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# SOME FIRST THOUGHTS ON COURT SIMPLIFICATION: THE KEY TO CIVIL ACCESS AND JUSTICE TRANSFORMATION

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## ABSTRACT

*Given the discrepancy between access to justice needs and the resources that are realistically made available, current incremental approaches are almost bound to fail. The only realistic path to providing 100% of litigants with meaningful access to justice is through a simplification approach that both increases the accessibility of the legal system and reduces its costs. Indeed, we may now be in a rare moment of opportunity in which the interests of courts, bar, and legal aid align in favor of such an approach. This Article discusses the causes of excess complexity, the beginnings of simplification in current innovations, and recommends a number of short- and long-term approaches to fundamental simplification, including reconsideration of issues of burden of pleading and production. Among the suggestions is a possible reworking of the Federal Rules (and particularly their state derivatives). Those Rules are now almost one hundred years old and date back to a time when almost everyone in court had lawyers and no one, not even the government, had the luxury of technology—not even photocopiers.*

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\* Richard Zorza is coordinator of the Self-Represented Litigation Network. Opinions expressed are personal to the Author. Special thanks to Katherine Alteneder, Thomas Clarke, Deborah Chase, Russell Engler, Bonnie Hough, Rochelle Klempner, Marc Lauritsen, Susan Ledray, Richard Moorhead, Glenn Rawdon, and Hon. Laurie Zelon. The usual caveats apply.

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## I. INTRODUCTION

There is broad agreement that we face a critical access to civil justice crisis.<sup>1</sup> Many solutions have been suggested, and many may indeed contribute toward alleviating the problem. However, none of them alone, and perhaps not even in combination, offer any realistic likelihood of solving the problem. At a minimum, the success of these proposed solutions would require a massive multi-billion dollar infusion of funds, which is highly unlikely in the current economic climate.<sup>2</sup>

This Article suggests an approach that, while arguably controversial and requiring an enormous amount of political will, could solve the access issue and be acceptable to a broad range of legal system constituencies.

To summarize the approach proposed here: We must find ways to radically simplify the legal dispute resolution system so it becomes much more accessible and so the costs of accessing and operating the system dramatically decrease. Such an increase in access will lead to an improvement in the justness and fairness of outcomes.<sup>3</sup>

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1. See, e.g., Laura K. Abel, *Language Access in the Federal Courts*, 61 *DRAKE L. REV.* 593 (2013); David J. Dreyer, *Déjà Vu All Over Again: Turner v. Rogers and the Civil Right to Counsel*, 61 *DRAKE L. REV.* 539 (2013); Jona Goldschmidt, *Ensuring Fairness or Just Cluttering Up the Colloquy? Toward Recognition of Pro Se Defendants' Right to be Informed of Available Defenses*, 61 *DRAKE L. REV.* 667 (2013); John Pollock, *The Case Against Case-by-Case: Courts Identifying Categorical Right to Counsel in Basic Human Needs Civil Cases*, 61 *DRAKE L. REV.* 763 (2013); Annette J. Scieszinski, *Not on My Watch: One Judge's Mantra to Assure Access to Justice*, 61 *DRAKE L. REV.* 817 (2013).

2. LEGAL SERVS. CORP., STRATEGIC PLAN 2012–2016, at 1 (2012), available at [http://www.lsc.gov/sites/default/files/LSC/lscgov4/LSC\\_Strategic\\_Plan\\_2012-2016--Adopted\\_Oct\\_2012.pdf](http://www.lsc.gov/sites/default/files/LSC/lscgov4/LSC_Strategic_Plan_2012-2016--Adopted_Oct_2012.pdf) (recognizing limits to federal funding and other financial resources).

3. The idea is not an entirely new one. In 2000, the Conference of State Court Administrators White Paper recommended as follows: “COSCA should support the National Center for State Courts, State Justice Institute sponsored initiative to experiment with re-engineering the dispute resolution process for certain types of actions, so as to address this issue in the context for changing process, procedure, and rules for all parties, represented or not.” CONFERENCE OF STATE COURT ADM’RS, POSITION PAPER ON SELF-REPRESENTED LITIGATION 6 (2000), available at <http://cosca.ncsc.dni.us/WhitePapers/selfreplitigation.pdf>. For an analysis of the relationship between access outcomes and justice outcomes, see RICHARD ZORZA, POSTER PROPOSAL: OUTCOME MEASURES: A CRITICAL NEED, available at <http://accesstojustice.net/2012/11/13/maybe-these-poster-proposals-from-srln-will-stimulate-ideas/> (follow “Outcome Measures” hyperlink).

## II. SIMPLIFICATION MIGHT BE ACHIEVABLE NOW

This is an unusual moment, one in which all our judicial institutions are facing long-term economic crises. Courts are coming to realize that for the foreseeable future, they will experience both an increase in demand for services and a lessening of resources.<sup>4</sup> They will compete at the state level with compelling demands to increase funding for healthcare, education, and infrastructure replacement and modernization.<sup>5</sup>

Legal aid institutions, always under pressure and never able to provide more than a small percentage of the services needed,<sup>6</sup> see no funding improvement on the horizon.<sup>7</sup> On the contrary, pressures on funding are likely to intensify.<sup>8</sup>

Finally, the private bar, traditionally insulated from government funding pressures, is coming to realize that it is pricing itself out of the market due to the high costs of representation. The statistics on self-representation, themselves far from comprehensive, also make a compelling case for overpricing.<sup>9</sup> No realistic paths out of the declining market viability for the private bar are clear—at least for those serving individuals rather than corporate institutions.<sup>10</sup> To the extent that

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4. For example, in California, state general fund support for the courts has dropped by two-thirds in five years. *InFocus: Judicial Branch Budget Crisis*, CAL. JUD. BRANCH, <http://www.courts.ca.gov/partners/courtsbudget.htm> (last visited Apr. 25, 2013). Additional information on state court budgets can be found at *Budgets & Funding*, NAT'L CENTER FOR ST. CTS., [http://www.ncsc.org/Information-and-Resources/budget-resource-center/budget\\_funding.aspx](http://www.ncsc.org/Information-and-Resources/budget-resource-center/budget_funding.aspx) (last visited Apr. 28, 2013).

5. See CARL BAAR ET AL., BJA-AM. UNIV. CRIMINAL COURTS TECHNICAL ASSISTANCE PROJECT, FINANCING THE THIRD BRANCH IN LEAN TIMES: PLACING THE PRESENT FISCAL CRISIS IN PERSPECTIVE 1–2 (2010), available at <http://www1.spa.american.edu/justice/documents/2711.pdf>.

6. See LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 9 (3d ed. 2009) [hereinafter LEGAL SERVS. CORP. (2009)], available at [http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting\\_the\\_justice\\_gap\\_in\\_america\\_2009.pdf](http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf).

7. See *id.* at 28.

8. See LEGAL SERVS. CORP., *supra* note 2, at 2 (providing a survey of legal aid programs and budgets).

9. For a good summary of statistics on the self-represented, focusing particularly on pro se litigants in Texas, see generally TEX. ACCESS TO JUSTICE COMM'N, PRO SE STATISTICS, available at <http://www.texasatj.org/files/file/3ProSeStatisticsSummary.pdf>.

10. While discrete task representation offers some market expansion possibilities, the impact is likely to be limited without the adoption of the approach

technology is offering cost-effective ways of practice,<sup>11</sup> that opportunity would be greatly enhanced by simplification of the kind advocated for here.

Thus, for perhaps the first time, the major institutional players are facing an unsustainable future. They are in need for a transformational change, or else they face a breakdown of their participation in the system. Moreover, after over a decade of access to justice innovation, we have a better understanding of the barriers to access and their complexity.<sup>12</sup> We have experience in a variety of experiments and their implications, all of which can help inform the creation of simplification strategies.<sup>13</sup> We now better understand how the system fails for those without lawyers, how large that population is, and the costs imposed on the system as a whole by the interaction of barriers and an overly complex system.

These innovations have given us a better handle on the constitutional environment in which simplification might be achieved. In *Turner v. Rogers*, the Supreme Court made clear the appropriateness of judicial engagement and intervention, and the obligation of procedures that provide sufficient accuracy and fairness, in light of the interest at stake.<sup>14</sup> Some states, particularly California<sup>15</sup> and New York,<sup>16</sup> have also formed the

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discussed in this Article. See Standing Comm. on Lawyer Referral Info. Serv., *Unbundling/Discrete Task Representation*, A.B.A. (June 9, 2009), [http://www.americanbar.org/groups/lawyer\\_referral/resources/clearinghouse/discrete.html](http://www.americanbar.org/groups/lawyer_referral/resources/clearinghouse/discrete.html); see also Deborah L. Cohen, *Growing Justice: Law Schools Hop on the Incubator Trend*, A.B.A. J. (Oct. 1, 2012), [http://www.abajournal.com/magazine/article/growing\\_justice\\_law\\_schools\\_hop\\_on\\_the\\_incubator\\_trend/](http://www.abajournal.com/magazine/article/growing_justice_law_schools_hop_on_the_incubator_trend/). Similarly, while the incubator idea has the potential to increase the effective *supply* of low- and middle-income lawyers, it does too little alone to make their long-term participation viable. However, a simplified system would help ensure the viability of incubators and of middle-income practice.

11. For a summary of the changes in the private practice of small firms and solo practitioners, see Richard S. Granat & Marc Lauritsen, *The Next Five Years—Predictions for the Future of eLawyering*, 37 L. PRAC. MAG., Sept.–Oct. 2011, at 42, 42–43, available at [http://www.americanbar.org/publications/law\\_practice\\_magazine/2011/september\\_october/the\\_next\\_five\\_years.html](http://www.americanbar.org/publications/law_practice_magazine/2011/september_october/the_next_five_years.html).

12. See discussion *infra* Part III.

13. See discussion *infra* Parts V–VI.

14. *Turner v. Rogers*, 131 S. Ct. 2507, 2519–20 (2011) (imposing requirements for procedural safeguards to ensure fundamental fairness); see also Richard Zorza, *Turner v. Rogers: The Implications for Access to Justice Strategies*, 95 JUDICATURE 255, 255–57 (2012).

15. See ADMIN. OFFICE OF THE COURTS, JUDICIAL COUNCIL OF CAL., ELKINS

beginnings of state-level processes that represent an exploration of simplification. The National Center for State Courts is also exploring and spreading concepts to reengineer court processes.<sup>17</sup>

Finally, the innovations have also given us insights into the impact of technology. On the one hand, technologies deployed by banks, credit card companies, and other large institutions now hold massive information about underlying cases, which suggests a need to rethink the rules of information production and the burden of production. On the other hand, access to justice technologies and more advanced court decision support tools raise the question as to whether more case processing and decisionmaking can be handed off to automated tools and protocols, potentially supporting simplification.

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FAMILY LAW TASK FORCE: FINAL REPORT AND RECOMMENDATIONS 58–73 (2010) [hereinafter ELKINS FAMILY LAW TASK FORCE REPORT], available at <http://www.courts.ca.gov/documents/elkins-finalreport.pdf>; see also ADMIN. OFFICE OF THE COURTS, JUDICIAL COUNCIL OF CAL., REPORT TO THE JUDICIAL COUNCIL 3–4 (2010), available at <http://www.courts.ca.gov/documents/20101214item17.pdf>; ADMIN. OFFICE OF THE COURTS, JUDICIAL COUNCIL OF CAL., REPORT TO THE JUDICIAL COUNCIL 1–7 (2012), available at <http://www.courts.ca.gov/documents/jc-20120228-itemA11.pdf> (dealing with rules changes). The Elkins Family Law Task Force Report had an extremely broad focus, and included significant simplification elements, including “Helping People Navigate the Family Court Through Caseload Management,” “Providing Clear Guidance Through Rules of Court,” “Streamlining Family Law Forms and Procedures,” “Making Court Facilities More Responsive to the Needs of Family Court Users,” and “Improving Domestic Violence Procedures.” ELKINS FAMILY LAW TASK FORCE REPORT, *supra*, at 20, 30, 33, 41, 71.

16. Fern Fisher, *Testimony at the Chief Judge’s Hearing on Civil Legal Services*, in STATE OF N.Y. UNIFIED COURT SYS., THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK: REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK: APPENDICES 846–47 (2011) [hereinafter TASK FORCE TO EXPAND ACCESS: APPENDICES], available at [http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-2011\\_Appendices.pdf](http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-2011_Appendices.pdf) (noting that New York is embarking on a forms-focused simplification agenda); STATE OF N.Y. UNIFIED COURT SYS., THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK: REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 32–42 (2012), available at [http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT\\_Nov-2012.pdf](http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT_Nov-2012.pdf).

17. Daniel J. Hall & Lee Suskin, *Reengineering Lessons from the Field*, in FUTURE TRENDS IN STATE COURTS 2010, at 36 (2010), available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1625>.

### III. THE SOURCES OF COMPLEXITY AND RESISTANCE

The complexity of court processes has multiple causes, which are discussed in more detail below. The general point, however, is that almost all of the short-term forces act in the direction of greater complexity, and many of them provide an explanation for why substantial opposition can be expected. In contrast, simplification only occurs as a result of an intentional focus on reducing complexity. The best example of successful simplification is the 1930s project to develop the Federal Rules of Civil Procedure, which eventually had a near-universal impact.<sup>18</sup> But that initiative is now almost eighty years old. The current world is a fundamentally different one, and the assumptions behind that project, such as the presence of lawyers on both sides of all cases and paper recordkeeping, are now out of date.<sup>19</sup>

#### A. Ratchet Effect

The ratchet effect, as described here, is the idea that almost every change in the legal system (and indeed in the outside world) results in greater procedural complexity.<sup>20</sup> Each change seems worthwhile when viewed on its own, but it is almost never assessed before implementation for its potential to increase complexity or costs.<sup>21</sup>

#### B. Players in the System

Increasingly, external players that have an interest in judicial outcomes are lobbying legislatures for consideration of factors and interests that might not have been contemplated.<sup>22</sup> External players include

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18. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 694–97 & nn.22–39 (1998). Efforts for simplification were also driven by concerns about the functionality of existing law. *See id.* at 693.

19. Additionally, there is now less access to lawyers and an increase of data collection by large governmental and corporate entities.

20. See Claudio Tennie et al., *Ratcheting Up the Ratchet: On the Evolution of Cumulative Culture*, 364 PHIL. TRANSACTIONS ROYAL SOC'Y 2405, 2405 (2009) (describing the ratchet effect as a phenomenon “in which modifications and improvements stay in the population fairly readily . . . until further changes ratchet things up again”).

21. *See id.*

22. See, e.g., *Natl Assn of Criminal Defense Lawyers*, OPENSECRETS.ORG, <http://www.opensecrets.org/lobby/clientsum.php?id=D000054408> (last visited Apr. 28, 2013) (showing the National Association of Criminal Defense Lawyers has increased its federal lobbying expenses from \$60,000 in 1999, to \$200,000 in 2012).

those who advocate on behalf of groups and institutions that may benefit from or are hurt by particular types of court decisions.<sup>23</sup> Some of the most obvious examples are landlords,<sup>24</sup> hospitals,<sup>25</sup> domestic violence advocates,<sup>26</sup> and mental health advocates.<sup>27</sup> As a general matter, there is far more lobbying and advocacy than there was in the past.<sup>28</sup>

Similarly, and often reflecting these outside interests, there are an increased number of players internal to the court system—custody evaluators, mental health assessors, mediators, guardians ad litem, etc.<sup>29</sup> Each time one of these groups becomes part of the court system, it becomes an ongoing player with interests to protect and expand, which almost inevitably increases complexity.<sup>30</sup>

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23. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 746–47 (2000) (discussing the recent explosion of amicus briefs and their recognition as a form of lobbying the Court).

24. The National Apartment Association PAC spent approximately \$575,000 on contributions in 2012. *National Apartment Assn Summary*, OPENSECRETS.ORG, <http://www.opensecrets.org/pacs/lookup2.php?strID=C00113241> (last visited Apr. 28, 2013).

25. The American Hospital Association spent almost \$20,000,000 on lobbying in 2012. *American Hospital Assn*, OPENSECRETS.ORG, <http://www.opensecrets.org/orgs/summary.php?id=D000000116> (last visited Apr. 28, 2013).

26. The National Coalition Against Domestic Violence conducts a Lobby Day. *About the National Coalition Against Domestic Violence*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, <http://www.ncadv.org/aboutus.php> (last visited Apr. 25, 2013).

27. The National Alliance on Mental Illness spends about \$40,000 per year on lobbying. *National Alliance on Mental Illness*, OPENSECRETS.ORG, <http://www.opensecrets.org/lobby/clientsum.php?id=D000054118> (last visited Apr. 28, 2013).

28. Statistics on the growth of lobbying can be found at *Lobbying Database*, OPENSECRETS.ORG, <http://www.opensecrets.org/lobby/index.php> (last visited May 1, 2013) (noting that lobbying expenditures rose at the federal level from just under \$1.5 billion in 1998 to \$3.3 billion in 2012). Obviously, there are additional expenditures by groups lobbying at the state and local level.

29. See generally MICHAEL S. DAVIS ET AL., CUSTODY EVALUATIONS WHEN THERE ARE ALLEGATIONS OF DOMESTIC VIOLENCE: PRACTICES, BELIEFS, AND RECOMMENDATIONS OF PROFESSIONAL EVALUATORS (2010), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/234465.pdf> (examining the increasing tendency of courts to appoint custody evaluators).

30. See, e.g., *id.* at i–ii (demonstrating the complexity of the increased use of custody evaluators).

### C. Systematic Sources

Over time, the system tends, at least as a formal matter, to recognize an increasing number of rights.<sup>31</sup> These can come from appellate decisions and from legislative and regulatory enactments at the state or federal levels. Each new right may require additional data for adjudication, additional court steps, and perhaps the involvement of additional players.

Reducing judicial discretion is one possible source of simplification, but this has often backfired. The best-known example of this is the enactment of mandatory sentencing regimes and the resulting complications, which developed partly because of Supreme Court intervention.<sup>32</sup> Another example is the move to formula-driven child support calculations<sup>33</sup>—arguably simpler than the alternatives. As it is well-known, federal sentencing processes are now far more complicated.<sup>34</sup> Moreover, child support calculations can become highly technical, requiring extensive data collection.<sup>35</sup>

There is a complex dynamic between procedural and substantive rights, which often results in increased complexity. This can take many forms, but in one example, a substantive right is sought to be undercut by putting in place complex procedural requirements for the articulation of that right.<sup>36</sup> In another example, it might prove difficult to create a new substantive right, but easier to create burden shifting or evidentiary requirements that have the same aggregate impact.<sup>37</sup> In either case,

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31. That there has also been a parallel expansion of legal doctrines that make it harder to enforce those rights increases rather than decreases the complexity. See *infra* notes 38–39.

32. See *United States v. Booker*, 543 U.S. 220, 223–27 (2005) (description of complex federal sentencing system).

33. *Child Support: An Overview*, LEGAL INFO. INST. (Aug. 19, 2010), [http://www.law.cornell.edu/wex/child\\_support](http://www.law.cornell.edu/wex/child_support).

34. See U.S. SENTENCING COMM’N, SENTENCING GUIDELINES FOR UNITED STATES COURTS 8–73 (2013), available at [http://www.ussc.gov/Legal/Federal\\_Register\\_Notices/20130115\\_FR\\_Proposed\\_Amendments.pdf](http://www.ussc.gov/Legal/Federal_Register_Notices/20130115_FR_Proposed_Amendments.pdf) (detailing, in seventy-six pages, recently proposed amendments to the sentencing guidelines).

35. For example, California’s INCOME AND EXPENSE DECLARATION was carefully designed for maximum simplicity under the governing law. INCOME AND EXPENSE DECLARATION, FORM FL-150 (2007), available at <http://www.courts.ca.gov/documents/fl150.pdf>.

36. See Steve Subrin, *Ashcroft v. Iqbal: Contempt for Rules, Statutes, the Constitution, and Elemental Fairness*, 12 NEV. L.J. 571, 579–80 (2012).

37. See, e.g., 42 U.S.C. § 1973–1973(q) (2012) (shifting to the jurisdiction the

complexity increases. The U.S. Supreme Court has contributed to this problem with decisions that have increased complexity in areas such as standing and pleading sufficiency.<sup>38</sup> The impact of these decisions can now be seen, reflected in state court decisions.<sup>39</sup>

For a generation, caseload management has been intended to keep cases moving—even in the face of attorneys gaming the system and general inertia. However, there is a general sense that courts are tending to move away from a focus on timelines, often ignoring caseload reports.<sup>40</sup> The result has removed the speediness pressure from the equation, allowing complexity to flourish.<sup>41</sup> At its best, caseload management can be used to identify roadblocks and as an opportunity to provide services or to change

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burden of showing that the proposed change does not have a discriminatory impact of proposed change). The Voting Rights Act, currently under Supreme Court review, requires “covered jurisdictions” to obtain prior approval from either the U.S. Attorney General or the U.S. District Court for the District of Columbia. *Id.* §§ 1973b–1973c; *Statutes Enforced by the Voting Section*, CIV. RTS. DIVISION, U.S. DEPT OF JUST., <http://www.justice.gov/crt/about/vot/overview.php> (last visited Apr. 13, 2013); *see also* *Shelby County v. Holder*, 679 F.3d 848 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 594 (2012). Approval requires that the jurisdiction demonstrate that the proposed change is free of any discriminatory purpose or effect. 42 U.S.C. §§ 1973 (b)–1973(c).

38. As New York University School of Law Professor Arthur Miller put it:

Thus, the Supreme Court’s recent decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* should be seen as the latest steps in a long-term trend that has favored increasingly early case disposition in the name of efficiency, economy, and avoidance of abusive and meritless lawsuits. It also marks a continued retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth.

Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 9–10 (2010) (footnotes omitted); *see also* Subrin, *supra* note 36, at 580 (discussing how the increased pleading burdens on plaintiffs will result in increased dismissals).

39. A. Benjamin Spencer, *Pleading in State Courts after Twombly and Iqbal*, POUND CIV. JUST. INST. 2010 F. FOR ST. APP. CT. JUDGES 14–20 (2010), *available at* [http://poundinstitute.org/docs/2010\\_judges\\_forum/2010\\_Pound\\_Forum -- Spencer Paper.pdf](http://poundinstitute.org/docs/2010_judges_forum/2010_Pound_Forum_-_Spencer_Paper.pdf).

40. As John Greacen, a judicial administration consultant, put it: “[J]udges consider these reports to be ‘weather reports’—marginally interesting but describing matters beyond their control.” E-mail from John M. Greacen, Greacen Assocs., LLC, to Richard Zorza, coordinator of Self-Represented Litig. Network (Feb. 21, 2013, 12:47 PM EST) (on file with author).

41. *See id.*

procedures to help remove those roadblocks.<sup>42</sup>

Sometimes steps judges take to simplify their tasks end up complicating the process for litigants, particularly self-represented litigants. An example of this can be seen in *Elkins v. Superior Court*, a California case in which a county court had implemented procedural barriers to live testimony in the interest of increasing access for the self-represented.<sup>43</sup> However, the policies resulted in significant barriers to being heard, and so the barriers were reversed on appeal.<sup>44</sup>

Any incentives for simplification that may exist are undercut by the complexity and multiplicity of funding sources. All too often, an investment by one player, such as the courts, results in savings for other players, such as the bar or other governmental entities—for example, child support agencies. Internalizing as many costs as possible into one budgetary system might realign incentives.<sup>45</sup>

#### D. Financial Resources

Perversely, the availability of additional resources can add to complexity. Because cases are not *required* to move quickly, they often do not move quickly, thus consuming more, rather than fewer, resources.<sup>46</sup>

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42. See, e.g., GREACEN ASSOCS., LLC, DEVELOPING EFFECTIVE PRACTICES IN FAMILY CASEFLOW MANAGEMENT 150 (2005), available at [http://www.courts.ca.gov/partners/documents/FL\\_Caseflow\\_Mgmt\\_Manual.pdf](http://www.courts.ca.gov/partners/documents/FL_Caseflow_Mgmt_Manual.pdf).

43. *Elkins v. Superior Court*, 163 P.3d 160, 161 (Cal. 2007).

A local superior court rule and a trial scheduling order in the family law court provided that in dissolution trials, parties must present their case by means of written declarations. The testimony of witnesses under direct examination was not allowed except in ‘unusual circumstances,’ although upon request parties were permitted to cross-examine declarants. In addition, parties were required to establish in their pretrial declarations the admissibility of all exhibits they sought to introduce at trial.

*Id.*

44. *Id.* at 178.

45. Richard Zorza, *After Turner: A Proposed “Attorney Diagnosis” Approach to Triage for Access to Justice*, RICHARD ZORZA’S ACCESS TO JUST. BLOG (Sept. 6, 2011), <http://accesstojustice.net/2011/09/06/after-turner-a-proposed-attorney-diagnosis-approach-to-triage-for-access-to-justice/>.

46. Even in the current budget climate, a recent chart from the National Center for State Courts shows more state court budgets are increasing than are decreasing. *Budgets & Funding*, *supra* note 4.

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Moreover, the availability of more resources can mean more players, internal and external, and more players means more steps. In contrast, when resources are reduced, the system typically slows down, rather than simplifies.<sup>47</sup>

When interest groups get organized, they tend to get conservative, at least with respect to their own institutional interests. The internal pressures of the stakeholder organizations tend to reinforce an agenda of protecting stakeholder interests at the price of broader interests. Thus, stakeholders tend to solidify their positions, pushing for additional complexity in protection of those rights. This, in turn, can result in well-funded and determined opposition, which furthers resistance to simplification.

It is unavoidable that financial interests of players cause them to protect and expand their roles in the system. Serious thought has to be given to the value of arbitrators, custody evaluators, and others who have recently been added to the process.<sup>48</sup> There needs to be much more rigorous research into their cost, efficiency, impact, and benefits.

In contrast to the many forces that make the system endlessly more complex, there is no real pressure for simplification, other than occasional, if intensifying, budget crises.<sup>49</sup> Moreover, even the pressure that can come from budget crises is often moderated by institutional factors. Governmental organizations that increase efficiency sometimes fear that it will weaken the organization's case for more resources during financial crises. This Author has been in meetings in which organization

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47. A review of court actions to save resources is available in a spreadsheet, *Court Saving Tactics*, produced by the National Center for State Courts. *Court Saving Tactics*, NAT'L CENTER FOR ST. CTS., available at [http://www.ncsc.org/information-and-resources/~media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/CourtClosings%20\(2\).ashx](http://www.ncsc.org/information-and-resources/~media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/CourtClosings%20(2).ashx) (last visited Apr. 28, 2013).

48. Richard Zorza, *Court Simplification—Steps to Reduce Costs and Intrusiveness [sic] of Family Investigators—An Interesting Pioneer Step By the Colorado Supreme Court*, RICHARD ZORZA'S ACCESS TO JUST. BLOG (Apr. 22, 2011), <http://accesstojustice.net/2011/04/22/court-simplification-steps-to-reduce-costs-and-intrusiveness-of-family-investigators-an-interesting-pioneer-step-by-the-colorado-supreme-court/> (citing OFFICE OF THE CHIEF JUSTICE, SUPREME COURT OF COLO., DIRECTIVE CONCERNING COURT APPOINTMENTS OF CHILD AND FAMILY INVESTIGATORS PURSUANT TO C.R.S. 14-10-116.5, at 1, 7 (2012) (limiting fees and prohibiting psychological and certain other tests)).

49. See, e.g., LEGAL SERVS. CORP., *supra* note 2, at 15–16 (discussing the need to implement streamlined processes and reduce redundancies due to budget pressures).

representatives explicitly argue that innovations should not be promoted in efficiency terms, but only in terms of their potential for adding services and capacity by cutting the cost of current services. It may be that those who would gain the most from simplification are also the least well represented in the political structures at play.<sup>50</sup>

Court procedures are ultimately the product of a highly complicated, competitive dance for advantage between interest groups. This is played out in court disputes, the legislature, and on appeal.<sup>51</sup> Almost every step in that dance adds complexity. In one such scenario, advocates for a certain right obtain a legislative enactment, but then those who oppose the right persuade courts to put in procedural obstacles.<sup>52</sup> Interplay between parties and judges can also add to the complexity.<sup>53</sup> Similarly, appellate courts demand written findings to enable review, adding to complexity and delay.<sup>54</sup>

#### IV. POLITICS AND THE GOALS OF A SIMPLIFICATION APPROACH

The politics of simplification will be highly complicated, with interest groups fearful that simplification will shift the balance of power in one direction or the other.<sup>55</sup> In part to alleviate this fear, it is helpful to lay out the goals of a simplification agenda and process very carefully. Potentially, these goals, which may at times conflict, can be used as a neutral template to assess the success of the process.<sup>56</sup>

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50. See Miller, *supra* note 38, at 9–10.

51. See, e.g., Subrin, *supra* note 36, at 579–80 & n.58 (describing how defense attorneys convinced the U.S. Supreme Court to heighten the pleading standard after years of unsuccessful attempts to reform the Federal Rules of Civil Procedure).

52. See *id.*

53. The classic example is in federal sentencing. See *United States v. Booker*, 543 U.S. 220, 233–37 (2005) (describing the complexity of the Federal Sentencing Guidelines involving a multitude of factors, including: what the defendant was charged with, for what crime the defendant was ultimately convicted, and the nature of the defendant’s conduct and circumstances).

54. See, e.g., *Custody of Vaughn*, 664 N.E.2d 434, 439–40 (Mass. 1996) (requiring factual findings as to presence or absence of domestic violence in child custody cases with such allegations).

55. See Subrin, *supra* note 18, at 693–94 (discussing the political context of the Federal Rules Enabling Act, its initial support from conservatives, and ultimate passage as New Deal legislation).

56. See NAT’L CTR. FOR STATE COURTS, *A CASE STUDY: REENGINEERING UTAH’S COURTS THROUGH THE LENS OF THE PRINCIPLES FOR JUDICIAL ADMINISTRATION* 32–43 (2012), available at <http://www.ncsc.org/services-and-experts/~>

A. *Minimizes Costs, Maximizes Access*

Minimizing the cost of decisionmaking is the first of the key goals. Nominal simplification alone is useless. Simplification should result in a system that is actually cheaper for individuals and the state.<sup>57</sup> While there are remarkably few serious estimates of the cost of obtaining civil justice, there is some significant research showing that procedural changes can reduce costs to both courts and litigants.<sup>58</sup> For example, research in the San Joaquin Valley of California suggested that each dollar of investment in workshops and other informational assistance would save several dollars in court processing costs, and an equivalent amount of money for the litigants themselves.<sup>59</sup> Some have noted that simplification and increasing consumer satisfaction are two sides of the same coin.<sup>60</sup>

Maximizing access to the system is the next important goal. From a conceptual point of view, access is the fundamental variable. It is possible to imagine a nominally simple system that is inaccessible to most because of the skills required to navigate it. Thus, simplicity is a means to the end of access, and it is necessary to assess simplicity as to whether it meets accessibility goals. Implicit in access is the harder-to-measure justness of the result.<sup>61</sup> The National Center for State Court's CourtTools includes a module for assessing access and fairness in trial courts.<sup>62</sup> Similarly the Self-

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/media/Files/PDF/Services%20and%20Experts/Court%20reengineering/Utah%20Case%20Study%20%2027.ashx; NAT'L CTR. FOR STATE COURTS, PRINCIPLES FOR JUDICIAL ADMINISTRATION 7–11 (2012) [hereinafter NCSC, PRINCIPLES], available at <http://www.courts.ca.gov/partners/documents/TCFWG-20130115-NCSC.pdf> (listing a useful set of general goals and principles).

57. See NCSC, PRINCIPLES, *supra* note 56, at 12–17. There is a buried complexity here in that some changes may result in increases in costs to one class of litigants, while reducing the costs to litigants as a whole or to the system. It is in such situations that the political complexity arises. See *id.*

58. See, e.g., JOHN GREACEN, ADMIN. OFFICE OF THE COURTS, JUDICIAL COUNCIL OF CAL., THE BENEFITS AND COSTS OF PROGRAMS TO ASSIST SELF-REPRESENTED LITIGANTS: RESULTS FROM LIMITED DATA GATHERING CONDUCTED BY SIX TRIAL COURTS IN CALIFORNIA'S SAN JOAQUIN VALLEY 1–5 (2009), available at [http://www.courts.ca.gov/partners/documents/Greacen\\_benefit\\_cost\\_final\\_report.pdf](http://www.courts.ca.gov/partners/documents/Greacen_benefit_cost_final_report.pdf).

59. *Id.* at 4–5.

60. Patrick Wauters & Barbara Lörincz, *User Satisfaction and Administrative Simplification Within the Perspective of eGovernment Impact: Two Faces of the Same Coin?*, EUR. J. EPRACTICE, Aug. 2008, at 59, 65, available at [http://epractice.eu/files/ePractice-Journal-Volume-4\\_0.pdf](http://epractice.eu/files/ePractice-Journal-Volume-4_0.pdf).

61. See ZORZA, *supra* note 3 (follow “Outcome Measures” hyperlink).

62. See generally NAT'L CTR. FOR STATE COURTS, COURTTOOLS: TRIAL

Represented Litigation Network has developed a number of tools to assess how accessible courts are to the self-represented.<sup>63</sup>

Access is not merely a formal matter. Access must be meaningful. It is not enough for it to be possible to file papers. As discussed below, facts and law must be properly and reasonably complete before the decisionmaker, and the decisionmaker must, in turn, pay serious attention to the facts and law before making a decision.<sup>64</sup> To date, there are few assessments measuring the extent of such access. Such assessment might be achieved by a combination of court viewings, file reviews, and posthearing interviews with litigants.<sup>65</sup>

Speedy resolution, while not the only goal, is important to litigants.<sup>66</sup> Speed is also closely related to total cost. For poor and middle-income people, each hearing or step may represent lost wages, or even the threat of a lost job, as well as incidental travel and childcare expenses.<sup>67</sup> To the extent that advocacy costs are being incurred, those also increase with longer case processing time. Finally, extra time adds complexity and, thus, other costs.<sup>68</sup> Several decades of caseload management data give us the

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COURT PERFORMANCE MEASURES (2005), *available at* [http://www.courtools.org/~media/Microsites/Files/CourTools/courtools\\_Trial\\_measure1\\_access\\_and\\_fairness.aspx](http://www.courtools.org/~media/Microsites/Files/CourTools/courtools_Trial_measure1_access_and_fairness.aspx).

63. *See generally* SELF-REPRESENTED LITIG. NETWORK, A MODEL FOR A COMPREHENSIVE SELF ASSESSMENT OF COURT PROGRAMS TO ASSIST SELF-REPRESENTED LITIGANTS (2007), *available at* [http://www.selfhelpsupport.org/library/item.223578-A\\_Model\\_for\\_a\\_Comprehensive\\_Self\\_Assessment\\_of\\_Court\\_Programs\\_to\\_Assist\\_Sel](http://www.selfhelpsupport.org/library/item.223578-A_Model_for_a_Comprehensive_Self_Assessment_of_Court_Programs_to_Assist_Sel) (login access required).

64. *See* NCSC, PRINCIPLES, *supra* note 56, at 7–11.

65. *See* GREACEN ASSOCS., LLC, SELF-REPRESENTED LITIG. NETWORK, EFFECTIVENESS OF COURTROOM COMMUNICATION IN HEARINGS INVOLVING TWO SELF-REPRESENTED LITIGANTS: AN EXPLORATORY STUDY (2008), *available at* [http://www.selfhelpsupport.org/library/item.223587-Effectiveness\\_of\\_Courtroom\\_Communication\\_in\\_Hearings\\_Involving\\_Two\\_SelfRepr](http://www.selfhelpsupport.org/library/item.223587-Effectiveness_of_Courtroom_Communication_in_Hearings_Involving_Two_SelfRepr). In this research, the *effectiveness* of communication between litigants was assessed by conducting video hearings and playing the video back to participants, followed by a review and discussion. *Id.* at 2–3. However, no attempt was made to assess the *comprehensiveness* of the communication (i.e., whether the litigants in fact communicated all that they wanted or needed to communicate). *See generally id.*

66. *See, e.g.,* DAVID B. ROTTMAN, NAT'L CTR. FOR STATE COURTS, TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS 35 (2005), *available at* [http://www.courts.ca.gov/documents/4\\_37pubtrust1.pdf](http://www.courts.ca.gov/documents/4_37pubtrust1.pdf).

67. GREACEN, *supra* note 58, at 7–8.

68. Alexander B. Aikman, *Making the "Pain of Real People" Part of Courts'*

tools to assess this criterion and a history of attempts to control timelines.<sup>69</sup>

The current system requires significant advocacy resources in order for litigants to obtain access and justice.<sup>70</sup> For people to have access to the current system, they need a lawyer or a substitute.<sup>71</sup> While alternative services such as self-help centers<sup>72</sup> may in some cases substitute or reduce the need for full advocacy resources, they too take time and money—and the extent of resources needed will depend on the complexity of the underlying system.

Thus, a major component of cost reduction comes from reducing the

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*Budget Arguments*, in FUTURE TRENDS IN STATE COURTS 2012, at 91 (2012), available at [http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Better-Courts/~media/Microsites/Files/Future%20Trends%202012/PDFs/MakingthePain\\_Aikman.ashx](http://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/Better-Courts/~media/Microsites/Files/Future%20Trends%202012/PDFs/MakingthePain_Aikman.ashx) (describing the impact that delay has on parties).

69. See generally Tom Clarke & Taunya Jones, *Practical Time Standards: Compliance Based on Business Processes*, in FUTURE TRENDS IN STATE COURTS 2013 (forthcoming 2013) (manuscript at 5) (on file with author) (explaining that the typical case involves only one to three weeks of actual court work, the rest of the time is delay; moreover, litigants want their cases resolved in half the time they actually take); *Caseflow Management: Resource Guide*, NAT'L CENTER FOR ST. COURTS, <http://www.ncsc.org/Topics/Court-Management/Caseflow-Management/Resource-Guide.aspx> (last visited Apr. 13, 2013) (providing extensive resources on caseload management strategies and case studies).

70. See ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POLICY, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2009, at 2–6 (2009), available at <http://www.clasp.org/admin/site/publications/files/CIVIL-LEGAL-AID-IN-THE-UNITED-STATES-2.pdf> (stating that legal aid funding in 2009 was approximately \$1.3 billion).

71. See 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, 904–06 (2013) [hereinafter Greiner et al., *District Court*] (discussing trend toward unbundled legal assistance); D. James Greiner et al., *How Effective Are Limited Legal Assistance Programs? A Randomized Experiment in a Massachusetts Housing Court* 12–15 (Mar. 12, 2012) [hereinafter Greiner et al., *Housing Court*], available at <http://www.law.uchicago.edu/files/files/Greiner%20Paper.pdf>.

72. See NAT'L CTR FOR STATE COURTS, ACCESS BRIEF: SELF-HELP SERVICES 1–3 (2012), available at <http://cdm16501.contentdm.oclc.org/utills/getfile/collection/accessfair/id/263/filefil/264.pdf>; see generally SELF-REPRESENTED LITIG. NETWORK, BEST PRACTICES IN COURT-BASED PROGRAMS FOR THE SELF-REPRESENTED: CONCEPTS, ATTRIBUTES, ISSUES FOR EXPLORATION, EXAMPLES, CONTACTS, AND RESOURCES (2008), available at [http://www.selfhelpsupport.org/library/item.223550-2008\\_edition\\_of\\_Best\\_Practices\\_in\\_CourtBased\\_Programs\\_for\\_the\\_SelfReprese](http://www.selfhelpsupport.org/library/item.223550-2008_edition_of_Best_Practices_in_CourtBased_Programs_for_the_SelfReprese) (discussing services offered at self-help centers).

need for full advocacy services. Moreover, reducing the need for these resources increases equity by ensuring that access is available for all, regardless of one's ability to obtain those advocacy or support resources. Current triage work could provide the foundation for developing criteria to determine whether minimization has been achieved.<sup>73</sup>

A major element of simplification is having a system in which tasks needed for resolution can be performed by those able to perform them most efficiently and appropriately. This is impacted by the timing of events, triggering requirements for events, institutional responsibility in case processing, and laws and rules governing authorization to perform tasks.<sup>74</sup> For example, should the wording of a draft order, and enforcement in general, be the responsibility of the parties or of the court? As a general matter, with the increase of self-representation,<sup>75</sup> many tasks that were traditionally performed by lawyers are now more efficiently handled by the court.<sup>76</sup> This ultimately saves resources for the court as well as the litigants.<sup>77</sup>

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73. See generally James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 292 (2012); Richard Zorza, *The Access to Justice "Sorting Hat": Towards a System of Triage and Intake that Maximizes Access and Outcomes*, 89 DENV. U. L. REV. 859 (2013) [hereinafter Zorza, *The Access to Justice "Sorting Hat"*], available at <http://www.zorza.net/Sorting-Hat.pdf>; *SJI Board Awards Strategic Initiative Grants on Self-Represented Litigation and the State Courts*, ST. JUST. INST. (2008), [http://www.sji.gov/articles.php?pg=SIG\\_awards\\_SRL](http://www.sji.gov/articles.php?pg=SIG_awards_SRL) (announcement of grant for "Self-Represented Litigation Network (SRLN) and NCSC to develop formal case triage protocols for assistance to SRLs"); Richard Zorza, *A New Cut at Triage Principles*, RICHARD ZORZA'S ACCESS TO JUST. BLOG (Feb. 28, 2012), <http://accesstojustice.net/2012/02/28/a-new-cut-at-triage-principles/>.

74. See, e.g., STATE OF N.Y. UNIFIED COURT SYS., *supra* note 16, at 36. For additional discussion of the emerging movement toward authorizing non-lawyers to perform tasks traditionally limited to lawyers, and to do so for pay and without lawyer supervision, see Russell Engler, *Opportunities and Challenges: Non-Lawyer Forms of Assistance in Providing Access to Justice for Middle-Income Earners*, in MIDDLE INCOME ACCESS TO JUSTICE 145 (Michael Trebilcock et al. eds., 2012); Richard Zorza, *New York Court Task Force to Expand Access to Civil Legal Services Recommends Establishing Pilot Program in Non-Lawyer Practice*, RICHARD ZORZA'S ACCESS TO JUST. BLOG (Dec. 5, 2012), <http://accesstojustice.net/2012/12/05/new-york-court-task-force-to-expand-access-to-civil-legal-services-recommends-establishing-pilot-program-in-non-lawyer-practice/>.

75. See Greiner et al., *District Court*, *supra* note 71, at 904.

76. See *id.* at 932–34.

77. See generally SELF-REPRESENTED LITIG. NETWORK, *supra* note 72, at 57–58.

### B. Provides More Complete and Just Outcomes

Meaningful access is more than a gateway into the courthouse. It requires a system in which all facts and law helpful to an appropriate decision are before, and considered by, the ultimate decisionmaker.<sup>78</sup> Moreover, meaningful access requires that cases are actually resolved.

The complexity of many systems results in an absence of actual decisions. Some cases sit forever without dismissal or action, or are decided on technicalities rather than on the merits. For example, cases may be dismissed for failure to meet timelines, even though those timelines are impractical for the self-represented to understand, let alone comply with.<sup>79</sup> Statistics from caseload management, traditionally used to ensure compliance with timelines, can be helpful in assessing whether this standard is met; however, these statistics are far from perfect in aiding the assessment.<sup>80</sup>

Lastly, a final decision on the merits will be worthless if the harmed party cannot obtain meaningful relief. This may be the largest area of current failure. Many cases never move to compliance even though there is an order or judgment that meets the “actual decision” standard.<sup>81</sup> Very few courts make any significant effort to ensure there is compliance with civil orders, except perhaps in the child support,<sup>82</sup> domestic violence, and custody areas.<sup>83</sup> Research into actual compliance would require expensive follow-up with litigants.<sup>84</sup>

### C. Provides Transparency and Contains Protections Against Reemergence of Complexity

Transparency is critical for obtaining and maintaining simplicity, as

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78. See NCSC, PRINCIPLES, *supra* note 56, at 7–11.

79. Paula Hannaford-Agor & Nicole Mott, *Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations*, 24 JUST. SYS. J. 163, 171 (2003) (noting the high rate of dismissals for self-represented litigants).

80. See generally *Caseload Management: Resource Guide*, *supra* note 69.

81. Hannaford-Agor & Mott, *supra* note 79, at 172–74 (comparing dispositions).

82. See, e.g., 42 U.S.C. § 654(4)(B) (2006) (imposing a federal requirement for enforcement of child support orders).

83. See, e.g., CAL. FAM. CODE §§ 210–217 (West 2004) (providing for general procedures).

84. Hannaford-Agor & Mott, *supra* note 79, at 175 (discussing logistical issues in data collection for litigant surveys).

well as for providing credibility to the system.<sup>85</sup> The more information that is made available about how the system functions, the more likely that external pressure will demand efficiency and simplification.<sup>86</sup> The mere knowledge that a system's problems will be publicly available is likely to increase internal pressure for review and change.<sup>87</sup>

For the reasons discussed in Part III, there are strong forces in the system that move toward increasing complexity. Systems, therefore, need protections against the reemergence of complexity. One protection might be a "Complexity Impact Statement" required before any change in processes or even in substantive law.<sup>88</sup> Protections could also include ongoing audit and reporting as to the factors discussed above.

#### *D. Works for All Stakeholders, Laying the Groundwork for Substantive Simplification*

As a political matter, any modified system has to provide benefits for all stakeholder groups, although the benefits may not be equally distributed, and may not be there for all members of all stakeholder groups in all cases. Such equal distribution would be a practical impossibility. However, benefits might be financial, political, or institutional, and might be long- or short-term, with the benefits for some stakeholders becoming apparent only over time. The calculus is not made any easier by the fact that simplification for one party may introduce additional complexity for a different party.

Finally, while simplification does not necessarily require substantive legal change, it can be enormously facilitated and extended by it,

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85. Order for *In re* Access to Justice Technology Principles, No. 25700-B- (Wash. Dec. 3, 2004), available at [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=am&set=ATJ&ruleid=amatj01order](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=am&set=ATJ&ruleid=amatj01order); WASH. COURTS, WASHINGTON STATE ACCESS TO JUSTICE TECHNOLOGY PRINCIPLES, available at [http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=am&set=ATJ&ruleid=amatj02principles](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=am&set=ATJ&ruleid=amatj02principles).

86. CONFERENCE OF STATE COURT ADM'RS, WHITE PAPER ON PROMOTING A CULTURE OF ACCOUNTABILITY AND TRANSPARENCY: COURT SYSTEM PERFORMANCE MEASURES 14 (2008), available at <http://cosca.ncsc.dni.us/WhitePapers/2008WhitePaper-PerformanceMeasurement-Final-Dec5-08.pdf>.

87. *See id.* at 4 ("The assessment of court performance serves as a basis for organizational change and as a means for continuous improvement of court operations and programs.").

88. Such an approach would be modeled after the environmental impact statement concept required by 42 U.S.C. § 4332. *See* 42 U.S.C. § 4332 (2006).

particularly in the long-term. Empirical research supports the conclusion that simpler underlying rules can result in more predictable outcomes—at least in “easy” cases—as well as generally more just outcomes.<sup>89</sup> Thus, process simplification should be designed to lay the groundwork for a broader substantive simplification agenda. This might, in part, be achieved by greater overall transparency.

#### V. EARLY FOUNDATIONS FOR A SIMPLIFIED SYSTEM AND LESSONS LEARNED FROM THEM

While we are far from a simplified system, access advocates in courts and beyond have learned a lot about the interplay of innovations, complexity, and access. Some of what has been learned will be of use as the court system moves forward.

##### A. Plain Language Forms and Online Document Assembly

Although it is a minor simplification step, the plain language and forms movement has shown how small changes in the process can have a significant impact throughout the system. Improvements in data collection potentially result in smoother processes and less wasted time.<sup>90</sup> These data

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89. M.P. Ellinghaus & E.W. Wright, *The Common Law of Contracts: Are Broad Principles Better than Detailed Rules? An Empirical Investigation*, 11 TEX. WESLEYAN L. REV. 399, 420 (2005).

Let us restate our findings in broad summary. First, we found decisions applying detailed rules were no more predictable than decisions applying broad principles. However, decisions applying broad principles were significantly more predictable in easier cases. Second, we found broad principles were more likely to lead to just outcomes. Third, we found broad principles were more accessible than detailed rules. Finally, we found broad principles were significantly more efficient.

*Id.*

90. Fisher, *supra* note 16, at 847; Fern Fisher, Testimony Before The Chief Judge’s Hearings on Civil Legal Services: First Department (Sept. 26, 2011), in TASK FORCE TO EXPAND ACCESS: APPENDICES, *supra* note 16, at 246, 360–61. A wide variety of forms programs are available online at LAWHELP INTERACTIVE, <https://lawhelpinteractive.org/> (last visited Apr. 25, 2013). See also Mirenda Watkins, *The Joi of Growth: LawHelp Interactive’s Past, Present, and Plans for the New Year*, CONNECTING JUST. COMMUNITIES (Feb. 14, 2013), <http://www.connectingjusticecommunities.com/the-joi-of-growth-lawhelp-interactives-past-present-and-plans-for-the-new-year/2013/02/> (reporting a total of more than 1.1 million forms completed on the site). However, system design is critical as it is

collection innovations have also highlighted that the more complex the underlying law, the more complex the data that needs to be collected—which in the long-term might help drive substantive simplification.<sup>91</sup>

These services are enhanced by court-based and web-based informational services that improve the quality of litigant submissions.<sup>92</sup> They might be made even more powerful if extended to include tools that would help litigants assess their positions and adjust their expectations.

### B. Judicial Engagement

There has been extensive and national experimentation and innovation on the role of judges in self-represented cases.<sup>93</sup> Research has shown the value and appropriateness of judicial questioning and engagement in ensuring full information is before the court.<sup>94</sup> This has been endorsed by the Supreme Court in *Turner v. Rogers*,<sup>95</sup> by the American Bar Association in its Model Code of Judicial Conduct,<sup>96</sup> and by the Conference of Chief Justices and the Conference of State Court

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important that the forms are easy for judges and clerks to use.

91. For a discussion on how lawyer representation affects the outcomes of formal adjudication, see generally Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51 (2010).

92. See, e.g., SELF-REPRESENTED LITIG. NETWORK, *supra* note 72.

93. See generally Richard Zorza, *A New Day for Judges and the Self-Represented: Toward Best Practices in Complex Self-Represented Cases*, 51 JUDGES' J. 36 (2012); Richard Zorza, *A New Day for Judges and the Self-Represented: The Implications of Turner v. Rogers*, 50 JUDGES' J. 16 (2011) [hereinafter Zorza, *The Implications of Turner v. Rogers*]. For a detailed review of judicial techniques employed in specific self-represented cases see Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 JUDGES' J. 16, 19–23, 42–43 (2003).

94. See, e.g., GREACEN ASSOCS., LLC, *supra* note 65, at 113; RICHARD ZORZA, SELF-REPRESENTED LITIG. NETWORK, CURRICULUM ONE: ACCESS TO JUSTICE IN THE COURTROOM FOR THE SELF REPRESENTED 4–6 (2007), available at [http://www.selfhelpsupport.org/library/item.167142-Curriculum\\_One\\_Access\\_to\\_Justice\\_in\\_the\\_Courtroom\\_for\\_the\\_Self\\_Represented](http://www.selfhelpsupport.org/library/item.167142-Curriculum_One_Access_to_Justice_in_the_Courtroom_for_the_Self_Represented); *Harvard Judicial Leadership Conference (Nov. 1–3, 2007)*, SELFHELPSUPPORT.ORG, [http://www.selfhelpsupport.org/library/folder.165143-Harvard\\_Judicial\\_Leadership\\_Conference\\_Nov\\_13\\_2007](http://www.selfhelpsupport.org/library/folder.165143-Harvard_Judicial_Leadership_Conference_Nov_13_2007) (last visited Apr. 25, 2013).

95. *Turner v. Rogers*, 131 S. Ct. 2507, 2519–20 (2011).

96. MODEL CODE OF JUDICIAL CONDUCT R. 2.2 cmt. 4 (2007) (“It is not a violation of this Rule [governing impartiality and fairness] for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.”).

Administrators in a recent joint resolution.<sup>97</sup>

It may be that such engagement provides real opportunities for simplification. The general lesson from what has been happening around the country in response to these changes is that judges can lead and structure the courtroom process on a case-by-case basis, thus making it easier for pre-courtroom steps to be simplified.<sup>98</sup> On the other hand, our experience with these changes has shown that correctly structuring the pre-courtroom steps allows judges to make more efficient use of their time.<sup>99</sup> Moreover, appropriately structured parallel services provided between and after hearings can have the same impact.<sup>100</sup>

### C. Burden Shifting

One potentially highly productive source of innovation comes in the area of the burden of producing evidence. The rules reform of the 1930s focused in large part on the creation of the mechanisms of discovery, based largely upon the insight that the party best able to produce evidence should be required to do so.<sup>101</sup> Since the 1930s, however, the technologies that manage underlying information have changed dramatically, while the rules

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97. *Resolution 2: In Support of Expanding Rule 2.2 of the ABA Model Code of Judicial Conduct to Reference Cases Involving Self-Representing Litigants*, CONFERENCE OF CHIEF JUSTICES (July 25, 2012), <http://ccj.ncsc.dni.us/resol2Rule22ModelCode.html>; Memorandum from Self-Represented Litig. Network on the Model Code of Judicial Conduct Provisions on Self-Represented Litig.: Options for Alt. Comment Language Prepared in Support of Potential State Activity in Response to 2012 Resolution 2 of the Conference of Chief Justices and the Conference of State Court Adm'rs (Mar. 2013) (on file with author).

98. See RICHARD ZORZA, SELF-REPRESENTED LITIG. NETWORK, JUDICIAL EDUCATION CURRICULUM PROJECT REPORT AND EVALUATION 7–9 (2008), available at [http://www.selfhelpsupport.org/library/item.259761-Judicial\\_Education\\_Curriculum\\_Project\\_Report\\_and\\_Evaluation](http://www.selfhelpsupport.org/library/item.259761-Judicial_Education_Curriculum_Project_Report_and_Evaluation).

99. GREACEN, *supra* note 58, at 11–13.

100. An excellent example of this is found in Alameda County, California. When the court took responsibility for generating the orders after hearings significantly fewer pro se litigants returned to the court. The Honorable Evelio M. Grillo describes the program in an article. HON. EVELIO M. GRILLO, ACCESS TO JUSTICE: DELIVERING EFFECTIVE SERVICE TO PRO SE LITIGANTS 5–6 (2009), available at [http://www.selfhelpsupport.org/library/item.263860-Access\\_to\\_Justice\\_Delivering\\_Effective\\_Service\\_to\\_Pro\\_Se\\_Litigants](http://www.selfhelpsupport.org/library/item.263860-Access_to_Justice_Delivering_Effective_Service_to_Pro_Se_Litigants) (“41% of pro se litigants who were not provided with a court order filed an O[rder to] S[how] C[ause] covering the same topic area within 30 months; and only 20% of pro se litigants who left court with a court order re-filed an OSC covering the same topic area within the same time period.”).

101. See Subrin, *supra* note 18, at 713–29.

governing production of evidence have not.<sup>102</sup>

There have been some experiments in which plaintiffs, such as in foreclosure cases, have at an early stage of the case been required to produce a broad range of evidence as to liability and compliance with requirements, such as for the offering of settlement and workout.<sup>103</sup> The success of these programs provide an opportunity for a broader re-thinking along these lines.

#### D. *Caseflow Management and Additional Services*

Caseflow management reform, particularly in its most recent iteration, has shown that the addition of services can result in speedier and more effective processing.<sup>104</sup> Furthermore, the research into caseflow blockages conducted in some jurisdictions has shown which areas of the current processes are likely to produce problems.<sup>105</sup> These areas should be priority candidates for elimination or simplification.<sup>106</sup>

#### E. *Discrete Task Representation (Unbundling)*

Similarly, the wide adoption of unbundling, in which the lawyer and client divide up tasks in the case, gives us insight into which parts of cases

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102. See *id.* at 744–45.

103. See, e.g., Richard Zorza, *NewsMaker Interview: CJ Lippman on New York Foreclosure Settlement Representation Project*, RICHARD ZORZA'S ACCESS TO JUST. BLOG (Apr. 4, 2011), <http://accesstojustice.net/2011/04/04/newsmaker-interview-cj-lippman-on-new-york-foreclosure-settlement-representation-project/> (discussing relationship of provision of representation and requirements for provision of information by banks at required foreclosure case conferences).

104. An example of providing additional services can be seen in Alaska, which has an interesting program in which pro bono attorneys are brought in to assist in cases that are near resolution. Richard Zorza, *Alaska Early Resolution Project Using Pro Bono*, RICHARD ZORZA'S ACCESS TO JUST. BLOG (Mar. 9, 2013), <http://accesstojustice.net/2013/03/09/alaska-early-resolution-project-using-pro-bono/>; see also *Volunteer Lawyers Project*, NYCOURTS.GOV, <http://nycourts.gov/courts/nyc/civil/vlpselfrep.shtml> (last updated Apr. 1, 2013).

105. See BARRY MAHONEY ET AL., *CHANGING TIMES IN TRIAL COURTS* (1988), available at <http://ncsc.contentdm.oclc.org/cdm/singleitem/collection/ctadmin/id/7/rec/17> (researching case-processing times in various trial courts to assess inhibitions to caseflow management and developments to ensure successful advancements to caseflow management).

106. Service of process, for example, has proved particularly problematic. See GREACEN ASSOCS., LLC, *supra* note 42, at 57 (“The default rate for cases in the program has been reduced to 1.2% from the rate in a comparison group of 64.4%.”).

are actually a problem for the self-represented, versus which parts they can handle on their own. Simplification efforts should focus on those areas that produce the most problems for the self-represented, and for which they therefore seek help from counsel. While there has been extensive on-the-ground experience with the approach, there has, as of yet, been little systematic analysis of what division of labor is actually occurring in unbundled cases.<sup>107</sup>

#### F. Limited Rules Experiments

A small number of states have experimented with changing formal rules that govern certain kinds of cases.<sup>108</sup> This is in addition to the almost standard changes that have occurred in small-claims processing.<sup>109</sup> Some doubt the impact of these small changes.<sup>110</sup> More ambitious changes are a potential source of data about what actually occurs when court processes are simplified.<sup>111</sup>

#### G. Triage and Data Analysis

We are beginning to think about triage and about using data to understand the flow of cases.<sup>112</sup> As we move to systems of triage based on data analysis, we will be in a position to design systems in which step structures are flexible, meaning that steps can be reduced without impacting quality.

### VI. DESIGN PRINCIPLES OF A SIMPLIFIED SYSTEM

This section lays out some possible process principles that might be

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107. Resources about discrete task representation are available at *Standing Committee on the Delivery of Legal Services: Resources*, ABA, [http://www.americanbar.org/groups/delivery\\_legal\\_services/resources.html](http://www.americanbar.org/groups/delivery_legal_services/resources.html) (last updated Dec. 14, 2011).

108. See, e.g., IDAHO R. CIV. P. 16(j) (governing informal custody trials, an optional, alternative trial procedure for child custody and support proceedings).

109. See *Basic Considerations and Questions*, CAL. DEP'T OF CONSUMER AFF. [http://www.dca.ca.gov/publications/small\\_claims/basic\\_info.shtml](http://www.dca.ca.gov/publications/small_claims/basic_info.shtml) (last visited Apr. 14, 2013) (outlining the informal procedures of small-claims court).

110. See, e.g., Arthur Best et al., *Peace, Wealth, Happiness, and Small Claim Courts: A Case Study*, 21 FORDHAM URB. L.J. 343, 370-78 (1994) (examining the differences between Denver small-claims courts with other small-claims court studies, and finding a wide range in user satisfaction and judicial styles).

111. See IDAHO R. CIV. P. 16(j).

112. See discussion *supra* Part IV.A.

used to design a simplified system. These may be familiar to those who have worked in simplified systems in other industries, but they are probably new when applied in our area.

*A. Information Collected Only If Needed from the Person Most Easily Able to Provide It*

A simple idea: Information is only collected if it is needed for a decision or action. Reviewing whether, as a general matter, particular information is really needed is likely to be a major source of small, incremental savings. These savings could add up to a significant impact. It is important to note the inconsistency within the presumptive, normal discovery rules that put this issue largely within the interplay of the parties.<sup>113</sup>

Collecting information from the person most able to provide the information is potentially a major shift in discovery,<sup>114</sup> replacing the current operating principle that information is presumptively provided on request by whomever it is asked from, unless it is in the hands of the requestor.<sup>115</sup> The massive increase in data collection and aggregation by large corporate and governmental entities made significant changes with respect to who provides requested information.<sup>116</sup>

*B. Information Provided at a Point of Convenience, Consistent with Showing of Actual Need*

As a general matter, information should be provided as early as possible and in as general a step as possible, but only to the extent that it is consistent with the principle that information is only required when it is actually shown to be needed.<sup>117</sup> For example, there is reason to require banks seeking foreclosure to provide the information to justify the

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113. See Subrin, *supra* note 18, at 744–45 (comparing the “fishing expedition” style of discovery, in which any and all information was collected, with later approaches to minimize discovery costs and abuse).

114. See Hall & Suskin, *supra* note 17, at 36 (suggesting that capturing information once and at the source would streamline the discovery process).

115. FED. R. CIV. P. 26–37.

116. See generally Xiaohua Hu, *A Data Mining Approach for Retailing Bank Customer Attrition Analysis*, 22 APPLIED INTELLIGENCE 47 (2005) (providing an example of sophistication of analysis given available data).

117. It is worth acknowledging that there are obvious potential inconsistencies in this, in that a showing of need may not be clear at an early stage.

foreclosure as early as possible, making it easier to filter out meritless or unsupported claims early<sup>118</sup> and for the parties to explore alternative resolutions.<sup>119</sup>

Data should not swamp decisionmakers but should be structured and presented when needed. As a general matter, the data is often needed earlier rather than later. Current systems often either collect lots of data regardless of need or put off collecting it and then waste time and generate additional steps in the collection process. Flexible systems should be able to assess early what is likely to be needed and collect it appropriately. Such systems should also be structured so the timing of presenting data to decisionmakers is flexible. Presentation should be based on when the information comes in, when it is ready, and when it is most appropriate, rather than according to formal and rigid schedules that are standardized for multiple kinds of cases.<sup>120</sup>

### *C. Minimize the Number of Steps Unless Compelling Reasons Exist*

Because each step in the court system inevitably involves so many people, so much expenditure, and such opportunity for delay and error, the number of steps should be minimized. This requires rigorous analysis as to whether there is a true need to subdivide steps. Indeed, the pressures of the day to day usually conspire to fragment rather than integrate steps—“let’s decide that at the next hearing,” “let’s get an additional report before deciding that,” and so on.

There is, however, a superficial tension here between the simplification approach and the triage approach. The triage approach—subdividing the track of a case based on the services needed—tends to add

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118. See the process described in Zorza, *supra* note 103 (explaining the requirements for provision of information by banks at mandatory foreclosure case conferences).

119. Amilda Dymi, *Alternative Resolutions Ease Foreclosure Burdens*, NAT’L MORTGAGE NEWS (Aug 28, 2012), [http://www.nationalmortgagenews.com/msn\\_features/alternative-resolutions-ease-foreclosure-burdens-1031997-1.html](http://www.nationalmortgagenews.com/msn_features/alternative-resolutions-ease-foreclosure-burdens-1031997-1.html) (login access required).

120. Beyond the scope of this Article is a discussion of intelligent display systems designed to support expert decisionmakers. See, e.g., Robert G.M. Keating & Richard Zorza, *The Ten Commandments of Electronic Courthouse Design, Planning, and Implementation—The Lessons of the Midtown Community Court*, NAT’L CENTER FOR ST. CTS. (Oct. 1994), <http://cdm16501.contentdm.oclc.org/cdm/singleitem/collection/facilities/id/142/rec/10>.

steps.<sup>121</sup> In the long term, however, triage should save steps because it moves cases that need fewer steps into the triage option, which is designed for cases with fewer steps.<sup>122</sup> In other words, spending resources to save resources is a good investment, and sophisticated triage and step analysis work together to meet this goal.<sup>123</sup>

*D. Involve Only Those Players Needed in Each Step and Design a Wide Range of Events in Processing*

Historically, all parties come into court, regardless of whether their presence is needed for the decision or for due process purposes. This can be more finely tuned; however, it would require a more finely tuned system of notice and respect for the parameters of such notice.

One major source of simplification is to return authority to a single decisionmaker, rather than to delegate decisions to outside experts, all of whom involve substantial cost and time. To the extent that outsiders are needed, that step should be ordered early, without the need for additional steps. Attention should also be paid to understanding the optimal time to make a decision, in terms both of minimizing cost and increasing compliance.<sup>124</sup>

Traditional court processes are built only around the hearing as the defining step. Nothing happens until the hearing, and then nothing happens until, or just before, the next hearing. Many events—such as data gathering, proposal making, and service provision—do not need the judge or a court appearance, which inherently includes more players and creates higher court costs.<sup>125</sup> Moreover, even judicial intervention does not

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121. See Cabral et al., *supra* note 73, at 292–93; see generally Zorza, *The Access to Justice “Sorting Hat,” supra* note 73.

122. Thomas M. Clarke & Victor Flango, *Case Triage for the 21st Century*, in FUTURE TRENDS IN STATE COURTS 2011, at 146 (2011), available at <http://www.ncsc.org/sitecore/content/microsites/future-trends-2011/home/Enhancing-Access/~media/Microsites/Files/Future%20Trends/Author%20PDFs/Clarke%20and%20Flango.ashx> (discussing court tracks for different situations).

123. See generally, as to integration of tasks, Hall & Suskin, *supra* note 17 (Principle 5: “Link parallel activities in the workflow instead of just integrating their results.”).

124. See generally Zorza, *The Implications of Turner v. Rogers, supra* note 93, at 20 (discussing the value of immediate decisions).

125. See, e.g., SUPERIOR COURT OF CAL., CNTY. OF SACRAMENTO, CASE MANAGEMENT PROGRAM INFORMATION AND MATERIALS (2012), available at <http://www.saccourt.ca.gov/forms/docs/cv-133.pdf> (providing an example of an attempt

necessarily need a full hearing. Video and phone hearings can be just as useful and are far shorter and cheaper.<sup>126</sup>

*E. Use Technology to Predict What Will Be Needed and Contextualize What Has Been Gathered*

As systems collect more data, import data from other systems, and analyze patterns, they will be able to predict which cases will need information and which will need additional steps, thus saving much time and many steps.<sup>127</sup> For example, if the database shows that in a high percentage of a particular kind of case an extra data element is ultimately required for a decision, then that data request can be added to an earlier step.

Similarly, because decisionmakers will be shown context,<sup>128</sup> they will be able to make decisions faster and call less on outsiders, thereby reducing the need for additional steps and avoiding the delay those steps cause. By contextualize, we mean that data will be compared to patterns, providing meaning and comparison to each piece of data. If the data does not fit the pattern, then the decisionmaker will be better equipped to draw inferences. For example, if a particular lender has a history of failing to provide opportunities for “work-out,”<sup>129</sup> that suggests a different implication than if the lender usually does provide such opportunities.<sup>130</sup> This may reduce the need for added data and result in speedier resolutions.

*F. Right Placing Responsibility for Compliance and Enforcement*

Current compliance support systems are weak and usually depend upon actions by the party seeking compliance. While this made sense in a

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to structure the process, including the issuance of tentative rulings).

126. RICHARD ZORZA, VIDEO CONFERENCING FOR ACCESS TO JUSTICE: AN EVALUATION OF THE MONTANA EXPERIMENT 16–17 (2007), available at <http://lsntap.org/sites/all/files/TIG%2003693%20MLSA%20Final%20Video%20Conferencing%20Evaluation%20Report.pdf>.

127. See Greiner et al., *District Court*, *supra* note 71, at 925–34; Greiner et al., *Housing Court*, *supra* note 71, at 15–37 (giving examples of data collected on this issue).

128. For an example of the use of data to create context in a court, see Keating & Zorza, *supra* note 120.

129. See *Puzz v. Chase Home Fin., LLC*, 763 F. Supp. 2d 1116, 1119 (D. Ariz. 2011).

130. See *Pinel v. Aurora Loan Servs., LLC*, 814 F. Supp. 2d 930, 934 (N.D. Cal. 2011).

resource-rich past, it is counterproductive in an era of high self-representation. It is likely that courts will need to play a much greater role in enforcement of their decisions. While some might feel this is non-neutral, there is nothing non-neutral about a court making sure its orders are understood and followed; indeed, it is arguably non-neutral if the court's inactivity systematically results in under-compliance.<sup>131</sup>

## VII. GETTING THERE—SHORT-TERM STARTS

This Part discusses some short-term approaches that might achieve these principles and provide empirical information that would inform the longer term and more ambitious approaches discussed in Part VIII.

### A. “Squeezing” Approach

The idea of the squeezing approach<sup>132</sup> is to look at the whole process of a case and critically assess every step, every piece of information, every hearing, every document, and every player, and to decide if each is really needed for appropriate adjudication of the issue.<sup>133</sup> The real question in the analysis is why a particular element is viewed as required, and for what reason.<sup>134</sup>

For example, a particular form might include needed information that can also be gathered with a different indispensable form. Alternatively, an automated system might be used to gather that same element if and only if

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131. See, e.g., SUPERIOR COURT OF FRESNO CITY, HELPING OFFENDERS NAVIGATE THE LEGAL SYSTEM 1–2, available at [http://www.courts.ca.gov/documents/KlepsBrief\\_ACTION.pdf](http://www.courts.ca.gov/documents/KlepsBrief_ACTION.pdf) (describing the After Criminal Traffic Infraction One-Step Network (ACTION) Center efforts to increase offender understanding of the system and accountability to the court).

132. This is, in part, parallel to the process analysis approach. See J. Stephen Poor, *Re-Engineering the Business of Law*, N.Y. TIMES DEALB%K (May 7, 2012), <http://dealbook.nytimes.com/2012/05/07/re-engineering-the-business-of-law/>; see, e.g., Seyfarth Lean, SEYFARTH SHAW ATT'YS, LLP (2013), <http://www.seyfarth.com/SeyfarthLean> (highlighting the efforts of the law firm of Seyfarth Shaw).

133. See, e.g., Clarke & Jones, *supra* note 69 (exemplifying the process in Idaho that is looking at the entire process in order to modify case-processing time standards).

134. SELF-REPRESENTED LITIG. NETWORK, DIAGNOSTIC AND RECOMMENDATION PROJECT: PROTOCOL TWELVE: GENERAL PROBLEM SOLVING PROTOCOL 5 (2010), [http://www.selfhelpsupport.org/library/folder.302620-Current\\_Versions\\_of\\_Protocols](http://www.selfhelpsupport.org/library/folder.302620-Current_Versions_of_Protocols) (follow “12. General Problem Solving Protocol ‘DOC’” hyperlink).

it was in fact needed.

### B. “What Is Needed for Decisions” Approach

This approach does not start with the existing process; rather, it takes an ultimate court decision and analyzes two things from scratch: first, what information is needed to make that decision appropriately, and second, who should gather and present the information, as well as how and when they should do so.<sup>135</sup>

The opportunity for advocacy and confrontation has to be built into the solution, just as in the prior system. It might be, however, that those opportunities are provided very differently than in the current system—for example, some might be electronic.

It is important to highlight one aspect of this: discovery and pleading reform. Early in the analysis, we need to start completely from scratch and look at who can most appropriately provide information needed for resolution.<sup>136</sup> As a general matter, relative to traditional rules, these burdens are likely to shift to larger institutions that are possessors and processors of ever-larger volumes of easy-to-obtain information.<sup>137</sup> And generally, it is not inappropriate to hold these institutions’ failures to maintain and provide this information against them.

### C. Caseflow Management Reform

As indicated above, analysis of caseflow data is a rich trove from which problems can be identified. If a case is clogging up at a particular point, there are two questions that need to be asked. The modern caseflow management question is whether services can be provided, for example, to help a litigant complete service of processes.<sup>138</sup> A modest example might be informational assistance in resolving the roadblock.

The broader simplification question, however, is whether the frequent failure may be an indication that the requirement itself is out of date for

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135. See Hall & Suskin, *supra* note 17, at 36 (“Organize around outcomes, not tasks.”).

136. For example, Massachusetts now has mandatory self-disclosure in domestic relations cases. MASS. PROB. & FAM. CT. SUPP. R. 410, available at <http://www.lawlib.state.ma.us/source/mass/rules/probate/srpc410.html>.

137. See, e.g., Zorza, *supra* note 103 (discussing requirements for disclosure of information by banks at required foreclosure case conferences).

138. See *supra* note 106.

the modern world, and whether it needs to be modified or eliminated. It is possible, for example, that the due process concerns that limit service of process can be met in completely different ways than the current cumbersome and delaying systems—such as replacing expensive and largely useless service by publication in a newspaper with service through a court website.<sup>139</sup> The notice required by due process is far more likely to be found today in an online search than in print.<sup>140</sup>

#### *D. Protocol Approach*

The protocol approach takes each stage of a proceeding and, instead of allowing wide discretion in the stage's steps that can result in confusion and delay, identifies what needs to be done to keep cases moving through the system. In other words, for each stage there is a list of steps that must be done by the court or by the parties. This approach includes protocols that check whether these steps have been done and, if not, either trigger processes to ensure their completion or provide alternative ways of finishing each step. For example, in a family law case, this might involve pre-submission of data from those professionals involved in monitoring the family.

#### *E. Triage Approach*

The triage approach provides intelligence to step analysis. For each step, it uses data from past cases to identify if that element is in fact required, and it permits bypass when the element is not needed. For example, steps such as a home inspection or a custody evaluation might be skipped if data shows they will not be needed based on the facts of the case.<sup>141</sup>

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139. See Stephanie Francis Ward, *Our Pleasure to Serve You: More Lawyers Look to Social Networking Sites to Notify Defendants*, A.B.A. J., Oct. 2011, at 14, 14 (noting that because “[t]he traditional way to get service by publication is antiquated and is prohibitively expensive,” it is “only a matter of time before electronic service of process becomes commonplace.” (quoting Hennepin County, Minnesota Judge Kevin S. Burke) (internal quotation marks omitted)).

140. See *id.* (“Nobody, particularly poor people, is going to look at the legal newspaper to notice that [they have been served]. . . . Service is critical, and technology provides a cheaper and hopefully more effective way of finding respondent[s].” (quoting Judge Burke) (internal quotation marks omitted)).

141. See, e.g., Marjory D. Fields, *DV Case Preparation and Trial Examination: A Heavy Burden*, in DOMESTIC VIOLENCE, ABUSE, AND CHILD CUSTODY: LEGAL STRATEGIES AND POLICY ISSUES 19-1, 19-6 to -8 (Mo Therese Hannah & Barry

## VIII. LONG-TERM APPROACHES

A. *Redo Civil Rules*

One highly ambitious approach would be to take an overall look at the process and text of the civil rules, with the goal of reworking the rules so they are returned to their original access vision.<sup>142</sup> Such an approach would step back and attempt the “what is needed for decisions” approach,<sup>143</sup> and try to create a new general process that would apply in most situations. This new process would be access-driven.<sup>144</sup>

The new general rules would probably need to be supplemented with detailed case-specific protocols. These would impose on parties and courts responsibility for particular steps and processes,<sup>145</sup> as is already the case

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Goldstein eds., 2010); Elizabeth J. Kates, *Why “Therapeutic Jurisprudence” Must Be Eliminated from Our Family Courts*, 3 FAM. & INTIMATE PARTNER VIOLENCE Q. 127, 127–32 (2010).

142. As explained by Professor Arthur R. Miller:

Beneath the surface of the[] broad procedural concepts [in the civil rules] lay several significant policy objectives. The Rules were intended to support a central philosophical principle: the procedural system of the federal courts should be premised on equality of treatment of all parties and claims in the civil adjudication process. It should abjure technical decisionmaking and ‘promote the ends of justice.’ The simple but ambitious notion was that the legal rights of citizens should be enforced. This idea was a baseline democratic tenet of the 1930s and then of postwar America with regard to such matters as civil rights, the distribution of social and political power, marketplace status, and equality of opportunity.

Miller, *supra* note 38, at 5 (footnotes omitted).

143. *See id.* (discussing the broad role available to the Advisory Committee on Rules). For a discussion of the “what is needed for decisions” approach, see Part VII.B.

144. Part of the original impetus for the Federal Rules of Civil Procedure was criticism of the common law and state “Field Codes” as providing technical barriers to an accessible and just system. Subrin, *supra* note 18, at 693.

145. The use of such protocols was urged in the technology context by the recent Summit on Technology and Access to Justice. Richard Zorza, *Some Reflections on a Foundational Access to Justice Technology Summit*, RICHARD ZORZA’S ACCESS TO JUST. BLOG (Jan. 18, 2013), <http://accesstojustice.net/2013/01/18/some-reflections-on-a-foundational-access-to-justice-technology-summit/>. The use of protocols in legal services work is also discussed in Jeanne Charn, Senior Instructor, Harvard Law Sch., Presentation to the Legal Services Corporation Board of Directors, Provision For The Delivery Of Legal Services Committee (Jan. 30, 2004) (transcript available at <http://www.lsc.gov/board-directors/meetings/board-meeting-transcripts/board-meeting-transcripts-2004-3>).

with many supplemental or specialist rules.<sup>146</sup>

Among the areas that would need the most attention are discovery,<sup>147</sup> claims pleading,<sup>148</sup> and enforcement.<sup>149</sup> The largest changes might be in the allocation of responsibility, the triggering of events, the determination of what entities have responsibility for moving events forward, the role of technology in managing the whole process, and compliance and enforcement.<sup>150</sup> It is interesting and suggestive that the 1930s Rules did not make significant changes in systems of enforcement; it may be that this was due to a desire to let any increases in enforcement efficiency tilt the playing field toward the creditor class.<sup>151</sup> However, the politics of a rules redo would be highly complicated, with strong opposition from interest groups committed to the current structure.<sup>152</sup> It is astonishing to think that the

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146. See generally MASS. R. DOM. REL. P., <http://www.lawlib.state.ma.us/source/mass/rules/dom/index.html>.

147. See Subrin, *supra* note 18 (pointing out that discovery reform was not originally part of the debate on the Federal Rules Enabling Act).

148. The “old” law was articulated in *Conley v. Gibson*, 355 U.S. 41 (1957) and *Hickman v. Taylor*, 329 U.S. 495, 501 (1947). See Miller, *supra* note 38, at 3–17 (detailing the history of *Conley* and subsequent transition after *Twombly* and *Iqbal*).

149. Note the current deference in enforcement to state law in Federal Rule of Civil Procedure 69. See also FED. R. CIV. P. 69 advisory committee’s notes (1937), subdiv. (a) (explaining that applicable state law supersedes local district court rules).

150. See Richard Zorza, *Changing the System so that Self-Represented Litigants Receive Compliance with Judgments and Orders: Where We Are and Where We Should Be Going*, in NAT’L CTR. FOR STATE COURTS, THE FUTURE OF SELF-REPRESENTED LITIGATION: REPORT FROM THE MARCH 2005 SUMMIT 59 (2005), available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/accessfair/id/24> (discussing “developments designed to increase the enforcement of orders obtained by self-represented litigants . . . and ways of making the system as a whole more compliance friendly”); SELF-REPRESENTED LITIG. NETWORK, *supra* note 72, at 87–88. (discussing best practices in compliance and enforcement support).

151. Interview with Benjamin Kaplan, Professor Emeritus, Harvard Law Sch. (2003) (discussing Kaplan’s experience as Reporter to the Advisory Committee on Rules in the 1960s). Kaplan, who also served as a justice on the Massachusetts Supreme Judicial Court, played a key role in drafting amendments to the Federal Rules of Civil Procedure during the 1960s. See Ruth Bader Ginsburg, *In Memoriam: Benjamin Kaplan*, 124 HARV. L. REV. 1349, 1350 & n.5 (2011).

152. Such opposition is strong even when courts attempt minor changes to the status quo. For a recent example, see Anna Whitney, *Some Family Lawyers Oppose Creating Divorce Forms*, TEX. TRIB. (Jan. 24, 2012), <http://www.texastribune.org/texas-courts/state-bar-of-texas/texas-state-bar-asks-supreme-court-stop-forms-task/>, and Carl Reynolds, *Self-Represented Litigants and the Bar*, COURTEX (Jan. 24, 2012), <http://www.courtex.blogspot.com/2012/01/self-represented-litigants-and-bar.html>

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Federal Rules are now almost one hundred years old and date back to a time when almost everyone in court had lawyers and no one, not even the government, had the luxury of technology—not even photocopiers.

### B. *Technology*

In a technology approach, algorithms would drive data gathering, and technology would simplify the choice of steps, including choices by litigants.<sup>153</sup> This might be done by assembling, presenting, and contextualizing the data for the decisionmaker. Under a more sophisticated version, an algorithm would present a preliminary decision for human challenge or review.<sup>154</sup> Obviously, the preliminary decision approach would require great care, with sensitivity to the public trust and confidence and potential legitimacy implications. Many are profoundly disturbed by this idea. A combination of the two approaches—technology and rule reform—would be the most powerful. The politics of such an approach would require initial testing in tiny sub-pilots.

### C. *Substantive Simplification*

Lurking in the above discussion about procedural simplification is the question of substantive simplification. Often the complexity of procedure is driven by underlying substantive complexity.<sup>155</sup> Issues that involve many factors, many steps, or broad-ranging, complex discretion, tend to require the collection of a broad range of data. The adjudication process is even more complicated when the legislature or appellate courts add sub-rights

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(discussing the opposition from the Texas State Bar to state court promulgation of standardized forms in uncontested divorces). The conflict appears to have been won by access advocates. Richard Zorza, *Victory in Texas*, RICHARD ZORZA'S ACCESS TO JUST. BLOG (Nov. 15, 2012), <http://accesstojustice.net/2012/11/15/victory-in-texas-almost/>.

153. Cabral et al., *supra* note 73, at 292 (distinguishing litigant self-triage from other approaches and exploring the elements of such triage). Such triage would be strengthened by online predictors to assist the litigant in assessing the possible outcomes, and thus aligning expectations with likely outcomes. See Deborah L. Cohen, *Not Playing Games: Firm Takes Decision-Making Theory into Transactions*, A.B.A. J. (Jan. 1, 2013), [http://www.abajournal.com/mobile/mag\\_article/not\\_playing\\_games\\_firm\\_takes\\_decision-making\\_theory\\_into\\_transactions/](http://www.abajournal.com/mobile/mag_article/not_playing_games_firm_takes_decision-making_theory_into_transactions/).

154. Richard Zorza, *Preliminary Thoughts on Blue Sky Technology Driven Access and Decision Systems*, HARV. J.L. & TECH. OCCASIONAL PAPER SERIES 4 (Feb. 2013), available at <http://jolt.law.harvard.edu/symposium/articles/Zorza-BlueSkyTechnology.pdf>.

155. See *supra* Part IV.D.

into the analysis.

The politics of simplifying those rights are intensely complicated. Sometimes substantive complexity—often added in the interests of access and justice—has the effect of increasing barriers to access. This occurs when the procedural complexities are such that the self-represented party cannot practically navigate those complexities. The problem is particularly great when a self-represented litigant faces a represented party, as is often the situation in consumer cases.<sup>156</sup> Research is the first step in changing the political environment, and the procedural simplification process advocated in this Article may provide the data needed for that first step.

#### IX. TOWARD A RESEARCH AGENDA ON SIMPLIFICATION

The inclusion of a simplification component in any access to justice research agenda is a critical first step in the simplification process.<sup>157</sup> Law schools can play a key role in implementing this agenda, particularly through participation in clinical pilots. The remainder of this Article discusses potential elements of such an agenda component.

##### *A. Inventory of Efforts and Research Needed*

First we need an inventory of current and past efforts to simplify court processes. This might show that such efforts actually happen all the time, but that they occur under less ambitious labels and are not necessarily publicized.<sup>158</sup>

Second, research on the sources of delay and error in the current systems would help guide the development of a simplification agenda. Among the likely sources of delay are litigant ignorance,<sup>159</sup> unrealistic

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156. Fern Fisher, Deputy Chief Admin. Judge for N.Y.C. Courts, Closing Statement to Hearings on Access to Civil Legal Services, *available at* [http://www.nycourts.gov/ip/ny2j/pdfs/Fisher\\_Testimony2010.pdf](http://www.nycourts.gov/ip/ny2j/pdfs/Fisher_Testimony2010.pdf) (“In 2009, in New York City consumer debt cases approximately 1% of consumer defendants had counsel while 100% of plaintiffs were represented by counsel.”).

157. Richard Zorza, *Some Thoughts on the Recent Access to Justice Research Agenda Meeting*, RICHARD ZORZA’S ACCESS TO JUST. BLOG (Dec. 20, 2012), <http://accesstojustice.net/2012/12/20/some-thoughts-on-the-recent-access-to-justice-research-agenda-meeting/> (discussing plans to expand such research and to match researchers and projects).

158. *But see* ELKINS FAMILY LAW TASK FORCE REPORT, *supra* note 15.

159. *See* ADMIN. OFFICE OF THE COURTS, JUDICIAL COUNCIL OF CAL., CALIFORNIA COURTS SELF-HELP CENTERS: REPORT TO THE CALIFORNIA

expectations,<sup>160</sup> anxiety,<sup>161</sup> and lack of counsel in the current system.<sup>162</sup> Another source of delay is the absence of incentives to resolve problems and the absence of management structures focusing on their resolution.<sup>163</sup>

Research should also be conducted to show the costs of complexity to courts, parties, and society in terms of delay. Moreover, research into the potential of data to drive triage and, thus, simplification would be of use in moving toward more sophisticated simplification processes.<sup>164</sup>

Finally, it would be useful to examine how other countries resolve similar disputes. It may be that more inquisitorial systems grounded in a larger flow of data less filtered by adversarial concerns offer useful approaches.<sup>165</sup>

### B. Simplification Pilots

Much of the agenda could be driven by research in simplification pilots. Such pilots would drive replication and adoption. The best example of this strategy is the success of the drug courts, which started in a small

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LEGISLATURE 15 (2007), available at [http://www.courts.ca.gov/documents/rpt\\_leg\\_self\\_help.pdf](http://www.courts.ca.gov/documents/rpt_leg_self_help.pdf) (“Better-informed litigants have more realistic expectations both of the court process and the consequences of proceeding without a lawyer.”).

160. *Id.*

161. See RICHARD ZORZA, LIVEHELP PILOT PROJECT: CHAT SERVICES FOR ACCESS TO JUSTICE WEB SITE USERS: FINAL EVALUATION REPORT 21–22 (2007), available at <http://sntap.org/sites/all/files/LiveHelp%20Pilot%20Project%20Final%20Evaluation.pdf> (noting the relatively low impact of computer chat innovation on users confidence in their ability to navigate courts, compared to increases in their actual knowledge).

162. See Greiner, *District Court*, *supra* note 71, at 924–25; Greiner, *Housing Court*, *supra* note 71, at 19.

163. See, e.g., GREACEN ASSOCS., LLC, *supra* note 42, at 150.

164. See, e.g., Cabral et al., *supra* note 73, at 292–300 (suggesting how technology tools could shape and facilitate triage systems grounded in research); Greiner, *District Court*, *supra* note 71, at 908 (suggesting that, at least in the studied court, provision of counsel may make a massive difference, particularly when the legal aid program is given discretion to identify the cases in which it will make the greatest difference); Greiner, *Housing Court*, *supra* note 71, at 5–6 (suggesting that at least in some contexts, unbundled assistance may be sufficient); Zorza, *The Access to Justice “Sorting Hat,”* *supra* note 73, at 861–62 (proposing a number of triage approaches).

165. See, e.g., Jona Goldschmidt, *Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience*, 17 MICH. ST. J. INT’L L. 601 (2008–2009).

number of cities, were the subject of extensive research,<sup>166</sup> and are now a national standard.<sup>167</sup>

#### X. CONCLUSION

Moving forward on a simplification agenda will require, above all, leadership. The development of a leadership group for the agenda presents a supreme challenge to the justice community. Hopefully, the beginnings of collaboration and vision that we are seeing in the state-level Access to Justice Commissions can be an inspiration for state and national leaders to embrace this agenda.<sup>168</sup>

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166. See, e.g., AUBREY FOX, CTR. FOR COURT INNOVATION, BUREAU OF JUSTICE ASSISTANCE, *A TALE OF THREE CITIES: DRUGS, COURTS AND COMMUNITY JUSTICE 1* (2010), available at [https://www.bja.gov/Publications/CCL\\_Tale\\_3\\_Cities.pdf](https://www.bja.gov/Publications/CCL_Tale_3_Cities.pdf).

167. See, e.g., OFFICE OF THE NAT'L DRUG CONTROL POL'Y, EXEC. OFFICE OF THE PRESIDENT, *FACT SHEET: DRUG COURTS: A SMART APPROACH TO CRIMINAL JUSTICE 1* (2011), available at [http://www.whitehouse.gov/sites/default/files/ondcp/Fact\\_Sheets/drug\\_courts\\_fact\\_sheet\\_5-31-11.pdf](http://www.whitehouse.gov/sites/default/files/ondcp/Fact_Sheets/drug_courts_fact_sheet_5-31-11.pdf).

168. For perhaps the clearest articulation of the force and value of such commissions, see Laurence H. Tribe, Senior Counselor for Access to Justice, U.S. Dep't of Justice, *Keynote Remarks at the Annual Conference of Chief Justices 27–29* (July 26, 2010), available at <http://ccj.ncsc.dni.us/speeches/Keynote%20Remarks%20at%20the%20Annual%20Conference%20of%20Chief%20Justices%20to%20deliver.pdf>.