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## Simplification- A Civil Procedure Perspective

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# Symposium on Federal Government Simplification Experiences

## Simplification—A Civil Procedure Perspective

Doug Rendleman\*

### I. We know the way to simplification.

A lot of people, including Professor Neil Cohen, Mr. Martin Dunn, Mr. Mike Greenwald, Judge Robert Keeton, Ms. Annetta Cheek, Mr. Peter Goodloe, Professor Carol Mooney, Mr. Bryan Garner<sup>7</sup> and the late Professor David Mellinkoff, have told us, correctly and repeatedly, what tools to use to write better: be consistent with terms, avoid unnecessary jargon, keep sentences short, use active verbs and present tense with singular nouns, put the rule first, the exception last, and garnish liberally with headings. Finally, there is no good writing, only good rewriting. These are not difficult ideas. Yet complexity and confusion keep coming back. Why?

### II. Where is simplification on the hierarchy of nettlesome problems?

Complexity and the confusion complexity creates, although annoying, expensive and inefficient, are never a legal system's worst problems. A dynamic and pluralistic society will not pause long enough to agree on many single meanings. The major issues for legislatures and common law courts grow out of how to adopt the last generation's law to the culture that exists now and will exist in the future.

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As we begin the new century, the engines of legal change are the rise of computer technology and the decline of national boundaries. The computer has not merely obliterated political boundaries. Just as the Internet alters the way we communicate and trade, e-mail transforms the way we think and write. As global markets and international trade have advanced, the possibility of a single "simple" vocabulary has receded.

### III. Are all kinds of law equally amenable to simplification?

Even within one political entity, different kinds of law have different kinds of rules. Commentators on the Uniform Commercial Code have noted the difference between, on the one hand, open-textured Article Two for sales, which states principles and standards, leaving discretion to parties and factfinders and, on the other hand, rule-bound Article Nine for secured transactions, which recites positive law in rules intended to prescribe outcomes.<sup>1</sup> The different types of law call for different skills, both to draft and to administer. Sales and secured transactions will always be difficult; but they will be difficult in different ways.

### IV. Will "progress" always leave anachronism needing clarification in its wake?

At any given time, a lot of law qualifies for simplification because its vocabulary and analysis lags a generation or more behind the times. The American Law Institute's restatements, among other things, fill this gap. An example in remedies, one of the subjects I teach, is restitution. A Restatement of Restitution was completed in the 1930s, but, while it unifies restitution under the head of unjust enrichment, this restatement is written in a vocabulary modern lawyers do not understand and is based on a dual system of law and equity now almost forgotten. The late George Palmer's 1978 four-volume treatise on restitution is a monument—or perhaps a tombstone; for Professor Palmer, not suffering fools, wrote a work which, reflecting an earlier epoch, is formidable even for professors who specialize in remedies. Restitution is now undergoing restatement, and the legal profession is entitled to anticipate that Professor and Reporter Andrew Kull's

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1. Thomas Jackson and Ellen Peters, *Quest for Uncertainty: A Proposal for Flexible Resolution of Inherent Conflicts Between Article 2 and Article 9 of the Uniform Commercial Code*, 87 YALE L.J. 907, 908-09 (1978).

erudition and clear language will restore restitution to an accessible place beside contracts, property, and torts in the common law.<sup>2</sup>

#### V. Does procedure exhibit cycles?

In *The Death of Contract*, Grant Gilmore suggested that classical periods when law is “neat, tidy and logical” and codified alternate with romantic periods when detailed rules are out of fashion.<sup>3</sup> Professor Linda Mullinex of the Texas Law School presented a paper which demonstrated how Gilmore’s analysis of commercial law applies to procedure.<sup>4</sup>

Procedural rules, Professor Mullinex said, have a dialectic. They start out simple because everyone likes simple rules. Thinking we have wise judges and, confident they will decide correctly, the rulemakers have granted judges broad discretion. Many of the challenges in contemporary procedure result from these short, simple, discretion-creating rules. Lawyers and judges deal with new problems in new ways. How do we distinguish a new doctrine from a discrete exercise of discretion? When lawyers feel aggrieved, the rule, they argue, has developed exceptions and become complicated. As nuance is embroidered on the fringes of discretion, the rules, but particularly the decisions analyzing the rules, grow lengthier and more complex. The formerly simple rules evolve into a labyrinth complete with traps for the unwary. Another group of wise sages rises up and decides to start all over again with simpler, better-drafted rules. Complexity follows unadorned rules and the tendency toward complexity creates, in turn, the urge to reform and simplify—leading in turn to more complexity.

An example of the dialectic begins in the nineteenth century with horrendously complex “common law” pleading. Reformers intended the simplified code pleading in the nineteenth century to supplant the excessively technical common law forms of action. Then in the twentieth century, after code pleading became in its turn too cumbersome, procedure specialists developed notice pleading under the federal rules with their hallmark “one form of civil action.” Professor Mullinex closed this part of her piece with a clever pun, She asked, “Where are we now in the dialectic of complexity and simplification?” Has procedure become sufficiently

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2. RESTATEMENT (THIRD) OF RESTITUTION (Tentative Draft No. 1, (2001)).

3. GRANT GILMORE, *THE DEATH OF CONTRACT* 102 (1974).

4. A manuscript of Professor Mullinex’s paper is on file with Professor Rendleman.

intricate that a new age of reform will dawn with the twenty-first century? Will proceduralists experiment with trans-substantive rules and return to substance-based procedure? Or may we anticipate “one form of simple action?”

#### VI. Can simplification avoid context?

Reformers, even if they have a fresh start, can never simplify context. We have inherited in two of the foundation words in procedure, jurisdiction and equity, multiple, even inconsistent meanings. In the generation before mine, Professor Zechariah Chafee showed in his Cooley lectures and book *Some Problems of Equity* how several meanings of “jurisdiction,” particularly confusion between the concepts of equity jurisdiction and subject matter jurisdiction, have led courts into error that may have been inadvertent.<sup>5</sup> Another author enumerated seven different senses in which legal writers use the word “equity” without reaching the hinge on which the Seventh Amendment’s constitutional right to a jury trial turns—the primary distinction between legal-common law remedies and equity-chancery remedies.<sup>6</sup>

In addition to chameleons that change meanings with context, other legal subjects feature synonyms which create the vocabulary surplus Garner refers to as “needless variants.” Restitution, as I mentioned above, is undergoing long-needed restatement, where a major problem will be how to simplify the plethora of terms legal writers use to describe the plaintiff’s restitution action to recover a money judgment. The general terms are general assumpsit, indebitatus assumpsit, quasi-contract, and contract implied in law; all are spongy words which confuse the uninitiated by sending a false signal to connect unjust enrichment-restitution with a bargained contract.

#### VII. Are document simplifiers potentially prey to literalism?

Although plain English lacks a timeless originalist base in which to discover the authentic meaning, an equivalent to prescient Framers and a static Constitution, simplifying law is vulnerable to excesses of literalism. As I am using the word here, literalism is the idea that a pure unambiguous language exists which transcends

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5. Z. CHAFEE, *SOME PROBLEMS OF EQUITY* (Thomas M. Cooley Lectures 1950).

6. Newman, *The Place and Function of Pure Equity in the Structure of Law*, 16 HASTINGS L.J. 401, 402-03 (1965).

time and context and admits no deviance. Lacking a sense of nuance, literalism rejects ambiguity.

Legal language which ultimately expresses governmental power almost always requires interpretation. The meaning of important terms is open, porous, permeable, and changing. The language of a legal rule, a legal realist would say, has play in the joints. Lawyers learn in law school to accept, even exploit, process and uncertainty. Legal language on this plane is primarily a technique of analysis, rhetoric, and argument about how to use the political process, including a judge and a jury, to determine who gets what, where, when and how.

Literalism, if it attempts to control meaning and manage discourse, neglects the reality that law is a dialogue, usually leading to an exercise of judgment.

### VIII. Is simplification sexy?

Simplification is preventive law. Clear thinking followed by clear writing creates the statute or the contract that works, the will that sends the property to the intended destination, and the jury instruction that facilitates the correct decision. These finales are not exciting, indeed they are even dull, for nothing singular has happened. Crisis is thrilling. Lawyers like the exhilaration of procedure, litigation, and, most of all, trials. The trial lawyer is the person in our business with name recognition. The clear writing maven resembles the public health doctor who after preventing an epidemic observes a surgeon basking in public acclaim and accolades after performing a novel transplant.

### IX. What is in simplification for me? Or, where is mine?

Where is simplification's payoff? Legal writing instructors enjoy low, if any, professional prestige. Law school champions of plain English have not, on the strength of their advocacy, received offers from more prestigious universities, large salary raises, consultant fees, and professional celebrity. I suspect the writing specialist receives a similar reception from substantive specialists in law firms and government agencies. Satisfaction with a job well done, yes, but wealth and fame, no.

### X. Will universal approbation greet simplification?

Part of the profession's inertia stems from the discomfiting message the writing nag communicates. People resist change. Substantive proficiency is not drafting proficiency. Simplifying

something a specialist thinks is already substantively finished is difficult and time-consuming. It takes introspection to accept the need for change, effort to transform turgid prose, and time to rewrite it. The simplifier walks the land of thin shoes and tender toes.

Under our legal system of winner take all, complexity which creates uncertainty means that legal talent, always in short supply, commands even more of a premium. Savvy, specialist lawyers who have mastered complexity and learned to live with process and uncertainty develop a vested intellectual interest in complexity and they too lack any genuine incentive for reform.

#### XI. Conclusion.

Sure we should work assiduously toward a single set of guidelines or principles. Internationalization, globalization, digitalism, inevitable context, the desire to prepare for every contingency, and even human cussedness all militate against a golden future age of plain and simple law. Professor Carol Mooney reminded us it took seven years to simplify something as specialized and ostensibly straightforward as the rules of appellate procedure. Simplification is going to be with us for a long time.