document Preparation Tool – eCourts Guide & File (Aug. 31, 2020) (discussing document preparation program launched by the court that employs a guided interview process walking individuals through the steps and documents necessary to initiate the court process).

self-help models.³¹⁹ These hybrid court models, designed similar to self-help materials with step-by-step guides for a uniform legal process, can alleviate barriers to access such as cost, taxation on limited bandwidth, and even anxiety associated with court proceedings.³²⁰

In designing effective hybrid court models, scholars stress that the systems must be easy to follow, provide guides (procedures to follow), enforceable time-lines, and other steps making it an empowering experience for the individuals.³²¹ Courts have consistently been tasked with maintaining and developing “procedures, rules, and definitions that are relevant and consistent as times and technology change.”³²² In 2017, the Joint Technology Committee issued a report regarding hybrid court models (referring to ODR) noting that existing state rules and statutes needed to be updated to permit the growth of hybrid court models.³²³ The committee noted it is also important to carefully craft statutes and rules to assure that they provide enough information to guide how courts and participants proceed through the process.³²⁴ Formalizing and unifying the process becomes even more important when low-income litigants have additional difficulties accessing the courts, such as disabilities or language issues.³²⁵ Having a uniform and written process in plain language assures access.³²⁶ The studies regarding hybrid immigration courts exposed significant concerns, but one positive development was the uniform procedure for the proceedings and authority formalized

319. Schmitz, *supra* note 27, at 105–08.

320. Greiner et al., *supra* note 25.

321. Ayelet Sela, *The Effect of Online Technologies on Dispute Resolution System Design: Antecedents, Current Trends, and Future Directions*, 21 LEWIS & CLARK L. REV. 635, 669–71 (2017) (discussing that courts should integrate “restructured web-forms, intake flows, help texts, support buttons, process explanations, and the ability to go at one’s pace to achieve redress on their own” to assist low-income litigants). *See also* Schmitz, *supra* note 27 (noting the benefits of online dispute resolution (ODR) for low-income individuals include empowering the litigant to address their legal concerns as litigants can address their matter when it is convenient to them removing some of the hurdles to access that they face).

322. Von Wiegen & Oltmann, *supra* note 19.

323. *See generally* NAT’L CTR. STATE CTS., JTC RESOURCE BULLETIN: CYBERSECURITY BASICS FOR COURTS (2021), https://www.ncsc.org/__data/assets/pdf_file/0037/68887/JTC-2021-05-Cybersecurity-QR_Final-Clean.pdf. The Joint Technology Committee was established in part “to improve the administration of justice through technology.” The JTC has additional goals to develop and promote technology standards for the courts; improve court processes and business practices; ensure adequate education and training for court leaders in technology; and collaborate with the justice community, and other stakeholders. *Id.*

324. *Id.*

325. Remote Hearings and Access to Justice, *supra* note 19, at 4 (noting that the minimum accommodations for accessibility for persons with disabilities should include “closed captioning, keyboard accessibility, automatic transcripts, and screen reader support.”). *See also* Davison, *supra* note 198, at 140 (discussing failures to accommodate individuals in their needs to be able to access the courts would be a direct violation of the Americans with Disabilities Act).

326. *See* Remote Hearings and Access to Justice, *supra* note 19, at 12 (discussing that legal language utilized by courts and lawyers is often inaccessible to unrepresented litigants so assuring that information provided and available litigants is in plain understandable language is necessary to assure that individuals have an easier time accessing hybrid courts).

in statutes and rules.³²⁷ This limited any confusion as it was a uniform process and participants had a minimum knowledge of how their case would move forward.

Having a consistent hybrid process widely shared is likely to increase access to the courts. Hybrid court processes, developed in plain language, shared in a manner similar to self-help materials would assure access, if not increase access.³²⁸ Creating uniformity of individual court legal processes, assuring that the information is easily understandable and available, will assure low-income litigants have the knowledge necessary to effectively use the hybrid court systems.

B. Correct for the Digital Divide

In addition to addressing the confusion that can be caused by an inconsistent process, consideration must be given to the digital divide. Given the technological difficulties that low-income litigants experience when accessing the courts, including the lack of reliable technology, courts must provide options other than mandatory participation in a hybrid court process to ensure that the process does not contribute to the justice gap.³²⁹ As the traditional in-person court process is often complicated and difficult for non-lawyers to navigate, a hybrid court process could further hinder an individual's ability to participate. The technological aspects of hybrid court models have the potential to increase anxiety and other difficulties that low-income litigants experience when accessing the court, like when to talk or how to address the court.³³⁰ To assure a successful hybrid court model, the model should include a simple mechanism whereby individuals, particularly low-income individuals, have an option to opt out of the technological or remote aspects of the hybrid process.³³¹ As courts turned to remote court proceedings during the pandemic, juries had to participate in trials virtually.³³² However, just as the digital divide applies to low-income litigants and witnesses, prospective jurors had similar issues.³³³ As the pandemic and online trials continued, methods to address this had to be created, and the same process should be applicable to low-income litigants.³³⁴ Courts developed juror screening processes for the

327. See Eagly, *supra* note 28.

328. See Greiner et al., *supra* note 25.

329. See Remote Hearings and Access to Justice, *supra* note 19.

330. Greiner et al., *supra* note 25, at 1130.

331. BENNINGER ET AL., *supra* note 11, at 120 (noting that studies reveal that most believe that online trials should never be required). See generally Dalie Jimenez et al., *The Debt Collection Pandemic*, 11 CAL. L. REV. ONLINE 222 (2020) (discussing how default judgement in debt collection cases is a significant issue for low-income individuals which result from the individual not addressing the matter due in part to a lack of understanding of the process). It should be noted that without the option for an opt-out, default judgements would become a problem within the hybrid court process. This would result in backwards steps for assuring that the courts are accessible to low-income Americans.

332. See generally Jeffrey T. Frederick, *Online Jury Selection: New Tools for Jury Trials*, 51 SW. L. REV. 40 (2021).

333. Pierce et al., *supra* note 48 (noting this method of juror participation could lead to an unbalanced juror pool requiring. Jurors that are tech savvy and likely have a higher income).

334. *Id.*

necessary technological tools for remote participation as well as opt-out models for jurors that could not meet the necessary technological requirements for participation.³³⁵ This type of screening or opt-out model should be extended to all low-income litigants in a hybrid court model, assuring that the digital divide does not prevent them from participating in the legal process.

1. Allow Litigants to Opt-out of Hybrid Court Processes

Additionally, opting-out or objecting to a hybrid court process should be easy and accessible. While likely to be the preferred method for moving forward cases, individuals must have a means to opt-out of the remote components of the process. A number of courts have issued guidance memorandums on remote and hybrid hearings.³³⁶ Often these guidance memorandums focus on assuring that there is a process for either opting in or objecting to appearing in-person when it is deemed necessary “due to distance, health or other infirmities, or to ensure the security of a party.”³³⁷ While the guidance memorandums by courts are helpful, unfortunately they often are in conflict with Rules and other Statutory provisions.³³⁸ However, these recommendations do not go far enough as it is not simply whether or not the litigant appears in-person that creates an issue. The act of having any form of required remote component of a hybrid process could cause issues for low-income individuals. For example, in the Utah ODR model,

335. *Id.*

336. Davison, *supra* note 198, at 142–45.

337. Continued Use of ACT, *supra* note 114, at 13 n.7.

338. See generally ILLINOIS SUPREME COURT POLICY ON REMOTE COURT APPEARANCES IN CIVIL PROCEEDINGS (2020), https://www.illinoiscourts.gov/Resources/77204d09-8367-4b2b-994e-5f1a39644da8/ATJ_Commission_Policy_on_Remote_Court_Appearances_in_Civil_Proceedings.pdf (suggesting options for objecting to appearing virtually for a hearing). *But see* ILL. SUP. CT. R. 45. Illinois Supreme Court Rule 45 provides, in part:

(b) General Provisions.

(1) A judge presiding over a case in which the option to appear remotely without any advance approval is permitted may, in the exercise of the judge’s discretion, require a case participant to attend a court proceeding in person for reasons particular to the specific case, including the failure of a case participant to follow applicable standards of decorum. When exercising such discretion, the judge shall inform case participants on the record if they are required to attend a future court proceeding in person. . . .

(c) Civil Matters and Criminal Matters That Do Not Involve the Possibility of Jail or Prison Time.

(1) Case participants shall be permitted to attend court via the circuit court’s available remote appearance technology without any advance approval, except for the following proceeding types, which shall require the approval of the judge presiding over the matter:

- (i) Evidentiary hearings, except for *ex parte* evidentiary hearings (such as emergency orders of protection hearings);
- (ii) Settlement conferences;
- (iii) Bench trials;
- (iv) Jury trials; and
- (v) Any case type or proceeding type exempted from remote participation in accordance with paragraphs (b)(2) and (b)(7).

developed prior to the pandemic, individuals could seek an exemption.³³⁹ This exemption was only available if an unrepresented party could prove “undue hardship” in having to use the remote components of the hybrid process.³⁴⁰ The litigant was required to provide information on the difficulty and expense that participating in the online process would cause for the litigant.³⁴¹ Yet no guidance on what classified as an “undue burden” was provided and judges had significant discretion in granting or denying the requests.³⁴² Further complicating the exemption is the timing for the litigant to request to opt-out of the online hybrid court model.³⁴³ If a low-income defendant failed to register for the ODR system or receive an undue burden exemption the court could enter a default judgement against the defendant fourteen days after service was completed.³⁴⁴ An opt-out program that focuses on undue burden is too high for low-income litigants, however, a simplified opt-out process would be effective. Some scholars suggest that it is never appropriate to require an individual to participate in a hybrid court proceeding.³⁴⁵ Given the rights at stake or the private nature of the legal matter, the matter itself may not appropriate for a hybrid court process where remote participation is required.³⁴⁶ The opportunity to opt-out of the remote components of the hybrid court process can assure that low-income litigants experiencing difficulties from the hybrid court models due to procedure, the digital divide, or other barriers will not be hindered in accessing the courts.

2. Facilitate Low-income Litigants Access to Hybrid Court Models

Incorporating concepts from traditional unbundled legal services, or limited legal service models, into hybrid court models is a final step that could help facilitate a process that is accessible to low-income litigants. From the extensive research on services that provide the most aid to low-income litigants, limited legal service models have proven that with limited advice and guidance through the steps of the process there is a significant positive impact.³⁴⁷ These services have the ability to help low-income individuals successfully address their legal needs.³⁴⁸ These services are so successful that some states have expanded limited legal service models to allow paraprofessionals to assist low-income litigants with discrete legal tasks like document preparation and form selection.³⁴⁹ Often,

339. Dardanes, *supra* note 83, at 159–60.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.*

345. Davison, *supra* note 198, at 140.

346. BENNINGER ET AL., *supra* note 11, at 120.

347. *Limited Legal Assistance*, *supra* note 190, at 18–21.

348. *Id.*

349. *See, e.g.*, Dardanes, *supra* note 83, at 152–53. *See also* Luban, *supra* note 277, at 508 (describing Washington State’s program that allows the licensing of legal technicians to provide limited legal services for specific legal issues, without needing the full training of a lawyer).

limited legal aid services are offered where litigants frequently seek assistance, such as libraries, community organizations, and other local resources for information.³⁵⁰ Research supports the successes experienced by having resources available at these locations.³⁵¹ Developing a hybrid court system that assures that low-income litigants have limited real-time assistance in navigating the process and the ability to access the necessary technological requirements for effective engagement with the hybrid court models will increase access.

3. Establish Community-based Satellite Offices

Further, traditional hurdles such as the ability to get to court and the digital divide can be solved by having satellite offices for hybrid court participation. This limits issues related to the digital divide, assuring that each individual has access to broadband as well as audio and visual connectivity, and the technological tools necessary to effectively connect with the hybrid court proceeding.³⁵² By placing satellite hybrid court offices in community locations, such as libraries, magistrate offices, or even social service providers, hybrid courts can be more accessible for low-income individuals. As most states only have courthouses that are centralized in a county seat, it can be particularly difficult for low-income individuals to travel to the courts from rural areas.³⁵³ Whether it be a low-income individual who is a witness or litigant, a community-based location allows for participation in the hybrid court model at a location that the individual is comfortable and familiar with.³⁵⁴

Community-based satellite offices would also provide a private location with consistent ability to connect the platform technology to the internet.³⁵⁵ It would

350. Greiner et al., *supra* note 25, at 1121. *See also Legal Needs of the Public*, *supra* note 25, at 448.

351. Rebecca L. Sandefur, *Bridging the Gap: Rethinking Outreach for Greater Access to Justice*, 37 U. ARK. LITTLE ROCK L. REV. 721, 731 (2015) [hereinafter *Rethinking Outreach*] (proposing that services be offered at co-locations, legal and non-legal service providers creating community based partnerships similar to medical-legal partnerships, is a method to reach low-income litigants particularly those that do not view their issues as legal in nature). *See also* Greiner et al., *supra* note 25, at 1121–23 (discussing the prevalence of self-help materials and the necessary conditions for success).

352. Thumma & Reinkensmeyer, *supra* note 293, at 33–35; Tony Romm, *Lacking a Lifeline: How a Federal Effort to Help Low-income Americans Pay Their Phone Bills Failed Amid the Pandemic*, WASH. POST (Feb. 9, 2021), <https://www.washingtonpost.com/technology/2021/02/09/lifeline-broadband-internet-fcc-coronavirus/> (noting the federal program, Lifeline, used to assure that low-income Americans have access to smartphones failed during the pandemic, further exacerbating digital divide).

353. *Rethinking Outreach*, *supra* note 351, at 733. *See also* BENNINGER ET AL., *supra* note 11, at 61–66.

354. Thumma & Reinkensmeyer, *supra* note 293, at 34–35 (noting that community based partnerships for kiosks would also benefit court enhancing the access to technology without the need to address each individuals personal technology needs offering access to digital platforms and these partnerships could help provide assistance for technological awareness and training opportunities). *See also* Statz et al., *supra* note 283, at 363–64 (explaining that, for low-income litigants, particularly those that reside in rural areas, libraries are a “trusted, local source of information”).

355. *See, e.g.*, Press Release, MN Legal Kiosk Project, New Legal Aid Kiosks Expand Access to Free Legal Help Throughout Minnesota (May 3, 2021), <https://uploads.strikinglycdn.com/files/2aaef83a-01db-48a3-9a11-e3f4f9e1508/LegalKioskPressRelease.pdf?id=3883859> [hereinafter *New Legal Aid Kiosks*].

provide a private location without distraction or the invasion into the individual's home environment.³⁵⁶ A private location can enhance credibility and potentially empathy as distraction and the impression of the individual's home environment will not impact perceptions by the court or jury.³⁵⁷ For example, the Minnesota Legal Services Coalition received \$3.5 million in CARES Act funding, part of which went to deploying more than 250 "Legal Kiosks" stationed in a variety of community locations with reliable Wi-Fi connectivity and offering the ability to apply for civil legal aid services, access legal resources, and attend online meetings and remote court hearings in privacy.³⁵⁸ The project offers two types of kiosk: one that is more public and serves as an access point for legal information, self-help services, and legal aid intake; the other offers a more private virtual portal to allow individuals to meet with attorneys and appear in court virtually from a confidential space.³⁵⁹ The locations of the kiosks include family resource and nonprofit centers, public libraries, courts, community centers, and churches, among others.³⁶⁰ Satellite offices alleviate the issues relating to access to and stability of broadband or other internet connections experienced in rural areas. Overall, satellite offices for hybrid courts provide a number of benefits for low-income individuals, helping to eliminate transportation costs; extended childcare costs; the cost from missing significant amounts of work; concerns regarding the mundane aspects of court proceeding participation due to having real-time assistance available; and accessibility to the court.³⁶¹

Even with satellite offices, there still may be difficulties for low-income participants, witnesses or litigants, utilizing the platform technology to participate in the hybrid hearing. Real-time assistance is necessary for individuals accessing the hybrid court to address issues from technical difficulties to procedural issues, such as submitting evidence through platform document or screen sharing applications.³⁶² As exemplified by the success of limited legal service models, where some advice and guidance provides assistance, low-income litigants are able to navigate particular stages of the litigation. Support from a court staff member or even another non-lawyer paraprofessionals can help in a similar manner with the difficulties presented in a hybrid court model. The service provider would be able to help low-income individuals overcome potential procedural difficulties, provide technological support, and potentially offer limited guidance through the

356. Bandes & Feigenson, *supra* note 224, at 22 n.7.

357. *Id.* at 27–29. Having a satellite location benefits the court with credibility determination as it assures that witness coaching is not occurring. *Id.*

358. New Legal Aid Kiosks, *supra* note 355.

359. *Id.*

360. *Id.*

361. See Greiner, *supra* note 25.

362. See BANNON & ADELSTEIN, *supra* note 15, at 9; Remote Hearings and Access to Justice, *supra* note 19, at 4; Thumma & Reinkensmeyer, *supra* note 293, at 33. See also *The Future of Courts*, *supra* note 295 (noting the importance of having a secure system where information including evidence can be appropriately shared with all participants in the hybrid court process).

process.³⁶³ Similar to how facilitators in the Utah ODR program assist litigants through that process by explaining the process, the steps necessary for success with the program, and other necessary guidance, utilizing service providers at the remote location for hybrid hearing participation would assist significantly in addressing difficulties presented by a hybrid court model.³⁶⁴

There is significant support for assuring access to the courts by utilizing satellite locations with real-time assistance in the recommendations and principles being developed as guides for new hybrid court models.³⁶⁵ The proposals are similar in nature to the creation of satellite locations with live support, such as having chat features for litigants to directly interact with court personnel to assure successful utilization of the hybrid court process.³⁶⁶ Taking proposals such as these one step further to satellite locations and specialized assistance would help assure that low-income individuals have access to hybrid courts. Cabell County, West Virginia successfully took a similar approach with their hybrid domestic violence proceedings.³⁶⁷ By having the petitioners attend the hybrid court from local advocacy centers, they have access to the necessary technology to effectively participate while also having support from advocates to help them navigate the process creating a successful method to access the hybrid court process.³⁶⁸

The barriers presented by the digital divide as well as the traditional hurdles that low-income individuals face while trying to access the courts can be exacerbated by haphazard hybrid court design. Relatively simple steps can help low-income individuals overcome these barriers to access. Having consistent, well explained procedures, providing an opportunity to opt-out of the technological components process when necessary, and providing access to the hybrid court

363. Bannon & Keith, *supra* note 36, at 1915–17.

364. Himonas, *supra* note 84, at 880–82 (noting that a paraprofessional could successfully fulfill this role).

365. *See* Remote Hearings and Access to Justice, *supra* note 19; Continued use of ACT, *supra* note 114; BANNON & ADELSTEIN, *supra* note 15 (discussing proposals that in order to assure access to the system requires internet portals, stand-alone kiosks to access court services; simplified forms, and real-time court assistance services). *See also* Bannon & Keith, *supra* note 36 (noting that a key principle to the continuation of utilizing remote or hybrid proceedings must include that the courts be open to provide legal assistance to low-income individuals, through limited legal services or pro bono attorney stations, as well as providing technical assistance). Moving this model to community-based locations could fulfill the recommended best practices for continued remote/hybrid proceedings.

366. BANNON & ADELSTEIN, *supra* note 15, at 9. *See also* Thumma & Reinkensmeyer, *supra* note 293, at 24, 38–39 (proposals from guidance memos include: making sure that chat features are available between participants and necessary parties; chat bots to help with technological questions or procedural issues; available court technology support that can occur in real time; and assuring that information regarding the process is made available to participants well in advance of the hearing regarding the options, technical requirements, and the overall process of the hybrid court proceedings).

367. Adkins, *supra* note 120.

368. *Id.*

process through satellite offices with real-time assistance would make hybrid courts accessible and ensure increased access to justice.

V. CONCLUSION

Courts should carefully consider a quote that British writer, Damian Barr initially shared in 2020: “We are not all in the same boat. We are all in the same storm. Some are on super-yachts. Some have just one oar.”³⁶⁹

As hybrid courts are being expanded, it is necessary that we do not leave low-income litigants with “just one oar.” Given the difficulties that low-income litigants experienced in accessing the courts pre-COVID-19, it is critical to take a step back from the swift technological adoptions made during the pandemic to make sure that these changes do not widen the justice gap. By carefully considering pre-COVID-19 hybrid court models and the existing knowledge about successful solutions to the justice gap, it is possible to design hybrid courts that highlight the benefits of such a system while diminishing the difficulties experienced by litigants utilizing them. Knowledge of a consistent process provided in plain language; opportunity to opt-out of technological aspects of the hybrid process when necessary; and access to satellite locations with the necessary tools and real-time assistance can assure that Joy can successfully utilize the system in the same way that Johnny Depp and Amber Heard did.

369. Damian Barr, *George Takei Just Shared this Thought of Mine* (Mar. 25, 2021), <https://www.damianbarr.com/latest/damian-barr-george-takei-we-are-not-all-in-the-same-boat>. This quote that continues to be shared to this day via Twitter, Facebook, and media outlets reminds us of the differing impact that individuals are experiencing during these difficult times.