

The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance

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Pro se litigantsⁿ¹ used to be the only litigants in courts all over the world. In ancient times, every great civilization had its courts and laws.

But in those happy times, there was not a single lawyer to be found on the globe. Those involved in lawsuits or accused of crimes represented themselves. The plaintiff stood and stated a case, and the defendant gave a reply... In ancient times, a verdict was not made strictly in accordance with the technicalities of the law codes, which were intended only for guidance, but according to what the judge considered right, fair and just."ⁿ²

No one would advocate a return to the application of law as mere guidance. However, accompanying the acceptance of the notion of the rule of law is the law's ever-increasing complexity as well as the necessity of obtaining assistance from those with specialized knowledge of its contents to access the justice that is law's promise. Ironically, the necessity of legal counsel coexists with societal antilawyer sentiment, a relationship with a long history beginning in ancient Greece. What is different today from previous historical periods is that the pro se litigant is returning to court, insisting on access to justice without a lawyer.

The surge in pro se litigation, particularly in the family courts of every common law country, is reported in official reports and anecdotally by judges and court managersⁿ³ and in systematic studies.ⁿ⁴ Multiple causes are responsible for this trend, including increased literacy, consumerism, a sense of rugged individualism, the costs of litigation and attorneys' fees, antilawyer sentiment, and the breakdown of family and religious institutions that formerly resolved many disputes that are now presented to courts instead. Pro se litigants are a fact of life, and courts across the country are struggling with the perceived problems they present to [*37] judges and the legal profession. Pro se litigation is now the subject of many recent conferences, blue-ribbon committees and task forces, and judicial education seminars.

The purpose of this article is to offer a proposal to resolve the perceived quandary judges often face in light of the growing frequency of pro se litigants in their courts. It arises when a pro se litigant in general jurisdiction civil or family court case confronts a represented adversary. On one hand, judges readily acknowledge that all litigants are entitled to access to justice. On the other hand, they do not know how to reconcile their constitutional duty to provide a meaningful hearing (which I equate with access to justice) with their ethical duty to remain impartial. Currently, they tip the balance of these obligations in favor of their ethical duty to remain impartial--both in fact and in appearance--and they do so within our traditional, adversarial system, in which the judge's role is the passive umpire of the fight between what the justice system (and adversary theory) assumes are two represented parties. The result is not unexpected: The represented party usually wins.

The result of tipping the balance in favor of maintaining the appearance of impartiality is often a denial of a pro se litigant's claim or defense through strict enforcement of procedural or evidentiary rules.ⁿ⁵ Paradoxically, this act itself reflects bias--not merely in appearance, but in fact--in favor of the represented party, who is already advantaged unfairly by knowing the rules of the game while the pro se adversary does not. This practice often results in equal protection of the law only for represented parties.ⁿ⁶ Facing the judges in these scenarios are not only nervous pro se litigants but glaring attorneys frustrated at the delay caused by pro se litigants in the cases ahead of their own. They stand ready

in their own clients' cases to cry foul and object on the record--as the standard bearers of the sacrosanct adversarial system and its requirement of judicial impartiality--in the event the court actively assists the pro se litigant. Thus, pro se litigants, many if most of whom have come to court with the expectation that the court will assist them in obtaining justice, often encounter bench and bar resistance. They typically receive a hostile reception from overworked court staff who feel put-upon by having to educate them about the system and from agitated judges, frustrated by the lack of counsel in the case, who must show the attorneys--when one party is represented--that they will do whatever is necessary to uphold the adversary system and the requirement of impartiality, in appearance and in fact, even if an unavoidable consequence is a denial to a certain class of litigants of access to justice.

PUBLIC PERCEPTION OF ACCESSIBILITY TO JUSTICE

In *Meeting the Challenge*, we conducted a nonscientific survey of judges and found that they often encounter self-represented parties who expect the court to assist them. They detect "a sense that the court will be the pro se's defender." The judges variously describe the feelings on the part of self-represented litigants when that assistance is not forthcoming as a belief that "the system is fixed," "a feeling of isolation," and a "sense of unfairness, helplessness, and futility." n7

In a recent national survey on public perception of the state courts, 58 percent of the public stated that they strongly or somewhat agreed with the statement, "It would be possible for me to represent myself in court if I wanted to." n8 In commenting on these findings, Frank Bennack, CEO of the Hearst Corporation, which funded the survey, stated that

[*38] I think the perceptions about self-representation are interesting. On the one hand, that's good because it speaks to a favorable view of access. But on the other hand, Judges Wapner, Mills and Judy have created unreasonable expectations about the ease of interaction with the court system. And if so, and if that perception grows, are the courts ready to accommodate it? And should they? n9

It seems contradictory for a spokesman for a media concern that sponsored such a public survey and presented the results at a National Conference on Public Trust and Confidence in the Justice System to, on one hand, label as "good" the public's "favorable view of access" to justice, yet, on the other hand, imply that courts cannot and should not accommodate people with such views--views that his own communications industry helped to shape. I also question whether these television judges referred to are really showing the public how accessible justice can be or if they are showing the public how rudely they may be treated if they go to court. n10 In any event, the public's perceptions, as reflected by this survey, that they have a right of access to the courts and that courts should help them obtain that access, are reasonably justified both constitutionally n11 and morally. n12

We expect, after all, equal protection of the laws. The question is how to balance the right of access, including the court's obligation to give meaning to that right, with the principle requiring judges to remain impartial in fact and in appearance. The movement toward institutionalizing "up-front" (i.e., outside the courtroom) pro se assistance programs--which have served thousands of pro se litigants in the past ten years--is a positive one and shows no sign of slowing down. n13 But inside the courtroom, the biggest barrier remains the many judges and lawyers who, together, resist suggestions to reform their traditional adversarial roles or the complex rules by which they operate. Professor Luban and others, notably John Locke and Reginald Heber Smith, have noted the danger of not meeting the public's expectations that justice is accessible. According to Luban,

Equality before the law, like universal suffrage, holds a privileged place in our political system, and to deny equality before the law delegitimizes that system. . . . when these rights are denied, the expectation that the affronted parties should continue to respect the political system . . . that they should continue to treat it as a legitimate political system--has no basis. n14

Luban cited Locke in regards to the dire consequences of a legal system that permits the haves to trench upon the rights of the have-nots by failing to provide "the means for the have-nots to utilize the legal apparatus," being a right to resist their government. "Their alternative is the law of the streets, of resistance that is entirely rightful." n15 Smith, a Progressive Era advocate of legal services for the poor, warned that "where law recognizes and enforces a distinction

between classes, revolution ensues or democracy is at an end." n16

This, then, is the answer to the attorney who stood up at a recent judicial education seminar and--reflecting the views of many judges and lawyers--asked, "What is this? Why are we suddenly going all out to assist the pro se litigant?" The effort to develop pro se assistance policies and programs, including the writing of articles like this one giving thought to some of the issues in meeting that challenge, is based on an awareness of the significance of the loss of public trust and confidence in the courts to our orderly society.

[*39] THE JUDGE'S ROLE IN THE ADVERSARY SYSTEM

The literature about the common law adversarial system is vast and includes historical descriptions, comparative analyses of the adversarial system and the inquisitorial system of continental Europe, claims of the purported superiority of the adversary system (including inconclusive empirical studies), and many critiques of the American adversarial system. n17 Space does not permit a review of all aspects of the debate but, to place the judge's role in context, it is useful to briefly review the history of the adversary system. n18

Historically and anthropologically, leaders of small social groups as well as larger communities, including tribal leaders, priests, governors, and kings, served as the fountains of justice. n19 Their powers were said to come from the divine. n20 In English common law history, into which the roots of our adversary system extend, parties in the early twelfth century presented their cases before the king as best they could without representation. n21 The press of other matters and the increased rate of disputing led the king to delegate his justice-dispensing duties to his courtiers. n22 Divine intervention was retained as the mode of justice, but it took different forms in early medieval history. Civil and criminal disputes were decided by primitive trials by battle, wagers of law, and trial by ordeal. n23

As Professor Landsman pointed out, in none of these was there a need for fact finding. They each emphasized divine intervention, and the activity performed was, to an overwhelming degree, "carried on by the parties rather than by advocates." n24 These forms of trial declined as the clergy were in A.D. 1215 prohibited from participation, and trial by jury gradually replaced them during an evolutionary process between the late twelfth and eighteenth centuries (the civil and criminal juries having evolved separately). n25 By this time, the earlier, more primitive forms of dispute resolution had served two purposes: (a) They established the principle that the parties to a dispute were to play the preeminent part in the procedure leading to its resolution, an idea "fundamental to the adversary system"; and (b) they established the tradition that "restricts judicial control of litigation." n26

Early juries were selected by the king's officers and had local knowledge about the dispute. n27 They were active and inquiring during a trial. n28 By 1470, jurors were selected from areas other than where the dispute had arisen, which led to the tradition of impartiality in their selection. Judges had strict control over early juries, requiring often that they rule in the manner the king would wish. n29 By 1670, the jury came to be considered independent of government and the judiciary. n30

In continental Europe in the thirteenth century, combined aspects of Roman and ecclesiastical law caused the primitive forms of trials to decline and be replaced by a process that placed "fundamental emphasis on active inquiry by the judge to uncover the truth." n31 This system, the precursor to the inquisitorial system, gave the judge duties of investigation and evidence gathering, decision-making authority, and other extensive powers. In criminal cases, this power was limited by strict evidentiary requirements to establish guilt. n32

The adoption of the jury system permitted English courts to be open to "a broad spectrum of evidence to be assessed by our increasingly neutral and passive fact finder." n33 The fact finders' neutrality was also a product of the legal profession, the emergence of which was an evolutionary process beginning in the twelfth century, when parties were first allowed to appear by substitutes familiar with court procedures. n34 In the early fourteenth century, the king began the practice of recruiting judges from this emerging lawyer class. n35 Through the [*40] advent of the Inns of Court, formed for the purposes of training and governance of the bar, "the men formed the nucleus of a legal profession that would eventually assert exclusive control over the judicial machinery," thus diminishing the jury's investigatory role by giving lawyers the duty to supply them with evidence. n36

The rise of the legal profession gave its members a special status as masters of the law's evidentiary process. n37 Various evidentiary privileges and other exclusionary rules developed to prohibit the use of evidence in jury trials that was misleading, untrustworthy, not the best evidence, or hearsay. n38 As one comparativist explained,

Over time the employment of counsel to manage lawsuits . . . [led] to refinement of procedural arrangements and sophistication of procedural action: instruments evolved that permit virtuoso performance but that cannot properly be played by persons without special talent and proper training. n39

Thus, beginning in the 1640s, activism on the part of the judge and the jury was reduced, and by the eighteenth century, the jury was seen as neutral and passive as to facts (and as a check on despotic governments or judges); judicial neutrality and passivity took a little longer to develop because of the influence of the royal prerogative writs (e.g., mandamus, certiorari, prohibition) in the seventeenth and eighteenth centuries. n40

In America, middle-class merchants advocated for a common law in which precedent, rigorous rules, and the passive neutrality of the judge would provide the maximum predictability of outcome and, therefore, more individual control of the proceedings. n41 It was their interests that motivated the adoption of due process, trial by jury, and other constitutional rights. n42

In the United States of the early 1800s, judges were openly partisan, resulting in limits being placed on their political activism. n43 Coupled with the increasing importance and strength of the bar, judicial conduct came to be controlled by applying strict rules of evidence and limits on judges' comments to the jury at the end of a case. Attorneys' responsibilities as "purveyors of evidence and managers of litigation" were expanded. n44 Rules of evidence evolved during the period between the late seventeenth and early nineteenth centuries "designed to prevent the trial judge from taking too active a part in the prosecution of the case." These included placing of limits on judicial questioning of witnesses, which also "helped to curtail judicial activism." n45 Thus, it became part of judicial philosophy that "the best means to demonstrate neutrality was by using a disinterested and passive fact finder." n46 Both the English and American judicial process made increasing allowances for each party to run his lawsuit as he saw fit, to voice his claims and to select his evidence. The judicial decision was directly tied to the presentations of the parties. . . . [The] adversarial process was in the interest of lawyers as a group. It created even more work for attorneys, as increasing numbers of potential litigants sought legal advice, and provided a dramatic public outlet for their forensic skills. n47

In the early nineteenth century, ethical duties were established for attorneys, including that of zealous advocacy. n48 Social and economic changes resulted in courts' entertaining new claims, parties' being given more latitude to define issues and evidence, and an expansion of participation in the court process by different social and economic classes. n49 By the early twentieth century, reformers attacked the problem of delay in court proceedings by focusing on the enhancement of the judicial role in the settlement of cases through pretrial conferences "to determine not only the pace but the content and direction of litigation," while rules [*41] regarding the authority of judges to ask questions of party witnesses and to call court witnesses were "steadily liberalized." n50 All of these changes appreciably altered the adversary process "by encouraging judicial management at the expense of party control of proceedings." n51 Adoption of the Federal Rules of Civil Procedure and Federal Rules of Evidence, and modern modifications of those rules, have also served to sacrifice adversarial principles for an expansion of the judicial role in addition to reducing the advocates' ability to direct the proceedings. n52 Despite these changes, adversary theory requires the judge to remain passive until the conclusion of the advocates' presentations. He is not free to conduct an independent inquiry or otherwise accelerate the pace of the proceedings . . . [this passivity is] to ensure that the trier will remain neutral until he renders his decision . . . [and neutrality is to ensure] the integrity of adversarial deliberations. n53

Thus, we have come to believe that party-controlled courts receive more information than judge-centered courts; in an adversary trial, we are not--as surprising as it might seem to many--concerned with "material truth" because it is "not really possible given human weakness in perception, memory, [and] expression." n54

Professor Strier, a critic of the system, has argued that "belief in the adversary system leads to blind adherence to its rules of procedure often at the expense of substantive law and justice. In effect, the rules of the game become more important than the outcome." n55 This echoes Roscoe Pound's famous characterization of the adversary system as

reflecting the "sporting theory of justice," in which victory will be in the hands of the more skillful game player rather than the party with the more just cause. n56 When parties are mismatched because they have attorneys of differing levels of skill and competence, judges can do little to rectify the situation. Adversary judges do not ordinarily intervene in the name of justice; their role is limited to that of passive referee, ensuring that the rules are followed. But even here, the judge reacts (to objections of counsel) rather than initiates. Justice is said to result from observance of the system rules, a premise strongly criticized by detractors. n57

In comparison, the inquisitorial system was drawn from Roman civil law, which focused on the central authority of the state, and became the dominant mode of adjudication in continental Europe. In this system, the professionally trained judge takes an activist role and ensures a solution based on the merits of the case by calling the witnesses, asking most of the questions, and conducting hearings that are staggered over a period of time instead of culminating in a final trial as under the adversary system. Narrative testimony is invited and, with some exceptions, most evidence offered by the parties is admitted. Hearsay, opinions, character evidence, and prior convictions are not excluded unless better evidence is available. n58 With greater judicial involvement in fact finding, "the threat of one-sided distortions of misinformation appears less immediate, and the need to subject means of proof to testing becomes less compelling." n59

The conclusions to be drawn from the foregoing history are as follows: (a) The American adversary system has historical roots in English common law, which began with primitive means of dispute resolution in which unrepresented parties "controlled" the proceedings (through battles, ordeals, etc.), the outcomes of which were considered to be a product of divine intervention; (b) juries, as lay triers of fact, replaced these methods, concurrently with the adoption of procedural rules for uniformity of proceedings conducted by appointees of the king and with the emergence and evolution of the professional bar; and (c)

[*42] the system survives by requiring the litigants to be represented by lawyers who are trained in procedure and are governed by the Bar itself . . . and by emphasizing the judge's role in applying procedures rooted in tradition and in the common views of the legal profession. The greater the conflict between the parties, the more strictly the court enforces the rules. n60

Somewhere along the line, the interests of unrepresented litigants were forgotten until the creation of small claims courts in the early twentieth century. n61

UNDERSTANDING BENCH AND BAR RESISTANCE

The establishment in the Progressive Era of small claims court jurisdiction did much to alleviate the barrier of the high cost of litigation by eliminating the necessity of attorneys and applying relaxed rules of procedure and evidence. The public continues to benefit from small claims courts, although there is some evidence they are largely utilized by corporate creditors rather than individual litigants. n62 In the early 1900s, parties in domestic relations cases also seldom needed an attorney because various court officials assisted the litigants. Depending on the jurisdiction and the nature of the case, these cases were variously heard in general-jurisdiction civil courts, probate courts, municipal courts, and criminal courts. n63 Because of the state's interest in many of the proceedings that were conducted in criminal courts (e.g., criminal nonsupport and delinquency), probation officers or prosecutors assisted parties unable to secure legal assistance. n64 Soon, many jurisdictions began moving toward establishment of domestic relations courts with civil jurisdiction for divorce, maintenance, and custody matters. n65

Currently, domestic relations cases in every jurisdiction employ ordinary civil procedural and evidentiary rules, and, with the exception of cases involving recoupment of child-support payments paid by welfare agencies to divorcees on public aid, the state does not provide legal assistance to the parties. Indigent parties in such cases are provided legal services, but these are usually--due to the scarcity of legal services--limited to cases involving contested child custody issues. n66

It is now common knowledge among judges and court managers that the great tide of pro se litigation today appears on the steps of the family courts. n67 Judges in those courts are, therefore, the first outside the limited-jurisdiction courts to face the challenges of pro se litigation. Conversely, the challenge to adoption of court reforms that will provide

genuine access to justice for all pro se litigants--whether they be indigent, persons of modest means, or just fiercely independent--is a set of sociological and institutional constraints inhibiting the possibility of modifying judges' traditionally passive role.

First and foremost, judges in family (as well as general-jurisdiction civil and criminal) courts are law trained and, as lawyers, philosophically devoted to the adversary system. This stems, of course, from their loyalty to and socialization by the legal professions. They naturally equate judicial impartiality with judicial passivity, a notion deeply ingrained in all lawyers and judges. However, as one commentator noted,

There is some tendency in the literature to confuse impartiality with passivity. The two concepts must be distinguished. A judge can be impartial but very active in developing the case, as judges are in the continental inquisitorial systems. Impartiality is a requirement for fair adjudication, but judicial passivity is not. Those who confuse the two ideas betray a bias in favor of adversarial adjudication. n68

[*43] In my view, judges should not be rigidly passive; rather, they should provide pro se litigants what I call "reasonable judicial assistance" as an entitlement of living in a democracy and as a matter of constitutional right. The source of this constitutional right may of necessity be found in state constitutional law in light of the Supreme Court's view that judges are not obligated to assist a pro se litigant as a matter of federal constitutional law. The parameters of my conception of reasonable judicial assistance will depend on such factors as the facts of the case, the characteristic of the litigants, and the nature and scope of pro se assistance programs.

Second, judges operate within the framework of appellate court precedents that authorize judges to be passive. State appellate case law generally holds that procedural and evidentiary rules are to be strictly applied to all litigants, whether represented or pro se. n69 The only latitude the Supreme Court and some state courts have permitted a pro se litigant is a right to have his or her complaint interpreted with liberality in the context of a motion to dismiss. n70 Otherwise, it has been held that a criminal pro se defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course. n71

It has been suggested that this holding applies with equal force to civil cases, n72 and it also typifies the hands-off policy of most judges when confronted with a pro se litigant in the courtroom.

Third, we have judicial canons of ethics that also legally authorize judges to remain passive and justify their refusal to provide assistance to pro se litigants. n73 Judges and lawyers cite their state judicial ethics rules, most of which are modeled after the American Bar Association's *Model Rules of Professional Responsibility* (1983, amended 1990) (hereinafter *Model Rules*), which require in part that judges "avoid impropriety and the appearance of impropriety" in all judicial activities and act "in a manner that promotes public confidence in the integrity and impartiality of the judiciary." n74 The *Model Rules* further provide that "the test for an appearance of impropriety . . . is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." n75

Judges and lawyers who object to judicial assistance to a pro se litigant use the following argument on this issue: "Avoidance of the appearance of impropriety includes remaining impartial. If a judge assists a pro se, he or she may be perceived as not being impartial. Therefore, judges must avoid assisting the pro se litigant." This is a tempting but weak argument. It is based on certain unreasonable assumptions. One such assumption is that all forms of judicial assistance (however defined) constitute a per se appearance of bias/impropriety, a proposition with which, thankfully, most progressive judges will not agree, because of the wide range of assistance that conceivably could be provided (and is in fact being provided by many judges to both pro se litigants and inexperienced or incompetent attorneys), depending on the circumstances of each case.

Another assumption is that the represented party and his or her attorney, who are the pro se litigant's adversaries, are the sole "reasonable minds" referred to in the foregoing test for defining the occurrence of an appearance of impropriety (in the form of lack of impartiality). But, the reasonable-person test must be met by including others who might be

observing the proceedings as well as the general public--to which we usually refer when deciding the objectivity of conduct and what is reasonable--and whose expectations regarding accessibility [*44] to justice were described earlier. In other words, the fact that attorneys for represented parties complain about the appearance to them and their clients of bias from the court's assistance to pro se litigants should not be dispositive of the impartiality question. It is possible to formulate a cautionary admonition to the parties that addresses this issue, as described Proposal 3 below.

Thus, a combination of adversary ideology and legal constraints (i.e., case law and judicial ethics rules) justifies and sanctions judicial passivity. Most judges, in the face of actual or anticipated objections from counsel, rely on these legal obligations and give them greater weight than their concomitant constitutional duties to ensure due process in the form of a "meaningful hearing" and access to justice. One explanation for this, aside from the positive law described that judges dutifully follow, is the fact that they are loyal to the legal profession. Most judges were lawyers before they took office, remain lawyers while on the bench, and sometimes return to law practice. n76 Judges in most states also rely on the bar for financial support in the judicial selection process. n77 Thus, the challenge for reformers is twofold: to formulate legal policies that will both reverse this unfairness, tipping the balance toward meaningful hearings (beyond the abstract opportunity to be in a courtroom to present a claim or defense) and equal access to justice for both parties; and at the same time be politically palatable to--and, hopefully, supportable by--the bench and bar.

While their stated objection to pro se assistance is based on impartiality grounds, the bar has an obvious economic interest in minimizing pro se litigation. The members of the bar most concerned with pro se litigants are the solo and small-firm practitioners who handle small to medium-sized personal-plaintiff and domestic relations cases. Larger firms with institutional clients are not yet affected by pro se litigants, except for an occasional defense firm that may encounter them in a general-jurisdiction civil case from time to time. Members of this most resistant segment of the bar do not crassly admit their concern with the economic threat posed by pro se litigation but, instead, justify their resistance to pro se assistance on the same grounds as their opposition to nonlawyer practice, that is, public protection. They argue that it is better practice to ensure counsel for indigents through enhanced legal services and expansion of (voluntary) pro bono programs. The bar's resistance to pro se assistance may also be based in part on the fear that clients may realize that they, too, could have handled their own case, given the assistance they see court staff and judges provide to pro se litigants. This, however, ignores the reality that most pro se litigants are not pro se by choice; they cannot afford or obtain counsel for various reasons, and most would prefer having an attorney if they had a choice. So, it is not likely that large numbers of paying clients will simply decide to go it alone and try to negotiate the labyrinth of court procedures just because they see the court provide some assistance to their pro se adversaries.

There is another, unstated reason for some attorneys to oppose pro se assistance policies and programs. Attorneys have been fortunate thus far in having appellate case law justify the courts' requirement of strict compliance by all litigants with procedural and evidentiary requirements. n78 This has in many instances meant that their objections to pro se litigants' pleadings, offers of evidence, questioning of witnesses, and so on, have been sustained, resulting in dismissal or other denial of relief to the pro se litigant. n79 To remove the bar's ability to "trip up" pro se litigants and prevail on a basis other than the merits of the case will make winning in cases against pro se litigants more difficult, or at least more risky and less predictable.

The challenge is to persuade the resisting segment of the bar that economic opportunities will accompany the pro se phenomenon. Attorneys can--and many now do--offer unbundled legal services for pro se litigants who need and can afford a reasonable fee for [*45] some research, drafting, or coaching services. n80 Rules of legal ethics in most states need to be modified to recognize and authorize these services; many recent ethical issues have arisen with regard to this. Attorneys may also profit from correcting mistakes made by nonlawyer practitioners to whom many pro se litigants go because of the high cost of legal representation. As all practitioners know, a client who leaves satisfied after receiving advice or legal services of a minor nature will likely return in the future with a more substantial case, so these contacts can also be viewed as having a profit potential. Last, the smaller civil cases and family cases that many of the pro se litigants pursue often take much more time than anticipated, and fees do not keep up with the additional time spent on such cases. Not getting these cases is a benefit to attorneys who might otherwise take a loss on them, and it frees them up to spend more time on the better paying cases.

Finally, opponents of pro se assistance (programmatic or judicial) have not suggested alternatives to the current

unavailability of affordable counsel other than the need for increases in legal services funding and enhancement of voluntary pro bono programs. Nor have they offered, except in the case of explicitly unbundled legal services, to reduce their fees to service those of modest means ineligible for legal services. The establishment of programs, courtwide policies, and uniform judicial protocols for handling pro se litigants would be unnecessary (or their need greatly reduced) if legal services were available to those who desired and could afford them. We may be in a period of transition in which, absent a radical change in law practice, elements of society may eventually demand "a complete and systemic change as to the role and function of lawyers in our society, and how law schools prepare lawyers for those roles." n81

PROPOSALS FOR REFORM

In this section, I make recommendations for reform in several areas. They do not radically alter the adversarial system or the traditional role of the judge. Nor do they make the judge the feared gatherer of evidence who may unfairly side with the party whose theory of the case is consistent with his or her investigation, as is the claimed deficiency of the judge's role in the inquisitorial system. n82 But first, let me address the often-heard objection made by some members of the bench and bar with respect to any proposals to assist pro se litigants, whether they be programmatic in nature (e.g., ranging from the simple, such as adopting simplified court forms or instructional videos and brochures, to the more complex, such as educational clinics, courthouse facilitators, or comprehensive self-help centers) or might involve modifying the judicial role in the courtroom. That objection is "To assist pro se litigants is to encourage pro se litigation." n83

Implicit in this causal proposition is the belief that pro se claims will in fact increase if the word gets out that courts will assist unrepresented parties in having their claims meaningfully heard. Empirical evidence of that predicted causal relationship is, as far as I know, unavailable; but it is certainly something we should study in the future to meet the needs of the litigating public, represented and unrepresented. But, is it reasonable for those objecting to judicial pro se assistance to believe that the empirical evidence will bear out such speculation? I think not. As noted earlier, many people have the expectation that they would be able to handle their own court case if they had to, a belief that must rest in part on the reasonable assumption that this is what courts do in a constitutional democracy: They assist people in having their claims meaningfully heard. Even if the procedures are complex, the public assumes they will be assisted, just as many administrative agencies assist and guide them [*46] through often complicated procedures. Thus, it is more probable that if the word gets out that pro se litigants were treated fairly and provided reasonable assistance the news would only serve to validate already-held public expectations and enhance public trust and confidence in the courts rather than increase the frequency of pro se litigation.

The aforementioned antiassistance argument also implies that pro se claims are by definition--or in large part--illegitimate or frivolous. This is an unsupported assumption without basis in fact. While every court has its unusual pro se litigants, such as the "pests," "kooks," or militia-affiliated "constitutionalists," n84 there is no basis for asserting that pro se parties are any less sincere or have less legitimate claims or defenses than represented parties. Also implicit in the argument is that these claims should not take up the court's time, perhaps because it would be bad for judges to have more work to do and/or because pro se litigants are not worthy of having their claims heard by the court. As to the workload increase (which is at this juncture speculative), were the rate of pro se litigation to increase more than might normally be projected from population growth, creation of new legislative remedies, or other factors, the state would have the obligation in a democracy--as it has whenever any fundamental constitutional rights are affected--to provide resources adequate to secure people's rights, including the right of access to justice through effective means of legal dispute resolution. n85 As far as pro se litigants' not being worthy of having their cases heard (for reasons other than the purported frivolousness of their cases), this is another unsupported presumption and is frivolous itself. But there are judges who believe that there is "a real possibility of pro se litigants, especially the 'Constitutionalist,' clogging our judicial system" and who "can see a need to limit their access if that does happen." Conversely, some insightful judges share mine and others' belief that pro se litigants are "the symptom of a lack of access to justice, the seeds of future revolution." n86

Instead of resisting them, the bench and bar should recognize the significance and necessity of meeting the public's expectations of fairness and justice and establish "up-front" pro se assistance programs and pursue other access-to-justice-enhancing activities. n87 In doing so, they may wish to consider the following proposals relating to the roles

of court staff the judge and the attorney in cases involving pro se litigants. It is hoped that trial judges, who acknowledge the need to be more active with pro se litigants and want the authority to do so, will support these proposals or others like them, resulting in their future codification in the form of legislation and court rules governing procedure, evidence, judicial ethics, and professional responsibility.

1. The Court Should Train Court Staff to Provide Basic Legal Information to the Public Regarding the Elements of Common Causes of Action, Defenses, Statutes of Limitations, and Such Procedural Requirements As Those for Service of Process and Execution of Judgment

Court staff around the country complain that they are given inadequate guidance regarding the limits of assistance and information requested by and provided to pro se litigants. Commentators, most notably John Greacen, have offered guidelines to assist clerks in determining "how far they can go."ⁿ⁸⁸ In my view, these guidelines are too restrictive, and court staff should be free to offer a broader range of information. For example, I believe pro se litigants are entitled as a matter of due process to know the elements of commonly brought causes of action and defenses thereto. It is not enough to instruct a pro se regarding the method of introducing one's evidence if the litigant does not know the "rules of the game" with respect to what it is he or she is required to prove. Fortunately, where court forms for [*47] divorce are available, these already require insertion of the requisite information that, if properly proven, satisfies the elements of the divorce action. This is not usually the case with other family law actions involving the panoply of postjudgment issues or many civil actions in general-jurisdiction courts including negligence, various intentional torts, and breach of contract, where there are no court forms. In such cases, the public is entitled to know what elements must be proven and what test must be met (e.g., a "substantial change in circumstances" for modification of a divorce decree). Likewise, pro se defendants should be informed of the elements of the commonly available defenses.

In addition, pro se litigants often ask statute-of-limitations questions, questions about the proper person to serve (e.g., when suing a corporation), or about the manner of enforcing a judgment (whether it be a monetary judgment or an order of court). These are basic questions the public expects court staff to answer. Answering them does not necessarily involve unauthorized practice of law under any definition, and, if it did, the unauthorized practice rule or statute should be changed to permit court staff to provide such information. Court staff are an extension of the court and should be excluded from these UPL rules that ostensibly protect the public from competent nonlawyer practitioners rather than court staff.ⁿ⁸⁹ Statutes of limitation are relatively fixed, like penalties for traffic violations and criminal offenses, the latter being subjects about which court staff routinely answer questions. But, court staff generally will not answer a limitations question, much less direct the litigant to the appropriate part of a state code. The same holds true for service of process rules that, for example, specify that service of a complaint against a corporation is to be made on the registered agent of the corporation, and the methods of enforcing orders through rules to show cause, or monetary judgments through various forms of execution. These and other examples of basic legal information should be made available to the public, and there is no valid reason for keeping this information secret and in the exclusive possession of the bar and the court.

How far a court goes in providing such basic information will depend on public need, as measured by questions posed to court staff and the court itself. Of the various definitions used by state courts to define the practice of law, the most workable one is that which prohibits giving advice based on the application of the specific facts of a litigant's case to rules of substantive law.ⁿ⁹⁰ That should be the only "bright line" to guide court staff.

2. Pretrial Conferences Should Be Conducted by Court Staff or Judicial Personnel to Prepare the Litigants for Trial

Pretrial conferences are commonly used in most general-jurisdiction and family courts. Often, their use is limited to the weeks or days before trial or are only conducted when one of the parties requests that they be convened. They should be utilized liberally in pro se cases for several reasons. They provide an opportunity--in the absence of any pro se assistance program--for the court to review pleadings to determine their sufficiency, to narrow the issues, to provide instruction to the litigants regarding such matters as pretrial procedures (e.g., motions and discovery) and procedures for evidence gathering (i.e., type and proper use of subpoenas), for submission of evidence at trial, for preparing instructions in a jury case, to explain the order or proof taking, and for the purpose of ruling on all evidentiary objections. A judicial officer is not necessarily required to conduct preliminary pretrials. A clerk, law clerk, court staff attorney, or courthouse facilitator may be employed to conduct these conferences to the extent they involve providing basic legal

information, except perhaps for the conference immediately before trial. Those presiding over pretrials with pro se litigants [*48] should be authorized to enter uncontested orders, grant leave to amend or add parties, appoint special process servers, and handle other preliminary matters.

Multiple pretrials in a case should be conducted as needed. Group pretrials could also be conducted for many of these purposes in pro se cases. These conferences and instructional sessions will avoid the necessity of the court's having to repeat the same instructions about court procedures for each individual pro se litigant. Court staff should be exempt from UPL rules or statutes as they perform these and other functions relating to pro se assistance because they act as an extension of the court; likewise, they should benefit from a statutory qualified immunity from potential civil liability when performing these functions.

3. Judges Should Be Authorized to Provide Reasonable Assistance to Pro Se Litigants and Facilitate the Introduction of Their Evidence

The judicial role should be expanded by explicit rules authorizing judges to provide a reasonable degree of assistance to pro se litigants in presenting their claim or defense. Outside the courtroom and before trial, the nature of the assistance should be programmatic and instructional. In the courtroom, however, the court should assist by making sure all evidence the pro se litigant wishes to introduce is properly offered and admitted (unless found to be inadmissible due to privilege, irrelevance, immateriality, or redundancy--the hearsay problem being addressed in Proposal 5, below). It is common knowledge that judges often assist attorneys by suggesting the correct form of a question, a certain line of inquiry not being pursued, or the manner of properly offering a document or other item into evidence. This proposal would, therefore, authorize similar assistance to pro se litigants. It may seem to radically change the traditionally passive role of the adversarial judge, but it is really only a modest expansion of that role.

Under this proposal, a pro se litigant, having been instructed before trial about the mechanics of subpoenas and discovery, would appear at trial with his or her documentary and tangible evidence derived from those procedures. The court, which has ruled on evidentiary objections to the pro se's evidence at a pretrial conference, would ask the pro se to identify and mark the evidence he or she seeks to offer and then declare--absent a valid objection by the adverse party or a sua sponte decision to deny admission on the foregoing grounds--that the evidence be admitted. Many judges already "nudge" the pro se litigant and ask whether he or she wants certain items of evidence introduced into the record. n91 This proposal addresses the unfairness from the pro se litigant's inability to mark, offer, and move for admission of evidence, which often results in an adverse judgment from a court that strictly applies the rules of evidence. n92

Many attorneys will object to this proposal on grounds that such assistance will be perceived, especially by their clients, as a lack of impartiality on the part of the court. As discussed above, such assistance is only perceived as unfair by the represented litigant who already has an unfair advantage over the pro se litigant. The court, therefore, should begin the proceedings with a standard instruction or admonition to the parties and counsel (and the jury, if present) to this effect:

From time to time the court may assist the pro se litigant in this case by helping him or her to properly introduce evidence into the record. The court has a duty to provide a meaningful hearing and access to justice to all parties, whether represented or not, and a lack of knowledge regarding the proper method of introducing evidence because of a lack of counsel may not be a barrier to these rights. In addition, the court needs all relevant evidence to make a proper judgment. [*49] The court's assistance in facilitating the introduction of evidence should not be viewed as an indication of the weight, if any, the court will give that evidence.

Attorneys must also be separately informed (or by court rule notified) that they may not make objections on grounds of appearance of impropriety or lack of impartiality because of the court's facilitation of the introduction of evidence. Better still, they should have a duty to explain to their client before the hearing that the court has an obligation to assist pro se litigants to introduce their evidence and that they would receive the same assistance if they were unable to afford counsel.

4. Judges Should Be Permitted to Ask Questions, Call Witnesses, and Conduct Limited Independent Investigations

Judges, under *Rule 614 of the Federal Rules of Evidence* and under most states' procedures, already have the authority to inquire of witnesses and parties; and they do so on a limited basis, usually after each party has had the opportunity to conduct his or her own examination. Many of the decisions discussing the power of the judge to ask questions arise from criminal cases. For example, there are cases that permit judicial questioning "for the purpose of bringing out the facts"; n93 for the purpose of "eliciting the truth," as long as constitutional rights are not violated; to permit the defendant an opportunity to explain certain answers or reconcile certain statements n94 "to clarify the evidence"; and to conduct an "extensive examination" if the court "has reason to believe a witness is not telling the truth." n95 Most judges in small claims and domestic violence cases engage in extensive questioning of the parties and witnesses. As one judge explained,

Early on, I realized that it was necessary for me to keep absolute control of the structure of the trial or hearing. Because cross-examination between *pro se* parties rapidly could and did result in arguments, insults and potential violence, I have eliminated that step, and require that all testimony be directed to me as the judge. I am careful to let the parties state everything that they want to present, but prohibit interruption of their opponent's testimony or presentation. By my questioning of parties and witnesses, after their initial presentation I guide the proceeding to the important issues and avoid the inevitable effort to talk endlessly about facts or incidents which are not necessary to deciding the questions before the court. n96

Expressly permitting the court to engage in extensive questioning, by way of court rule or otherwise, will avoid the problems attendant to a *pro se* litigant who has difficulty formulating a proper question during direct examination or cross-examination. Some judges believe this approach is particularly well suited to custody disputes. n97 What if a crucial witness is not present, perhaps as a consequence of a *pro se* litigant's lack of understanding of the proper method of issuing a subpoena? If it finds, for example, that lack of such procedural knowledge was the reason why the witness is not present, the court itself should have the subpoena issued and continue the matter for a further hearing. But, if a crucial witness or piece of evidence has not been sought or called by either side, may the court conduct its own investigation and gather evidence for the record?

Most practitioners would say the court has no such authority. There are some reported cases in which a court's independent investigation was indeed found to be in error. n98 In one case, a judge in a criminal proceeding made an independent investigation through his secretary regarding whether the defendant had a driver's license under a name other than the one given when he was charged. n99 After the prosecutor had rested her case, the court announced [*50] to counsel that it had made such an inquiry and permitted the prosecutor--over defense counsel's objection--to reopen the proof, recall the defendant, and cross-examine the defendant with the information gathered by the court. In reversing the conviction, the appellate court reviewed the circumstances under which a judge may take an active role in the proceedings:

This is not to say that during a trial the judge should be merely a passive onlooker. . . . In some circumstances a trial judge may play a more active role, but when that happens, he or she must at all times "remain a disinterested and objective participant in the proceeding . . ." A trial judge, of course, has "not only the right but the duty . . . to participate directly in the trial, including the propounding of questions when it becomes essential to the development of the facts of the case . . ." This power should be sparingly exercised, however, for it is primarily the task of counsel, not the court, to develop the facts essential to the jurors' understanding of the case. . . . Judicial intervention may also be permissible, and perhaps necessary, when the judge detects "a patent omission which might vitiate a full adjudication of the defendant's guilt or innocence." . . . The trial judge [in this case] erred in undertaking an off-the-record investigation to check appellant's veracity on this point [regarding his denial that he had a driver's license]. n100

In another case, arising from a judicial misconduct proceeding, one charge of many against the respondent judge was that, in a criminal jury trial involving a hit-and-run accident, he directed his bailiff to contact a local auto parts dealer to see if he could obtain a rear tail light lens for the type of vehicle driven by the defendant. n101 During a lunch break, the judge--over both parties' objections--went to see the part, determined it was the same as used on the defendant's vehicle, and returned with it to the courtroom. When the proceedings resumed, he interrupted the defendant, who was in the middle of his testimony, and called the parts manager as the court's own witness. n102 The appellate court reversed the defendant's conviction because of the lack of legal authority for the judge's independent investigation.

While a judge may examine witnesses, "the manner in which [the judge] placed his own witness on the stand (by interrupting the defendant's testimony) seriously prejudiced the defendant." n103 The judicial conduct commission found this conduct prejudicial and sanctionable, and the California Supreme Court agreed. n104

The appellate court that reversed the criminal conviction referred to in the latter case stated, however, that it was not prepared to totally bar independent investigations by the trial court:

It is possible to imagine rare and extreme circumstances that could authorize a judge to initiate some investigation into matters that neither side is willing to pursue. Such circumstances should be limited to cases where the lack of judicial investigation will clearly result in substantial injustice. Even then, prior to undertaking any such investigation, the court should give prior notice of its contemplated action and an opportunity to the parties to pursue their own corrective action. Furthermore, the court should endeavor to remain as detached as possible from the investigative process through the use of such measures as a court appointed expert or investigator. The results of the investigation should not be presented to the jury unless counsel has had a reasonable opportunity to review the evidence and comment on the method of its presentation. In its desire to provide the jury with all relevant information, the trial court must take every precaution to ensure that the presentation of the evidence will not be interpreted as partisan advocacy. n105

There is no reason why the principles enunciated in these criminal cases should not have equal application to civil cases. The stated rationales supporting judicial question asking and the limited power to conduct an independent investigation and to call court's witnesses, that [*51] is, to "clarify" or "bring out" the facts, to "elicit the truth," to test a witness's veracity and determine whether perjury was committed, and to determine facts for the jury essential for the development of the case that were omitted by the parties, certainly appertain in civil cases of all kinds. Judges in several classes of cases, such as juvenile, child custody, and mental health, already take an active role in the proceedings. This is done to protect these litigants even when they are represented; pro se litigants are entitled to no less protection in their quest for justice. Moreover, these existing powers are in some ways already broader than the judicial role expansion I propose here. Under my proposal, a judge would not only be permitted to act for the foregoing purposes; he or she would be permitted to do such things as verify facts by telephone, including facts alleged to be hearsay by either party, or make other simple, factual inquiries, many of which may fall far short of sending an investigator to develop evidence. In some administrative proceedings, such as hearings conducted by the Chicago Department of Consumer Services, with which I am familiar, out-of-court witnesses appear by speaker phone, allowing the hearing officer and the parties an opportunity to question them.

A small claims court rule in California provides that those proceedings "shall be informal, the object being to dispense justice promptly, fairly, and inexpensively." n106 This language is typical of many small claims statutes, but a subsequent subdivision is somewhat unusual; it permits the court to "consult witnesses informally and otherwise investigate the controversy with or without notice to the parties." n107 In *Houghtaling v. Superior Court of San Bernardino County*, n108 the California Court of Appeals commented on this statute as follows:

As a matter of due process and fundamental fairness, courts should tread carefully in obtaining evidence ex parte and then ruling without giving the adverse party the opportunity to respond to apparently damaging evidence so obtained. On the other hand, the Legislature has evidently recognized that small claims litigants sometimes present their cases so inexpertly that the trial court can best serve justice by using its own experience and resources to investigate the matter and evaluate the facts. n109

There goes our adversary system! The point is that judges should have--and in some states already do have--explicit authorization to engage in question asking and witness calling and to embark on a limited independent investigation to ensure substantial justice. Both rules of court and judicial ethics provisions must be modified accordingly to free judges to engage in these activities and determine the "truth" in every case. I would suggest, however, that as a general rule, the parties be fully informed of the court's intent to conduct an independent investigation and be given an opportunity to provide the court with information that would make such an investigation unnecessary.

5. The Rules of Procedure and Evidence Should Be Relaxed in Cases Involving Pro Se Litigants

Relaxation of rules is another controversial area that is strongly resisted by the bench and bar. This is to be expected in light of the history of the evolution of the rules of evidence as previously described. But, it is a necessary reform in cases involving pro se litigants, who have no understanding of the rules or their rationales. The fact that this proposal is in direct contradiction to the general rule repeatedly announced in federal and state appellate case law--that procedural and evidentiary rules are to be strictly enforced against all litigants--makes reform that much more difficult. n110 Implementation of this proposal will, therefore, require adoption of new legislation and court rules.

[*52] As with the other proposals discussed above, there are existing precedents for them. For example, the Maine small claims court rule provides that

the rules of evidence, other than those with respect to privileges, shall not apply. The court may receive any oral or documentary evidence, not privileged, but may exclude any irrelevant, immaterial, or unduly repetitious evidence. The court shall assist in developing all relevant facts. The hearing shall be conducted in a manner designed to provide the parties with full opportunity to present their claims and defenses. n111

The Maine representatives to the American Judicature Society National Conference on Pro Se Litigation developed an action plan that includes a proposal to expand the scope of this rule to "all actual or potential self-represented litigants, regardless of income or type of case." n112

The case of *Houghtaling v. Superior Court of San Bernardino County*, n113 cited earlier in connection with the previous proposal, has an interesting discussion of the issue of relaxation of rules of evidence. The case involved a plaintiff who brought a small claims suit for negligent repair of his vehicle. In the original proceeding, he was permitted to introduce into evidence an out-of-state mechanic's notarized statement stating that the car had been examined and repaired and that the previous repairs to plaintiff's vehicle by the defendant were negligently made. Defendant appealed to the superior court. At the trial de novo, the statement was found inadmissible and the defendant prevailed. Plaintiff appealed, and the court of appeals reversed, reinstating plaintiff's original judgment.

The court explained that,

the current trend of the law is to defer to the intent of the Legislature . . . to create an informal and flexible forum in which disputes over modest sums of money may be resolved without the necessity for incurring disproportionate expenses or consuming undue amounts of time. n114

It cited precedent holding that the chief characteristic of the "informality" referred to in the small claims rules is that there are "no legal rules of evidence." n115 The court then reviewed the law of hearsay and its various exceptions based on their indicia of reliability and cited *Wigmore* for the proposition that the hearsay rule, like other technical rules of evidence, is generally "not vigorously enforced in bench trials." n116

The court then noted a "more practical" point that has application to cases beyond small claims:

It is simply unrealistic to expect lay litigants to understand and abide by the formal rules of evidence. How is a lay plaintiff to be made to understand that the bill for services which he presents to show the repair costs for his damaged property must be authenticated as a business record? Or that the police report of an accident proves nothing in the eyes of the law? Nor would strict enforcement of the hearsay rule serve the policies of speed and economy, if the result were to compel the parties to bring in numerous additional witnesses to testify in person. . . . In the case of inexperienced pro se litigants, it is better to err on the side of admitting an ore-heap of evidence in the belief that nuggets of truth may be found amidst the dross, rather than to confine the parties to presenting assayed and refined matter which qualifies as pure gold under the rules of evidence. . . . It is better for the trial court to listen patiently, even if it is mentally classifying the evidence as improbable, incredible, or preposterous. . . . We need not admonish judges not to rely on evidence to which no reasonable person could give any credence; this duty, and the ability to perform it, is inherent in the job. n117

[*53] I have found only one case in which a trial court judge was complimented for relaxing the rules of evidence in a general-jurisdiction case. In *Austin v. Ellis*, the New Hampshire Supreme Court, in a general-jurisdiction civil case, commended a trial judge for his conduct in relaxing the rules of evidence and making "a special effort to facilitate the [pro se] plaintiff's presentation of his case. n118 In another non-small claims case, the same court interpreted two rules, one

that affords a judge discretion to allow a late filing of a defense "for good cause shown" and another that provides that "as good cause appears and as justice may require, the court may waive the application of any rule. . . ." The court held that these rules entitled the trial judge in a hospital collection case to raise sua sponte the defense of statute of limitations for the pro se defendant debtor. n119

These cases enunciate principles that should be applied in family law and general civil jurisdiction cases involving pro se litigants. There is really no valid reason why they should not be applied to these other types of cases involving more significant issues and/or greater monetary sums. If genuine doubt exists regarding the reliability of an item of evidence, the limited independent investigation power discussed earlier could be invoked, or the matter could be adjourned to give the parties an opportunity to gather corroborating or contradictory evidence. The only thing that stands in the way of this type of reform is the legal profession's oft-heard cry that the court's impartiality would be threatened--a spurious argument, as noted earlier. The bar's real but unstated concern is the loss of the its long-standing unfair advantage over pro se litigants because of its specialized knowledge of the complex rules of procedure and evidence that must be understood to secure access to justice.

CONCLUSION

Just as judges and court staff must face the challenge of pro se litigation, reformers hoping to enhance pro se access to justice face the challenge of bench and bar resistance. The issues from either perspective are complicated by anti-pro se litigant case law built on adversary theory, which assumes that both parties are represented by counsel, and by the incorrect assumption that impartiality can only be preserved through judicial passivity. To afford unrepresented litigants meaningful access to justice, the role of judges must be broadened. Judges should provide reasonable assistance to pro se litigants, the parameters of which are discussed in the aforementioned proposals.

I disagree with Professor Luban, who suggested that gradual adoption of some elements of the inquisitorial system would be unsuccessful because "by so doing we would be sacrificing some important elements of popular control over the legal system" and because the changes would only be "trade-offs rather than clear-cut improvements." n120 The expansion of the judge's role as described is modest and does not radically change the judge's traditional adversarial role or the parties' control of the litigation. In fact, it restores the control pro se litigants used to have over their cases before the lawyerization of the courts.

Many features of the proposals are already in place; they only need to be codified and extended to pro se litigants to provide them with the equal protection of the laws to which they--like represented parties--are entitled. I also disagree with Professor Luban's assertion that delegalization is not a substitute for legal services. n121 The delegalization proposed here consists of eliminating the secrecy regarding basic legal information, such as the elements of causes of action, and relaxing the rules of procedure and evidence. These do not effect changes in substantive law, only in the fairness of the proceedings for all litigants. Even if proceedings under these proposals turn out to be, in one commentator's words, "litigation [*54] lite" n122 for pro se litigants and their adversaries, that is better than unfair litigation or no access to justice at all.

FOOTNOTES:

n1 *Pro se* is defined as "For himself; in his own behalf; in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court." *Pro per*, an interchangeable term used in some Western states (e.g., California and Arizona), is an abbreviated form of *in propria persona*, defined as, "in one's own proper person. It was formerly a rule in pleadings that pleas to the jurisdiction of the court must be pleaded in propria persona, because if pleaded by [an] attorney they admit the jurisdiction, as an attorney is an officer of the court, and he is presumed to plead after having obtained leave, which admits the jurisdiction." (Black's Law Dictionary 712, 1099 [5th ed.] [1979]). In the United Kingdom, the unrepresented are referred to as "litigants in person."

n2 ANDREW ROTH & JONATHAN ROTH, *DEVIL'S ADVOCATES: THE UNNATURAL HISTORY OF LAWYERS* 2 (1989).

n3 JONA GOLDSCHMIDT, BARRY MAHONEY, HARVEY SOLOMON, & JOAN GREEN, MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS (1998) [hereinafter MEETING THE CHALLENGE].

n4 Nicole L. Mott & Paula Hannaford, *A Picture of Pro Se Litigants: Who and Why?* (July 2001, unpublished paper presented at joint meeting of the Law and Society Association and Research Committee on Sociology of Law of the International Sociological Association [on file with author]).

n5 Mott and Hannaford, *supra* note 4, at 48, found that, "Comparing outcomes of cases with a pro se litigant matched against a represented litigant show [*sic*] evidence that the pro se litigant is at a disadvantage. The data show that in most sites the represented party was more likely to receive a favorable outcome." (*Id.*)

n6 "A system that routinely favors parties with lawyers over parties without, regardless of the merits of the cases, cannot be viewed as impartial" (footnote omitted). Russell Engler, *And Justice for All--Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORD. L. REV.* 1987, 2023 (1999).

n7 MEETING THE CHALLENGE, *supra* note 3 at 53.

n8 NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS 25 (1999). The report noted, "That expectation may in time pose a significant challenge for courts, particularly if it extends into kinds [*sic*] of cases beyond the traditional areas such as small claims where pro se litigants are prevalent. There were no significant differences between racial and ethnic groups on agreement with the statement." (*Id.*)

n9 *Id.* at 3.

n10 Some judges and attorneys believe that the public's expectation that they will receive assistance from the court in presenting their claim or defense is misplaced. They believe that we should disabuse the public of this belief by educating them about the values inherent in the adversary system, such as impartiality, which it is contended can only be achieved through judicial passivity and neutrality. Nonlawyers may interpret this to mean that it is more important to be impartial in an unjust proceeding (i.e., one in which litigants without counsel engage in the symbolic "fight" against represented parties with the proverbial "one hand tied behind their back") than it is to conduct a proceeding that is as just as it is impartial. I think nonlawyers would intuitively reject that justification for the refusal of a court to assist them (however *assistance* is defined) and would wonder why courts have not yet figured out a way to satisfy their right of access to justice--which is their reasonable expectation in our constitutional democracy--and a means for courts to preserve their impartiality. The proposals made below will hopefully contribute toward that end.

n11 The right of access to courts has been variously traced in U.S. Supreme Court case law to the privileges and immunities clause, the First Amendment right to petition the government for redress of grievances, the due process clause, and the equal protection clause. See MEETING THE CHALLENGE, *supra* note 3, at 19-22. The right of self-representation, according to Thomas Paine, is a natural right, the right to counsel being "an appendage to the natural right of self-representation." *Faretta v. California*, 422 *U.S.* 806, 830 n. 39 (1975). Recently, the Supreme Court held that the right of self-representation does not extend to appeals in criminal cases and that a state may require that a criminal appellant accept the services of a state-paid attorney on appeal. *Martinez v. Court of Appeal of California, Fourth Appellate District*. 528 *U.S.* 152, S. Ct. 684 (2000).

n12 Professor Luban has argued that a right to civil legal services for the poor is implicit as a matter of political morality; by denying legal services to a person in our constitutional democracy, we deny them equality before the law, and "to deny someone equality before the law delegitimizes our form of government." DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 251 (1988). He also argued that the state and the legal profession are responsible for our current inaccessible legal system, the state by designing a legal system "that cannot be operated by lay people," by enforcement of unauthorized practice of law (UPL) laws to "prop up legal fees without serving any other significant public interest," and by "conferring the advantages of the legal system on those who can afford to use it and building it on the backs of those who cannot"; and the legal profession by serving only clients who are well off. *Id.* at 247-48.

There is no moral right to counsel because there is no moral right to our particular legal system, it being only one means or strategy to achieving other needs and rights. But the right to legal services for the poor "follows from the notion of equal justice to which our legal system is in principle committed," a right "granted by the rules of the game," an "implicit right." *Id.* at 249.

n13 See AMERICAN JUDICATURE SOCIETY, A NATIONAL CONFERENCE ON PRO SE LITIGATION: A REPORT AND UPDATE Appendix B (April 2001) (reporting the results of a national survey of state court administrators describing 152 pro se assistance programs) [hereinafter AJS REPORT AND UPDATE].

n14 LUBAN, *supra* note 12, at 264-66.

n15 *Id.* at 255.

n16 *Id.* at 256.

n17 FRANKLIN D. STRIER AND EDITH GREENE, THE ADVERSARY SYSTEM: AN ANNOTATED BIBLIOGRAPHY (1990). While in need of updating, this volume is the best collection of the established sources on the subject.

n18 My proposal includes a recommendation to expand the traditional, passive judicial role. Whenever anyone begins suggesting modifications of the American adversarial system of justice, they are met, as I have been at judicial seminars, with some hostile comments by those who consider such talk as bordering on un-Americanism. After all, some believe that the adversarial system is culturally appropriate for Americans because of their predominantly adversarial, that is, competitive society; because it reflects "the same deep-seated values we place on competition among economic suppliers, political parties, and moral and political ideals. It is an individualistic system of judicial process for an individualistic society." Robert J. Kutak, *The Adversary System and the Practice of Law*, in DAVID LUBAN, ED., THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 172, 174 (1983). See also Anatol Rapaport, *Theories of Conflict Resolution and Law*, in COURTS AND TRIALS: A MULTIDISCIPLINARY APPROACH 22, 29 (1975) (arguing that the adversary system reflects the primacy of competition in our society, and is a "direct transplant of competitive economics into the apparatus of justice"). This, according to one critic, is "folklore [and a] legend because, if we are required to reach justice by way of competition, then the justice we achieve is not likely to be any more 'equal' than are the competitors who participate in the process. . . . We have prenatally agreed to do combat in the courts, and any second thought at this late date must be understood as requiring no more than minor adjustments. The system itself must be saved, because it is all that stands between us and the jungle." (Edmund Byrne, *The Adversary System: Who Needs It?* in MICHAEL DAVIS & FREDERICK A. ELLISTON, EDS., ETHICS AND THE LEGAL PROFESSION 204 [1986]) One German student in an American law school remembered his comparative law class, in which he, as a fervent believer in the inquisitorial system, "felt under constant attack. . . . Discussions appeared to me to be a pretext for emphasizing the superiority of my guest country's legal accomplishments. You need only mention adversarial versus inquisitorial proceedings to feel a chilling breeze on the back. . . . When emotions trump reason, the expectation of a reciprocal profitable exchange is eluded. Support for national legal rules has much in common with religious or patriotic sentiments. It is a case of 'my country, right or wrong.'" (Daniella Lupas, *An Introspective View of the Inquisitorial Trial*, 18 CRIM. JUST. ETHICS 17, 18 [1999])

n19 E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS 296-97, 324 (1954).

n20 MARTIN SICKER, THE GENESIS OF THE STATE 40 (1991).

n21 THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW (5th ed.) 216 (1956).

n22 *Id.* "And inevitably, as soon as business was entrusted to deputies, it became necessary to confine them within a routine, a strict procedure, a set of forms and a system of pleading. This in turn necessitated the growth of the legal profession." *Id.*

n23 For the most accessible history of the adversary system, although not necessarily the most impartial one, *see* STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND A DEFENSE* 8-9 (1984); and Henry Lea, *The Wager of Battle*, in PAUL BOHANNAN, ED., *LAW AND WARFARE: STUDIES IN THE ANTHROPOLOGY OF CONFLICT* 233-53 (1967).

n24 LANDSMAN, *supra* note 23, at 9.

n25 *Id.* at 10.

n26 *Id.*

n27 *Id.* at 11.

n28 *Id.*

n29 *Id.* at 12.

n30 *Id.* at 11-13.

n31 *Id.* at 13.

n32 *Id.* at 13.

n33 *Id.*

n34 PLUCKNETT, *supra* note 21, at 216-17.

n35 The result, one legal historian noted, was the beginning of "a remarkable relationship of goodwill and understanding between judge and barrister, which permits of real cooperation in the administration of justice." *Id.*, at 233.

n36 LANDSMAN, *supra* note 23, at 14.

n37 *Id.* at 14.

n38 *Id.* at 14-16.

n39 MIRIAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* 144 (1986).

n40 LANDSMAN, *supra* note 23, at 19-20; PLUCKNETT, *supra* note 21, at 394-95; SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 150 (2d. ed. 1959).

n41 Marian G. Neef & Stuart S. Nagel, *The Adversary Nature of the American legal System from a Historical Perspective*, 20 N.Y. L. FORUM 123, 157-58 (1974).

n42 *Id.* at 157.

n43 LANDSMAN, *supra* note 23, at 19-20.

n44 *Id.*

n45 *Id.* at 22. See also JAMES B. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW* 266 (1898)

(rules of evidence were "the child of the jury system"). A second, more modern view is that common law evidence is "the result of the prominent role partisan counsel play in gathering evidentiary material and presenting it to the court. On this second view, then, common law evidence is first and foremost the child of the adversary system." MIRJAN R. DAMASKA, *EVIDENCE LAW ADRIFT* 80 (1997) [hereinafter *EVIDENCE LAW*]. The latter perspective is reflected in T. P. Gallanis, *The Rise of Modern Evidence Law*, 84 *IOWA L. REV.* 499, 503 (1999) (the growth of exclusionary rules of evidence, e.g., the hearsay rule, due to "increased participation of lawyers in late-eighteenth century criminal trials"), and John Langbein, *The Criminal Trial before Lawyers*, 45 *U. OF CHI. L. REV.* 263, 306 (the technical niceties of the law of evidence are not so much the natural outgrowth of trials before lay juries as they are the "lawyerization" of trials).

n46 *Id.* at 24.

n47 *Id.* at 24-25.

n48 LANDSMAN, *supra* note 23, at 19-20.

n49 *Id.* at 24.

n50 *Id.* at 30.

n51 *Id.*

n52 *Id.* at 32. Under the Federal Rules of Evidence, relevant evidence is presumptively admissible, *FED. R. EVID.* 402, and the court's discretion has increased over the determination of preliminary facts, *FED. R. EVID.* 104(a), and the use of hearsay evidence. *FED. R. EVID.* 803(24).

n53 *Id.* at 34.

n54 *Id.* at 37. Professor Landsman argued that, if material truth were in fact the goal of the adversary system, any technique including torture would be permissible: "Truth is not the ends courts seek. Truth is nothing more than a means of achieving the end, justice." *Id.* Adversary system critics point out that parties in that system do not seek truth, but, rather, victory: "They may each present such divergent and conflicting versions of the facts, and may so skillfully resist the attacks of the adversary, that the decision-making is difficult. The adversarial exchange casts doubt on both competing versions of the facts, rather than simply demolishing error and triumphantly bringing forth a simple truthful record." (WILLIAM A. GLASER, *PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM* 6 [1968])

n55 STRIER & GREENE, *supra* note 17, at 23.

n56 Roscoe Pound, *Causes of the Popular Dissatisfaction with the Administration of Justice*, 40 *AM. L. REV.* 729, 738(1906).

n57 STRIER & GREENE, *supra* note 17, at 24. "The theoretical cornerstone of the adversary system is that the opposing sides are roughly equally matched. Critics refer to this dubious supposition as the adversary myth. As the gap between the idea and the reality of equality widens, the putative benefits of the system correspondingly diminish. Yet the gap is undeniable." (Franklin Strier, *The Real Crisis in the Courts*, 48 *THE HUMANIST* 5, 6-7 [1988]). "The adversary system results in full presentation of rival claims if both sides enjoy equal skill and resources." GLASER, *supra* note 54, at 7.

n58 Karl H. Kunert, *Some Observations on the Origin and Structure of Evidence Rules under the Common Law System and in the Civil Law System of "Free Proof" in the German Code of Civil Procedure*, 16 *BUFF. L. REV.* 122, *passim* (1966). Elimination of the jury under the inquisitorial system removes the need for exclusionary rules of evidence; it is admitted, with its weight or value determined by the judge. Hans-Heinrich Jescheck, *Principle of German Criminal Procure in Comparison with American Law*, 56 *VA. L. REV.* 239, 244-45 (1970).

n59 DAMASKA, *EVIDENCE LAW*, *supra* note 39, at 80 (1997). The inquisitorial judges are "free to inject themselves

in proof-taking if they so choose. . . . [This is perceived] as flowing from their responsibility for the correct decision--'the truth.'" *Id.* at 90-91. Professor Damaska pointed out that, unlike inquisitorial judges who are professionally trained for that position, American adversary justice relies on lay triers of fact (jurors). He noted the irony that the oldest and most widely accepted justification for Anglo-American evidentiary rules is "the need to compensate for the alleged intellectual and emotional frailties of amateurs cast in the role of occasional judges. . . . One would expect a legal process that glorifies novice amateurs as fact finders to presume their intellectual and emotional capacity for the job." (*Id.* at 28-29). Furthermore, common law evidence is highly complex because "The method prescribed in law for the conduct of fact-finding departs in large measure from the method of factual investigation employed in general social practice . . . [as] reflected in the rejection of much information that is otherwise probative, and in the distinctive manner in which the informational sources are tapped in the courtroom [and in other ways]. . . . In consequence, there is relatively little an untutored person can extrapolate from his or her ordinary life experience that can be used in forensic proof-taking without much lawyerly intermediation." (*Id.* at 11-12)

n60 GLASER, *supra* note 54, at 15. Reginald Heber Smith argued that denial of access to justice for the poor was a product of three factors, or "defects, which in their practical results destroy the impartiality of the administration of justice and thereby make impossible that absolute equality before the law which the ideal of democracy demands, which our form of government was designed to secure, and which it is trying to guarantee through a fair and sound substantive law. [The first difficult is delay, the second is court costs and fees which the poor are unable to afford]. . . . The third difficulty results from the trilemma that the machinery of justice can be operated only through attorneys, that attorneys must be paid for their services, and that the poor are unable to pay for such services. . . . Our legal institutions were framed with the intention that trained advocates should be employed, and . . . no amount of reorganization or simplification, short of a complete overturn of the whole structure, can entirely remove the necessity for an attorney." (See REGINALD HEBER SMITH, THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, BULL. NO. 13 (3d ed.), JUSTICE AND THE POOR 240-241, 1924)

n61 *Id.* at 41-59. Smith referred to small claims courts as the forum for claims that "are often contemptuously spoken of as 'petty litigation.' But it is in this very field that the courts have their greatest political effect. In every urban community these are the cases of the large majority of citizens. As they are treated well or ill, so they form their opinion of American judicial institutions. . . . "There is no reason why a plain, honest man should not be permitted to go into court and tell his story and have the judge before whom he comes permitted to do justice in that particular case, unhampered by a great variety of statutory rules." Instead of that, we have got our procedure regulated according to the trained, refined, subtle, ingenious intellect of the best practiced lawyers, and it is all wrong. This deplorable condition is not the result of the evil machinations of any group or class; *it is the consequences of the failure of the judicial system to keep pace with the changing conditions of life.*" (*Id.* at 42., footnotes omitted, emphasis added) The last statement is applicable to the current situation in our family courts and general-jurisdiction civil courts.

n62 Lawrence M. Friedman, *Access to Justice: Social and Historical Contexts*, in MAURO CAPPELLETTI & JOHN WEISNER (EDS.), ACCESS TO JUSTICE, VOL. II 5, 12-13 (1978); Beatrice A. Moulton, *The Persecution and Intimidation of the Low Income Litigant As Performed by the Small Claims Courts in California*, 21 STAN. L. REV. 1657 (1969); Barbara Yngvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC'Y REV. 219 (1975).

n63 SMITH, *supra* note 61, at 74. Turn-of-the-century reforms also included establishment of conciliation courts, described as "an entirely voluntary affair, an informal proceeding by which the two disputants are enabled to discuss the issue before a trained and impartial third person having the dignity of judicial office, who explains to them the rules of law applicable, informs them of the uncertainties and expense of litigation, tries to arouse their friendly feelings and suppress their fighting instincts, and if an adjustment agreeable to the parties is reached, draws up a proper agreement, has it executed, and gives it the sanction of a judgment." (*Id.* at 60-61)

n64 *Id.* at 78-79.

n65 *Id.* at 81. "While the territorial expansion of domestic relations courts will be rapid, the increase in jurisdiction of each court to include all domestic disputes and all proceedings relating thereto will probably be slow. There is a gulf, fixed by history and tradition, between civil and criminal matters that will not easily be bridged. The individualistic conception in law revolts at the idea of a court deciding a divorce case on what it knows through its own agents instead of from such

evidence as the parties choose to offer, and this idea will die only as the fact that the state is the supreme party in interest in all litigation, particularly domestic litigation, gradually becomes recognized." (*Id.* at 82)

n66 The Supreme Court has held that indigents have no constitutional right to counsel at state expense for civil actions. *Lassiter v. Dept. of Social Services of Durham, N.C.*, 452 U.S. 18 (1981) (termination of parental rights). Relying on its previous ruling in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court found no constitutional right to counsel absent the possibility of a deprivation of physical liberty. According to Professor Luban, "The fallacy in the Court's argument lies in its lopsided emphasis on physical liberty over all other interests. Why is there a 'presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of physical liberty'? To be sure, physical liberty is of great importance to us; but so are other things. We should not forget that the loss of physical liberty can be slight as well as great; when it is slight, other things can outweigh it. 'Losing one's driver's license,' Justice Powell and Rehnquist pointed out in their concurring opinion in *Argersinger*, 'is more serious for some individuals than a brief stay in jail.' I would rather do thirty days in jail than be fined twenty thousand dollars or lose parental rights. Wouldn't you?" (LUBAN, *supra* note 12, at 261-62)

n67 "A report to the California State Bar Committee on Courts and Legislation entitled 'The Pro Per Crisis in Family Law' notes that, while pro se litigation in general has increased, 'family law appears to be the most impacted by the growing trend to "go it alone."' . . . [This] has created serious problems for judges in family law matters, for court staff, for attorneys when the other side is unrepresented, and for the pro se themselves who are often 'at sea without a compass.' The report refers to a 'dramatic increase' and 'the flood' of unrepresented litigants who appear in family law cases." (GOLDSCHMIDT, ET AL., MEETING THE CHALLENGE, *supra* note 3, at 15-16, footnote omitted)

n68 See Ellen E. Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 *IND. L. J.* 301, 321 n. 96 (1989) (footnote omitted).

n69 See, e.g., "Pro se litigants are not entitled to special treatment in the courtroom and the normal rules of procedure apply without dispensation. . . . [A] defendant who competently elects to represent himself must assume the responsibility for his decision and its consequences. . . . Courts are not required to relax the rules of criminal procedure." (See *People v. Hudson*, 41 *Ill. App.* 335, 408 *N.E. 2d* 325, 329, 1980). See also *Newsome v. Farer*, 103 *N.M.* 415, 708 *P.2d* 327 (1985); *Creedon v. Asher Truck & Trailer, Inc.*, 1989 *Ind. App.* LEXIS 171, 535 *N.E. 2d* 148 (1989); *Lyddy v. Administrator, Unemployment Compensation Act*, 1995 *Conn. Super.* LEXIS 3526 (1995). Occasionally, a case will appear in which the court will give lip service to the notion that "courts will go to particular pains to protect pro se litigants against the consequences of technical errors if injustice would otherwise result," *United States v. Sanchez*, 88 *F. 3d* 1243, 1247 (*D.C. Cir.* 1996), but these cases are few and far between. Most cases use such typical language as, "The trial court is under no obligation to become an 'advocate' for or to assist and guide the pro se layman through the trial thicket." *United States v. Pinkey*, 548 *F. 2d* 305, 311 (10th *Cir.* 1977).

n70 See *Haines v. Kerner*, 404 *U.S.* 519, 520 (1972). *Accord Findlay v. Lewis*, 171 *Ariz.* 454, 831 *P. 2d* 830 (1991). It should be noted that there are also some courts that recognize that pro se litigants do not understand summary judgment procedure, and impose a duty on counsel to provide such litigants with a notice explaining "that a fact stated in the moving party's Statement of Material Facts and supported by admissible evidence will be accepted by the Court as true unless the opposing party cites specific admissible evidence contradicting that statement of material fact." See L.R. 56.1(i)(1), U.S. Dist. Ct. (S.D. Ind.). The latter rule also provides that the court may, "in the interests of justice or for good cause, excuse failure to comply strictly with the terms of this rule." *Id.* at (j). Federal case law is split on the subject of cautionary warnings to pro se litigants about summary judgment practice, with some courts requiring such warning for all pro se litigants, *Timms v. Frank*, 953 *F. 2d* 281 (7th *Cir.* 1992), and others limiting such warnings to prisoners. See *Jacobsen v. Filler*, 790 *F. 2d* 1362 (9th *Cir.* 1986).

n71 See generally *McKaskie v. Wiggins*, 465 *U.S.* 168, 183-84, reh. denied 104 *S.Ct.* 1620 (1984).

n72 See generally Julie Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 *U. OF CHI. L. REV.* 659 (1988) (suggesting that although pro se civil litigants are granted a liberal construction of pleadings by courts, pro se civil litigants should be entitled to other procedural flexibilities).

n73 This is, of course, a generalization, and we know that some judges are more active than others when it comes to handling a case with one or both pro se litigants. See GOLDSCHMIDT ET AL., MEETING THE CHALLENGE, *supra* note 3, at 57-58, for comments of "active" judges regarding their trial strategies, for example, "I give the pro se greater latitude and on critical issues I may ask questions and make my own objections that normally are made by trial counsel"; "The court begins the trial by asking extensive questions of each party, under oath; this seems to work well with custody cases, the bulk of our caseload"; "I guide them through the process a bit--making sure they know they have the right to object to the other party's proffered evidence and nudging them along by asking them if they want X to be marked and they want X to be admitted"; and "[I suggest] how the evidence sought might properly be presented."

n74 See AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL RESPONSIBILITIES, Canon 2, § A (1990) [hereinafter MODEL RULES].

n75 *Id.* at Commentary, § A.

n76 At a recent judicial conference, I commented that it appeared to me that some judges were more concerned with protecting the bar than providing a meaningful hearing to pro se litigants, to which one judge responded, "If it wasn't for the Bar, we wouldn't be here," prompting the audience to applaud.

n77 One commentator suggested that the reason why reforms of the adversary system are unattainable is not historical tradition or the common law's concern with individual liberties but, rather, society's need to preserve the image of the judge as a beneficent, distant idol "above" the human struggle of the courtroom. See ALBERT EHRENZWEIG, PSYCHOANALYTIC JURISPRUDENCE, 271 (1971).

n78 The cases stating this proposition are legion. See, e.g., *Lockett v. A.L. Sandlin Lumber Co.*, 588 So. 2d 889, 890 (1991) ("A party acting pro se must comply with legal procedure and court rules and may not avoid the effect of the rules due to unfamiliarity"); *Hines v. City of Mobile*, 480 So. 2d 1203 (Ala. 1985). See also cases cited, *supra*, note 61.

n79 One family law attorney puts it this way: "Above all, treat the self-represented individual with deference, civility and avoid any form of patronizing behavior. Do not bare your clenched teeth. Even if the pro se does not respond in kind, *the court will reward you by insisting that the pro se be held to the attorney standard of conduct, which is your ultimate goal.*" (emphasis added) See Lowell Halverson, *Family Law--Self Help Guide: The Pro Se Litigant in Dissolution Cases*, at <http://www.halverson-law.com/prose.htm> (last visited October 22, 2001).

n80 See, e.g., Advertisements on the Internet by ConsultingAttorney.Com, at <http://www.consultingattorney.com/> (last visited October 22, 2001) ("Our mission is to support people who do not have their own lawyers, and who are going through the California family court system by offering our attorneys' experience, knowledge and advice? You hire Consulting Attorney.Com to provide only the specific services that you request"); and by LawExpress.Com, at <http://www.lawexpress.com/askattorney/index.cfm> (last visited October 22, 2001) ("For only \$ 39.95, you can speak directly with an attorney in your state over the telephone. . . . Your telephone attorney will: listen to your situation, ask clarifying questions, explain how the law applies to you, identify the steps you can take to resolve your situation, [and] provide information and/or advice").

n81 Comment in margin of earlier draft of this paper sent as attachment to e-mail from Hon Dan Slayton, Judge Pro Tem, Superior and Justice Courts of Coconino County, Arizona, to author (October 4, 2001, 10:31 M.S.T.) (on file with the author).

n82 "If the judge is assigned the task of making factual inquiry, both theoretical analysis and empirical data suggest that his biases are likely to be intensified and his decisions opened to prejudicial influence." LANDSMAN, *supra* note 23, at 37. See also American Bar Association, *Professional Responsibility: Report of the Joint Conference*, 44 ABA JOURNAL 1159, 1161 (1958) (maintaining a neutral arbiter and partisan advocates is the only way to counteract the arbiter's natural tendency to prejudge while developing the arguments for the parties; if the court prepares the case, it will be disposed to publicly confirm what it has privately decided). Defenders of the inquisitorial system "concede this possibility. They contend it is worth the risk of some latent judicial bias to deny control of the proceedings to those

openly biased--the attorneys." STRIER, *supra* note 57, at 4. The modest proposal for expanding the role of the judge that I make avoids this controversy.

n83 "Some judges with a negative view of self-represented litigants have a deep mistrust of them or see them as a threat. As one judge put it, 'Some are just trying to get a free lunch. Some are quite knowledgeable and want to do things that a lawyer wouldn't let them do--they are most likely to attack the court or judge with lies and innuendoes.' . . . [Another stated] that taxpayers should not be compelled to fund what essentially is 'social engineering,' and that any encouragement or education of self-represented litigants about the judicial process 'will destroy our justice system.'" (GOLDSCHMIDT ET AL., *supra* note 3, at 52)

n84 *See* GOLDSCHMIDT, ET AL., *supra* note 3, at 60.

n85 Part of the resource issue is also a function of efficient court administration and management, that is, designing cost-effective pro se assistance programs and policies, using existing resources more efficiently, making organizational changes, and so on.

n86 Contained in the narrative responses to the judicial survey conducted for GOLDSCHMIDT, ET AL., *supra* note 3 (on file with the author).

n87 *See* GOLDSCHMIDT, ET AL., *supra* note 3, at 107-13, for a wide-ranging list of policy recommendations on the subject of pro se litigation formulated by a diverse bench, bar, and citizen advisory committee appointed by the State Justice Institute.

n88 *See* John Greacen, "No Legal Advice from Court Personnel" What Does That Mean? THE JUDGES' JOURNAL 10 (Winter 1995). *See also*, Michigan Court Support Training Consortium, *Michigan Judicial Institute, Legal Advice vs. Access to the Courts: An Interactive Training Program*, JERITT BULL. 1-3 (January-March, 1997). A growing number of states have found the Greacen guidelines persuasive and have adopted them in whole or in part.

n89 There are eight different definitions of the practice of law extant in state case law, Jona Goldschmidt, *Cases and Materials on Pro Se Litigation* (unpublished manuscript on file with the author), available at <http://www.pro-selaw.org/pro-sebib.html> (last visited October 22, 2001).

n90 *Id.* *See also*, *In Re Burson*, 909 S.W. 2d 768 (Tenn. 1995) (practice of law includes any act that requires the professional judgment of a lawyer, the essence of which is the lawyer's educated ability to relate the general body and philosophy of law to a specific legal problem of a client).

n91 "I guide them through the process a bit--making sure that they know they have the right to object to the other party's proffered evidence, and nudging them along by asking them if they want X to be marked and they want X to be admitted." (*See* GOLDSCHMIDT, ET AL., *supra* note 3, at 58)

n92 While I see a greater risk of appearance of impropriety problems with Professor Engler's characterization of the required degree of judicial assistance to pro se litigants as needing to be "vigorous," Engler, *supra* note 6, at 2028, preferring a "reasonableness" standard instead, I agree with his suggestion that the judge's role should be modeled after rules in use in small claims court and administrative settings. He cites several rules, such as the rule that requires judges to conduct trials in a manner "best suited to discover the facts and do justice in the case," MASS. UNIF. SM. CL. R. 7(c); a rule that states that "In an effort to . . . secure substantial justice," the court must assist the unrepresented litigant on procedure to be followed, presentation, of evidence, and questions of law, FLA. CT. SM. CL. R. 7.140(e); and a rule that provides that the court has a "basic obligation to develop a full and fair record . . ." ILL. SUP. CT. R. 286(b). *Id.*

n93 *See People v. Mortensen*, 26 Cal. Rptr. 746, 751 (1962).

n94 *See People v. Morris*, 292 P. 2d 15, 21 (1956).

n95 See *People v. Schuldt*, 160 Ill. Dec. 545, 552 (1991).

n96 See Tom Warren, *How to Remain Sane in Small Claim's Court, or an Anti-Harassment Hearing or Any Pro Se Proceeding*, ABA JUDICIAL RECORD 4 (Fall 1999).

n97 In *Meeting the Challenge*, we quoted one judge who said, "The court begins the trial by asking extensive questions of each party, under oath; this seems to work well with custody cases, the bulk of our caseload." GOLDSCHMIDT, ET AL., *supra* note 3, at 57.

n98 The cases discussed in this section regarding the subject of a judge's independent investigation are neither exhaustive nor representative of the law in every jurisdiction, but I believe the reasoning is illustrative of the manner in which the issue is treated elsewhere.

n99 See *Davis v. United States*, 567 A. 2d 36, 1989 D.C. App. LEXIS 241 (1989).

n100 *Id.* at 39-40. The court based its ruling on grounds that the independent investigation was a form of prohibited ex parte communication. It then found that the error was not harmless because this action by the judge did "both impeach appellant's credibility and undermine a critical part of his defense. . . . Because the judge's intervention substantially prejudiced the defense, we cannot find it harmless." *Id.* 41. Then, the court explained that "it was the court's exercise of discretion, more than anything else, that exacerbated the appearance of partiality. . . . We do not deny that a trial judge has a duty to expose perjurious testimony whenever possible. . . . Nevertheless, under our system of laws, a judge is not an investigator; the investigative function belongs to the parties and their agents. Laudable goals and lofty purposes cannot be attained when the cost is the loss, or even the appearance of loss, of judicial impartiality. . . . When the roles of neutral magistrate and partisan prosecutor become intertwined as they did in this case, the defendant's right to an impartial decision-maker is denied." (*Id.* at 42, footnotes and citations omitted)

n101 See *Ryan v. Comm. on Judicial Performance*, 45 Cal. 3d 518, 754 P. 2d 724 (1988).

n102 *Id.* at 536.

n103 *Id.*

n104 Curiously, the same court in *People v. Eilers*, 231 Cal. App. 3d 288, 282 Cal. Rptr. 252 (1991), found no error when, in a criminal case--over defendant's objection and specific request not to do so--the court gave the jury several less-included-offense instructions and defendant was convicted of one or more of these. Here, the court held that the trial court has a sua sponte duty to give instructions on necessarily included offenses where the evidence raises a question as to whether all the elements of the charged offenses were present and there is evidence that would justify a conviction of such a lesser offense. *Id.* at 255. The court explained, "Neither the defendant nor the People have a right to incomplete instructions. The requirement of instructions on lesser included offenses is based on the elementary principle that the court should instruct the jury on every material question. [Citation.] The state has no interest in a defendant obtaining an acquittal where he is innocent of the primary offense charged but guilty of a necessarily included offense. Nor has the state any legitimate interest in obtaining a conviction of the offense charged where the jury entertains a reasonable doubt of guilt of the charged offense but returns a verdict of guilty of that offense solely because the jury is unwilling to acquit where it is satisfied that the defendant has been guilty of wrongful conduct constituting a necessarily included offense. Likewise, a defendant has no legitimate interest in compelling the jury to adopt an all or nothing approach to the issue of guilt. Our courts are not gambling halls but forums for the discovery of truth." (*Id.* at 257) Some would question the validity of the distinction between drawn, by the same court, between the court's conducting an improper independent investigation and its proper sua sponte decision to provide instructions to the jury regarding offenses neither party had requested. The case does, however, show how certain forms of judicial activism will be upheld.

n105 See *People v. Handcock*, 145 Cal. App. 3d 25, 32-33, 193 Cal. Rptr. 397 (1983).

n106 See CAL. CIV. PROC. CODE, § 116.520 (West 2001).

n107 See *id.* at subd. (c).

n108 See *Houghtaling v. Superior Court*, 21 Cal. Rptr. 2d 855, 17 Cal. App. 4th 1128 (1993).

n109 *Id.* at 858, n. 6.

n110 See, e.g., *Marsh v. Wenzel*, 732 S. 2d 985 (Ala. 1998) ("Even though Marsh commenced this action pro se, we simply cannot relax the rules for pro se litigants") (footnote omitted).

n111 See ME R SM CL P R 6 (2000). Note the court's duty to "assist in developing all relevant facts," similar to the preceding proposal.

n112 See AJS REPORT AND UPDATE, *supra* note 13, at 35. The report points out that "since the proposed simplifications appear to challenge lawyers' traditional role of keeper of specialized knowledge of law and procedure, opposition from attorneys can be expected. If their peer group discussion is an indication, opposition may also come from judges. The judges' peer group noted the lack of public understanding of the importance of the rules of procedure and evidence as a problem. This initiative could take years, and will be particularly interesting to monitor." (*Id.*)

n113 See *Houghtaling v. Superior Court*, 21 Cal. Rptr. 2d 855, 17 Cal. App. 4th 1128 (1993).

n114 *Id.* at 857. The court cited Dean Roscoe Pounds's comment that "For ordinary causes, our contentious system has great merit as a means of getting at the truth. But it is a denial of justice in small causes to drive litigants to employ lawyers, and it is a shame to drive them to legal aid societies to get as a charity what the state should give as a right." (Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 318 [1913])

n115 The court quoted *Sanderson v. Niemann*, 110 P. 2d 1025, 1030, 17 Cal. 2d 563 (1941).

n116 *Houghtaling*, *supra* note 111, at 859, citing 1 Wigmore, EVIDENCE (Tillers rev. ed. 1983) § 4d.1, pp. 213-14. "Indeed, the occasional resistance to this policy of relaxed rules is described by the author as 'surprising persistence' or even 'stubborn persistence.' After all, there is no need for concern over the danger that the jury will overestimate the value of such evidence; the trial judge is routinely called upon to evaluate proffered evidence by balancing its probative worth against the danger that it will mislead the jury. This, there is significant precedent for permitting the judge, in a small claims matter, to receive all relevant evidence and then determine its probative value." (21 Cal. Rptr. 2d at 859)

n117 *Houghtaling*, *supra* note 111, at 859-861 (citations omitted). The court noted, however, that rules of privilege, which "reflect important concerns of public policy, rather than concerns over reliability" (*Id.* at 860) should still apply and that judges should still exclude evidence which is cumulative, overly time-consuming, or prejudicial (*Id.* at n. 9). The dissent argued against the admissibility of hearsay evidence in small claims, on grounds that to do so would "cause a general decrease in the appearance of fairness in such proceedings, which in turn could have an appreciable and adverse impact on the public's reliance on, and use of, small claims proceedings as a means of resolving suitable disputes. . . . The profferor of the hearsay evidence is in an unfair position because she or he would never be aware that in the judge's decision making process such evidence was going to be discarded as 'improbable, incredible, or preposterous.'" (*Id.* at 867) The dissenting judge proposed an alternative process in which the court, after receiving relevant hearsay evidence and an objection to it on the grounds of hearsay, first determines if an exception to the rule applies. If so, it should be admitted. If not, the court then determines if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. If it affirmatively so concludes, it should be admitted. This latter factor in the court's application of the rule preserves the basic underlying principle of the rule; that is, to be admissible, hearsay must have a degree of reliability and trustworthiness while also conforming with the informal nature of small claims proceedings. *Id.* at 870.

n118 See *Austin v. Ellis*, 408 A.2d 784, 785 (N.H. 1979). The New Hampshire Supreme Court followed the

recommendation of an ABA committee in declining to set any firm parameters regarding how far a judge should go to assist a pro se litigant: "The court is confronted by an especially difficult task when one of the litigants chooses to represent himself. The court's essential function to serve as an impartial referee comes into direct conflict with the concomitant necessity that the pro se litigant's case be fully and completely presented." (*Id.* at 785)

n119 See *Exeter Hospital v. Hall*, 629 A. 2d 88, 137 N.H. 397 (N.H. 1993) (interpreting New Hampshire District Municipal Court Rules 1.1 and 3.10A). The court, however, found the trial judge had abused his discretion in refusing the hospital's motion to reopen the proof and address the limitations defense. The concurring justice disagreed with the majority regarding the trial court's authority to raise the statute of limitations defense for the pro se defendant: "Raising an affirmative defense sua sponte, in my view, crosses the line from conscientiously explaining procedure to an inexperienced pro se litigant to intervening in the substance of a case on behalf of one of the parties. A pro se litigant should not receive a benefit from his or her decision not to retain the services of counsel." (*Id.* at 89)

n120 LUBAN, *supra* note 12, at 103. He further argued that each system has "complimentary pluses and minuses; why, then, look for greener grass on the other side of the fence?" *Id.*

n121 He is skeptical about "how simple the law could be made in a society as enormously complex as ours." *Id.* at 245, n. 20.

n122 See Jack M. Sabatino, *ADR As "Litigation Lite": Procedural and Evidentiary Norms Embedded within Alternative Dispute Resolution*, 47 *EMORY L. J.* 1289 (1998).