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## Simplicity as Justice

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## **SIMPLICITY AS JUSTICE**

KATHRYN A. SABBETH\*

Introduction .....	287
I. Justice for Less.....	289
II. Swift Justice.....	294
III. Public Interest Law.....	300
Conclusion .....	303

### INTRODUCTION

*“Simplicity . . . is taken to be a great American virtue.”<sup>1</sup>*  
James Baldwin.

Simplification of the legal system has attracted attention as a means of improving access to justice. A major motivation driving reform is the perception that pro se litigants have flooded the courts and begun clogging up the wheels of justice.<sup>2</sup> Ordinary people do not know rules of procedure, evidence, or substantive law; do not handle their cases effectively or efficiently; and have, the argument goes, generated a “pro se crisis.”<sup>3</sup> A number of states and localities have responded by increasing the availability of legal services, funding programs that offer solutions ranging from limited assistance to full representation, and a few legislatures have even established a statutory right to counsel for particular categories of cases.<sup>4</sup> Given the expense of advocates’ labor, however, most jurisdictions have sought instead to improve litigants’

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1. James Baldwin, *Address to the National Press Club Weekly Luncheon: The World I Never Made* (Dec. 10, 1986), <https://www.c-span.org/video/?150875-1/world-made> (last visited, Mar. 23, 2018).

2. See, e.g., Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1274 (2010) (arguing that pro se court reform “would alleviate the pro se crisis, make better use of precious judicial resources, save money and (as a bonus) produce better, fairer outcomes”) (emphasis added); Richard Zorza, *Some First Thoughts on Court Simplification, The Key to Civil Access and Justice Transformation*, 61 DRAKE L. REV. 845, 857–63 (2013) (listing goals of simplification).

3. See, e.g., Barton *supra* note 2, at 1270–72.

4. Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 760–61 (2015).

ability to handle their legal matters on their own.<sup>5</sup> As an alternative to providing litigants with representatives who could help them navigate the courts, a growing number of commentators propose simplifying proceedings to obviate the need for such representation.<sup>6</sup> Methods of simplification include creating form pleadings, introducing technology, and relaxing formal rules that could confuse lay litigants.<sup>7</sup> Proponents of simplification claim that it will decrease the time and cost of proceedings,<sup>8</sup> help litigants meet the technical requirements of the fora in which they appear,<sup>9</sup> and increase litigants' satisfaction with the process.<sup>10</sup>

This essay argues that the objectives of the simplification project are incomplete and carry potential downsides. It does not take the position that such efforts should be abandoned but recommends that their limits and unintended consequences receive careful scrutiny. Prior commentary has highlighted challenges of simplification from an individual litigant's standpoint, such as the risk of substandard services and the reality that one-size-fits-all will not fit everyone.<sup>11</sup> This essay turns instead to the efficiency goals themselves and how they affect the administration of justice broadly defined.<sup>12</sup> Part I critiques the goal of

5. See Barton, *supra* note 2, at 1269–71. Cf. Richard Abel, *State, Market, Philanthropy, and Self-Help as Legal Services Delivery Mechanisms*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 295, 298 (Robert Granfield & Lynn Mather eds., 2009) (delineating four models for the delivery of services: (1) state; (2) philanthropy; (3) market; and (4) self-help).

6. See Barton, *supra* note 2, at 1234 (“[B]etter pro se courts would expose how unnecessary lawyers are in many cases.”); Zorza, *supra* note 2, at 860–61 (“A major component of cost reduction comes from reducing the need for full advocacy services.”). Some commentators also favor simplification of substantive law. *Id.* at 878; BEN BARTON & STEPHANOS BIBAS, ROBOOTING JUSTICE 201–04 (2017). Thoughtful scholars and policymakers have also recommended combined approaches that include appointment of counsel and elements of simplification. See, e.g., Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 38–39 (2010).

7. See Martha Minow, *Foreword to BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA* xv, xvii (Samuel Estreicher & Joy Radice eds., 2016) [hereinafter BEYOND ELITE LAW].

8. See, e.g., Zorza *supra* note 2, at 856 (system faces “no real pressure for simplification, other than occasional, if intensifying, budget crises”).

9. See, e.g., Steinberg, *supra*, note 4, at 788.

10. Zorza, *supra* note 2, at 858.

11. See, e.g., Raymond H. Brescia, *What We Know and Need to Know About Disruptive Innovation*, 67 S.C. L. REV. 203, 215–16 (2016).

12. See also Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777 (2015) (arguing against civil procedure reform in the name of “efficiency” that cuts pecuniary costs while neglecting other categories of costs and benefits); Zachary Liscow, *Is Efficiency Biased?*, at 3 (Aug. 14, 2017) (unpublished manuscript)

cutting costs. Part II critiques the goal of increasing speed. Part III urges that public interest law values figure more prominently in access to justice reform.

### I. JUSTICE FOR LESS

Proponents of simplification argue that the access to justice crisis makes a complex court system too expensive to administer fairly.<sup>13</sup> It is simply unrealistic to expect lawyers to be available to represent all litigants who need counsel, so we should instead devise solutions less expensive than representation.<sup>14</sup> If there is a cheaper alternative that offers the same substantive outcomes at a fraction of the price, no one could object. Indeed, Professor Ben Barton claims that if we develop a low-cost alternative that allows people to represent themselves, poor litigants could become the envy of the rich; only lawyers and their self-interest stand in the way of such a future.<sup>15</sup>

Yet the push to make the legal process cheaper rests on two flawed assumptions: (1) providing services at lower cost is (necessarily) socially useful; and (2) decreasing the cost of services increases the availability of services (and is the only or best way to expand availability to reach people with limited financial resources).

First, making justice cheaper is a socially positive result only if there is a net positive in social benefits. As Brooke Coleman has observed in the federal context, commentators considering reforms of the civil justice system often collapse the categorical assessments of “cheap” and “efficient.”<sup>16</sup> They determine that money-saving reforms are efficient without accounting for the full range of benefits and losses that result.<sup>17</sup> The same mistake appears in analyses of poor people’s courts. Many efficiency assessments neglect substantive case outcomes.

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(explaining that Kaldor-Hicks efficiency, measured by willingness to pay, benefits the rich over the poor), [<https://perma.cc/A73G-2H84>].

13. BARTON & BIBAS, *supra* note 6, at 203 (“Complexity is thus at odds with equal justice under law.”); Steinberg, *supra* note 4, at 806–07.

14. *But see* RICHARD L. ABEL, *Introduction*, in *THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* 1, 7 (Richard L. Abel ed., 1982) [hereinafter *INFORMAL JUSTICE*] (“Political choice is portrayed as blind necessity.....Informal institutions are said to be a necessary response to inexorable economic forces. The courts are ‘overcrowded,’ there is ‘too much’ litigation.....Yet even if this were conceded . . . it would not dictate a response. The courts could be relieved of their congestion instantaneously if they expelled all corporate plaintiffs or prohibited the government from litigating.”).

15. Barton, *supra* note 2, at 1273.

16. Coleman, *supra* note 12, at 1777.

17. *Id.* at 1777–78.

*Substantive case outcomes must receive consideration. To the extent that simplicity helps litigants manage technical requirements, simplification might provide the appearance of improved court access. For example, if a court simplifies the process for filing responsive pleadings, it might decrease the number of default judgments. Yet keeping a pro se defendant's case alive means little if the substantive outcome is unaffected because she does not know how to prove the defenses contained in her form answer.*<sup>18</sup>

*Many studies tout pro se court reforms as successful because of litigant satisfaction but, even assuming litigant surveys are accurate,<sup>19</sup> subjective indicators should not be the primary measure of success. Subjective assessments of court functioning reflect expectations as much as results and should not be given undue weight.<sup>20</sup> Litigant satisfaction does matter from a democratic perspective and one of human decency, but ultimately courts make decisions that allocate resources and responsibilities. How people feel about the process is only part of the story. Legitimacy is a necessary ingredient for a healthy legal system but not sufficient.*

*Without substantive justice, acceptance of the legal system might be more damaging than helpful.<sup>21</sup> It remains unclear that pro se court reform yields substantive outcomes comparable to those produced by legal representation.<sup>22</sup> On an individual level, unless accuracy of outcomes is protected, the promise of efficiency fails.<sup>23</sup>*

*Even if individual case outcomes were the same, social outcomes beyond individual cases must also be considered. Public adjudication*

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18. See Steinberg, *supra* note 4, at 784–85.

19. See ABEL, *supra* note 14, at 8 (“[A]lthough applicants certainly want cheap, speedy justice, justice may be more important than speed—and they may be willing to pay for it. Finally, there is considerable evidence that people want authority rather than informality. They want the leverage of state power to obtain the redress they believe is theirs by right, not a compromise that purports to restore a social peace that never existed.”).

20. Gary Blasi, *How Much Access? How Much Justice?*, 73 *FORDHAM L. REV.* 865, 870 (2005).

21. See Engler, *supra* note 6, at 87–88 (“If tenants expect to lose in housing court, and landlords expect to win, advice to the tenant that explains the process but fails to affect the outcome might lead to satisfied landlords and tenants.”).

22. See, e.g., Engler, *supra* note 6, at 90.

23. Even for individuals, adjudication produces much more than case outcomes. It can create collateral consequences for parties' physical, emotion, and financial health. See Catherine R. Albiston & Rebecca L. Sandefur, *Expanding the Empirical Study of Access to Justice*, 2013 *WIS. L. REV.* 101, 111–12; Kathryn A. Sabbeth, *The Prioritization of Criminal Over Civil Counsel and the Discounted Danger of Private Power*, 42 *FLA. ST. U. L. REV.* 889, 910–15 (2015).

serves multiple democratic purposes: development of law,<sup>24</sup> participatory deliberation, public education, deterrence,<sup>25</sup> and, occasionally, social change.<sup>26</sup> The administration of justice is different from a commodity or service to be delivered to market as smoothly as possible at a cost as close as possible to zero. Reforms of the courts concern the design of a justice system, and reducing the costs of the system's administration could result in unintended consequences.

The imposition of costs can actually produce positive social outcomes. To the extent that costs are borne by wrongdoers, costs can deter misconduct. This is a basic principle of tort law.<sup>27</sup> Social science research demonstrates that the possibility of incurring costs serves the goal of deterrence. In particular, defendants report that the threat of being saddled with victims' attorneys' fees makes a difference in their calculus about their activity.<sup>28</sup> Notably, in this context, where the attorney fees result in a deterrent effect, the cost of public interest lawyers is not a necessary evil but a socially useful feature of the current system's design. Were the cost of advocates' labor reduced, certain categories of misconduct might increase.

Second, another benefit of retaining the costs of the legal system might be that the imposition of costs draws attention to otherwise neglected social problems. The alleged crisis of *pro se* litigants overwhelming the courts reflects a social reality: in many of these cases, people too poor to hire lawyers are getting dragged into court for failure to comply with property law.<sup>29</sup> Those failures to comply with property law, such as to pay rent due, reflect a broader set of political and economic circumstances, including the growing gap between wages and housing expenses. The attention attracted by costs of the legal

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24. See Colleen Shanahan, Anna Carpenter & Alyx Mark, *Can a Little Representation Be a Dangerous Thing?*, 67 HASTINGS L.J. 1367 (2017) (describing law reform activities that may atrophy in the absence of representation).

25. See Catherine R. Albiston & Laura Beth Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why It Matters for Social Change*, 39 L. & SOC. INQUIRY 62, 86 (2014).

26. See Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 830-31 (2009) (highlighting benefits of public adjudication to be considered when evaluating private dispute resolution mechanisms).

27. See, e.g., Richard A. Posner & William M. Landes, *An Economic Theory of Intentional Torts*, 1 INT'L REV. L. & ECON. 127 (1981).

28. See Albiston & Nielsen, *supra* note 25, at 86 (quoting plaintiffs' lawyers explaining that attorneys' fees are the "number one . . . deterrent to companies") (citations omitted).

29. David J. Luban, *Self-Representation, Access to Justice, and the Quality of Counsel: A Comment on Rabea Assy's Injustice in Person: The Right of Self-Representation*, JERUSALEM REV. LEGAL STUD., \*17-19 (forthcoming), [<https://perma.cc/X3TR-VPQK>] (describing other examples of broader changes that cause apparent growth in *pro se* population).

system could potentially get directed toward developing solutions to the underlying social problems.

Although this normatively positive impact of costs has not previously been studied, examples of it have emerged in criminal law. In the criminal context, the costs of the justice system have successfully resulted in the decriminalization of conduct.<sup>30</sup> Decriminalization has included removing categories of conduct from criminal law statutes; decreasing penalties for criminal acts still on the books; declining to enforce criminal laws as a matter of discretion; and replacing punishments, like incarceration, with attempts to address underlying causes of the criminal conduct, such as through drug treatment.<sup>31</sup> For those troubled by mass incarceration and its collateral consequences, these efforts might provide a step in the right direction. Regardless of the merits of these particular solutions, they suggest that the pressures imposed by systemic costs could inspire consideration of policies that would otherwise never be attempted.

In the housing context, if a perception develops that there are too many eviction cases and eviction defense is expensive, this might put pressure on governments to improve substantive housing laws to promote affordable housing. In this sense, the causal arrow could go both ways: the rise in homelessness in gentrifying cities has created pressure to appoint housing defense lawyers;<sup>32</sup> the work of housing lawyers and the expense of supplying them could also draw attention back to the social phenomena that make housing difficult to maintain.

Subsidies for civil counsel were never intended to solve a problem of legal services' unaffordability. Rather, they comprised one part of a programmatic effort to address broader inequalities. Ideally, providing lawyers to the poor was hoped to be a temporary solution, necessary only until the underlying inequalities were alleviated. As a historical matter, this was the purpose of the Legal Services Corporation: to aid the War on Poverty.<sup>33</sup> In the current era, the cost of lawyers could potentially create incentives for adoption of more fundamental solutions to the underlying social problems.

An obvious counterargument is that our current legal system is far from that ideal, and right now the costs of retaining counsel and

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30. See Mary Fan, *Beyond Budget-Cut Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 634–37 (2012); Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 701–02 (2015).

31. Woods, *supra* note 30, at 683–84, 686, 689, 693.

32. Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. J.L. & GENDER, at 30–35 (forthcoming 2018), [<https://perma.cc/7XYV-77T5>].

33. William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960's to the 1990's*, 17 ST. LOUIS U. L. REV. 241, 244–45 (1998).

*participating in litigation deter people from enforcing their rights. As an obstacle to access, costs thwart the rule of law and the capacity of the legal system to protect vulnerable members of society. For example, a tenant without the resources to retain counsel might give up her home when her landlord threatens eviction even if the case would be non-meritorious and a housing defense lawyer could have filed a successful motion to dismiss. Even parties able to retain counsel may be stymied as the costs of litigation mount. Wealthy parties regularly use discovery devices and motion practice to make it impossible for less powerful actors to pursue meritorious claims to conclusion. If proceedings were simplified and less expensive, access would not be reserved for the rich.*

*Yet the relationship between financial resources and the ability to pursue or defend against litigation stems from the rule that all parties, regardless of means, absorb their own litigation costs. Imagine if costs could be separated from particular private parties and instead were absorbed by another source, another private party, or the state. To suggest that decreasing the cost of services increases their availability assumes that availability requires the ability to pay. This relies on market logic – services will be distributed based on who can pay and how much. Yet market logic is not the only way to conceive of the distribution of legal (or other goods) and services.<sup>34</sup>*

*For example, fee-shifting statutes support the distribution of legal services using a different approach. They deliver services to a defined category of victims and assign the costs to the wrongdoers. Specifically, they require defendants to cover prevailing plaintiffs' attorney fees in areas of litigation recognized by Congress as in the public interest.<sup>35</sup> Under fee-shifting provisions, rather than the means of the parties, what matters is the subject matter of the litigation and whether the plaintiff substantially prevailed. Although fee-shifting statutes as a solution to access to justice have their own limitations,<sup>36</sup>*

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34. See Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEGAL ETHICS 649, 650–53 (2016).

35. See Kathryn A. Sabbeth, *What's Money Got to Do with It? Public Interest Lawyering and Profit*, 91 DENV. U. L. REV. 441, 465–68 (2014).

36. For a discussion of how fee-shifting schemes have faltered under attacks from the Supreme Court, see *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001) (ruling that serving as a catalyst for change in a defendant's behavior is not sufficient to obtain payment for lawyers); *Evans v. Jeff D.*, 475 U.S. 717, 728–30 (1986) (ruling that defendants may condition a settlement for full injunctive relief on waiver of all fees for plaintiffs' counsel); *Marek v. Chesney*, 473 U.S. 1, 10 (1985) (holding that a Rule 68 offer of judgment could cut off entitlement to fees), and even when they function, they reward only particular subsets of cases. See ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST



*the point is this: the expense of legal representation does not have to be borne by the parties to whom our current system assigns it. Costs can be separated from the litigants for whom they are expended. If costs can be separated from the litigants, making the process cheaper is not necessarily relevant to poor litigants' access to courts.*

## II. SWIFT JUSTICE

*Proponents of simplification argue that it will allow cases to move more quickly.<sup>37</sup> This will not only make judges' jobs easier but also will improve the experience of litigants. The sluggishness of court processes can be particularly burdensome for unrepresented parties. Unlike those with counsel to appear on their behalf, pro se parties must attend all court dates and wait for their cases to be called.*

*Yet we ought not to embrace speed to the point of unraveling rights. Russell Engler makes this point well:*

*Eviction cases would be greatly simplified if the landlord did not have to prove his prima facie case, or tenants were not allowed to raise defenses. . . . The question remains as to whether speed is a good or bad thing. Where unrepresented litigants are steamrolled in housing court, slowing down the system is an important goal.<sup>38</sup>*

*To the extent that the assertion of rights requires time (or money) and the denial of that opportunity saves resources, there remains a question as to whether the savings are worth it. The Supreme Court indicated with its *Mathews v. Eldridge*<sup>39</sup> due process test that cutting such corners is sometimes a constitutionally acceptable choice.<sup>40</sup> Yet even if constitutionally permissible, such choices may not be good policy. Where do we draw the line? As a society, we recognize that efficiency goals should sometimes give way to higher ones. To the extent that speed is pursued at the expense of compromising rights, caution is required.*

*One of the best arguments in favor of simplification is that complexity allows technicalities to thwart the rule of law and trip up*

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LAWYERING: A CONTEMPORARY PERSPECTIVE 188–89 (2013); Albiston & Sandefur, *supra* note 23, at 114.

37. See, e.g., Zorza *supra* note 2, at 854–55.

38. Engler, *supra* note 6, at 76, 87.

39. 424 U.S. 319 (1976).

40. *Id.* at 348.

disadvantaged parties who might otherwise prevail.<sup>41</sup> To be sure, this does occur with some regularity. Yet “technicalities” that thwart the application of law can cut both ways.<sup>42</sup>

Slower processes can offer benefits to otherwise disadvantaged parties. For a poor tenant facing eviction by a landlord, slowing down the process has particular value. It can provide time to scrape together money to pay the rent, to accumulate evidence in her defense, or to locate alternate housing if ultimately she is forced out of her home. The possibility of delay can also convince a landlord to settle on terms that account for tenants’ rights and interests.<sup>43</sup>

Some of the complexities of housing law were inserted by legislatures to protect tenants. It is useful to consider whether simplification of housing court processes could potentially cause some of these tenant protections to be lost. For example, landlords are generally required to serve a notice of termination within a particular window of time prior to terminating a tenancy. Without adequate prior notice, the tenancy has not been terminated, and an eviction action cannot be pursued (unless and until the tenancy is terminated properly). If a landlord files an action without proper notice and termination, a tenant can file a motion to dismiss, and the action must be dismissed. That dismissal would generally be granted without prejudice so the landlord could file a new action after proper notice and termination. Were the court process streamlined in the interest of speed, this kind of “inefficiency” could potentially go by the wayside.

For poor defendants in civil and criminal proceedings, requiring the opposing party to complete a series of steps before a judgment in its favor can be enormously beneficial, and often this is the only hope they have. Such procedural steps can trip up the plaintiff or prosecutor (as in a landlord’s failure to provide notice, resulting in dismissal of an action), or offer the defendant a second chance (as in the tenant’s opportunity to create a record of good behavior after an initial incident of alleged nuisance), with either resulting in an improved outcome for the defendant. Even when the outcome remains unchanged, procedural hoops can at least hold that final judgment at bay.

Whether it is by allowing a different substantive result to come about or just delaying the inevitable, the process checks the application of the plaintiff’s or prosecutor’s otherwise unbridled power. It might be

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41. See Marc Galanter, *Why the “Haves” Come out Ahead: Speculation on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95, 124 (1974) (arguing that complexity favors the party with more resources, because they can better manipulate the many rules).

42. See ABEL, *supra* note 14, at 10–11.

43. Mark H. Lazerson, *In the Halls of Justice, the Only Justice is in the Halls*, in *INFORMAL JUSTICE*, *supra* note 14, at 119, 131.

said that for parties disadvantaged by the surrounding economic system and the underlying substantive law,<sup>44</sup> procedural protections are the most that the disadvantaged can expect from the system.

It is for this reason that historically the critique of lawyers as clogging up the courts with overly clever use of technicalities has been lodged to undercut public interest lawyering. In the 1980s, federal legislators argued that capital defense attorneys were manipulating processes rather than promoting fair trials, and then imposed massive funding cuts to capital defender offices.<sup>45</sup> Just this past year, Attorney General Jeff Sessions used similar rhetoric in an attempt to undermine lawyers for immigrants, arguing, “[S]mart attorneys have exploited loopholes in the law.”<sup>46</sup> Yet for capital defendants and immigrants facing removal, it is essential that proper procedures be followed before extraordinarily harsh consequences are visited upon them.

This is true not only as a matter of fairness to the individual defendants but also in the interest of restraining excesses of power. The function of due process may be understood as erecting obstacles between the individual and the force of the state.<sup>47</sup> In the words of Herbert Packer, “maximal efficiency means maximal tyranny.”<sup>48</sup> Monroe Freedman argued that the purpose of the criminal trial is not

44. Substantive law criminalizes a broad range of behaviors and favors the rights of those who own property over those who do not. See, e.g., Paul Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 *YALE L.J.* 2176, 2183 (2013) (“The criminal law deliberately ignores the social conditions that breed some forms of law-breaking. Deviations associated with poverty are not usually ‘defenses’ to criminal liability”).

45. See Kathryn A. Sabbeth, *Capital Defenders as Outsider Lawyers*, 89 *CHI. KENT L. REV.* 569, 591 (2014).

46. Jeff D. Sessions, Attorney Gen., Remarks to the Executive Office for Immigration Review (Oct. 12, 2017), [<https://perma.cc/UG97-WUWN>].

47. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 62 (1988) (describing the criminal adversarial process and the lawyer’s role within it as creating an obstacle course for the State); Herbert L. Packer, *Two Models of the Criminal Process*, 113 *U. PA. L. REV.* 1, 13 (1964) (“[T]he Due Process Model looks very much like an obstacle course. Each of its successive stages is designed to present formidable impediments to carrying the accused any further along in the process.”).

48. See Packer, *supra* note 47, at 16. Packer elaborates:

Precisely because of its potency in subjecting the individual to the coercive power of the state, the criminal process must, on this model, be subjected to controls and safeguards that prevent it from operating with maximal efficiency. According to this ideology, maximal efficiency means maximal tyranny. And, while no one would assert that minimal efficiency means minimal tyranny, the proponents of the Due Process Model would accept with considerable equanimity a substantial diminution in the efficiency with which the criminal process operates in the interest of preventing official oppression of the individual.

*Id.*

(only) to seek truth but to protect individual rights, and that truth-seeking functions may be subordinated to those protecting individual dignity.<sup>49</sup> I would argue that this insight extends beyond the requirements of constitutional jurisprudence and individual rights, as it reflects a general truth of “political theory and historical experience.”<sup>50</sup> There is democratic value in containing potential abuse by powerful parties.<sup>51</sup>

Although Freedman focused his writing on criminal defense, the need for restraints on excessive power exists also in civil contexts.<sup>52</sup> Just a quick review of poor people’s courts reveals that the state is the adversary of the *pro se* party in a wide variety of civil cases—from public housing eviction to termination of parental rights—not only in criminal prosecution.<sup>53</sup> Just as zealous legal representation and vigilant maintenance of the adversary system serve to check state power in criminal cases, the need for restraint exists in these civil contexts as well.<sup>54</sup>

Even when the state is not a party in the technical sense, the state plays a role. The state creates, maintains, adjudicates, and enforces all law.<sup>55</sup> Ultimately, the state’s force is at play in all adjudication.<sup>56</sup> The state requires the parties to appear or else face the penalty of a default judgment and execution of that judgment. The state literally enforces those judgments parties refuse or are unable to satisfy. If a losing party fails to pay a monetary judgment, a sheriff will forcibly seize her assets. If a landlord wins an eviction case, an agent of the state will forcibly remove any tenant who remains in possession of the property.<sup>57</sup> The violence of economic force can be as important as violence to the

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49. See MONROE H. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* 2–3 (1975) (suggesting that the purpose of the criminal trial is to protect individual rights, not to seek truth); *id.* at 3–4 (describing human dignity as among the “higher values” to which even truth-seeking may be subordinated). See also Packer, *supra* note 47, at 17 (describing “guilt-defeating doctrines” of due process model).

50. See LUBAN, *supra* note 47, at 60 (“We want to handicap the state in its power even legitimately to punish us, for we believe as a matter of political theory and historical experience that if the state is not handicapped or restrained *ex ante*, our political and civil liberties are jeopardized.”).

51. See FREEDMAN, *supra* note 49, at 2.

52. See Sabbeth, *supra* note 23, at 923–24.

53. *Id.* at 923.

54. *Id.* at 921–23.

55. *Id.* at 927 n.261.

56. *Id.*

57. *Id.*

physical body,<sup>58</sup> and, ultimately, the latter is always available to back up the former.

Like other state actors, judges, too, abuse their power. This results not only from implicit and explicit bias related to race, class, and gender,<sup>59</sup> but also to the desire for speed. While some judges have demonstrated a deep and sincere commitment to improving fairness for pro se litigants, many others support access to justice measures primarily because of the time they hope to shave off proceedings. They express hostility towards poor people who consume too much judicial attention. For example, judges presiding over criminal cases regularly express frustration about the time lost to the assertion of rights by poor people's lawyers.<sup>60</sup> Judges in housing courts have long allowed landlords to obtain judgments without showing any admissible evidence and silenced tenants who have attempted to articulate arguments in their own defense.<sup>61</sup> It is difficult for an attorney to push back against such judicial conduct, but it is all the more challenging for a pro se layperson. Indeed, one of the major reasons for the establishment of counsel in juvenile delinquency proceedings was the determination that, even in a seemingly non-adversarial context, poor people are at a disadvantage.<sup>62</sup> While it is possible that an educational program could be undertaken to change judicial attitudes,<sup>63</sup> evidence from the development of the right to criminal defense counsel indicates that it is establishment of a clear right to counsel that may be most effective in changing court culture.<sup>64</sup> In the absence of restraints on their power,

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58. See Sarah Buhler, "Don't Want to Get Exposed": Law's Violence and Access to Justice, 26 J.L. & SOC. POL'Y 68, 74-75 (2017) (summarizing critical literature on the "violence of social and economic inequality"). See also Sabbeth, *supra* note 23, at 910 (discussing definitions of liberty that privilege freedom from incarceration over other forms).

59. See Sabbeth, *supra* note 32 (collecting literature).

60. See, e.g., Nicole Martorano Van Cleve, *Reinterpreting the Zealous Advocate: Multiple Intermediate Roles of the Criminal Defense Attorney*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 293, 299, 309-12 (Leslie C. Levin & Lynn Mather eds., 2012).

61. See, e.g., Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992).

62. See *In re Gault*, 387 U.S. 1 (1967).

63. See Rebecca L. Sandefur, *Elements of Professional Expertise, Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 AM. SOC. REV. 909, 910 (2015) (explaining that lawyers' "presence in a courtroom encourages the court to follow its own rules").

64. See Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15, 18-23 (2016) (describing how judges pre-Gideon showed little regard for the right to appointed counsel, even when mandated by state law, but attitudes shifted after the decision).

even well-intended judges might simplify proceedings to the point of sacrificing litigants' substantive and procedural rights.<sup>65</sup>

In addition to the need to spend time to protect litigants' rights, investments of time can offer inherent benefits. Like the financial costs discussed in the previous section, time costs can result in socially beneficial consequences, such as increased public education and deterrence. For example, litigation that attracts attention can educate the public and impact the reputations of alleged bad actors.<sup>66</sup> When more time passes before the parties reach a resolution, potentially more education and deterrence can result from the litigation process. Reputational harms—such as to employee morale, customer loyalty, and investor interest—can translate into financial impact exceeding that of a monetary judgment.<sup>67</sup> Even before or without any monetary judgment, information unearthed during discovery, along with any media coverage, can magnify reputational harms. The longer litigation continues, the more potential there is for reputational damage from discovery produced and disseminated, and the longer media actors will continue to remind the public of the underlying misconduct alleged. While most of the literature on this topic comes from federal litigation, the logic could potentially apply in other public interest cases, particularly if poor parties work in concert with organizers who bring broader attention to the underlying conduct. Delay can increase the capacity of litigation to educate the public and influence the reputations of alleged bad actors. Slowness of adjudication is not necessarily a bad thing.

It must be acknowledged that slowing the machinery of justice is not only a potential byproduct of respecting poor people's rights, such as that of the tenant to raise defenses in Engler's example, but such slowing is often an intentional strategy on behalf of the disadvantaged precisely because it can benefit them. Advocates of a right to counsel in civil matters tend to assert that counsel will smooth out and speed up proceedings currently slowed down by pro se litigants' confusion. Yet the presence of lawyers can also have the reverse effect; indeed, delay

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65. See Zorza, *supra* note 2, at 857 (arguing for decreasing requirements for written opinions articulating bases for judicial decisions); cf. Steinberg, *supra* note 4, at 787–88 n.256 (advocating for simplification measures but highlighting the need for limits on judicial discretion).

66. See Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 493–509 (2004) (describing history of litigation attracting public attention); Roy Shapira, *Reputation Through Litigation, How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193, 1200–01 (2016).

67. See Kishanthi Parella, *Reputational Regulation*, 67 DUKE L.J. (forthcoming 2018), [<https://perma.cc/MEE8-5PVM>].

by lawyers is often intentional.<sup>68</sup> The ethics of intentional delay are beyond the scope of this essay, but the point is that speed is not a neutral or inherently positive value: the meanings assigned to speed and delay depend on the political, economic, and legal environment. Whether speed is an unvarnished good depends on the context and goals of adjudication. Sometimes checks on power require time to administer, and sometimes delay is itself an important check.

### III. PUBLIC INTEREST LAW

Although the drive to simplify poor people's courts reflects efforts to make justice attainable for a larger percentage of the population, it should not go unnoticed that a similar trend has been underway across U.S. civil and criminal justice systems. In recent decades, a "cost-and-delay narrative" has driven reforms of the Federal Rules of Civil Procedure, even in the face of contradictory empirical evidence.<sup>69</sup> The populist<sup>70</sup> push to simplify courts and make them accessible without the need for lawyers<sup>71</sup> reflects a broader anti-lawyer sentiment and anti-regulation trend, which favor privatizing adjudication and eschewing formal law for informal arrangements.<sup>72</sup>

The shift from formal law to informal arrangements includes a dramatic reduction in trials. Increasingly, civil litigation ends in settlements<sup>73</sup> and criminal defendants accept pleas.<sup>74</sup> Litigants resolve their cases through negotiation rather than adjudication.<sup>75</sup> Individual choice of contract, rather than the mandatory application of rules,

68. See BARTON & BIBAS, *supra* note 6, at 108.

69. See Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1090 (2012).

70. See, e.g., Editors' Preface to BEYOND ELITE LAW, *supra* note 7, at xi (arguing that the U.S. legal system "remains, at its core, a system of elite law largely for the elite" and "system redesign is needed to help people better represent themselves").

71. See, e.g., *supra* note 6 and accompanying sources.

72. See, e.g., Judith Resnick, *Lawyers' Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 FORDHAM L. REV. 1899 (2017).

73. See, e.g., Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461-84 (2004); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1073-75 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995).

74. See, e.g., Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1093-94 (2013).

75. Query how voluntary these arrangements are and what alternatives, if any, exist.

governs.<sup>76</sup> Both the process and the results remain outside the public eye.<sup>77</sup>

Much dispute resolution has migrated out of the courthouse altogether. In many jurisdictions, mediation is mandatory as a prerequisite to adjudication. Quotidian activities, such as purchasing a cell phone or accepting a job at a chain restaurant,<sup>78</sup> require giving up the right to judicial adjudication and replacing it with arbitration. The replacement fora are favored for reaching results that are not required or restrained by the parties' legal relationships. Unlike the rough justice of law, the argument goes, parties can craft solutions that are tailored to what they are able and willing to offer. Access to justice has been marshaled as an argument in favor of alternative dispute resolution. The "simpler" fora are touted as more easily navigated by ordinary individuals, including those without counsel.<sup>79</sup> I've argued elsewhere that the reality is less encouraging, both for individuals and for society as a whole.<sup>80</sup>

Some of the democratic purposes of public courts could appear to have more relevance for civil rights cases in federal courts than eviction cases in small claims court. Yet the need for public airing of disputes may be equally if not more important in poor people's courts. The simplification trend in access to justice discussions reveals a growing chasm between access to justice for poor people and public interest law. The simplification approach assumes legal services lawyers will not be doing any public interest law of the law-changing or law-challenging kind.<sup>81</sup>

The drive to simplify proceedings and distill them to a one-size-fits-all approach suggests poverty law is static, or at least that it is incapable of revision on behalf of the less powerful through litigation. It treats law as a cumbersome tool to be managed. This neglects the ways creative lawyering can revise case law over time so that the substance becomes better (or at least less bad) for the poor.

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76. See Resnick, *supra* note 72, at 1921 (citing her own earlier work); Josh Bowers, *Two Rights to Counsel*, 70 WASH. & LEE L. REV. 1133 (2013); Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650 (2013).

77. See Resnick, *supra* note 72, at 1920–21.

78. See *id.* at 1926–30 (discussing *EEOC v. Waffle House* and reprinting arbitration "contract" at issue in that case).

79. See Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563 (2001).

80. Sabbeth & Vladeck, *supra* note 26.

81. See Shanahan et al., *supra* note 24, at 1367 ("From the perspective of solving the civil access to justice crisis, it seems like a concession to the larger crisis to give some individuals representation – when they would otherwise have none – yet be satisfied when this representation excludes them from the evolution of the law.").



*Simplification, with its de-emphasis on law and reliance on unrepresented parties to serve themselves, leaves little room for public interest law as an agent of change.*

Some might argue that simplification devices will free up more time for legal services lawyers to handle public interest law cases, but it remains unclear how lawyers will find those matters. Who will make the assessment of complexity and at what stage? To the extent a line can be drawn between public interest and ordinary matters (which is questionable),<sup>82</sup> that distinction is not always apparent at the outset of representation. Finding a complicated issue or the potential to influence precedent can happen along the way; a lawyer conducting an evaluation might not know what a case involves before finding herself knee-deep in a knotty problem that at first appeared simple.

Many nooks and crannies of poverty law have not been litigated precisely because of the underavailability of lawyers representing the side of the poor. The Court in *Turner v. Rogers*<sup>83</sup> decided that there is no right to appointment of counsel in a civil contempt proceeding in part because it assumed the question of the ability to pay child support is a simple one,<sup>84</sup> but perhaps the issue is not simple; it is just underlitigated.<sup>85</sup> If we find cases simple because lawyers have not handled them frequently enough to develop a complex body of case law, and then we deem those cases unworthy of appointment of counsel because of the lack of complexity, the underdevelopment of law on behalf of the poor recreates itself in an unfortunate feedback loop.

Obviating the need for lawyers is tempting as a democratic project, given the skepticism the legal profession has earned by its own conduct and the important observations of critical scholars highlighting the power dynamics at play in the lawyer-client relationship.<sup>86</sup> Yet democratic values like dignity and voice are not necessarily satisfied by the opportunity to fill out forms. Court access must mean more.<sup>87</sup>

82. See generally Rebecca Sharpless, *More Than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy*, 19 *CLINICAL L. REV.* 347 (2012).

83. 564 U.S. 431 (2011).

84. *Id.* at 438.

85. See Laura K. Abel, *Turner v. Rogers and the Right of Meaningful Access to the Courts*, 89 *DENV. U. L. REV.* 805, 816–18 (2012) (questioning the Court's assumptions about the lack of complexity and highlighting contrary evidence in the record).

86. See Dana Remus, *Reconstructing Professionalism* 21–23 (Apr. 30, 2015) (unpublished manuscript), [<https://perma.cc/GT3X-HWLH>].

87. Luban, *supra* note 29, at \*22 (“[T]hose who defend the right of self-representation on autonomy grounds usually offer merely ‘an abstract idea of freedom of choice,’ without explaining why freedom to personally handle the minutiae of a civil trial is a choice that matters. . . . [W]hat does matter is having one’s voice and

Relatedly, while it is important to examine the power dynamics between lawyers and clients, it remains as important as ever to maintain the strength of lawyers who can protect clients from third parties who wield far more dangerous power.<sup>88</sup>

Advocates of simplicity are right that access to justice should mean more than access to lawyers.<sup>89</sup> But they are wrong if they suggest the latter is entirely extraneous to the pursuit of the former. Barton says people need housing, not housing lawyers.<sup>90</sup> It is undeniable that housing is a first order need while legal representation is not. But sometimes representation helps people meet their more basic needs. Sometimes lawyers force actors with material resources to transfer those resources, which can make an enormous difference to the recipient, and sometimes lawyers can push substantive law in a better direction for the future. To deny these aspects of lawyers' work is to imply a profound loss of faith in the professional project and the potential of public interest law.<sup>91</sup>

#### CONCLUSION

The promise of faster, cheaper justice is tempting, and if individual litigants seem satisfied with simpler procedures, it sounds anti-democratic to object. Yet customer service and economic efficiency are not, and should not become, the core values of justice. Financial costs will always influence the details of policy, but the distribution and consequences of costs reflect economic and political choices. These are not absolute laws of the universe but instead variables subject to creative adjustment. In designing a system of justice, considerations of cost should be secondary to our core values. The time required for legal proceedings also, while a relevant variable, should not accumulate outsized weight. There are some rights too fundamental to sacrifice for speed. Moreover, while it may be

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viewpoint reflected . . .") (quoting RABEEA ASSY, *INJUSTICE IN PERSON: THE RIGHT TO SELF-REPRESENTATION* 154 (2015)).

88. See MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 8 (4th ed. 2010) ("In expressing the distinctive feature of ethics in the legal profession, we would identify the client not as 'this person over whom I have power,' but as 'this other person whom I have the power to help.'"); William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. MIAMI L. REV. 1099, 1110 (1994) ("[T]he . . . concern with lawyer oppression of clients has increased, while the scale of material and organizational ambitions has declined.").

89. See Barton, *supra* note 2, at 1234.

90. *Id.* at 1269.

91. See Remus, *supra* note 86, at 38; Roiphe, *supra* note 34, at 652.

controversial to delay matters intentionally, slowness can in some cases serve as a desperately needed restraint on the application of force.

The purpose of this essay is not to argue against all simplification measures. Scholars like Jessica Steinberg and Russell Engler have offered thoughtful approaches to designing a hybrid of simplification and an increase in appointment of counsel.<sup>92</sup> Certainly, common-sense reforms could make poor people's courts less like Kafka's Trial.<sup>93</sup> Creation of form pleadings would be beneficial in non-contested matters<sup>94</sup> and potentially some contested matters.<sup>95</sup> For example, in many jurisdictions, courts already provide complaint forms for landlords initiating eviction proceedings to check the boxes indicating the bases for the actions. To provide form pleadings for landlords, the disproportionately represented parties, and not tenants, the disproportionately unrepresented parties, is backwards, and correction of that asymmetry could be productive. Other simplification devices, using technology for document assembly, could also have a normatively positive impact.

Yet the question remains whether such measures might not go far enough or, more to the point, might go too far in the wrong direction. We should not confuse the benefits that flow from the availability of form answers with the benefits that flow from the availability of zealous advocates.<sup>96</sup> As we experiment with simplification in the name of access to justice, it is incumbent upon us to keep in mind what we mean by justice. Promotion of public law values, namely democratic participation and limiting excesses of power, must remain among our highest priorities.

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92. See Engler, *supra* note 6 (offering comparative assessments of *pro se* reform and appointment of counsel across different areas); Steinberg *supra* note 4, at 747 (proposing reforms including mandatory form pleadings for both sides, revision of evidentiary rules, and guidelines to limit judicial discretion).

93. See Barton, *supra* note 2, at 1270 n.230 (identifying a need to train court personnel on common courtesy and how to avoid conveying the appearance of bias).

94. See Steinberg, *supra* note 4, at 786 (describing absurdly complex process for non-contested divorce).

95. See Brescia, *supra* note 11, at 213–14 (describing mass production of eviction answers that include warranty of habitability defenses and reference appendixes where tenants can list specifics of substandard conditions).

96. Whether all advocates should be lawyers remains a good question, and whether all advocates are zealous is one whose answer must be no. See Luban, *supra* note 29, at \*12–15.