THE ACCESS TO JUSTICE "SORTING HAT": TOWARDS A SYSTEM OF TRIAGE AND INTAKE THAT MAXIMIZES ACCESS AND OUTCOMES

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INTRODUCTION

One of the most memorable images in the first Harry Potter film, a film built on such images, is that of Harry wearing the Sorting Hat and finding out from the slightly hesitant voice provided by Leslie Philips that he is to join Gryffindor House.[1] The Hat thinks aloud, providing a certain transparency to a difficult decision.

We know far less, however, about the processes by which the millions of people who approach courts, legal aid intake systems, and hotlines are directed into them, or the access services they do or do not receive, or indeed the consequences of those choices. All we really know is that these processes are fragmented, inconsistent, and non-transparent. We also know that these access systems feed into a relatively predictable court process, in which procedures are governed by case type, such as family law, landlord tenant, small claims, or subsets of those, and, with the exception of some jurisdictions, in which relatively few access services are as yet provided to litigants as part of the processing of the case.[2] The very differing needs of cases are not reflected in the ways those cases are processed by the courts.

The importance of building a transparent and defensible sorting system has recently increased dramatically. When the Supreme Court in

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1. HARRY POTTER & THE SORCERER'S STONE (Warner Bros. 2001). Disclosure: The author of this paper still does not know how or why at his school in England he was assigned to the slightly less romantically named "A Club." In any event, the opinions in this paper are those of the author alone, and not of any clubs, "houses," or organizations with which he has been associated.

2. It is an interesting question why we know so little about these systems. In part, our lack of knowledge about this issue is just a conseqence of the general lack of research on civil aspects of the court system. There may, however, be a different force at work. A focus on triage would, and indeed will, require honesty about the consequences of scarcity, not just as a general matter, but in concrete cases, and that can be difficult for those in charge of the systems to deal with. *See generally* Earl Johnson, Jr., *Justice for America's Poor in the Year 2020: Some Possibilities Based on Experiences Here and Abroad*, 58 DEPAUL L. REV. 393 (2009); Meehan Rasch, *Development: A New Public-Interest Appellate Model: Public Counsel's Court-Based Self-Help Clinic and Pro Bono "Triage" for Indigent Pro Se Civil Litigants on Appeal*, 11 J. APP. PRAC. & PROCESS 461 (2010); Peter Salem, Debra Kulak & Robin M. Deutsch, *Triaging Family Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen*, 27 PACE L. REV. 741 (2007).

Turner v. Rogers[3] reversed a child support civil contempt incarceration for failure to provide procedures that would ensure sufficient fairness and accuracy to a self-represented litigant, and indicated that the procedures needed would depend on the particular circumstances of the case, it was in effect endorsing the need for triage, at least in cases in which such accuracy and fairness were not protected by the provision of counsel. It is of interest that in a recent speech Justice Breyer, the author of *Turner*, urged those with views to engage in the debate on the need for triage.[4]

The need for attention to the overall problem is also increased by the focus that some courts are now starting to pay to the possibility of treating cases less uniformly. For a generation most courts have had in place systems of caseflow management, essentially case aging tickler systems. Many of these systems now employ "differentiated caseflow management," which manage these systems differently based on case complexity. [5]The new change, of potentially immense significance, is that some courts are considering or experimenting with treating the entire processing of the case differently depending on its attributes, including issues to be decided, rather than case type.[6]

The understanding of the need for triage has also increased with the cuts to legal aid and court budgets, and the realization that 100% access to justice cannot realistically be achieved by funding a traditional lawyer in all cases. The California Shriver Pilot statute assumes that there must be a process of triage and indicates the general criteria to be used in that program.[7] The practical reality is that without an integrated well-

3. Turner v. Rogers, 131 S. Ct. 2507 (2011). A different article in this Symposium Issue analyses how prior cases, together with *Turner*, create a right of access, as opposed to a right to counsel, and how that right can be met in many ways. Implicit in that analysis is the idea that there is a right to triage to decide which of those services is required to obtain access. Indeed, such a right with respect to whether counsel is needed in a particular case dates at least to *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), although sadly the access community has long ignored that aspect of the case, focusing instead on the no-automatic right-to-counsel holding of the case as an example of the hostility of the system to access. *See generally Archive for Symposium on* Turner v. Rogers, CONCURRING OPINIONS, http://www.concurringopinions.com/archives/category/symposium-turner-v-rogers (last visited April 10, 2012).

4. Justice Stephen Breyer, *Speech to National Legal Aid and Defender Association Annual Conference*, NAT'L LEGAL AID & DEFENDER'S ASSOC. (December 9, 2011), http://www.nlada100years.org/audiopage?q=node/13002.

5. THOMAS M. CLARKE & VICTOR E. FLANGO, *Triage: Case Management for the 21st Century*, 2011 NAT'L CTR. FOR STATE COURTS: FUTURE TRENDS IN STATE COURTS 146, 146 (2012).

6. This idea, and the first experiments are detailed in CLARKE & FLANGO, *supra* note 5, at 147–48. As discussed below, attributes might include case complexity, relationship of the parties, whereas, case type tends to derive from the formal legal issue at hand.

7. The statute lists the following factors as to whether counsel is to be provided:

> Case complexity[, w]hether the other party is represented[, t]he adversarial nature of the proceeding[, t]he availability and effectiveness of other types of services, such as self-help, in light of the potential client and the nature of the case[, l]anguage issues[, d]isability access issues[, l]iteracy issues[, t]he merits of the case [, t]he nature and severity of potential consequences for the potential client if representation is not provided[, and w]hether the provision of legal services may eliminate or reduce the need for and cost of public social services for the potential client and others in the potential client's household.

designed, transparent, and intellectually defensible triage system, there is simply no chance of achieving either improvements in court efficiency or significant expansion in access, let alone the 100% access that is the only defensible ultimate goal.[8]

In fact, of course, there are multiple complex systems already in place, particularly on the litigant services side. The problem is that those systems are often ad-hoc, frequently not intentionally designed, rarely publicly described, almost never based on objective research, and not integrated with each other. This results in inconsistency, lack of credibility, inefficiency, and failure to service many in legal need.

This Article attempts to start the process of discussion and design that is needed to put such an integrated system in place.

The main suggestions in the paper are as follows:

- Recognize and design around the fact that there are two different triage processes: one dealing with how a court will handle a case and one dealing with how litigants will obtain the services they need to interact with the court and other players. (This would include situations in which going to court would not be involved.) The questions are whether this triage is being done thoughtfully and effectively, and how we can best ensure that all systems use their resources well.

- Develop an agreed upon set of core principles that would guide the design of triage processes.

- Consider, as one possibility, a process in which a trained assessor makes recommendations for both sets of triage based upon relatively general protocols.

- Consider as an alternative system one in which an algorithm makes the recommendations based upon information provided by litigants, the court, and access providers to a web gateway, while being sensitive to the risks of non-human decision-making.

- In either possible system, the decision about the track to which a court assigns a matter should be based upon the kind of tasks the court will need to do, rather than the case type.

A.B. 590 § 6851(b)(7) (Cal. 2009); *see also* AMERICAN BAR ASSOCIATION, ABA MODEL ACCESS ACT §3 (2010).

8. *See* Richard Zorza, *Access to Justice: The Emerging Consensus and Some Questions and Implications*, 95 JUDICATURE 156, 166–167 (2011); Richard Zorza, *Courts in the 21st Century: The Access to Justice Transformation*, 49 JUDGE'S J. 14, 17 (2010); Russell Engler, *Toward a Context-Based Civil Right to Counsel*, 40 CLEARINGHOUSE REV. 196 (2006). While not the subject of this paper, the author believes that the other *sine qua non* for creation of 100% access is system simplification. While this is excruciatingly hard to achieve in practice, there is probably a better chance than ever before of progress, largely because of the parallel and intersecting financial crises faced by courts, legal aid, and indeed the private bar.

- In either possible system, the decision about the services the litigant will receive should be based upon the tasks the litigant will need to perform in the track to which she has been assigned, and her capacity to perform those tasks given the kinds of services provided.

- Be sensitive during the design process to the fact of the relative lack of validation of theories about the impact of different services upon outcomes.

- At least in the case of the tech-based algorithm, use a presumption-based system, in which the tasks and services would be presumed based upon the court track, the stake, the relationship (including power relationship) between the parties, the case type, and the prior presence of an attorney on the other side. The presumptive result would then be modified based upon the capacity of the litigant and based upon data not necessarily directly relevant to the case, including potential information relating to ability to prosecute the case on their own, language spoken at home, literacy level, and prior experiences in court.

- Recognize that at least one of the reasons for the lack of progress in this general area has been fear of the consequences of identifying individual cases in which services are required but cannot be provided for resource reasons.

- Faced with these resource limitations, build the system so that the system would change its behavior to match service need and availability. This could be done in ways that either protect those with lower capacity or those facing the highest stakes and most difficult issues.

- Ensure that the system produced ongoing reporting of the mismatch between litigant services need and capacity, and these results could then be used to design new service components and argue for additional resources.

The paper starts by discussing the analytically foundational relationship between triage in different parts of the system (Part I). It then suggests a set of principles under which any triage system should operate (Part II) and briefly assesses the current system against those principles (Part III). The paper then proposes and assesses two very different alternative models: one based on individualized assessment and one using technology to apply formal protocols (Parts IV and V). The paper concludes by discussing the potential problems associated with deploying either of these models (Part VI)

I. THE RELATIONSHIP BETWEEN COURT PROCESS TRIAGE AND LITIGANT SERVICE TRIAGE

Until now, triage has been discussed, if at all, only in either the court or legal aid context. This works for each system only if the other system is not doing triage. If the organization focuses only on access

services for individuals, or only on the court's process, then the system the organization is building will be aimed at a moving target that will itself respond differently depending on how the other is behaving, leading to endless loops and confusion.

The only way to think rationally about this problem is to analyze not only the needs and potential of triage with respect to access services such as might be provided to individuals needing access to justice services, including but not only as litigants, but also to integrate that with consideration of the needs and potential of the court's overall caseflow system and its division of cases. The goal is to figure out how the two processes can work together to provide both optimum case handling from the court's point of view (described as court process triage) and access from the individual's point of view (described as individual services triage).

There are a variety of ways of breaking up the analysis of the triage systems, although all lead to the conclusion that an ideal system would be structured to make all the decisions about case processing and individual services in one process—or at least one that seems integrated to its users.

- *Individual Services versus Case Processing Focus*

In this division, there are separate triage systems for services provided to individuals, compared to the court processes that are provided to all the parties—usually together. In this division, court self-help and forms services would fit under individual services and be triaged together with full representation services. This is the approach assumed in the remainder of this paper, although the other approaches are detailed for clarity. This approach is chosen because it most accurately reflects the needs of litigants and other individuals. It does, however, require closer working relationships between courts and non-court service organizations.

- *Service Provider Focus*

In this division, each provider system gets their own triage system. The court and legal aid each triages into their own system, and it treats the other system as fixed—until of course it changes its behavior. The theory here would be that this would reflect management and political reality. Under this division, court self-help services would be allocated in the court category. This system would be easiest to administer from a strictly bureaucratic perspective.

- *Neutral versus Advocacy Services*

Under a third option, probably the most analytically correct, the distinction would be between services provided under a neutral banner and those provided as advocacy. Under this division, forms assistance would

be treated as neutral if provided outside the attorney–client relationship, regardless of the provider.[9]

It is possible to imagine systems in which the court decides what process is appropriate, and the other part of the system then decides what people need in terms of services to participate appropriately in that process.[10] Alternatively, service institutions or advocacy systems could first decide what services will be provided, and the court could then use those determinations as one of the bases for its process choice decision.

But it is much better to attempt to design a system that works as one, i.e., one in which the court system (or the case processing system or the neutral service system) decides what process it will put the case through in the same general process that it is decided what other services will be provided to individuals to help them negotiate that process, or through non-litigation processes. The system built will need to allow for the case posture to change and be iterative in order to bring additional resources to bear.

II. PRINCIPLES FOR TRIAGE AND INTAKE

Any broad system of court and access services triage and intake is going to have to be acceptable to a wide variety of stakeholders and participants. As such, it must be designed on strong foundations that respect differences in perspective and permit collaboration between organizations with very different cultures, budgets, and institutional needs.[11] The best foundation seems to be a set of commonly agreed upon principles that can be used to resolve differences. The following are offered as a first cut and apply regardless of the choices suggested in Part I:[12]

1. Universality

- Everyone in need should be able to use the system, get into the system, and get the help they need to obtain access to justice.

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9. For discussion on related topics and some of the relatvely limited writing on this issue, see Paul R.Tremblay, *Acting 'A Very Moral Type of God': Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475 (1999); Justine A. Dunlap, *I Don't Want to Play God—A Response to Professor Tremblay*, 67 FORDHAM L. REV. 2601 (1999).

10. Although there would be complexities for problems that occur outside court processes, such as the writing of a will.

11. Courts, for example, must be neutral, are under pressure to move cases quickly with limited resources, and to reflect social policy choices. Civil legal aid programs may have substantive reform agendas (fighting poverty, protecting the rights of the disabled), often operate under restrictions imposed by funders, and have a desire to maintain their independence from the judiciary. Law school clinics have a need to select the cases that will provide their students with the best learning opportunities.

12. These proposed principles are based in significant part on a set that were brainstormed by a working group at the 2012 Technology Initiative Grants Conference. For more information, see Richard Zorza, *Exciting Triage Progress at TIG Conference*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG (January 15, 2012), http://accesstojustice.net/2012/01/15/exciting-triage-progress-at-tig-conference/. Special thanks to those who participated in that meeting, as well as to Tom Clarke, who proposed a restructuring that was close to the final product in this paper.

- The system should provide actual court access and actual services help to everybody who uses it, providing help at an appropriate level of meaningful assistance.

2. Consistency and Predictability of Triage Outcomes

- The system should be consistent in who is provided with what services or goes into which court processes.

3. User Focus, Control, Support, and Choice

- The system should be user-friendly, user-oriented, and user-directed (if it is to meet user needs, not just or even primarily those of the organizations participating).

- The system should allow users maximum control over the paths and services they use, consistent with cost issues.[13]

- The system should offer multiple ways for users to enter and move between service options and choices (such as deciding to seek legal assistance after first attempting self-help).

- The system should include varied user support systems.

- The system should minimize the need for users to provide repeated information.

- The system should get people directly linked to, and trackably processed by, the organizational resources from which they need a response.

- The system should have the capacity to export data directly into multiple, standardized organization intake or information systems and tools—it should not be just a referral system.

- The system should have built into it the up-to-date case-acceptance criteria and service availability data, so that there are no "dead-end" hand-offs.

- The system should include mechanisms for follow up in order to minimize multiple, duplicative, or incorrect referrals.

4. Comprehensiveness of Problems and Services

- The system should be comprehensive in the range of problems identified and addressed.

- The system should take advantage of legal analysis, social science research, and ongoing analysis of existing case and intake data to be able to ask sufficient questions to make sure that it identifies and responds to an appropriately holistic range of a person's issues.

13. The impact of cost issues may be very different in the court process versus litigant services areas of triage.

- The system should include access to all service mechanisms, including court access services, legal aid programs, law school clinics, providers of unbundled services, informational websites, document assembly systems, online chat, pro bono, and private lawyer referral systems.

- The system should be expandable to include future delivery modalities.

5. Cost Benefit and Impact Maximization

- The system should connect people to the highest level of needed and useful access services assistance that is available to them, consistent with cost-effectiveness.

- The system should allocate scarce assistance resources where they will have the biggest impact.

- The system should direct cases into routes and services that involve the least cost and inconvenience for both litigants and the system, consistent with a fair determination.

6. Transparency

- The system should be transparent in the patterns of its operations, while providing privacy to individual users.

7. Evidence Based

- Individual service acceptance and priority criteria should be informed by and reflect research and ongoing data analysis.

- The system should be "self-learning" so that it provides better responses and improved outcomes as there is more experience.

III. THE CURRENT SYSTEM, AND HOW IT STACKS UP AGAINST THESE PRINCIPLES

Not to put too fine a point on it, but the current system seems like an almost complete antithesis of one that would be in compliance with the above principles.

It has four main groups of component elements: a national network of legal aid, pro bono, and clinic intake systems; a patchwork of court based service selection systems operated by those courts that provide access services; systems of websites that provide information and tools, and various courts and state systems that do the same thing; and bar operated referral services that include low and middle income components. In addition, court diversion into mediation offers some elements of triage, at least where it follows protocols, or is discretionary rather than

fully automatic for a case type. The near chaos of this system reflects the broader fragmentation in the systems that actually deliver services.[14]

A. The Current System

1. Court Process Triage

Currently, courts triage by dividing cases by case type and then generally putting all the cases of the same type within the same queue.[15] They may well split within overall types—divorces go into a different queue than guardianships. Sometimes there is branching—the uncontested go on a different calendar call, but that is the extent of the triage. The decision is made on the papers alone and limited to an extremely short list of factors.[16]

However, as Clarke and Flango point out, differentiated case management systems do treat cases differently based on some estimate of anticipated complexity and workload.[17]

As a general matter, however, there is little system, little logic, and not enough focus on the overall system and its needs.

2. Legal Aid, Clinic, and Pro Bono Intake Systems

The legal aid, clinic, and pro bono systems are scarcity based. The task of their systems is to allocate extremely limited advocacy resources among an overwhelming pool, and to do so in a system that is characterized by provider fragmentation and lack of coordination or central planning. For most organizations, the issue is whether to provide the traditional full services of an attorney (done in the minority of cases), to provide brief services probably limited to that provided during a phone call, or to refer to online or group services.

Actual sorting occurs in the following ways:

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14. This fragmentation is both described and labeled in REBECCA L. SANDEFUR & AARON C. SMYTH, AMERICAN BAR ASSOCIATION, ACCESS ACROSS AMERICA: FIRST REPORT OF THE CIVIL JUSTICE INFRASTRUCTURE MAPPING PROJECT ix (2011) ("The results [of the research] are sobering. They underscore a fundamental absence of coordination in the system, fragmentation and inequality in who gets served and how, and arbitrariness in access to justice depending on where one lives."). Funders are not funding holistic systems—rather bits of fragmented systems. To the degree that different systems have different resources available it is natural that some systems will be more developed and sophisticated than others.

15. CLARKE & FLANGO, *supra* note 5, at 146.

16. Some courts push all divorce cases into mediation—and then add a minor triage element by providing an exemption for domestic violence cases. There is also talk of treating supposed "high conflict" cases differently. Although this approach has come under criticism from the advocacy community for treating both parties as equally to blame for the extent of the conflict.

17. CLARKE & FLANGO, *supra* note 5, at 146. It should be noted that the system described in Peter Salem, Debra Kulak & Robin M. Deutsch, *Triaging Family Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen*, 27 PACE L. REV. 741 (2007), is highly elaborate, with use of scaling of conflict, dangerousness, etc, in detirming triaging into more consentual and less adversarial processes. That paper has an extensive bibliograpy.

- Organizations have priorities (indeed, if funded by the Legal Services Corporation, they are required to have them).[18] They can rarely, if ever, take all of the cases within the priorities.

- Organizations limit intake by day and time of day, and often have long phone waits.

- Organizations require interviews with an advocate, in which discretionary and essentially unguided decisions about the value of representation services are made.[19]

- Some states have integrated intake phone lines that refer to the most appropriate organization that then makes a decision whether to accept the case.[20]

- Finally, it should be noted that categorical triage occurs when a statutory or constitutional role results in a right to counsel, which is then met by a government agency, private lawyers paid by the state, or by a non-profit operating under contract.

No state can reasonably claim to have a system that is making broadly defensible choices about who is getting what level of service, although most do not provide services to those who do not benefit. In many states, huge amounts of provider and litigant time are wasted in "pinball" referral systems.[21]

3. Court-Based Litigant Service Allocation

More and more courts are providing informational services to a significant segment of their litigant population. At this point about 70% of states do so in at least some locations.[22] Over time, these services are expanding more deeply into the overall processing of the case. Early in the development of these services, they were limited to the provision of

18. LSC grantees are required to establish priorities. 45 C.F.R, §1620.3(a) (2000). LSC has also made suggestions for the priorities process, and for priorities. LEGAL SERVICES CORPORATION, SUGGESTED LIST OF PRIORITIES FOR LSC RECIPIENTS ADOPTED BY THE BD. OF DIR. OF THE LEGAL SERV. CORP (1996).

19. For example, the Legal Services of New Jersey hotline procedure is explained at *Statewide Hotline*, LEGAL SERV. OF N.J. (April 16, 2012), http://www.lsnj.org/StatewideHotline.aspx.

20. LSC has collected resources on hotlines at http://lri.lsc.gov/search/node/hotlines. In the early to mid 2000s the Legal Services Corporation made TIG grants available to fund the integration of advanced telephony systems to streamline intake procedures in various programs. Prior to that set of grants, the Agency on Aging, had funded senior legal hotlines in multiple states. These experiments in coordinated intake, using telephony, yielded a good set of examples of how legal aid groups could reform their intake systems to be able to do more and better intakes, and ultimately end up with better cases to represent, than the traditional "walk in the door" approach. However, not all legal aid groups abandoned the 1970s approach of letting potential clients self select by distance to the intake locations—and to date in many states, legal aid groups are content with taking cases near their office catchment areas—rather than proactively looking for cases for their full service area and with certain criteria for extended services and litigation.

21. It cannot be avoided that the fragmentation is made worse by restrictions on LSC funding.

22. SANDEFUR & SMYTH, *supra* note 14, at 11.

forms (without assistance in filling them in) but now include non-private one-on-one consultations about the status of the case based on the file and what needs to be done, review of the sufficiency of completed forms, services to assist in moving procedurally stuck cases, etc.[23]

To provide such services, court centers have to engage in some form of triage. This is because they have to provide services to all, and yet their resources are severely limited. A few self-help programs perform triage using a list of services—referrals and in-house—with service criteria. Some self-help centers are starting to bring in house more pro bono services. In the final analysis, those who cannot be referred out, or put into a particular internal service, are simply served as fast as possible consistent with daily demand. At this stage there is much individual discretion in the system.

At other centers, informal interviews conducted by the author of the paper with self-help center directors in California revealed a number of triage perspectives like the following, caught in reconstructed quotes:

- "We refer when we can, then for everyone else we try to help."
- "I try to figure out what tasks a person needs to do to handle the case, and whether they can do them. If not I try to find a referral, but there is not always one there."
- "Sometimes it is just a matter of doing the best I can to help them, knowing that in the end, nothing I can do is going to make much difference."[24]

Put another way, it is an informal system with each court's procedures depending very much on the availability of referrals—which then go into the systems described above in subpart 2, the legal aid, clinic, and pro bono intake systems, with all their uncertainties.

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23. The current state of such informational services is illustrated by CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, GUIDELINES FOR THE OPERATION OF SELF-HELP CENTERS IN CALIFORNIA TRIAL COURTS 9 (2008) (Guideline 15):

> Basic core services most frequently include the following: Interview and assessment; Assistance with pleadings and fee waiver applications; Document review; Procedural information, including but not limited to explanation and clarification of court orders and the process by which to obtain, enforce, and modify orders; Assistance with understanding service requirements and methods; Preparation for hearings; Completion of orders after hearings and judgments; and Drafting stipulations. Additional services that self-help centers should consider offering include but are not limited to: Mediation or other settlement assistance; Readiness reviews for calendar appearances; Case status meetings; and Courtroom assistance, including but not limited to answering questions from litigants, explaining procedures, conducting mediations, preparing orders after hearing, and otherwise assisting litigants without making an appearance or advocating on their behalf.

24. One Center director noted to the author that there are litigants who have difficulty understanding the limits upon what courts can do.

4. Legal Aid and Court Website Services

There is now a wide mosaic of website services available. Every state has an LSC supported site intended to provide a full range of legal information, as well as referral information, to the self-represented.[25] This includes broad information about non-litigation situations.

The court system is more varied, with many states having strong informational systems, and others providing much more limited information.[26] Some local courts have detailed information, and most courts have at least some online presence.[27]

Some of these sites provide links to forms, or online forms generators, but coverage is varied as to both content and geography.[28]

There are almost no examples of good diagnostic tools helping litigants figure out whether they should be using forms or an alternative approach.

5. Bar Referral Services

Bar referral systems are usually, but not always, operated by local or state bar associations. Many, but not all, offer low cost referrals and make no differentiation except in broad areas of practice such as family law. A small number will refer for unbundled services. The intake systems include the gathering of no information about the case. In short they are business referral systems, not triage systems.

6. Unbundled Diagnosis by Private Attorneys

Most of the small but growing number of attorneys who offer unbundled or discrete task representation include in the process a diagnostic interview in which they work with the client to decide who does what.[29] While this process is not generally considered part of the triage system, it in fact plays this role since it helps litigants decide what they can do on their own and what they will have to pay an attorney to do. The experience of these attorneys will be very valuable in developing broader diag-

25. LAWHELP.ORG, http://lawhelp.org, (last visited Apr. 3, 2012) (provides access to all states' self-help webistes).

26. *State Court Websites*, THE NAT'L CTR. FOR STATE COURTS, http://www.ncsc.org/information-and-resources/browse-by-state/state-court-websites.aspx (last visited April 3, 2012).

27. *Virtual Self-Help lawcenter*, CONTRA COSTA CALIFORNIA COURT, http://www.cc-courthelp.org/ (last modified April 13, 2012).

28. The Texas Access to Justice Commission recently surveyed the country as to availability of forms. *See Statewide Uniform Forms*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG, http://richardzorza.files.wordpress.com/2012/01/3-states-forms-info-final.pdf (last visited April 3, 2012). *See generally,* JOHN GREACEN, RESOURCES TO ASSIST SELF-REPRESENTED LITIGANTS: A FIFTY-STATE REVIEW OF THE "STATE OF ART," available at http://www.msbf.org/selfhelp/GreacenReportMichiganEdition.pdf (2011) (providing a more general study of the Michigan Bar Foundation).

29. *See* MODEL RULES OF PROF'L CONDUCT 1.2(c) (requiring this diagnostic process).

nostic processes, and the tools they use to help litigants decide what tasks they can do themselves may well offer prototypes for the task capacity analysis recommended below.

B. Does the Current System Satisfy the Proposed Principles?

Sadly, the current system does not even begin to satisfy the proposed principles. It is neither predictable, nor consistent, nor comprehensive. It is not user-oriented, efficient, or transparent. It fails to meet any of the above principles—indeed, in many cases it fails to even attempt to do so.

To be direct about this is not to criticize the good faith, the hard work, or the intellectual capacity of those who direct the system. Rather, it is to be honest about our collective failure to deliver a defensible system.

IV. ALTERNATIVE MODEL ONE: AN ASSESSMENT MODEL

The next section of this Article lays out a possible model, one based on a human-based assessment of the needs of the case, and the people involved. The section begins by summarizing the steps involved to decide both the most appropriate court process and the services needed by litigants in that track, and then goes on to discuss the potential appeal of the approach.

A. How the Model Might Work

This model attempts both to triage cases into the appropriate court process track and to ensure that litigants get the assistance and services they need to present their cases fully in the track. For reasons of comprehensiveness, it assumes sufficient resources to provide counsel when required—an optimistic assumption. (We cannot refuse to consider what a system should look like because we do not yet have the resources to support it, but we would have to consider how to modify it to function if insufficient resources were available.)

The general approach[30] of this model is for all litigants without previously retained counsel to have an assessment staffer, possibly associated with the court, to review filed papers and interview parties. In addition, the assessment staffer should do each of the following:

30. Richard Zorza, *After Turner: A Proposed "Attorney Diagnosis" Approach to Triage for Access to Justice*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG (Sep. 6, 2011), http://accesstojustice.net/2011/09/06/after-turner-a-proposed-attorney-diagnosis-approach-to-triage-for-access-to-justice/ [hereinafter Zorza, *After Turner*]. The idea is explored in more detail in a follow-up post. Richard Zorza, *Questions and Answers About the Attorney Diagnosis Proposal*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG (Sep. 12, 2012), http://accesstojustice.net/2011/09/12/questions-and-answers-about-the-attorney-diagnosis-proposal/ [hereinafter Zorza, *Question and Answers*].

- Make a recommendation as to which of the available tracks into which the case would be placed, including a super-simple uncontested track.

- Assess what services are needed to enable each litigant to obtain access to justice, taking into account the full range of available services. If one or more parties do not have prior counsel and are financially eligible, make a recommendation for or against appointment of counsel for such parties, taking into account the nature of the case, the merits and the stakes for the litigant, and, most important of all, the sufficiency of alternative lower cost access services.

- In cases in which counsel is not provided, provide informational services to both sides, or refer for unbundled services or to a variety of forms of additional informational services.

In order to ensure consistency and fairness, the screener would operate under a protocol, discussed below, but the ultimate decision would include the totality of the circumstances and involve discretionary judgment with a written, if brief, decision.[31] Decisions would be subject to review by a judge, on the papers, upon request by a party. The cost of the screening process could be supported by an enhanced filing fee, which would be waived as appropriate, while counsel costs would have to be provided by other mechanisms. To the extent that counsel were not available for financial reasons, even with full cooperation with and referrals to legal aid, pro bono programs, and law school programs, a full record of that unavailability would at least be clear.[32]

Below are the proposed steps in the process.

1. Initial Intake

When a litigant takes an initial action in a case, the intake person would determine if the case were contested, to the extent known, and would evaluate the person's financial eligibility status, which would be used in subsequent assessment. Such intake might be done by a self-help center, by a court clerk, or in a social service or administrative agency office, and would not necessarily require a formal filing of a pleading, although the filing of a pleading would automatically trigger this process.[33] Referral would be made into the assessment system in all but a

31. One commentator on an early draft of this paper felt that the discretionary component of the option violated the transparency principle. The statement of reasons for the recommendation should resolve this issue, and reviewability should address consistency concerns.

32. To the extent that the screening had found counsel required, but the system had failed to provide counsel, questions might arise under *Turner* as to compliance with due process requirements. Note that in at least one state, the overall payment mechanism has been structured to automatically pay for counsel when found to be constitutionally required. MASS GEN. LAWS ch. 211D, § 5 (2011).

33. Community-based programs might well reach many who would never come to court, particularly for non-litigation matters.

small number of cases in which no individualized assessment would be needed.

2. Assessment, Track Assignment, and Referrals

In this key step the assessor diagnoses the person's legal needs and may recommend that counsel be appointed. The assessor can also recommend the provision of unbundled services or refer for self-help. It is the belief of this writer that the assessor should be an attorney and should have a limited, confidential, but non-exclusive confidentiality relationship with all the parties, as discussed below.

The assessor:

a. Reviews any paperwork and interviews the parties if needed

The interview can be joint or separate, as requested by the parties.[34] The interview should include the gathering of data required for the making of the determinations described in the steps below.

b. Screens for categorical eligibility for counsel services

The screening attorney would first screen for certain forms of predetermined categorical eligibility of either one party or both parties to receive a lawyer, such as child-custody with domestic violence cases or tenants over 65 (other categories to be determined). The categories for such eligibility will have been established in the overall system protocols based in part on legal aid program criteria and on analysis under *Turner* given the specific procedures in the court.

c. Makes an analysis of most appropriate court process track

Among the possible tracks:[35]

- Non litigation situations (which would mean a jump to the next step, with the process possibly then being managed by a services program rather than by the court)
- Uncontested cases requiring no court involvement beyond approval
- Uncontested cases requiring non-judicial court involvement to optimize agreement and decisions for fairness and/or finality
- Contested cases amenable to alternative dispute resolution

34. The parties should be asked in private and individually if they wish to have individual interviews to minimize the risk of coercion. As a general matter, uncontested matters, to the extent to which they need an interview, are likely to be appropriate for joint interviews. *See* Zorza, *After Turner*, *supra* note 30.

35. If the system were expanded to include administrative agency disputes, some of which end up in court, this list of tracks might be expanded.

- Contested cases requiring single final resolution between parties
- Contested cases requiring extensive supervision of the pre-trial process
- Contested cases likely to require ongoing decision-making and/or compliance activity

Note that this selection of tracks is ultimately derived from an analysis of the tasks that the court, either the judge or staff, is going to have to do to conclude the case satisfactorily. While this is surely only a very initial list of possible tracks, the court task approach is probably the best way to approach the analysis.

d. Identify the most cost effective services for each of the parties to obtain access to justice within that track taking into account merit and stakes, including counsel if needed

In identifying the appropriateness and sufficiency of services, the assessor would apply a set of standards and would consider i) the facts of the case, ii) the track tentatively chosen, iii) the complexity of the governing procedural and substantive law, and iv) the parties' particular capacities (including literacy, linguistic capacity, mental capacity, and amenability to negotiation, case complexity, and, arguably of particular importance, whether opposing party would have counsel[36]).

The process would be guided by a protocol, which would ultimately focus on the tasks needed to be performed by or on behalf of the litigant.[37] For each litigant, the assessor needs to consider whether particular tasks are likely to be needed in this case, whether the litigant has the capacity to complete them on her own in the court track as it actually operates,[38] and if not, what kind of service or assistance is needed.[39] The assumption is that the cheapest service, consistent with access, would be chosen. For example, the checklist, to be filled out separately for each party, might look like the following:

36. Note the risk of circularity. When both parties enter the system without counsel, the assessor should consider the impact of providing counsel to both, neither, or one. It may be that the capacity of one of the parties makes it necessary to appoint counsel, and that this will then trigger the need for counsel for the opponent. In such a case, the search for alternative assistance services may be highly cost effective. *See* Zorza, *Questions and Answers*, *supra* note 30.

37. This approach is drawn from that used in some existing self-help programs. *See, e.g.*, CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, *supra* note 23, at 4 (Guideline 6).

38. *See* Zorza, *After Turner*, *supra* note 30. It is important to note that as the court gets better at making itself litigant-friendly, more of these tasks can be performed with services on the left side of the chart. This provides a powerful financial incentive to such simplification.

39. *Id.* In some cases a mix of services might be needed, such as both a guardian *ad litem* and an attorney.

Task Oriented Triage Checklist[40]

Task Name	Needed?	Perform on own?	Perform with online info/tools	Perform with available informa-tional assistance	Perform with available unbundling assistance	Requires counsel to perform	Important
Filling Out Online Pleading Forms.							
Complete Service							
Identify Issues and Needs							
Manage Negotia-tion/mediation							
Request Discovery							
Respond to Discovery							
Prepare Evidence							
Present Own Case -- Self							
-- Witnesses							
-- Documents							
-- Other Exhibits							
Cross Examine							
Summary of evi-dence/closing							
Prepare Judgment							
Enforce Judgment							

It is important to note that this grid would expand with the availability of additional service modalities such as legal technicians[41] or lay advocates.[42]

e. Screens for merit and stakes

For all persons diagnosed as potentially requiring appointment of counsel or other high margin cost systems, the assessor would determine whether there was sufficient significance of the matter at issue for the party by applying appropriate standards as to whether the case was non-frivolous whether the matter was important enough for the state to invest resources.

40. The experience of attorneys who currently diagnose as part of the discrete task representation process would be very valuable in elaborating this list.

41. Order, Washington State Supreme Court (June 15, 2012) http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf (establishing Limited Practice Rule for Limited License Legal Technicians). For a summary and discussion of the Rule, see Richard Zorza, *Important Step Forward with Washington State Legal Technician Rule*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG, http://accesstojustice.net/2012/06/19/important-step-forward-with-washington-state-legal-technician-rule/.

42. Richard Zorza, *Non-Lawyer Assistance in the Courtroom—the UK Model*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG, http://accesstojustice.net/2011/12/02/non-lawyer-assistance-in-the-courtroom-the-uk-model/; 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 (Michael Trebilcock, Anthony Duggan & Lorne Sossin eds., 2012).

f. Makes Referral and/or Recommendation

If the assessor diagnoses that informational services are sufficient, then a referral is made directly. If the assessor determines that brief pro bono unbundled or other uncompensated legal assistance is available or sufficient, then a referral is made (permitting ultimate control over intake to remain in legal aid programs). If it is determined that a compensated unbundled or full service attorney is required, then the assessor attorney would complete a Recommendation Form for review by the selected decision maker.

3. Where Counsel is Recommended, Final Decision Maker Decides to Appoint or Deny Counsel

The decision maker would review the assessor's recommendation and make the final decision ex parte, on the papers, as to whether counsel would be appointed for either or both parties.[43] The decisional materials would be confidential and not open to discovery. Ideally, retired judges would serve in this role pro bono. Having retired judges perform this role preserves the decision makers' independence, while maintaining a judicial perspective.[44]

The overall approach should appeal to a variety of funding, bar, court, and service delivery constituencies since it offers the following benefits:

- *Financial Efficiency and Incentives*

The approach promotes cost effectiveness by putting simpler cases into lower-cost court processes and by providing more expensive services, such as counsel, only for those who need it most. It also creates incentives for communities to establish funding for its functions, primarily by making conspicuous the need for counsel and the consequences for justice. It also builds in long-term incentives for developing the most cost-effective alternatives. The cost of the process is reduced by having, as in medical triage, different levels of professional skills applied during different steps.

43. A process of further interlocutory review would run the risk of being be highly cumbersome, and while there would always be the possibility of review as part of a later appeal on the merits, such a right would be illusory as a practical matter in most cases, as *Turner* illustrates. Zorza, *After Turner*, *supra* note 30.

44. *Id.* One possibility is to have a volunteer panel of three members decide. They could be pulled from those with experience as bench officers, legal services attorneys, and government attorneys. This would provide a good balance in terms of experience identifying and evaluating the criteria.

- *Financial Viability*

Because communities can adjust the financial and substantive screening standards, this approach thus does not commit communities to an uncontrollable service entitlement system.

- *Broad Legitimacy*

As the approach becomes increasingly grounded in research-based knowledge of the effectiveness of different forms of assistance, and since decisions are made by trained assessors, possibly attorneys, and confirmed by judges, it will be perceived as broadly legitimate and as supporting the efficiency of court operations.

- *Middle-income Options*

The approach anticipates that some communities might determine to offer services to a middle-income population on a partially subsidized basis, while charging others nothing, and still others full cost. It also allows communities to determine to fund diagnostic screening for all through a flexibly waived, enhanced filing fee (with a simple formula to determine financial eligibility). These elements would make the adoption of a 100% access system much more palatable.

- *Flexibility.*

The approach is flexible, allowing for variations and changes in categorical eligibility, in the standards governing the screening process, in the ways that existing non-profit providers can participate in the provision of services, in how court processes can be made more effective, and in the relationship to other players in the system.

B. Problems Implementing the Proposal

The biggest problem is cost—both the administrative cost of the system and the cost of providing counsel to those for whom it is found necessary.

As to administrative cost, this could be covered by an increased waiveable filing fee. Litigants would reap the benefit of improved diagnosis and referral. Moreover, in a different version, multiple assessors might interview the parties and meet to decide on the track. This would make it possible for them to provide actual unbundled assistance at the same time as the assessment interview, increasing the efficiency of the system.

As to the cost of counsel, that will be a problem in any true triage system. This proposal would reduce costs by moving people to lower cost services whenever possible and would also incentivize changes in the underlying tracks and case processing, which would further reduce costs of counsel. This is both a minimum cost and a cost minimizing system.

Moreover, some of the costs of counsel could be covered by use of existing legal aid, pro bono, and law school clinic resources.

V. ALTERNATIVE MODEL TWO: A TECH-ENABLED GATEWAY

The second model also aims to select both the court process track and the services to be provided to litigants, but it replaces the individualized assessor with a tech-enabled gateway which would line up information about the case and the litigants with a protocol and with information about available services in order to make appropriate referrals.

Perhaps the greatest advantage of the use of technology is that it makes it possible to get needs of all parties in the mix without violating confidentiality concerns. The system would gather information from all parties and would then simultaneously use the algorithm to assign the case to a court process track, identify the services litigants would need to function in that track, and make referrals consistent with those needs as well as the policies and capacities of providers. To function as a 100% access system, this system would also need to be a system of residual provision of counsel.

An additional advantage is its ability to modify its choices based on updated information. For example, an assignment to the uncontested track would change quickly with the filing of a contesting responsive pleading.

A. How the System Might Work

1. Initiation and Information Submission

While the system would end up processing cases through the same protocol, cases could be initiated in a wide variety of ways: from the triage/intake portal online, from the portal at a kiosk in the court or legal aid program, by electronic filing in the court, or in other ways in cooperation with other agencies or web gateways.

The initiation process would include the submission of data that would: 1) establish the case (initial pleading information), 2) permit the system to make a preliminary court processing track decision (including the non-litigation track), 3) permit the system to make a preliminary assessment of the level of services needed to permit the person to pursue and present their case, and 4) attempt to match the litigant to actual available services, including consideration of programs' eligibility criteria. The data submitted for the last item would be kept confidential.[45]

45. *Id.* This might require a change in law. Or, that portion of the intake process could be under the control of a non-court agency. The user would have to know which information would be kept confidential.

A variety of support mechanisms would be available to help the litigant. Help would be available in person at the court, by chat and co-browsing over the Internet, or in person at community centers and libraries.

2. Communication to Other Party

In litigation situations, the system would then communicate to the opposing party that the action was being commenced and would give them an opportunity, at the same range of locations, to provide the same responsive information. This could be done electronically or by traditional service.[46]

3. Party Response or Failure

A responding party would submit the same information, except that the interface for the portion that responded to the legal claims would be structured to reflect the asserted claims. The same assistive services would be available.

A failure to respond would be a key piece of data impacting the allocation of both track and services below. If response is required, this would mean a higher engagement track and higher services. If not, then the opposite.

4. Simultaneous Assignment to Track and Identification of Service Needs

The system would then be in a position to complete initial court track and litigant service decisions. These would be subject to change based on future changes in status in both components of the system.

These would be based on the same criteria as those described above in Part V. However, rather than rely on the judgment of an individual assessor, the system would ask questions from which the kind of court processing needs and litigant capacity decisions could be made according to a somewhat more formal protocol.

Assessing the court track would be done by asking questions that:

- Determine the court history between the parties;
- Estimate the level of conflict between the parties;[47]
- Look at the stake in terms of finality and complexity;

46. Electronic service would probably require a change in law in many jurisdictions, although this is now changing. *See* Richard Zorza, *ABA Journal Discusses Electronic Service/Notice and the Self-Represented*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG, http://accesstojustice.net/2011/10/05/aba-journal-discusses-electronic-servicenotice-and-the-self-represented/ (Oct. 5, 2011).

47. *Cf.* Salem, Kulak & Deutsch, *supra* note 2, at 747–49.

- Find out about whether the parties have prior compliance issues with courts or other government agencies; and

- Estimate, using answers to questions in the section below, whether additional engagement from judge or court staff may be necessary, resulting in assignment to a particular sub-track.[48]

The system would also use historical data on the case type to impact the weighting of these factors. For example, it would know the history of compliance with a particular class of small claims cases, or the relationship between the age of the children and the extent of the need for ongoing supervision of child visitation.

5. Integration into Court System

The choice of court track would then be passed to the court, with the court's systems being responsible for establishing scheduling, etc. Major changes in the court status, such as filing a late responsive pleading, would trigger a re-referral to both parts of the triage system.

6. Identification of Need for and Availability of Services

The selection of court track will provide the first major data element in determining the need for services for each of the litigants. The major factors include what issue is at stake, the opponent (including power relationship and if other already has counsel), capacity of the party, the relationship between them, and the tasks needed to be performed in this context.

The capacity/task relationship will have to be assessed using questions that are often indirect. One approach to each of the tasks described above in Part IV may be to identify other equivalent tasks, whether the litigant does them on their own or with help and how hard they find them. Here are examples of questions (which will ultimately need validation).

Finalization of Pleadings

- What does an automated assessment of comprehensiveness of pleadings (including literacy level), tell the system about the person's capacity?

- Do you complete your own tax returns (1040 or 1040-EZ)?

- Do you have difficulty completing health insurance forms on your own?

Presentation of Evidence

48. Alternatively, these engagement issues might be managed within tracks and the services provided be treated within the litigant services triage process. *See* Zorza, *After Turner*, *supra* note 30.

- Do you find it easy to tell the doctor what is wrong with you when you visit?

- When you call a store with a problem, are you able to explain the problem?

Preparation of Judgment

- Do you find it easy to understand and remember what a doctor tells you to do? If you do not understand, are you able to comfortably ask for a clearer explanation until you do understand?

- Do you think you have good follow-up skills? Do you take notes to help remember what you need to do? Do you write down questions so you won't forget to ask them later?

- Are you able to break down projects into separate discrete tasks and perform those tasks in a logical order?

While none of these questions are perfect, and while some may raise difficult privacy and other social policy concerns, they do provide a way of developing a better picture of capacity. [49]

Education level, primary language, and age may also be relevant.

The goal then is to have an algorithm that can make at least a preliminary screen. Particularly as more and more contested cases start with an initial appearance that has a triaging role, or by a referral to a court self-help service, such preliminary screening can be reviewed by an individual who can then make a non-technology assessment of the appropriateness of the systems initial decision.

The algorithm itself might be built on a presumptive model. In other words, stake, power relationship, and court track might be used to develop a presumptive list of needs and sufficient services for each situation, with that presumption then being tested by capacity measuring questions such as the ones above.

The algorithm has to be able to adjust based on the relationship between capacity and demand, with limited resources requiring a higher threshold of need as capacity declines or demand increases. So, the presumption line has to move based on this match, and the system has to know how to move the presumption line. However, the algorithm can only change in steps over significant time periods, or the consistency principle would be violated.

49. This set of questions, and indeed the attempt to assess capacity, is viewed by some as paternalistic. The problem is that for triage to be effective it has to take into account individual capacity, and we know that the traditional demographic information is just not sufficient to allow for this assessment. *See* Zorza, *supra* note 38.

7. Referrals

Referrals to certain programs may require no appointment or acceptance—examples would be online tools or walk-in programs. Others may require appointment setting or acceptance by the service provider.

The system would generate notices to the litigant telling them which services they have been found to need and directions where to go when no follow up as to detail is needed.

For referrals to providers with independent intake, the system would match the litigant's detail again with available programs eligibility criteria and attempt to obtain electronic acceptance of the referral. This might require simultaneously sending data about the litigant to several programs.[50]

8. Follow Up for Completion of Referral and Download of Data

The system should not hand off the referral process to the litigants but should attempt to complete it, sending the litigants only the information that they need to confirm appointment time or the equivalent. The system should also have an electronic capacity to follow up to check that the referral link has been made.

9. Appeal to a Human

At least until research has much more fully validated the protocols and their criteria, users should be given the option at the end of the process of requesting a conversation, possibly by phone, to explain why they feel that they would not be able to manage their cases with the level of assistance offered under the system. Such a conversation would be informed by the materials produced by the system in aid of the analysis, and might be particularly necessary in limited-English proficiency situations.[51]

10. Activity if Service Needs Can Not Be Met with Existing Capacity

Unless there is a radical change in funding, a system like this will result in findings of service needs that cannot be met. This requires that the algorithm be able to adjust to provide services to those most urgently in need—something the algorithm should relatively easily produce if it can do its primary job. This can be done either by automatically adjusting the grid of presumptive need generated by the facts of the case or by changing the system of modifying those presumptions when sufficient services are not available.

50. This might require change in ethics rules. The ABA should consider changing the Model Rules to facilitate this process.

51. Interview with Associate Justice Laurie Zelon, California Court of Appeals.

In addition, it should produce ongoing reporting about this service gap. There are those who think that one reason these systems have not made better progress analyzing triage is that they have not been willing to face the programmatic reality of the consequences of the service gap.

B. Problems Implementing the Design

1. Service Capacity Issues

The biggest challenge by far, of course, is that the resources are not there to provide all the access services. While the author strongly believes that a system such as this would be far cheaper to implement than a classic right to counsel for all approach, the total cost of this system will be hard to calculate until a pilot is attempted.

There are two possible strategies to follow. A small pilot in a small area would give good data on total cost, as well as on savings relative to traditional models. Indeed, if, as some advocated, the Shriver Pilot had been focused on one county with the kind of approach described here, then the pilot might have provided just that kind of data.[52]

The second strategy, as described above, would be to design the service triage system so that it adjusts its behavior based on the match between resources and need. There are actually two ways to do this, at least in the tech version. In one, the presumptions of service need inferred from the situation grid would be changed if need exceeded capacity. In the other, the presumptions would stay the same, but the formula for adjusting those presumptions would change based on availability of services. The first is more effective at protecting those with capacity issues. The second is better at making sure that those facing higher stake, higher conflict issues have counsel but would be less protective of those with lower capacity.

2. Court Track Restructuring Issues

The process of persuading a court to modify its segmentation of cases will be difficult. Clarke and Flango have it right; we need not to focus on case type but on the issues to be decided and the processes needed.[53] However, case type as the dominant paradigm is hundreds of years old, and is supported by systems of judicial and staff specialization, computer software, physical design of courthouses, etc.

It might well be much easier to start a complexity and service court track experiment in a new court. This was the model used in the highly successful Midtown Community Court, which tested a variety of treat-

52. JUDICIAL COUNCIL OF CALIFORNIA, FACT SHEET: SARGENT SHRIVER CIVIL COUNSEL ACT (AB 590) (FEUER) (2011), *available at* http://www.courts.ca.gov/documents/AB-590.pdf.

53. Thomas M. Clarke & Victor E. Flango, *Case Triage for the 21st Century*, 26 COURT MANAGER 14 (2012).

ment and community engagement innovations at the same time in Manhattan in the early 1990s.[54] As one who participated in the project, the author can report that he finds it hard to imagine the project succeeding without the flexibility provided by the ground up space, staff, and technology build-up.

3. Court Legal Aid Integration Issues

For courts, with their strong neutrality commitment and cultures, the concept of having their operational and technology systems so tightly interwoven with those of service providers, such as legal aid, will be a source of significant anxiety. On the technology side, it should be noted, however, that it is not proposed that legal aid operates the integrated triage system, rather that the integrated system communicate with both court and legal aid systems—and indeed with those of other neutral service providers. Thus data would only go from the central system as needed to enable processing in the system to which it went. The triage system would be built both technically and legally to avoid compromising confidential data.

In the non-tech option, the assessor would also have confidential information from both sides, and rules would need to be established to protect the confidentiality of that information—in a sense the role has some similarities to that of a mediator who meets privately with both sides and communicates only that which is authorized to be communicated.

4. Legal Aid Autonomy Issues

Legal aid programs are likely to fear loss of control over caseload—always a risk in moving towards any system of provision of counsel services other than by complete legal aid intake autonomy.[55]

The access benefits of this system are just too great for a rational legal aid provider to reject; however, some programs are likely to retain some discretion over intake and certainly some discretion to handle cases other than those coming in through this system. These would be matters for negotiation. Legal aid programs would have huge costs by moving to this system.

5. Protocol Development

Both models proposed in this paper assume some form of protocol. The non-tech system would function well with limited protocols. The

54. *Midtown Community Court*, CENTER FOR COURT INNOVATION, http://www.courtinnovation.org/project/midtown-community-court (last visited April 20, 2012)..

55. Lonnie Powers, Jim Bamberger, Gerry Singsen & De Miller, *Key Questions and Considerations Involved in State Deliberations Concerning an Expanded Civil Right to Counse*l, MGMT. INFO. EXCHANGE J., Summer 2010, at 10.

tech system would require much more sophisticated protocols, which would lead to clear decisions.

While those protocols will initially be based on consensus discussions among advocates, courts, and research experts,[56] in the long term, the data coming out of the system should make possible first protocol component validation and then lead to the suggestion of new components.

6. Legitimacy of Protocols

Legitimacy of the protocols, particularly the litigant service protocols, is likely to be a major issue. Many advocates believe that the decision to provide counsel is almost equivalent to deciding what the ultimate decision by the court on the merits will be, so they see any triage process as determinative.[57]

Ironically, much of the access community is likely to accept the legitimacy of individualized assessment more easily than that of automated protocols. This is because it reflects the way they work and uses skills with which they are comfortable. It is, however, far less transparent and far more likely to reflect unconscious bias.[58]

7. Cost Issues

Deploying this system will not be cheap for courts, legal aid, or whoever takes responsibly for the system as a whole. While it will ultimately save court time, focus litigant services where needed, and eliminate huge waste in current referral systems, it cannot be avoided that establishing and operating the system will require initial investments.

The author recommends a small start and that the development of protocols be supported by national resources, either from the federal government or from foundations. He also believes that federal investment in pilots is highly appropriate. If the federal funding is provided for

56. A proposal for the funding of such a design process has been approved by the State Justice Institute. The proposal was submitted jointly by the National Center for State Courts and the Self-Represented Litigation Network.

57. Recent studies cast some doubt on the universality of this conclusion. *Archive for the 'Symposium (What Difference Representation?)' Category*, CONCURRING OPINIONS, http://www.concurringopinions.com/archives/category/representation-symposium (last visited Apr. 8, 2012). More recent research is discused at Zorza, *Exciting Triage Progress at TIG Conference*, *supra* note 12; Richard Zorza, *More Greiner et al Offers of Counsel Studies—The Debate Continues—Newsmaker Interview Planned*, RICHARD ZORZA'S ACCESS TO JUSTICE BLOG (Oct. 24, 2011), http://accesstojustice.net/2011/10/24/more-greiner-et-al-offers-of-counsel-studies-—-the-debate-continues-—-newsmaker-interview-planned/.

58. It would be wise to build in statistical reporting systems designed to identify such asymmetrical outcomes early in the use of the process. *See* Richard Zorza, *Avoiding the "Shut Down Effect" from Uncertain Research Results*, CONCURRING OPINIONS (Mar. 28, 2011, 5:25 PM), http://www.concurringopinions.com/archives/2011/03/avoiding-the-shut-down-effect-from-uncertain-research-results.html.

research, the general protocols and software should work across the country, greatly reducing costs.[59]

8. Management Issues

The state would have to decide who would build such a system and who would administer it. As Professor Sandefur notes, no state has any agency playing a coordination role that approximates the need.[60] This writer believes that responsibility must be taken by a body such as the Access to Justice Commission, which combines the authority of its appointing authority from the state supreme courts with the legitimacy of the range of its participants.[61]

9. Possible Limited Deployment—Track or Service Assignment Only

It should be noted that either of the two kinds of triage envisioned in this paper could be piloted independently of the other. This would be politically far simpler but would obviously lose some of the power of the experiment.

CONCLUSION

We will never build either an efficient court system or a 100% access-to-justice system without a triage system. In the past, we have shied away from the attempt to do so, in part because of fear of the complexity any system would require.

While the author understands that the thoughts in this paper represent only a small step in launching an ultimate design process, he hopes that these initial ideas will act as a spur for a comprehensive and creative discussion of how to build the system that is so desperately needed.

In particular, this paper highlights that any effectively functioning system is going to have to be skillfully and legitimately coordinated. It is hoped that this paper will also encourage states to start to wrestle with the problem of how to establish a system to do so and that state players will start to take responsibility for thinking about the triage function, even before it is practicable to start to deploy it. Professor Dumbledore would ask no less.

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59. Compare the systems that have been deployed to support web information portals, www.lawhelp.org, and document assembly, www.lawhelpinteractive.org. Both systems integrate court and access to justice resources.

60. SANDEFUR & SMYTH, *supra* note 14, at 9.

61. Laurence Tribe, Professor Harvard Law School, Keynote Address at the Conference of Chief Justices (Jul. 26, 2010) (urging the adoption of Commissions in all states), *available at* http://www.scribd.com/doc/35916291/10-07-26-Prof-Laurence-Tribe-s-Keynote-Remarks-at-the-Annual-Conference-of-Chief-Justices-s.