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In Defense of Rules and Roles: The Need to Curb Extreme Forms of Per Se Assistance and Accommodation in Litigation

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IN DEFENSE OF RULES AND ROLES: THE NEED TO CURB EXTREME FORMS OF PRO SE ASSISTANCE AND ACCOMMODATION IN LITIGATION

DREW A. SWANK*

TABLE OF CONTENTS

Introduction 1538
I. The Pro Se Phenomenon.....1539
A. The Cost of Counsel—The Usual Explanation for the Growth of Pro Se Litigation 1541
B. The Ability to Proceed Pro Se 1546
C. The Effect of Pro Se Litigation.....1547
D. The Response to Pro Se Litigation and the Growth of Pro Se Assistance 1549
1. Assistance short of legal advice.....1549
2. How to provide the information.....1551
3. Pro se programs that give legal advice 1552
E. Goals and Benefits of Pro Se Assistance Programs.....1553
F. The Perceived Failure of the Existing Pro Se Assistance Efforts 1555
II. Calls for Greater Assistance and Accommodation 1559
A. Different Rules for Pro Se Litigants 1560
B. Changing the Roles of the Judges, Clerks, and Opposing Attorneys 1563
1. Changing the role of the judge.....1564
2. Changing the duty of the clerk.....1569
3. Duties of attorneys to pro se litigants 1570
C. Eliminating the Adversarial System of Justice.....1571
D. The False Assumption as to Why Individuals are Pro Se.....1573

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E. The False Belief that Having Counsel Guarantees Access to Justice 1577
III. The Reality of "Justice" 1582
A. In Defense of Traditional Roles 1583
B. In Defense of Rules 1590
Conclusion 1593

INTRODUCTION

Probably the only thing growing as fast as the number of self-represented litigants in our state and federal courts are the efforts to assist and accommodate them.[1] These efforts, designed to ensure that all individuals have meaningful access to the courts, are laudable. Some proponents argue, however, that while current pro se assistance programs are a step in the right direction, they are not enough. They want even more "accommodation" by seeking to change the fundamental rules governing litigation and the roles of the main players in the judicial system.[2] They argue that judges, clerks, and even opposing attorneys have an obligation to advise and assist a self-represented litigant through the trial process.[3] They also assert that procedural and evidentiary rules should apply only to represented parties, and not those representing themselves.[4] In effect, there should be one system of justice for the represented, one for the pro se, and probably a third for when the pro se litigant is facing a represented party—naturally each must be separate, but equal, with the others. This article suggests that these proponents of greater pro se assistance and accommodation are wrong. Just as with schools and drinking fountains, "separate but equal" justice systems will be neither equal nor just.

In support of this argument, this article begins by examining the prevalence of pro se litigation and the current means of assisting the self-represented. It then analyzes the calls for greater assistance and accommodation of pro se litigants, and more importantly, explores the false

1. *See infra* notes 66-105 and accompanying text (discussing the effects of pro se litigation); *see also* Symposium, *Access to Justice: Does it Exist in Civil Cases?*, 17 GEO. J. LEGAL ETHICS 455, 479 (2004) (commenting that pro se litigation is increasing, particularly in family law, consumer law, and landlord/tenant law).

2. *See generally* Tiffany Buxton, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 138-47 (arguing that procedural and institutional reform in United States courts would benefit pro se litigants).

3. *See* Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 46-49 (2000) (arguing that court staff should be trained to provide basic legal information to pro se litigants, that pretrial conferences should be conducted to prepare pro se litigants for trial, that judges should be authorized to assist pro se litigants and facilitate introduction of their evidence, and that judges should be allowed to ask questions, call witnesses, and conduct limited investigations).

4. *See id.* (maintaining that new legislation and court rules should be adopted to relax rules of evidence and procedure in matters involving pro se litigants).

assumptions that underlie the notions of pro se litigation. Finally, the article explores how the calls for greater assistance and accommodation will do more to harm the administration of justice for all people—including the pro se. While this view is far from politically correct, the fundamental notions of fairness and justice for all demand a preservation of the traditional rules and roles.

I. THE PRO SE PHENOMENON[5]

All across the United States, from administrative hearings to oral arguments before the United States Supreme Court, people are representing themselves—and even sometimes prevailing.[6] The rates at which individuals represent themselves in court, and the fact that those rates have been rising, are well documented. For instance, in some state courts—those that handle traffic, landlord/tenant, and child support or other domestic relations issues, the number of cases in which at least one side is pro se far outnumber those in which counsel represent both parties.[7] In many of these courts, eighty to ninety percent of cases involve at least one pro se litigant.[8] While in many cases both sides will be unrepresented, in perhaps one-third or more of all litigation a pro se litigant is against a represented party.[9] This phenomenon is not limited to state courts. One

5. *See generally* Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 376-78 (2005) (examining the recent rise in pro se litigation, its reasons, and its implications).

6. *Cf.* Deborah J. Cantrell, *Justice for Interests of the Poor: The Problem of Navigating the System Without Counsel*, 70 FORDHAM L. REV. 1573, 1582 (2002) (noting the recent increase in pro se litigation, especially in those areas where the problems of the poor are more prevalent). *But see* Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel For Indigent Civil Defendants*, 10 GEO. J. POVERTY LAW & POL'Y 1 (2003) (stating that pro se litigants rarely prevail). *See generally* Buxton, *supra* note 2, at 107-08 (recounting pro se litigation's historical origins in British common law).

7. *See* Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1987 (1999) (referring to such courts as "poor people's courts") [hereinafter Engler, *And Justice for All*].

8. *See id.* at 2047 (explaining that studies have found such statistics for family law cases); Bonnie Rose Hough, *Description of California Court's Programs for Self-Represented Litigants* (2003) (collecting data on the number of pro se litigants in California's family law courts to show that they have increased dramatically in the last twenty-five years), *available at* www.unbundledlaw.org/Program%20Profiles/California%20SRL%20Projects.pdf; Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879, 1884 (1999) (stating that a 1990 study found that approximately ninety percent of divorce cases in Maricopa County, Arizona, involved at least one pro se litigant); Paul D. Healey, *In Search of the Delicate Balance: Legal and Ethical Questions in Assisting the Pro Se Patron*, 90 LAW LIBR. J. 129, 132 (1998) (reporting that eighty-eight percent of litigants in Washington, D.C., family court represent themselves); *see also id.* (explaining that over 30,000 people represent themselves each year in Minneapolis small claims court).

9. Engler, *And Justice for All*, *supra* note 7, at 2048.

study of federal litigation found that pro se cases constituted thirty-seven percent of all cases filed.[10] Overall, pro se filings account for approximately a quarter of all civil cases.[11] Once confined "to political dissidents or lawyer-haters, self-representation is no longer rare."[12]

The increase in the rate of self-representation is well documented.[13] For instance, in 1971, only one percent of litigants in California divorce cases were pro se.[14] By 1985, the rate had risen to forty-seven percent; more recently, the rate approached seventy-five percent.[15] In other California courts, there has been a thirty percent increase in self-representation in five years.[16] While the largest increase has been in family courts,[17] the rise is

10. Buxton, *supra* note 2, at 112.

11. Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 400 (2004) [hereinafter Rhode, *Connecting*].

12. Marie Higgins Williams, *The Pro Se Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles*, 71 U. COLO. L. REV. 789, 815 (2000) (citations omitted).

13. *See, e.g.*, Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 479 (2002) (explaining that filings in federal courts have increased dramatically and that a significant percentage of those filings involve pro se litigants); Ronald W. Staudt & Paula L. Hannaford, *Access to Justice for the Self-Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers*, 52 SYRACUSE L. REV. 1017, 1018 (2002) (commenting that filings by pro se litigants have increased in the past decade); John M. Stanoch, *Working With Pro Se Litigants: The Minnesota Experience*, 24 WM. MITCHELL L. REV. 297, 297 (1998) (stating that pro se litigation has increased recently in federal and state courts); Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145, 1145 (2002) (referring to the "increased presence of pro se litigants in the court"); Michael J. Mueller, *Abusive Pro Se Plaintiffs in the Federal Courts: Proposals for Judicial Control*, 18 U. MICH. J.L. REFORM 93, 101 (1984) (pointing out that pro se litigation has grown faster than case filings and caseloads and noting that much of the increase has come from prisoners); Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 107 (2001) (stressing the "rising incidence" of pro se litigants in family court); Candice K. Lee, *Access Denied: Limitations on Pro Se Litigants' Access to the Courts in the Eighth Circuit*, 36 U.C. DAVIS L. REV. 1261, 1280 (2003) (referring to the increase as a "floodtide"); John M. Greacen, Self Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know 1 (July 20, 2002) (referring to the increase as an "explosion")(on file with the American University Law Review). *But see id.* at 4 (citing data that suggests that the numbers of pro se litigants are not increasing, but rather remaining constant in those cases in which pro se litigants are common—domestic relations, domestic violence, child support, traffic, and landlord/tenant).

14. Hough, *supra* note 8; *see also* Frances L. Harrison et al., *Courts Responding to Communities: California's Family Law Facilitator Program: A New Paradigm for the Courts*, 2 J. CENTER CHILDREN & CTS. 61, 61 (2000) (indicating that, in 1980, only twenty-four percent of litigants proceeded pro se in California family courts); Engler, *And Justice for All*, *supra* note 7, at 2052 (mentioning that a 1985 study found that few litigants proceeded pro se in bankruptcy court).

15. Hough, *supra* note 8; Harrison, *supra* note 14, at 61 (contending that self-representation in divorce cases in California is approaching seventy-five percent); *see also* Engler, *And Justice for All*, *supra* note 7, at 2053 (stating that pro se litigants in bankruptcy court have increased dramatically since the 1980s).

16. Healey, *supra* note 8, at 132 (noting that pro se litigants in Santa Monica, California family court increased from thirty to sixty percent in the 1990s).

17. Berenson, *supra* note 13, at 105, 110; *see* Harrison, *supra* note 14, at 61 (noting that the increase has taken place "especially in family law").

not limited to state trial courts; pro se appellants in federal appeals courts have increased by forty-nine percent within two years.[18] The rise of pro se litigation, and its existence in the first place, leads to the most important question—why do people represent themselves in court?

A. The Cost of Counsel—The Usual Explanation for the Growth of Pro Se Litigation

Popular opinion holds that the reason for the increase in pro se litigation is the cost of attorneys and litigation.[19] It is also believed that all pro se civil litigants would have an attorney if only they could afford one.[20] Litigation is expensive—besides attorney fees and court costs, it can result in lost wages from missed work, increased child care costs, et cetera. In issues such as divorce, it can even involve relocating, changing jobs, or changing lifestyles.[21] One author states that "an uncontested divorce that does not go to court will cost around $16,500, whereas a contested divorce that proceeds to trial could cost more than $150,000. However, the average price for obtaining a divorce is around $20,000."[22] For the poor, many issues that require judicial intervention will never be litigated due to these costs.[23] When they do litigate, they are involuntarily forced to represent themselves.[24] As one author concluded:

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18. Buxton, *supra* note 2, at 112; *see also* Edward M. Holt, *How to Treat "Fools": Exploring the Duties Owed to Pro Se Litigants in Civil Cases*, 25 J. LEGAL PROF. 167, 167 (2001) (commenting that pro se cases represent a significant portion of the federal docket).

19. *See, e.g.*, Engler, *And Justice for All*, *supra* note 7, at 2027 (characterizing a litigant's appearance without counsel in "poor people's courts" as "coerced," and inferring that most litigants appear without counsel because they cannot afford it); Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 669-70 (1988) (stating that most pro se civil litigants appear without counsel because they cannot afford it); Healey, *supra* note 8, at 133 (explaining that self-representation is primarily dictated by economics); *see also* Joseph M. McLaughlin, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule*, 55 FORDHAM L. REV. 1109, 1132-33 (1987) (noting that litigants who can afford counsel rarely proceed without it); Richard Zorza, *The Disconnect between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 425 (2004).

20. *See* Lee, *supra* note 13, at 1265 (suggesting that pro se litigants who cannot afford an attorney actually want one).

21. Raul V. Esquivel, III, *The Ability of the Indigent to Access the Legal Process in Family Law Matters*, 1 LOY. J. PUB. INT. L. 79, 84-85 (2000).

22. Amy C. Henderson, *Meaningful Access to the Courts?: Assessing Self-Represented Litigants' Ability to Obtain a Fair, Inexpensive Divorce in Missouri's Court System*, 72 UMKC L. REV. 571, 574 (2003), at 573.

23. Esquivel, *supra* note 21, at 85; *see also* Harrison, *supra* note 14, at 61 (reasoning that lawyers' imposition of the full-service model on clients disenfranchises those clients who cannot afford it).

24. *See* Esquivel, *supra* note 21, at 92 (stating that, where court-appointed counsel is unavailable, the poor must represent themselves either "out of economic necessity as a plaintiff or by compulsion as a defendant."); Engler, *And Justice for All*, *supra* note 7, at 2027 (characterizing a poor pro se litigant's appearance in court without counsel as

> Ultimately, the predominant reason for self-representation may be simple economics. Only those whose liberty is threatened are guaranteed a lawyer. For others, legal representation involves paying fees at rates often over one hundred dollars an hour, perhaps with thousands of dollars in advance as a retainer, for representation in a case that can drag on for months or even years. Yet we live in a litigious society, and in the course of their lifetime many people will find themselves involved in a legal action that affects their fundamental interests, such as a divorce or other litigation. For many such people, obtaining counsel is simply not an option.[25]

"The inability of a large portion of American society to afford attorney assistance has been deemed one of the glaring failures of our system, straining the principle of equal justice under the law."[26] The perceived result is that pro se litigants reluctantly participate in the legal system.[27]

Unfortunately, the need for legal counsel has increased at the same time that more parties are representing themselves in court.[28] In the last sixty years, legal services "have become more of a necessity and less of a luxury when compared to the past."[29] Historically, when individuals cannot hire their own counsel, they have turned to low or no-cost legal assistance. Legal assistance can come from three sources: the government or private sector in the form of legal services programs, the courts in the form of court-appointed counsel, or the bar. All of these programs, designed to offer legal representation at no- or very low-cost to the litigant, have fallen short of meeting the demand.[30] Both governmentally and privately funded legal service programs lack resources to help many civil litigants even though they would otherwise be eligible for assistance.[31] Only a small

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"coerced"); *see also* Bradlow, *supra* note 19, at 662 (reasoning that indigent civil litigants must represent themselves because they are not entitled to court-appointed representation).

25. Healey, *supra* note 8, at 133.

26. McLaughlin, *supra* note 19, at 1132-33.

27. Holt, *supra* note 18, at 173.

28. *Cf.* Buxton, *supra* note 2, at 111 (commenting that legal services have become more of a necessity as people use the legal system more often for resolution of conflicts); Esquivel, *supra* note 21, at 80-81 (noting that increases in family litigation are out of proportion to increases in the population).

29. Buxton, *supra* note 2, at 111.

30. *See* Staudt & Hannaford, *supra* note 13, at 1019 (indicating that local pro bono and legal aid programs could not meet the demand for their services); *see also* Rhode, *Connecting*, *supra* note 11, at 378 (noting that certain societal and political constraints have limited the success of legal aid programs).

31. Eric J.R. Nichols, *Preserving Pro Se Representation in an Age of Rule 11 Sanctions*, 67 TEX. L. REV. 351, 384 (1988); *see* Fern Fisher-Brandveen & Rochelle Klempner, *Unbundled Legal Services: Untying the Bundle in New York State*, 29 FORDHAM URB. L.J. 1107, 1107 (2002) (noting that legal services in New York turn away thousands of potential clients each year due to budgetary constraints); Helen B. Kim, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right To Be Heard*, 96 YALE L.J. 1641, 1642 (1987) (commenting that legal services often turn away eligible clients because they cannot meet the demand for their services); *see also* Deborah L. Rhode, *Equal Justice*

fraction get assistance, and the assistance they receive is minimal—usually only brief advice and not the full-service legal representation that they need.[32]

Prior to the 1960s, there was very little government assistance for representation in civil litigation.[33] Recently it has gotten worse. Over the last two decades federal funding of legal service programs has been cut by a third while greater restrictions have been placed on the types of cases and clients government-funded programs can help.[34] Less than one percent of the nation's legal expenditures go to fund legal aid for the poor.[35] The lack of funding has resulted in four-fifths of the legal needs of the poor and two to three-fifths of the legal needs of the middle class being unmet.[36] The net result is that there is only one lawyer available to serve approximately 9,000 low-income persons,[37] and that, in the mid-1990s, approximately 9.1 million Americans' legal needs were unmet.[38] It has been estimated that it would take three to four billion dollars a year to meet merely the minimal civil legal needs of low-income Americans; ten times the $300 million now being spent.[39]

Other means of providing legal services to the poor have likewise failed. Except in very limited circumstances, courts routinely decline to provide

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Under Law: Connecting Principle to Practice, 12 WASH. U. J.L. & POL'Y 47, 54 (2003) [hereinafter Rhode, *Equal Justice*] (explaining that legal services is capable of handling less than one-fifth of the needs of its eligible clients).

32. Rhode, *Equal Justice*, supra note 31, at 54; *see* Kim, *supra* note 31.

33. Buxton, *supra* note 2, at 106; *cf.* Barry, *supra* note 8, at 1879 n.2 (noting that the Economic Opportunity Act of 1964 instituted the first federally supported legal services program for the poor; that prior to 1964, there were about 150 legal aid societies in the United States employing 600 lawyers with a combined budget of $4 million; and that within a few years of the Act's passage, that number grew to over 2500 lawyers with a budget in excess of $60 million).

34. *See* Cantrell, *supra* note 6, at 1575 (explaining that federal funding for the Legal Services Corporation, the primary source of funding for civil legal services, was cut by thirty percent from $400 million to $278 million in 1996); *see also* Kim, *supra* note 31, at 1648 (commenting that reductions in federal assistance to legal aid programs have further limited their availability); *cf.* Rhode, *Equal Justice*, *supra* note 31, at 50 (finding that legislative budgets for civil legal aid programs have been "minimal," as the federal government, which provides about two-thirds of the funding for such programs, contributes approximately eight dollars per year for those officially classified as poor).

35. Rhode, *Connecting*, *supra* note 11, at 371; Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1788 (2001) [hereinafter Rhode, *Access to Justice*].

36. Rhode, *Connecting*, *supra* note 11, at 371; Rhode, *Access to Justice*, *supra* note 35, at 1785; *see* Engler, *And Justice for All*, *supra* note 7, at 1987 (citing reports that eighty percent of the legal needs of the "poor and working poor" are unmet); Rhode, *Connecting*, *supra* note 11, at 371.

37. Rhode, *Equal Justice*, *supra* note 31, at 47; Cantrell, *supra* note 6, at 1573. *But see* Rhode, *Access to Justice*, *supra* note 35, at 1788 (stating that there is one legal aid lawyer or public defender for every 4,300 individuals under the poverty line).

38. Barry, *supra* note 8, at 1885.

39. Rhode, *Equal Justice*, *supra* note 31, at 50; Rhode, *Access to Justice*, *supra* note 35, at 1788.

court-appointed counsel in civil cases.[40] While courts can appoint counsel for a variety of reasons, often they do not.[41] With state budgets in crisis, the states and courts have little incentive to use what funds they have to provide counsel in civil cases.[42] Surveys indicate that the vast majority of the public favors legal representation for the poor, but only if it does not cost them—the taxpayers—anything.[43] As one survey found, the majority of respondents prefer legal assistance from volunteer attorneys and not government subsidies, and forty percent want only advice provided, not representation in litigation.[44]

The private bar, however, has also failed in providing assistance to those who cannot afford legal representation.[45] Less than one percent of our nation's lawyers work for legal aid organizations that are to assist the seventh of the population that is poor enough to qualify for aid.[46] Volunteer efforts by attorneys—pro bono work—have likewise failed. "State supreme courts have adopted only aspirational standards, coupled in a few jurisdictions with occasional court assignments or mandatory

40. Rhode, *Equal Justice*, *supra* note 31, at 55; *see* Rhode, *Access to Justice*, *supra* note 35, at 1788 (noting that courts appoint counsel in only a "narrow category of [civil] cases"); Tina L. Rasnow, *Traveling Justice: Providing Court Based Pro Se Assistance to Limited Access Communities*, 29 FORDHAM URB. L.J. 1281, 1283 (2002) (explaining that courts may appoint counsel in civil matters for a minor in probate or guardianship proceedings, when a party is incarcerated, or when a party cannot otherwise appear on his own behalf, such as in child support and paternity cases).

41. *Cf.* Nichols, *supra* note 31, at 384 (commenting that, while civil litigants have a right to counsel in "limited types of proceedings," those with "apparently meritless claims may not be given counsel as readily as others.").

42. *Cf.* Jeffrey Cohan, *Alleghany County's Legal Defense Fund Runs Dry*, PITTSBURGH POST-GAZETTE, Aug. 20, 2002 (reporting that Allegheny County ran out of money to pay court-appointed criminal defense attorneys), *available at* http://www.post-gazette.com/localnews/20020820defense0820p2.asp; Eric Bartels, *Protest Arrests May Clog Courts*, PORTLAND TRIB., Mar. 28, 2003 (stating that the state budget crisis led to the elimination of court days and delayed trials for months), *available at* http://www.portlandtribune.com/archview.cgi?id=17336. *See generally* David M. Herszenhorn, *How Did Such a Rich State Get So Poor?*, N.Y. TIMES, Dec. 22, 2002 (discussing recent budget crises in Connecticut), *available at* http://www.ccsu.edu/aaup/csu/herszenhornarticle.htm; Jeffrey L. Rabin, *State Spent Its Way Into Budget Crisis*, L.A. TIMES, Oct. 29, 2002 (describing recent budget crises in California), *available at* www.caltax.org/LATimes-StateSpentWayIntoBudgetCrisis10-29-02.pdf; Robert Sandler, *State lawmakers are calling this the worst budget in years*, Mar. 1, 2002 (discussing recent budget crises in Missouri and speculating about possible budget cuts), *available at* http://www.mdn.org/2002/Stories/Budget3.htm.

43. *See* Rhode, *Equal Justice*, *supra* note 31, at 53 (stating that the public generally favors legal assistance for the poor); Rhode, *Access to Justice*, *supra* note 35, at 1791 (claiming that between sixty-five and eighty-five percent of Americans support providing legal aid to the poor in civil cases); *see also id.* (explaining that there is broad support for public assistance in cases involving domestic violence, divorce, child custody, and fraud against the elderly, and that there is little support for such assistance in challenges to welfare legislation or prison conditions).

44. *Id.*; Rhode, *Access to Justice*, *supra* note 35, at 1796.

45. *See generally* Rhode, *Equal Justice*, *supra* note 31, at 59 (discussing the "failures of the bar" in assisting those who cannot afford counsel).

46. Rhode, *Connecting*, *supra* note 11, at 371.

reporting systems. Yet, most lawyers have failed to meet these aspirational goals, and the performance of the profession as a whole remains at a shameful level."[47] As one commentator noted:

> [R]ecent surveys indicate that most lawyers provide no significant pro bono assistance to the poor. In most states, fewer than a fifth of lawyers offer such services. The average pro bono contribution is under half an hour a week and half a dollar a day . . . . Fewer than a fifth of the nation's 100 most financially successful firms meet the ABA's standard of providing fifty hours a year of pro bono service. Over the past decade, when these firms' revenues grew by over fifty percent, their average pro bono hours decreased by a third. For many other employers, salary wars have pushed compensation levels to new heights, which has eroded, rather than expanded, support for pro bono programs.[48]

The small amount of pro bono work currently being provided has not relieved the need for legal services.[49] All told, "seventy to eighty percent or more of low-income persons are unable to obtain legal assistance when they need and want it."[50] One writer summed up the situation by stating: "It is a national disgrace that civil legal aid programs now reflect less than one percent of the nation's legal expenditures. It is a professional disgrace that pro bono service occupies less than one percent of lawyers' working hours."[51] The end result is that those who represent themselves in court will usually have no access to any professional legal advice.[52]

B. The Ability to Proceed Pro Se[53]

Regardless if a person wants to represent himself in court, he or she normally has the opportunity to do so. Historically, the ability in the United States to represent oneself in court dates to the founding of our country.[54] Having its roots in the British common law,[55] self-representation

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47. Rhode, *Equal Justice*, *supra* note 31, at 59; *see* Cantrell, *supra* note 6, at 1577 (asserting that lawyers have failed to provide adequate public assistance despite a significant "pro bono infrastructure").

48. Rhode, *Connecting*, *supra* note 11, at 59-60.

49. *See* Barry, *supra* note 8, at 1884-85 (stating that lawyer volunteerism in the District of Columbia has not made an impact despite an increase in the District of Columbia Circuit Judicial Conference's recommended per-laywer pro bono contribution to fifty hours per year or a financial contribution of four hundred dollars).

50. Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 FORDHAM L. REV. 2241, 2241 (1999) (citing COMMISSION ON NONLAWYER PRACTICE, AM. BAR ASS'N, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS 77 (1995)).

51. Rhode, *Equal Justice*, *supra* note 31, at 62; Rhode, *Access to Justice*, *supra* note 35, at 1819.

52. Esquivel, *supra* note 21, at 93.

53. *See generally* Swank, *supra* note 5.

54. *See* Holt, *supra* note 18, at 168 (noting that the right to represent oneself was first recognized in the Judiciary Act of 1789); *cf.* Goldschmidt, *supra* note 3, at 36 (explaining that, in ancient times, pro se litigants were the only litigants).

55. Buxton, *supra* note 2, at 107; *see also* Nichols, *supra* note 31, at 379-80

evolved as a combined proposition of "natural law," an early anti-lawyer sentiment,[56] and the egalitarian "all men are created equal" concept that "financial status should not have a substantial impact on the outcome of litigation."[57] The American ideal of justice is that both the wealthy and the poor can have access to the courts, and be treated equally before it with the resulting decisions being as fair as possible.[58] Open access to the courts for all citizens has also been viewed as being important for the development of law and public policy and the "avoidance of citizens resorting to non-judicial self-help."[59]

The Judiciary Act of 1789 was an early codification of this belief. It granted "parties the right to 'plead and conduct their own case personally' in any court of the United States."[60] Many states, either through their constitutions or statutorily, also provide individuals with the right to proceed pro se.[61] It is unclear, however, if there is a *right* to self-representation pursuant to the Constitution of the United States.[62] The Sixth Amendment guarantees criminal defendants the right to have assistance of counsel; by implication the Amendment has served as a basis to hold that criminal defendants can waive that right and appear pro se.[63]

(recognizing the "historical tolerance, if not preference," for pro se litigants in the Anglo-American judicial system).

56. *Cf.* Goldschmidt, *supra* note 3 (noting that necessity of counsel and anti-lawyer sentiment have a long history of coexistence).

57. Buxton, *supra* note 2, at 109 (discussing the creation in the United States of "paupers' rights"—court-ordered waivers of a poor litigant's court fees or costs).

58. *See id.* at 111 (explaining that the rationales behind a litigant's right to proceed pro se come down to a "court's attempt to reach the fairest result for the litigant under the circumstances.").

59. Nichols, *supra* note 31, at 380 (citations omitted).

60. Buxton, *supra* note 2, at 110 (discussing the Act as revised in 1948); *see also* Bradlow, *supra* note 19, at 661 (stating generally that a civil litigant's statutory right to represent himself began with the Act); Holt, *supra* note 18, at 168 (recognizing that the Act was the first to recognize a civil litigant's right to represent himself). This privilege continues today as codified in 28 U.S.C. § 1654 (2005). *See* Andrew Robert Schein, *Attorney Fees for Pro Se Plaintiffs Under the Freedom of Information and Privacy Acts*, 63 B.U. L. REV. 443, 467 n.146 (1983) (citing the 1976 version of the statute, which is identical to the current version).

61. Lee, *supra* note 13, at 1265-66; Bradlow, *supra* note 19, at 661.

62. *See* McLaughlin, *supra* note 19, at 1109 (commenting that it is unclear whether the constitutional right of criminal defendants to proceed pro se extends to civil litigants); Lee, *supra* note 13, at 1265 (explaining that courts are split on whether civil litigants have a constitutional right to self-representation); *cf.* John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After Faretta*, 6 SETON HALL CONST. L.J. 483, 596, 598 (1996) (arguing that the Sixth Amendment does not provide a right to self-representation). *But cf.* Bloom & Hershkoff, *supra* note 13, at 484-85 (implying that civil litigants have a constitutional right to appear in court without the assistance of counsel).

63. Bradlow, *supra* note 19, at 660; *see* Buxton, *supra* note 2, at 105 (explaining that the Sixth Amendment led to the increased protection of criminal defendants' pro se rights); *see also* Faretta v. California, 422 U.S. 806, 816 (1975) (providing examples of where the Supreme Court and United States Courts of Appeals have indicated that a criminal defendant has a right to represent himself). *But see* Decker, *supra* note 62, at 596 (arguing

Additionally, the First, Fifth, and Fourteenth Amendments have served as support for the right of individuals to have access to the courts without being represented.[64] Whatever right there is to proceed pro se in criminal cases, however, has not been extended by the Supreme Court to civil cases.[65]

C. The Effect of Pro Se Litigation

What have also been well documented are the negative anecdotal impressions regarding the increase in pro se litigation.[66] Pro se litigants are thought of as being underprivileged, uneducated,[67] and lacking basic litigation skills.[68] A pro se litigant is "untutored in the law, ignorant of his legal rights and unable to communicate effectively in writing."[69] The increase in pro se litigation has disrupted the efficiency of the courts, causing courtroom delays and overburdening judges, attorneys, and court staff.[70] Many pro se litigants require additional time at the clerk's office and in the courtroom because they do not understand the procedures or the limitations of the court.[71] Pro se litigants are "most often attacked for the judicial inefficiencies many judges, attorneys, and observers believe they create. They are more likely to neglect time limits, miss court deadlines, and have problems understanding and applying the procedural and

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that the Sixth Amendment right to counsel does not guarantee a right to self-representation).

64. *See* Nichols, *supra* note 31, at 379-80 (reasoning that pro se litigation implicates the right of access to the courts, which is guaranteed by the First, Fifth, and Fourteenth Amendments); *see also* McLaughlin, *supra* note 19, at 1116 (contending that the right of access to the courts guarantees pro se litigants an adequate hearing on all grievances).

65. *See* Nichols, *supra* note 31, at 379 (explaining that, in *Faretta*, the Supreme Court held that a criminal defendant has a constitutional right to self-representation, and that the Court has not extended that holding to civil litigants); *cf.* McLaughlin, *supra* note 19, at 1109 (commenting that it is unclear whether civil litigants have a right to self-representation).

66. *See* Buxton, *supra* note 2, at 114-15 (noting that judges, attorneys, and court observers often complain about the inefficiencies that result from pro se litigants); Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 312-14 (stating that the negative perception of pro se litigants has not been objectively studied or documented, but is rather based on anecdotal evidence); *see also* Connie J. A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCH. PUB. POL. & L. 989, 993 (2000) (providing an overview of studies that used anecdotal evidence from judges and court staff to conclude that pro se litigants adversely impact the court system).

67. McLaughlin, *supra* note 19, at 1119.

68. Holt, *supra* note 18, at 167 (citing Powell v. Alabama, 287 U.S. 45, 69 (1932)).

69. Mueller, *supra* note 13, at 101-02.

70. Henderson, *supra* note 22, at 576; Berenson, *supra* note 13, at 112-13; *see* Engler, *And Justice for All*, *supra* note 7, at 2050-51 (reporting that pro se litigants are perceived as "unduly burdening" court clerks); Esquivel, *supra* note 21, at 93 (noting that there is a belief that the cases of pro se litigants are slow to resolve).

71. Hough, *supra* note 8.

substantive law pertaining to their claim."[72] The self-represented are often described as "pests" and "nuts," who are an "increasing problem" clogging our courts.[73] Some pro se litigants may clutter up cases with rambling, illogical pleadings, motions, and briefs, intent on pursuing their own personal vendettas or advancing personal, social, and political agendas.[74] Some lawyers and judges even express concerns that pro se litigants are using their status to gain an unfair advantage over represented parties, who are required to "play by the rules."[75] The problems of pro se litigants in New York's Housing Court are so vast that they have led to periodic calls for the elimination of that court entirely.[76] Often overlooked is the effect that being pro se has on the litigants themselves; they often suffer more than judges, court administrators, and staff in pursuing their efforts to achieve justice.[77]

D. The Response to Pro Se Litigation and the Growth of Pro Se Assistance

It is precisely because of the growth of pro se litigation, and the problems encountered both by pro se litigants and the courts, that a variety of pro se assistance programs have been created. Assistance programs and courts designed primarily for the self-represented are not necessarily a new phenomenon. In 1921, California created a Small Claims Court designed for self-represented litigants; in 1978 the state created the Small Claims Advisor Program to provide free assistance to pro se litigants in these small claims courts.[78] Other states and courts have also created a variety of approaches for assisting pro se litigants,[79] paying millions of dollars to

72. Buxton, *supra* note 2, at 114.
73. Rosenbloom, *supra* note 66, at 381.
74. Nichols, *supra* note 31, at 351.
75. Engler, *And Justice for All*, *supra* note 7, at 1988; *see also* Healey, *supra* note 8, at 133 (contending that litigants may represent themselves to increase their chances for delay or a mistrial); *cf.* Mueller, *supra* note 13, at 98 (arguing that pleadings rules should be relaxed for pro se litigants); Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 44 n.2 (1989) (discussing how ethical constraints on attorneys do not fully apply to pro se litigants).
76. Engler, *And Justice for All*, *supra* note 7, at 2065.
77. Berenson, *supra* note 13, at 112, 115 (recognizing the adverse consequences that an increase in pro se litigants have on family law courts, but noting that such an increase may ultimately result in a "miscarriage of justice" for the pro se litigants, as their obvious disadvantage in the courtroom may result in denial of their meritorious claims).
78. Hough, *supra* note 8. By California statute, each county in California must provide some sort of assistance to pro se litigants before its courts. *Id.*
79. *See, e.g.*, Barry, *supra* note 8, at 1892-93 (describing Maricopa County (Arizona) Superior Court's Self-Service Center, which aids approximately 400 low-income people per day); Frances H. Thompson, *Access to Justice in Idaho*, 29 FORDHAM URB. L.J. 1313, 1319 (2002) (reporting that Idaho created Court Assistance Offices in each of its seven judicial districts to provide assistance to low-income people in family law matters); *see also* Berenson, *supra* note 13, at 122 (providing an overview of approaches that have been taken to address the adverse consequences of pro se litigation).

create or enhance pro se assistance efforts.[80] Whether government or privately funded, these pro se assistance efforts, "despite any variation in detail and structure, can be grouped into two basic categories: those designed to provide legal advice and those designed to provide assistance short of legal advice."[81]

1. Assistance short of legal advice

Providing legal information to pro se litigants increases their chances of success in legal matters.[82] Effective pro se assistance programs provide three types of information: how to bring an issue before the court, how the matter is processed before the court, and what to do after court in order to either comply with or enforce the court's order.[83] To help bring an issue before the court, the pro se litigant needs a basic overview of the court system and the forms needed to start the process.[84] The overview lets the pro se litigant know what a particular court can and cannot do, and describes the litigation process.[85] Providing simply written, court-approved forms, completed samples, and clearly written instructions is perhaps one of the most important functions a pro se assistance program can serve.[86] The best, most cost-effective programs not only provide clear, complete forms, but also written, video, or interactive directions that are easy to understand and in the pro se litigants' languages.[87]

The second type of information—about how a case is processed in court—should contain both procedural rules and local court administrative requirements.[88] Everything from a basic primer on courtroom behavior,

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80. *See Access to Justice: Does it Exist in Civil Cases?*, *supra* note 1, at 479 (stating that courts are pouring millions of dollars into self-help classes for pro se litigants).

81. Engler, *And Justice for All*, *supra* note 7, at 2001. *But see* Berenson, *supra* note 13, at 105 (classifying pro se assistance efforts into three categories: (1) efforts that embrace self-representation; (2) those which seek to increase the provision of legal services to pro se litigants by non-attorneys; and (3) those which seek to increase the availability of attorneys to self-represented litigants).

82. Lee, *supra* note 13, at 1282; Kim, *supra* note 31, at 1642.

83. Richard Zorza, *The Self-Help Friendly Court: Designed from the Ground Up to Work for People Without Lawyers* 17 (2002), *available at* http://www.zorza.net/Res_ProSe_Self HelpCtPub.pdf#search='The%20SelfHelp%20Friendly%20Court'.

84. *Id.*

85. *Id.*

86. *See generally* Barry, *supra* note 8, at 1892 (discussing a superior court's decision to use a Self Service Center to assist pro se litigants); John M. Greacen, *Legal Information vs. Legal Advice: Developments during the last five years*, 84 JUDICATURE 198 (2001), *available at* http://www.ajs.org/prose/pro_greacen.asp; *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 124, 301-05 (1997) (focusing on the burden that women and minorities face as pro se litigants).

87. Barry, *supra* note 8, at 1889-1919 (citing examples where a variety of formats proved useful in educating pro se litigants).

88. *Id.*

rules of evidence, and burdens of proof should be included.[89] The information should also specify how to request continuances from the court and what the possible consequences are of not following the court's orders.[90] This last aspect is the third and final type of information that should be included in pro se assistance information. How to comply with, or enforce an order, is often overlooked even though it is arguably the most important information a pro se litigant needs.[91] Just as prevailing at trial matters little if the judgment is not enforced, being held in contempt by the court for not understanding the ramifications of failing to follow its orders can be as bad, if not worse, as losing at trial.[92] Pro se assistance materials need to stress what to do after court, including how to appeal an order and how to request a rehearing.

2. How to provide the information

Just as there can be a variety of types of information to provide pro se litigants, there likewise are a variety of forms in which the information can be presented. These forms can be broken down into two basic types—programs with human interaction and impersonal or automated systems.[93] Programs with human interaction can include offices, information tables, and kiosks, court clinics, and "live" telephone systems manned by volunteer laypeople, pro se clerks, staff or volunteer attorneys, and law students.[94] General information about the law, procedure, and practice can be provided either individually or to a group of pro se litigants in a clinic setting.[95] Pro se litigants are typically assisted with finding the information needed to complete court forms, but generally the staff or volunteers do not prepare forms for the pro se litigant.[96] The goal of this approach is to provide sufficient information to allow the pro se litigant "to understand and access the type of pleadings required, basic rules such as service of process, basic information that the court will require to render a decision, and a sense of the range of remedies available."[97]

Examples of impersonal or automated systems include books, pamphlets, informational sheets, videos, automated telephone systems, and Internet

89. Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 JUDGE'S J. 16, 45 (2003).
90. Paula L. Hannaford-Agor, *Helping the Pro Se Litigant: A Changing Landscape*, 2003 CT. REV. 8, 14-15.
91. *Id.*
92. *Id.*
93. *See* Engler, *And Justice for All*, *supra* note 7, at 1999-2000 (listing a variety of ways that courts have dealt with the increase in unrepresented litigants).
94. *Id.*
95. *See* Barry, *supra* note 8, at 1883 (explaining that such clinics provide a range of critical information to pro se litigants).
96. Thompson, *supra* note 79, at 1314-15.
97. Barry, *supra* note 8, at 1883.

websites.[98] Videos on the court process, in pro se litigants' languages, can be very successful in walking litigants through legal procedures and explaining what they are likely to encounter in court.[99] Besides being able to be played in courthouse lobbies and waiting areas, videos can be lent to libraries, community organizations, and legal service providers.[100]

Perhaps the greatest potential for aiding pro se assistance efforts is the growth of information access and sharing through the Internet.[101] Forms and instructions are made available online, as are answers to frequently asked questions.[102] An eventual goal of such a technological approach is to create an Internet-based interactive system to generate forms using the pro se litigant's responses to a series of questions.[103] Computers are also being made available in courthouses to help pro se litigants; automated kiosks such as QuickCourt and ICan produce complete legal documents for use in court proceedings.[104] These interactive systems can be programmed to provide information in a variety of languages, with the goal of greatly reducing the number of questions posed to court staff while increasing the segments of the population that can be served.[105]

3. Pro se programs that give legal advice

Full-service pro se assistance programs—ones that not only provide legal information but also legal advice—are the legal equivalent to the "big-box" home improvement stores as they "suppl[y] the tools used to do the task yourself."[106] Some proponents of pro se assistance believe that telling people the law is not enough; programs also need to give guidance and advice on how to use the information provided.[107] Pro se assistance programs that give legal advice, in addition to all forms of information described above, fall into two basic categories: those programs that are

98. *See generally id.* at 1899-1919 (surveying types of assistance that courts provide in different parts of the country); Hough, *supra* note 8.

99. Barry, *supra* note 8, at 1915.

100. *Id.*

101. Margaret B. Flaherty, *How Courts Help You Help Yourself: The Internet and the Pro Se Divorce Litigant*, 40 FAM. CT. REV. 91, 91-93 (2002) (detailing the utility of self-sufficient websites for pro se divorce litigants).

102. Thompson, *supra* note 79, at 1314-15, 1318; Engler, *And Justice for All*, *supra* note 7, at 2000.

103. *See* Thompson, *supra* note 79, at 1320 (discussing a project aimed at aiding pro se litigants in domestic violence suits).

104. *See* Barry, *supra* note 8, at 1894 (noting that due to success of the assistance program, twenty-five kiosks were opened—though those privately run kiosks were unable to be financially self-sustaining, preventing the further expansion of the program).

105. *See* Staudt & Hannaford, *supra* note 13, at 1020 (noting counties' efforts to minimize strain on courts and pro se litigants through creation of self-help centers).

106. Barry, *supra* note 8, at 1894.

107. *See* Zorza, *supra* note 83, at 16-17 (concluding that piecemeal reforms will not resolve issues for pro se litigants); Kim, *supra* note 31, at 1643, 1650-51 (suggesting that information particularized to the pro se litigant's case is necessary for effective assistance).

court or courthouse based and officially sponsored by the court system, and those that are, both physically and organizationally, outside the court system.

Few court-based programs that provide pro se legal advice also provide any sort of representation.[108] As most of these programs serve a high volume of pro se litigants, often the legal advice given is not extensive.[109] Rather, the focus is on what the burdens of proof are for different causes of action, providing pro se litigants resources to better understand what he or she needs to do in order to meet those burdens,[110] or reviewing their pleadings and motions to ensure they are properly prepared and logically consistent prior to submission to the court.[111] A by-product of discovering what they would have to prove at trial in order to prevail is that many pro se litigants realize that they might be unsuccessful at trial and therefore may be more willing to seek lesser remedies or negotiate a settlement with the other party.[112] This process of evaluating the merits of claims is one of the more often overlooked roles of counsel and an area that is extremely vital to any pro se assistance program.[113] These programs provide advice in person, by telephone, or via e-mail.[114] Even with programs that provide legal advice, many queries are merely generic legal questions.[115] By performing initial case intake and screening, the court-based pro se assistance program can direct individuals to state and community agencies that might be able to help them with their underlying issues.[116]

The other form of pro se legal assistance that provides legal advice is provided by private attorneys, working either for free or reduced rates, and legal aid organizations operating outside the courthouse. While courthouse-based pro se assistance programs might refer pro se litigants to these programs, they are private entities separate from the official organizations that are operating within the courthouses.[117] These organizations provide the same services as the courthouse-based programs, but typically function under significant budgetary restraints.[118]

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108. Engler, *And Justice for All*, *supra* note 7, at 2001-02 (finding that pro se litigants benefiting from the aid of assistance programs do not receive much in the way of real legal advice).

109. *Id.*

110. *See* Thompson, *supra* note 79, at 1316-17 (noting that some judges require pro se litigants to have their forms checked by a Court Assistance Office prior to submission to ensure quality).

111. *Id.*

112. *Id.* at 1317.

113. *Id.*

114. *See id.* at 1317-18 (referring to support implemented by the Idaho Legal Foundation).

115. *Id.* at 1318.

116. *Id.*

117. *Id.* at 1314.

118. *See supra* notes 33-39 and accompanying text.

E. Goals and Benefits of Pro Se Assistance Programs

Regardless of the type of pro se assistance program, there are certain goals that are common to all programs. These goals include education of the litigation process, improving communication with the court, increasing litigant satisfaction, increasing access to justice, and increasing the efficiency and effectiveness of the courts.[119] An additional goal of any pro se assistance program would be to help the pro se litigant resolve his or her issues *without* going to court, either through settlement or alternative dispute resolution.[120] Having cases resolved out of court also helps to reduce the ever-growing burden on the court system.[121]

Pro se litigation assistance programs benefit the courts and other litigants in other ways as well.[122] Generally, after receiving information or assistance, pro se litigants' paperwork submitted to the courts is better prepared, litigants understand court processes better, are better able to present their case, are more self-confident, and less likely to have their cases rescheduled than those that do not utilize an assistance program.[123] Pro se litigants who understand what is going on, who file the correct paperwork with the court, and who are not constantly asking questions of court staff, place a lighter burden on the court and therefore free up resources for other litigants.[124] When pro se litigants are properly prepared, court proceedings have the potential to be completed with fewer continuances and more quickly than proceedings where both parties are represented.[125] Even the taxpayer can benefit through pro se assistance programs, as there is evidence that they are much more cost effective than other forms of legal assistance.[126]

Providing assistance to individuals who represent themselves is a response to the chronic lack of legal representation for all persons who

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119. Hough, *supra* note 8. *See generally* Kim, *supra* note 31, at 1641 (claiming the right to be heard in court lacks value if those heard as pro se litigants do not have the requisite knowledge to properly argue their claims).

120. *But see* Engler, *And Justice for All*, *supra* note 7, at 1988-89 (arguing that the pressure to settle often results in the forfeiture of a litigant's rights).

121. *Id.*

122. Barry, *supra* note 8, at 1881 (suggesting that for poor litigants, there is intrinsic value in understanding their rights and representing themselves rather than depending on pro bono representation); Henderson, *supra* note 22, at 575-76, 587 (referring to litigants who have had their confidence boosted through self-representation).

123. Thompson, *supra* note 79, at 1317; Greacen, *supra* note 13, at 2, 22, 24; *see* Henderson, *supra* note 22, at 587 (citing a national survey that reported lower numbers of document rejection where programs aided pro se litigants).

124. Engler, *And Justice for All*, *supra* note 7, at 2041; Henderson, *supra* note 22, at 587.

125. *See* Greacen, *supra* note 13, at 10 (providing a detailed chart that demonstrates the potential speed of cases featuring pro se litigants).

126. *Id.* at 3 (citing a report that found self-help programs were up to one-half the cost of other legal assistance programs).

desire it.[127] As access to justice cannot be predicated on having counsel,[128] the concept of pro se assistance remains an attractive, "next best" alternative to full-service legal representation.[129] Ultimately, the choice is not between having either a pro se program or not, but rather it is between having either a planned pro se assistance program or an unplanned pro se assistance program.[130] Even with a pro se assistance program, not all difficulties disappear; no matter how carefully forms are designed or how much help is given, some litigants will still have problems.[131]

F. The Perceived Failure of the Existing Pro Se Assistance Efforts

Despite the merits and enviable goals of pro se assistance programs, there nevertheless have been a variety of concerns and criticisms about them. Some critics feel these programs are not enough. They argue that the "educational" approach of pro se assistance

> [H]as resulted in a system that recognizes the need for access to justice through the courts yet simultaneously preempts any opportunity for a meaningful review of the pro se claims placed before it. This is largely due to the system's rigid adherence to the procedural motions and process of traditional litigation. As a result, although the procedural mechanism of proceeding pro se technically allows a large portion of our population to proceed with their claims, the net effect of this mechanism denies those choosing to proceed pro se a truly meaningful review of their claims.[132]

There is an inherent limitation of any information-based pro se

127. *Id.* at 12; *see* Kim, *supra* note 31, at 1647 (noting that unlike criminal defendants, counsel is not freely available to civil litigants); Rhode, *Equal Justice*, *supra* note 31, at 47 (citing a Legal Services Corporation's finding that eighty percent of legal services needed by the poor go unmet); Fisher-Brandveen & Klempner, *supra* note 31, at 1107.

128. Goldschmidt, *supra* note 13, at 1208-09 (touting the benefits of "ghostwriting," despite its disfavor in the legal system). "It is hypocritical to claim to provide fairness to everyone through a system that is not prepared to do so for those without lawyers." Engler, *And Justice for All*, *supra* note 7, at 2031.

129. Peter D. Houk & Donald L. Reisig, *Access to Justice: Facing the Challenge of Unrepresented Parties: Pro Se Assistance Relies on Bench-Bar Cooperation*, 78 MI BAR J. 1126, 1126 (1999) (discussing unrepresented litigants in divorce proceedings); Rasnow, *supra* note 40, at 1284 (analyzing the Family Law Pro Se Clinic for the Ventura Superior Court); Barry, *supra* note 8, at 1882 (questioning whether the emphasis of pro se programs on domestic relations issues is due to the volume of domestic relations cases or to the undervaluing of the issue).

130. Barry, *supra* note 8, at 1889-1919.

131. *Id.* at 5; *see* Berenson, *supra* note 13, at 106 (proposing a legal assistance program loosely based on medical education programs); Rasnow, *supra* note 40, at 1310-11 (emphasizing the continued need for legal aid programs, pro bono and social services); *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, *supra* note 86, at 310 (reminding that at times it is appropriate for a court to appoint counsel to a pro se litigant).

132. Buxton, *supra* note 2, at 106.

assistance program: telling people the law is not enough.[133] While telling a pro se litigant how to act in court, what to bring, and how to fill out a form is important, it will neither prepare him for all of the obstacles he will face, nor serve as a substitute for representation by qualified, competent counsel.[134] Programs that provide legal advice are little better; limited encounters with lawyers and assistance from non-lawyers may not provide pro se litigants with enough assistance and information to enable them to make informed choices about their cases or fully pursue their legal rights.[135] Even the most eager and intelligent pro se litigant cannot be expected to learn and understand procedural and substantive law in a short amount of time.[136] Legal rights are often overlooked as users take as gospel, and rely upon, the generalities offered in assistance—even though there are disclaimers that the information provided is general in nature and not a substitute for legal advice.[137] Encounters with pro se assistance materials or staff may produce only partially prepared, and often confused, pro se litigants[138] who gain a false sense of security from such encounters.[139] This can be especially true if the pro se litigant lacks functional literacy to understand the pro se assistance material.[140]

Another of the most consistent criticisms of current self-represented assistance programs is the resistance to allowing judges, clerks, and court staff to provide legal advice.[141] No matter how many self-represented assistance programs there are or how simple forms may be designed, clerks will always be asked questions,[142] and "handing out forms coupled with referral to a kiosk or clinic is not always the best response."[143] Furthermore, as self-represented litigants may require assistance before,

133. Zorza, *supra* note 83, at 14; *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, *supra* note 86, at 310; Kim, *supra* note 31, at 1643, 1650-51.

134. *See generally* Staudt & Hannaford, *supra* note 13, at 1020-21 (analyzing a research project that addressed the issue); Engler, *And Justice for All*, *supra* note 7, at 2002-03 (stressing that programs do not usually provide assistance for the duration of the proceedings); Goldschmidt, *supra* note 13, at 1207 (defending the practice of ghostwriting for pro se litigants).

135. Engler, *And Justice for All*, *supra* note 7, at 2002-03, 2005; Staudt & Hannaford, *supra* note 13, at 1020; Barry, *supra* note 8, at 1890.

136. *See* Rosenbloom, *supra* note 66, at 306 (claiming pro se litigants are nearly unanimously under-prepared to argue their claims).

137. Barry, *supra* note 8, at 1889.

138. Engler, *And Justice for All*, *supra* note 7, at 1890 (noting that assistance programs aid in the unrepresented litigant's endeavor).

139. *Id.* at 1888.

140. *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, *supra* note 86, at 308 (explaining that in several judicial districts in New York, forms are only available in English).

141. Barry, *supra* note 8, at 1880.

142. Greacen, *supra* note 86, at 199.

143. Barry, *supra* note 8, at 1916-17.

during trial, and after trial, some argue that the clerks and other court staff are in a unique position to provide the assistance.[144] Traditionally, clerks and court personnel have been allowed to provide legal information, but not legal advice. What constitutes legal advice versus legal information is nebulous at best; despite numerous attempts to define the difference, there is no clear, consistent answer.[145] To make the distinction some focus on the phrasing of a question,[146] but as critics correctly point out, the questions clerks receive rarely come formatted and phrased so as to be classified correctly.[147]

Ultimately, some argue that even with the assistance currently given, pro se litigants still may not have meaningful access to the courts.[148] Designers of pro se assistance programs admit that such programs are often inadequate to meet the needs of the litigants or ensure their access to justice.[149] Critics stress that limited-assistance models, operating under the traditional rules, are insufficient in helping pro se litigants, especially in cases where the other party *is* represented.[150]

Proponents for greater pro se assistance and accommodation assert that pro se litigants are hindered, confused, and frustrated by the complexity of the law and the legal process.[151] Despite liberal pleading requirements, "pro se litigants are almost unanimously ill equipped to encounter the complexities of the judicial system."[152] Pro se litigant complaints often fail to survive procedural requirements and motions to reach an actual trial for a meaningful review of their claim.[153] They may be getting their day in court merely to lose their case because they are unaware of their rights or do not understand the theory behind proving their case.[154] Pro se litigants

144. *See* Holt, *supra* note 18, at 170 (underscoring the crucial role clerks play in the litigation process).

145. *Id.* at 170-71.

146. *See* Greacan, *supra* note 86.

147. *See* Barry, *supra* note 8, at 1890 (placing the burden on judges to decide whether to take into account the fact that a litigant is self-represented when determining whether to accept the pro se litigant's filings as adequate—weighing the right to be heard with the rules of procedure).

148. Rasnow, *supra* note 40, at 1309-10 (praising the work of Richard Zorza); Buxton, *supra* note 2, at 106-07 (contrasting pro se assistance in the United States with that of other countries); Cantrell, *supra* note 6, at 1590 (focusing on the effect on the poor).

149. Engler, *And Justice for All*, *supra* note 7, at 2002-03; Rhode, *Access to Justice*, *supra* note 35, at 1804 (arguing that the court system, designed by and for lawyers, is biased against pro se litigants).

150. Engler, *And Justice for All*, *supra* note 7, at 2052.

151. Henderson, *supra* note 22, at 575-76 (noting that many pro se litigants also feel as though they are not treated with dignity during court proceedings); Rosenbloom, *supra* note 66, at 305; Buxton, *supra* note 2, at 106 (citing the complexity of the judicial system as the leading problem for the unrepresented).

152. Rosenbloom, *supra* note 66, at 306.

153. Buxton, *supra* note 2, at 106 (criticizing the system's strict rules regarding filing of pleadings and motions).

154. Rosalie R. Young, *The Search for Counsel: Perceptions of Applicants for*

are further hampered by family or work commitments that restrict the amount of time they may have to prepare their case.[155]

Victory at trial is rare for pro se litigants despite "romantic notions of pro se capacity and judicial paternalism."[156] Judges and court staff, restricted in their ability to assist the pro se litigant, "find themselves feeling frustrated by the pro se litigant's inability to grasp legal concepts or to comply with the rules of civil procedure."[157] As more and more individuals represent themselves, the "duty of the courts to provide fairness and justice for all who come before them becomes more and more difficult to fulfill."[158]

Due to the combination of large numbers of self-represented litigants and huge volume of cases, proponents of greater pro se assistance and accommodation maintain that there must be sweeping institutional reforms rather than assistance to individual litigants.[159] Just as merely having access to a law library, even with the assistance of a law librarian, would not create a level playing field for a pro se litigant against an experienced attorney, neither would mere access to a pro se assistance program.[160] Likewise, merely adding more judges, clerks, and courts will alleviate neither the increase of pro se litigants nor the issues they face.[161] The current approach to pro se assistance was summed up by one commentator as: "while law without lawyers is an increasing possibility for many Americans, it is frequently law without justice."[162]

What is needed, proponents of greater pro se assistance and accommodation argue, is a re-examination of the roles of court personnel and the procedures used.[163] Barriers that pro se litigants face must be identified systemically, and the traditional rules and roles revised as needed.[164]

Subsidized Legal Assistance, 36 J. FAM. L. 551, 558 (1997) (arguing that while Congress has taken some positive steps to provide funding for pro se assistance, more is necessary).

155. Henderson, *supra* note 22, at 575-76 (citing pro se complaints that litigation took over their lives).

156. Bindra & Ben-Cohen, *supra* note 6, at 1 (citations omitted) (emphasis omitted).

157. Rosenbloom, *supra* note 66, at 306.

158. Deborah J. Chase et al., *California's Family Law Facilitator Program: A New Paradigm*, 2 J. CENTER CHILDREN & CTS. 61, 70 (2000).

159. *Id.* at 79 (proposing that pro se assistance programs should expand to adapt to the needs of the 21st century).

160. Healey, *supra* note 8, at 146 (arguing that law libraries should provide some guidance to pro se litigants and that such guidance does not constitute legal advice).

161. Engler, *And Justice for All*, *supra* note 7, at 2070.

162. Rhode, *Connecting*, *supra* note 11, at 404.

163. Engler, *And Justice for All*, *supra* note 7, at 1988, 2070; Buxton, *supra* note 6, at 118; *see* Holt, *supra* note 18, at 173 (expressing an increasing desire by the judiciary to educate pro se litigants); Goldschmidt, *supra* note 13, at 1209 (advocating for the use of ghostwriting for pro se litigants).

164. Engler, *And Justice for All*, *supra* note 7, at 2043; *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the*

> Until and unless the courts make fundamental changes in their handling of unrepresented litigants, these litigants will continue to forfeit important legal rights due to their lack of representation. Improved information for unrepresented litigants, increased access to competent advice and assistance, and procedural reform to make the courts more accessible are important steps in helping unrepresented litigants. Yet the effectiveness of changes such as these will be limited, if not undercut, as long as the traditional roles of the judges, clerks, and mediators remain unchanged.
>
> As long as the rules reflect the traditional notion of impartiality, with actors limited by the traditional prohibition against giving legal advice, the actors will be unable to provide the necessary help.[165]

Proponents argue that pro se litigants would be better served by our court system if its assistance were rooted in procedural and institutional reforms rather than expansion of its current educational programs.[166] Until the courts make these fundamental changes when dealing with pro se litigation, critics maintain that the pro se will continue to forfeit their legal rights due to their lack of representation.[167]

II. CALLS FOR GREATER ASSISTANCE AND ACCOMMODATION

Calls for greater assistance and accommodation take two primary forms: changing the rules or procedures to be used when pro se litigants come before the court and changing the roles of individuals—judges, clerks, and even opposing attorneys—who interact with pro se litigants.[168]

A. Different Rules for Pro Se Litigants

In our legal system, the underlying assumption is that justice is preserved through court procedures.[169] "Yet, as is frequently noted, equal access to the justice system is a dubious proposition. Those who receive their 'day in court' do not always feel that 'justice has been done,' and with reason."[170] The court, which does not provide the self-represented civil litigant with an attorney, nevertheless holds them to the same standards and procedural requirements as an attorney.[171] Proponents of greater pro se

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Courts, *supra* note 86, at 383-84 (making a series of recommendations for court reforms).

165. Engler, *And Justice for All*, *supra* note 7, at 2069.

166. *Id.* at 2069-70; *see* Buxton, *supra* note 2, at 137-38 (referencing legal reforms in Japan designed to make the legal system more accessible).

167. Engler, *And Justice for All*, *supra* note 7, at 2069; *see* Buxton, *supra* note 2, at 103.

168. Engler, *And Justice for All*, *supra* note 7, at 2070.

169. Rhode, *Equal Justice*, *supra* note 31, at 48-49 (questioning accepted notions of "equal" access to justice).

170. *Id.*

171. *See* Bradlow, *supra* note 19, at 664 (theorizing that a court is allowed to deny a pro se civil litigant counsel under the current system and then hold that litigant to the same standards as a litigant with counsel). On the other hand, self-represented litigants in

assistance and accommodation argue that, by holding them strictly liable, the law's procedural requirements would "place in jeopardy the one due process right that pro se litigants clearly have: the right to a meaningful opportunity to be heard."[172]

Easing procedural requirements for the self-represented is already being done in limited ways.[173] The courts have recognized that pro se litigants may require special treatment at different stages of a lawsuit.[174] As one court stated, "[i]mplicit in the right to self-representation is an obligation . . . to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights . . . ." [175] Courts routinely provide significant financial assistance to self-represented litigants by waiving filing fees.[176] For example, eighty-four percent of pro se litigants commence civil actions without prepayment of fees.[177] Moreover, pleadings of the self-represented are generally held to a less stringent standard than those of attorneys,[178] as it is believed that holding pro se litigants' pleadings to the same standards as those prepared by attorneys would frustrate the pro se litigants' access to the courts.[179] These limited procedural variations, however, are also criticized by those arguing for greater accommodation. They argue that while accommodating pro se litigants' pleadings furthers their access to the courts, that access can be frustrated if they are held to the same procedural requirements as represented parties.[180] As one observer has noted, "[t]o liberalize pleading requirements for pro se litigants to ensure entry into the courthouse and then demand rigorous compliance with pretrial procedural rules fosters a

criminal trials, if facing the possibility of imprisonment, can be provided an attorney by the court. *Id.* at 669.

172. *Id.* at 670. *See generally* Holt, *supra* note 18, at 172 (recognizing a judicial obligation to protect pro se litigants but at the same time noting that pro se litigation should be encouraged).

173. *See, e.g.*, Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983) (holding that the district court erred in allowing forfeiture of a pro se litigant's claim caused by litigant's lack of legal skills).

174. *See* Bloom & Hershkoff, *supra* note 13, at 486 (describing situations in which courts may provide pro se litigants with special treatment).

175. McLaughlin, *supra* note 19, at 1115 n.37 (quoting *Traguth*, 710 F.2d at 95 (emphasis and internal citations omitted)).

176. *Cf.* McLaughlin, *supra* note 19, at 1130 (citations omitted) (noting that equal protection garners similar treatment for similarly situated persons).

177. *Id.* at 1131 n.141.

178. *See, e.g.*, Hughes v. Rowe, 449 U.S. 5, 9 (1980) (per curiam) ("It is settled law that the allegations of such a complaint, 'however inartfully pleaded' are held 'to less stringent standards than formal pleadings drafted by lawyers.'" (quoting Haines v. Kerner, 404 U.S. 519, 520 (1972))); Madyun v. Thompson, 657 F.2d 868, 876 (7th Cir. 1981) (treating pro se plaintiffs more leniently to reflect their lack of legal knowledge and sophistication).

179. *See* McLaughlin, *supra* note 19, at 1121 (stating that courts have exercised judicial paternalism towards pro se litigants).

180. *Id.* at 1121-22 n.78 (discussing at length case comparisons on the subject).

tenuous access to the courts."[181]

The suggestion that the rules of procedure and evidence should not apply at all to pro se litigants is also nothing new.[182] Critics have long claimed that "American legal procedures are strewn with unnecessary formalities, archaic jargon, and cumbersome rituals that discourage individuals from resolving legal problems themselves."[183] Pro se litigants dislike the "rigid rules and adversarial nature" of traditional litigation, where any single misstep can result in disaster.[184] The complex procedure and rules minefield often cause pro se litigants to "lose on procedural technicalities, not on the merits of their cases."[185] They also argue, contrary to what can occur with the claims of represented parties, that the rules should provide that pro se complaints should not be dismissed for failure to state a claim until after the pro se litigant is allowed an opportunity to correct the problem or the court is able to recharacterize the claim for them.[186] Likewise, failing to specify the appropriate relief or name the correct parties should not result in the dismissal of a pro se complaint even though it would for represented parties.[187] Furthermore, proponents argue that holding pro se litigants accountable to procedural rules will both deter individuals from proceeding pro se, and decrease the likelihood of success for those with meritorious claims.[188]

It is argued that the rules that govern litigation give represented parties an unfair advantage over pro se litigants.[189] The advantage comes from the fact that attorneys have studied the rules and can operate within their framework; individuals who have not studied them and do not understand

181. *Id.* at 1121.

182. *See generally Access to Justice: Does it Exist in Civil Cases?*, *supra* note 1 (transcribing a panel discussion at the Georgetown University Law Center in which the speaker, Father Robert Drinan, explains how pro se assistance may have extended too far).

183. Rhode, *Access to Justice*, *supra* note 35, at 1816.

184. Beck & Sales, *supra* note 66, at 989.

185. Lee, *supra* note 13, at 1264; *see* Rasnow, *supra* note 40, at 1283 (describing the rules and procedures of litigation as a "minefield" to those litigants who choose to represent themselves); *cf.* Buxton, *supra* note 2, at 114 (asserting that pro se litigants are more likely to misinterpret and fail to observe judicial rules and procedures).

186. *Cf.* McLaughlin, *supra* note 19, at 1120 (recognizing that judicial leniency to pro se litigants is most often exercised at the pleading stage).

187. *Cf. Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, *supra* note 86, at 388 (revealing that courts use a significant amount of judicial resources in admitting improperly pleaded pro se complaints); McLaughlin, *supra* note 19, at 1120 (arguing that a pro se complaint should not be dismissed unless the claim is apparently not supportable by either law or fact).

188. Bradlow, *supra* note 19, at 670 (jeopardizing pro se litigant's due process rights); *see* Buxton, *supra* note 2, at 106 (pointing out how pro se litigants often fall through the cracks of the legal system).

189. John C. Sheldon, *The False Idolatry of Rules-Based Law*, 56 ME. L. REV. 299, 301 (2004) (separating society into those that have legal access, and as a result, efficacy, and those who do not have such legal access).

them have more difficulty during litigation.[190] Therefore, "[t]he rules need to distinguish between cases involving only unrepresented litigants and cases pitting unrepresented litigants against represented ones, since the scenarios present different issues for the court system."[191]

Proponents argue that pro se litigants, who are claimed to be unable to decipher and understand the rules and are involuntarily representing themselves, should not have to follow procedural or evidentiary rules.[192] They argue that for pro se litigants, the principle should be that ignorance of the law justifies not following the law.[193] Proponents further assert that easing and even eliminating procedural requirements is not enough. They argue that prior to trial, rules should be *created* to restrict attorney conduct with pro se litigants during negotiations.[194] Some proponents even argue that if a pro se litigant relied on any erroneous advice—whether from clerks, attorneys, judges, etcetera—it could provide for a basis of relief and allow them to relitigate their issues.[195]

While rule changes alone are unlikely to eliminate all problems facing pro se litigants, "the continued absence of appropriate guidelines tailored to context is a gaping hole that must be filled if the courts are serious in their efforts to provide unrepresented litigants meaningful access to the courts."[196] In summary, "[a] fundamental goal of the adversary system is to provide fairness and justice. Where the operation of the traditional rules frustrates that goal, the rules, rather than the goal, must be modified."[197] Beyond rule and procedural changes, however, some argue that there must

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190. *See* Lee, *supra* note 13, at 1268 (stating that pro se litigants have difficulty reading procedural rules effectively).

191. Engler, *And Justice for All*, *supra* note 7, at 2044.

192. *See, e.g.*, Lee, *supra* note 13, at 1270-71 (explaining that the Eighth Circuit follows the general rule against ignorance of the law); Bradlow, *supra* note 19, at 683 (recognizing Supreme Court dicta that commands pro se litigants to not ignore relevant rules of procedural and substantive law); Bloom & Hershkoff, *supra* note 13, at 514 (describing the judge's important role as an umpire to ensure the fair nature of a trial); Henderson, *supra* note 22, at 590 (outlining recommendations handed down to the Missouri judicial system in enhancing the advice given to pro se litigants). *See generally* Jeffrey S. Wolfe & Lisa B. Proszek, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer*, 33 TULSA L.J. 293, 310 (1997) (discussing the role of judges in administrative hearings dealing with pro se parties); Engler, *And Justice for All*, *supra* note 7, at 2044 (contextualizing the legal issues arising in pro se litigation); Goldschmidt, *supra* note 3, at 44-45 (noting how attorneys offer limited legal advice to pro se litigants for smaller fees); Barry, *supra* note 8, at 1926 (asserting the efficacy of pro se clinics).

193. *See generally* Lee, *supra* note 13, at 1270 (discussing the role of ignorance of the law in treating pro se litigants).

194. Engler, *And Justice for All*, *supra* note 7, at 148-49 (proposing the enhancement of pro se litigants' rights).

195. *Id.* at 2040 (noting the possibility especially where such misinformation would result in a miscarriage of justice).

196. *Id.* at 2044.

197. *Id.* at 1989-90; *see, e.g.*, Harrison, *supra* note 14, at 70 (illustrating alternative rules and procedures for service conducted by pro se litigants).

also be institutional changes in the roles of the players in the judicial system.[198]

B. Changing the Roles of the Judges, Clerks, and Opposing Attorneys

Proponents of greater pro se assistance and accommodation argue that while procedural reform is essential, without changes to the roles of court personnel, the effectiveness of any procedural reform will be negated.[199] The Constitution requires that all individuals, whether represented or not, have more than mere physical access to the courts; the access must be adequate, effective, and meaningful.[200] Without assistance from the courts, however, proponents argue that pro se litigants "are denied the level of access to the courts and protection from the courts granted to parties represented by counsel."[201] To ensure that pro se litigants have meaningful access, proponents of greater pro se accommodation and assistance argue that the courts must affirmatively act to assist them.[202] Some proponents argue in even stronger terms, stating that judges, clerks, and opposing attorneys owe a *duty* to pro se litigants to ensure that their cases are decided on the merits and that this duty extends to pre-trial, trial, and post-trial treatment of pro se litigants.[203]

1. Changing the role of the judge

The proponents argue that the traditional role of the judge developed in the context of both parties being represented by attorneys, with there being no place in an adversarial system of justice for unrepresented parties.[204] Many times judges effectively ignore the fact that pro se litigants do not

198. Buxton, *supra* note 2, at 147 (recommending court sponsored petition drafting and mandatory mediation procedures as proper interim institutional reforms).

199. Engler, *And Justice for All*, *supra* note 7, at 2069 (emphasizing the importance of not only an increase of court personnel but also an extension of their roles in assisting pro se litigants).

200. Bounds v. Smith, 430 U.S. 817, 823 (1977); *see* Lee, *supra* note 13, at 1274 (recognizing that courts have required that states provide pro se litigants with services to protect individuals' right to access the courts); McLaughlin, *supra* note 19, at 1118 (arguing that *Bounds* indicates that states may be required to affirmatively act to protect this right); *cf.* Young, *supra* note 154, at 553 (asking whether legal access eases the disparity between the rich and the poor).

201. Holt, *supra* note 18, at 167.

202. *See, e.g.*, McLaughlin, *supra* note 19, at 1118 (recounting that the *Bounds* court recognized the difficulties involved with pro se litigation and the necessity of affirmative state assistance); Hurder, *supra* note 50, at 2274-75 (providing examples of how judges may protect pro se litigants' right to access courts); Lee, *supra* note 13, at 1266 (postulating that special circumstances can include providing inmates with reasonable access to legal research material).

203. *See* Holt, *supra* note 18, at 167 (exploring the duties owed to pro se litigants by various legal actors).

204. Engler, *And Justice for All*, *supra* note 7, at 1988 (noting the American legal system's adversarial nature).

have counsel, force them to abide by the same rules and procedures that govern represented parties, and will do nothing to assist them during litigation.[205] While the U.S. Supreme Court has held that pro se pleadings are to receive special consideration, some believe that many courts do not provide pro se litigants with any special treatment.[206] "[C]ourts," it is claimed, "have too often been part of the problem, not the solution" of pro se assistance.[207]

Proponents of greater pro se assistance and accommodation argue that if an unrepresented litigant is not getting legal assistance from anyone else, the only person left to help them is the judge.[208] Regardless of any assistance given to pro se litigants outside the court, such assistance is meaningless unless judges are willing to help them inside the courtroom,[209] because only the judge is in a position to determine whether a pro se litigant is "getting at the substance of their complaints and articulating the intervention sought."[210]

Judges should not only want to provide legal assistance to pro se litigants,[211] but it is argued that it is indeed the judge's duty to ensure that pro se litigants are able to exercise their constitutional right of access to the courts,[212] are aware of their legal rights,[213] are able to present their case,[214] and that cases are decided fairly on the merits despite any mistakes made by the pro se litigant.[215] They also argue that judges have a duty to protect

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205. *Id.* at 2013 (revealing that ninety-one percent of judges do not have a stated policy regarding the treatment of pro se litigants); Rasnow, *supra* note 40, at 1283 (discussing the reluctance of courts and legislatures to appoint counsel for pro se litigants).

206. *See* Lee, *supra* note 13, at 1270-71 (underscoring the reluctance of courts to allow ignorance to be an excuse for not knowing the law); Engler, *And Justice for All*, *supra* note 7, at 2013 (noting how some courts refuse to advise pro se litigants).

207. Rhode, *Access to Justice*, *supra* note 35, at 1804.

208. *Cf.* Engler, *And Justice for All*, *supra* note 7, at 2037-38 (theorizing the dynamics between pro se litigants, judges, and clerks).

209. Rasnow, *supra* note 40, at 1309-10 (emphasizing the role of the judge in protecting the rights of pro se litigants); McLaughlin, *supra* note 19, at 1120 (stating that there no is point in assisting a pro se litigant in liberally construing pleadings if the court then immediately dismisses the complaint on motion of the other party).

210. Barry, *supra* note 8, at 1890.

211. *Cf.* Rhode, *Connecting*, supra note 11, at 403 (discussing the reasons why judges seek and refuse to help pro se litigants).

212. Holt, *supra* note 18, at 168 (identifying the Supreme Court's decision in *Haines v. Kerner*, 404 U.S. 519 (1972), which advocated the liberal construction of pro se litigant's pleadings); Lee, *supra* note 13, at 1263 (stating that both the First Amendment and the Due Process Clause of the Fourteenth Amendment guarantee sufficient access to the courts).

213. *See, e.g.*, Margaret Martin Barry, *Access To Justice: On Dialogues with the Judiciary*, 29 FORDHAM URB. L.J. 1089, 1102 (2002) (stating that fairness mandates judges to make pro se litigants aware of their rights).

214. *Id.*

215. McLaughlin, *supra* note 19, at 1124-25 (asserting that ascertainment of the truth is the goal of a trial, and as such, the judge must seek equitable treatment of pro se litigants); Engler, *And Justice for All*, *supra* note 7, at 2028 (proposing that the judge has the responsibility of presiding over a fair proceeding); *see also* Rhode, *Access to Justice*, *supra* note 35, at 1816 (asserting that courts, in addition to other societal organizations, should

pro se litigants from opposing attorneys, especially when the pro se litigants are "poor, women, and/or racial and ethnic minorities."[216] More troubling is that if the court fails to take on this role, this form of legal subjugation can worsen and legitimize the abuse by attorneys.

Traditionally, judges' desire to appear impartial prevented them from providing effective assistance.[217] Proponents for allowing greater judicial assistance claim that there is no impartiality in the justice system in that it routinely favors parties with lawyers over pro se litigants regardless of the merits of their cases.[218] Changing our notion of judicial impartiality is therefore integral to having judges provide pro se litigant assistance. Proponents argue that "[t]he notion that a court cannot provide extensive assistance to one party without compromising its impartiality must be rejected. To the contrary, a court may need to provide more help to one side than to the other to maintain the impartiality of the proceeding."[219]

Judicial involvement in a hearing is nothing new; judges assist in the truth finding process by asking questions or injecting certain matters as necessary.[220] Proponents of greater judicial assistance assert that actual advocacy by the judge for one party would not result in a reversal absent actual prejudice against the other party.[221] "As long as a court is prepared to provide extensive assistance to both parties if necessary, the court will maintain its impartiality."[222] Supposedly this principle would also apply to parties with counsel, whether the counsel needed the "assistance" or not.[223] Under this new definition of impartiality, the failure to take an active role helping the pro se litigant—who is allegedly involuntarily representing him or herself—would itself be impartial because the represented party always and invariably has an unfair advantage.[224] Proponents argue that if the

work together to provide citizens with, at the very least, adequate access to justice).

216. Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 147 (1997) [hereinafter Engler, *Out of Sight*].

217. Engler, *And Justice for All*, *supra* note 7, at 1989.

218. *Id.* at 2023 (rejecting the idea that a judge cannot extensively assist one party without compromising the judge's impartiality); *see* Harrison, *supra* note 14, at 70.

219. Engler, *And Justice for All*, *supra* note 7, at 2023. *But see* Holt, *supra* note 18, at 170 (suggesting that judges must assist self-represented litigants without violating traditional notions of impartiality).

220. *See, e.g.*, United States v. Pinkey, 548 F.2d 305, 308 (10th Cir. 1977) (protecting the rights of the accused while at the same time upholding the interests of society); Quercia v. United States, 289 U.S. 466, 469 (1933) ("[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law."); McLaughlin, *supra* note 19, at 1124-25 (recognizing the judge's obligation to take affirmative steps to ensure a fair trial).

221. McLaughlin, *supra* note 19, at 1124-25

222. Engler, *And Justice for All*, *supra* note 7, at 2023.

223. *Cf. id.* at 2023 n.174 (defining impartiality as favoring neither and treating all alike).

224. *Id.* at 2023, 2028, 2030-31.

judge does not assist the pro se litigant in presenting his evidence and argument to the court, then regardless of appearances, the result cannot truly be impartial.[225] While undoubtedly the represented party would perceive assistance by the judge as being unfair, proponents argue that it merely makes the parties equal since the represented party already has an inherently unfair advantage over the pro se litigant.[226]

Judges, proponents argue, should provide reasonable assistance to the pro se litigant depending upon their needs at any stage before, during, or after appearing in court.[227] Prior to trial, "[j]udges should be free to instruct litigants about the information needed in order to make a decision, and to suggest resources for litigants to use in order to explore the full range of remedies available to them."[228] Proponents further argue that, before trial, judges should conduct pre-trial conferences for pro se litigants

> [T]o 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.[229]

In reviewing the pleadings, proponents argue that judges should ensure that they reflect the pro se litigant's goals, and allow them to modify them if they are legally insufficient.[230]

Outside the courtroom, some argue that judges will need to assist pro se litigants in their negotiations with attorneys.[231] The judge

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225. Zorza, *supra* note 19, at 431 (diagramming the inequitable results of evenhanded treatment by judges in the face of pro se litigants versus represented litigants).

226. Goldschmidt, *supra* note 3, at 48.

227. Engler, *And Justice for All*, *supra* note 7, at 2030, 2046-47 (stressing the importance of particularizing the level of assistance for each pro se litigant); Goldschmidt, *supra* note 3, at 43, 53 (encouraging judges to provide pro se litigants with reasonable assistance); *cf.* Zorza, *supra* note 19, at 452 (noting that pro se litigants often do not have counsel due to financial reasons beyond their control); Holt, *supra* note 18, at 170 (differentiating between legal advice and legal information in what types of assistance judicial clerks may provide to pro se litigants); Barry, *supra* note 8, at 1915 (pointing out factors that might limit the assistance provided to pro se litigants, such as family responsibilities and language barriers).

228. Barry, *supra* note 8, at 1926.

229. Goldschmidt, *supra* note 3, at 47; *see* McLaughlin, *supra* note 19, at 1125-26 (requiring a self-represented litigant to submit to the court and opposing counsel the questions he wished to ask witnesses at trial, after which the trial judge would then delete objectionable questions from the list to enable the pro se litigant to present his case to the jury with a minimum of interruptions from objecting counsel (citing Miller v. Los Angeles County Bd. of Educ., 799 F.2d 486, 487 (9th Cir. 1986)).

230. *See, e.g.*, Hurder, *supra* note 50, at 2274-75 (explaining how judges may allow pro se litigants to amend their pleadings if their original documents do not correctly represent their legal goals); McLaughlin, *supra* note 19, at 1126 (describing how judges oftentimes correct a pro se litigant's mistaken belief in a legal claim).

231. *See, e.g.*, Engler, *And Justice for All*, *supra* note 7, at 2029 (urging judges to take an

> [M]ust help the unrepresented litigant develop the relevant facts and identify potential claims and defenses . . . . examine the papers in the case and talk to the unrepresented parties to ensure that possible claims and defenses are being articulated. Only by first assessing the merits of the case can the judge gain perspective as to what, if any, claims are being compromised or waived, whether such waivers truly are knowing, intelligent, and voluntary, and whether the judge should place the court's imprimatur on the result.[232]

The judge, they argue, should be charged with ensuring that the rights of the pro se litigant are protected when they negotiate with attorneys and that the final agreement is fair.[233] Judges should be wary of any "misinformation, improper advice, manipulation, or threats" by attorneys during negotiations, and refer attorney misconduct to the appropriate disciplinary committees.[234] While there may be criticism of the court's interference with the pro se litigant's right to contract, some proponents of greater judicial involvement assert that the court's duty to protect pro se litigants from the ever-predatory, malicious attorney must be paramount.[235]

During courtroom appearances, proponents of greater judicial assistance propose that judges should advise pro se litigants of their "'statutorily granted substantive and procedural remedies.'"[236] They argue that the judge should assist the self-represented litigant with questions of procedure, laying the foundation for and the presentation of evidence, understanding issues of law, calling witnesses, conducting direct or cross-examinations, rebutting objections of opposing attorneys, and developing potential claims and defenses.[237] Proponents assert that judges should even consider conducting limited independent investigations in cases involving pro se litigants.[238] They argue that throughout the proceeding the judge should alert the self-represented litigant of the consequences of failing to

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active role on behalf of pro se litigants in their settlement negotiations); Hurder, *supra* note 50, at 2275 (discussing how judges may review the settlements entered into by pro se litigants to ensure that they are satisfactory).

232. Engler, *And Justice for All*, *supra* note 7, at 2029.

233. *Id.* (cautioning judges to be wary of any "misinformation, improper advice, manipulation, or threats" by attorneys during negotiations, and encouraging judges to refer such attorney misconduct to the appropriate disciplinary committees).

234. *Id.*

235. *See* Engler, *And Justice for All*, *supra* note 7, at 2030 (refuting this criticism).

236. Harvey Gee, *Is a "Hearing Officer" Really a Judge?: The Presumed Role of "Judges" in the Unconstitutional New York Housing Court*, 5 N.Y. CITY L. REV. 1, 32 (2002).

237. Engler, *And Justice for All*, *supra* note 7, at 2028-30; Goldschmidt, *supra* note 3, at 48-49; McLaughlin, *supra* note 19, at 1225-26; Rasnow, *supra* note 40, at 1309-10; Deborah J. Chase et al., *Community Courts and Family Law*, 2 J. CENTER CHILDREN & CTS. 37, 37 (2000); Harrison, *supra* note 14, at 70 (citing examples of people who suggest judges should help do what Chase suggests).

238. Goldschmidt, *supra* note 3, at 49 (stating that Rule 614 of the Federal Rules of Evidence and many state court procedures provides judges with such power).

meet procedural requirements.[239] Literally, if at any point the pro se litigant appears confused, the judge could step in and provide assistance.[240] Perhaps most importantly, proponents argue that judges should also inform a self-represented litigant when an attorney's help will be necessary in their case.[241]

Ultimately, proponents of increased judicial assistance for pro se litigants argue that

> The heavy responsibility of ensuring a fair trial in . . . a situation [involving a pro se litigant] rests directly on the trial judge. The buck stops there . . . . In order that the trial proceed with fairness . . . the judge finds that he must explain matters that would normally not require explanation and must point out rules and procedures that would normally not require pointing out.[242]

Unless judges accept this duty, proponents argue that pro se litigants "will continue to forfeit important rights due, not to the merits of their cases, but to the absence of counsel."[243] Judges, proponents assert, must also overcome their loyalty towards the bar and protect pro se litigants from attorneys, who for financial reasons want neither pro se assistance nor success.[244]

2. Changing the duty of the clerk

Critics of current pro se assistance methods also argue that court personnel should give assistance to pro se litigants—including legal advice.[245] Rules that still prohibit such advice—while supposedly designed to protect the pro se litigant—merely deprive them of the assistance they need and therefore must be repealed.[246] At least one proponent argues that

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239. *Cf.* United States v. Cornfeld, 563 F.2d 967, 971 (9th Cir. 1977), *cert. denied*, 435 U.S. 922 (1978) ("The trial judge may question witnesses to clear up ambiguities . . . ."); Holt, *supra* note 18, at 169-70 (noting how the failure to clear up ambiguities undermines a pro se litigant's right to legal access).

240. Parisie v. Greer, 705 F.2d 882, 898 (7th Cir. 1983), *cert. denied*, 464 U.S. 918 (1983) (asserting an implicit duty on judges to clarify pro se confusion); *see* Ross v. Franzen, 777 F.2d 1216, 1219 (7th Cir. 1985) ("[I]f defense counsel does not give pro se prisoner litigants such notice, the district court must do so.") (emphasis omitted); *cf.* Gordon v. Leeke, 574 F.2d 1147, 1152-53 (4th Cir. 1978), *cert. denied*, 439 U.S. 970 (1978) ("A district court is not required to act as an advocate for a pro se litigant; but . . . should afford him a reasonable opportunity to determine the correct person . . . against whom the claim is asserted, [and] advise him how to proceed. . . .").

241. *Cf.* Hurder, *supra* note 50, at 2274-75 (describing ways in which judges may assist pro se litigants).

242. Engler, *And Justice for All*, *supra* note 7, at 2014 (alteration in original) (citations omitted).

243. *Id.* at 1991.

244. Goldschmidt, *supra* note 3, at 44.

245. *See* Engler, *And Justice for All*, *supra* note 7, at 2036 (suggesting law clerks or a new position to handle such matters).

246. *Id.* at 2026 (describing the prohibition as protective of pro se litigants so they do not receive legal advice from non-lawyers).

prohibitions against the unauthorized practice of law should not apply to clerks and court personnel, as they would be giving legal advice for free and under the auspices of the court, which would not be considered the unauthorized practice of law.[247]

How much assistance should be given by clerks depends on the needs of the pro se litigants and the particular courts.[248] While some are critical of this approach, claiming clerks, not being attorneys, would be destined to provide bad advice;[249] proponents for having clerks provide advice argue that the solution "should be to improve the quality of the advice, rather than eliminate the advice-giving."[250] Just as with judges, it would be necessary to develop detailed guidelines as to the types of assistance clerks will be required to provide for pro se litigants so as to ensure the latter's access to the courts.[251]

3. Duties of attorneys to pro se litigants

Just as with judges and clerks, some argue that attorneys appearing in cases against a pro se litigant owe them special duties and obligations as well.[252] The first of these, some proponents claim, is to stop resisting efforts to assist pro se litigants. They claim that attorneys—and the judges who they influence and help elect—resist changes to the traditional adversarial rules and roles because any change that helps pro se litigants prevail more often, damages attorneys financially.[253] Instead of wanting pro se litigants to be handicapped during litigation, proponents for greater pro se assistance and accommodation argue that an attorney's obligation should be to embrace efforts to change the justice system to benefit pro se litigants.[254]

Secondly, proponents argue that attorneys must change how they behave when negotiating with pro se litigants. "The 'pro se problem' should be more properly recognized as an 'attorney problem' of rampant misconduct during negotiations."[255] Attorneys, it is claimed, often mislead pro se

247. *Id.* at 2040-41.

248. *Id.* at 2038; Holt, *supra* note 18, at 170 (contextualizing the types of advice that may be given so as to determine what types of advice clerks may appropriately provide).

249. *Cf.* Engler, *And Justice for All*, *supra* note 7, at 2026 (describing the reluctance of courts to allow non-attorneys to provide legal advice).

250. *Id.* at 2039.

251. *See* Holt, *supra* note 18, at 171, 173 (underscoring the importance of establishing guidelines for advising pro se litigants).

252. Goldschmidt, *supra* note 3, at 44-45 (suggesting that attorneys offer tailored legal advice for smaller fees).

253. *Id.* at 44; Deborah L. Rhode, Colloquium, *What Does it Mean to Practice Law "In the Interests of Justice" in The Twenty-First Century?: Keynote Law, Lawyers, and the Pursuit of Justice*, 70 FORDHAM L. REV. 1543, 1553 (2002) [hereinafter Rhode, Colloquium] (noting the incentives against championing pro se interests).

254. *Id.*

255. Engler, *Out of Sight*, *supra* note 216, at 130 (noting that such misconduct increases

litigants as to both the facts and the governing law in a case.[256] Proponents argue that "[l]awyers present legal and factual issues in a strategically favorable light, selectively control the flow of information, and manipulate their unrepresented adversary by misusing argument, appeals, threats, and promises. Whatever assistance an unrepresented litigant has received may be undercut by the litigant's encounter with the opposing lawyer."[257] Proponents argue that rules therefore need to be created that limit what attorneys can say and do during negotiations with pro se litigants, even if it hinders settlement of the case.[258] These rules should prevent attorneys from exploiting the ignorance of pro se litigants, requiring them to disclose to pro se litigants facts and claims necessary to the pro se litigant to allow them to make an informed decision about their own case, such as the disclosure attorneys must make to the court in ex parte proceedings.[259] These rules would differ from those where the other party is represented by counsel, and would place on the attorney a duty of fairness when negotiating with pro se litigants to prevent unconscionable agreements.[260] Proponents further assert such a duty would also need to apply during discovery efforts.[261]

Finally, some argue that attorneys should be required to help individuals who otherwise would be forced to proceed pro se. Attorneys should be willing to charge less for individuals who earn less, allowing the client's income to determine the fee instead of the complexity or time commitment of the case.[262] In the alternative, some argue it might be better to merely force all attorneys to perform a mandatory number of pro bono cases.[263]

C. Eliminating the Adversarial System of Justice

Ultimately, what many proponents of greater pro se assistance and accommodation seem to be seeking is an abandonment of the adversarial system of justice—at least when pro se litigants are before the court. Under the adversarial system, justice is presumed to be achieved through

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where courts apply additional pressure to settle).

256. *See* Rhode, *Access to Justice*, *supra* note 35, at 1816 (arguing that attorneys should be enjoined from exploiting ignorant clients by knowingly misleading them).

257. Engler, *And Justice for All*, *supra* note 7, at 2006.

258. Engler, *Out of Sight*, *supra* note 216, at 138.

259. Rhode, *Access to Justice*, *supra* note 35, at 1816.

260. *See* Engler, *Out of Sight*, *supra* note 216, at 138 (arguing that it is preferable to err on the side of protecting the unrepresented party).

261. *See* Hurder, *supra* note 50, at 2276 (asserting that the courts have a compelling interest in preventing lawyers' abuse of judicial power).

262. Goldschmidt, *supra* note 3, at 45.

263. *See* Engler, *Out of Sight*, *supra* note 216, at 153 (reasoning that the legal profession has the authority to use pro bono requirements to target the supply of counsel to particular groups of clients).

an equal contest of contrary interests,[264] in which both sides have a responsibility to "focus, develop, and present all relevant facts and legal arguments to the court."[265] Representation "promotes equality among unequal litigants."[266] Some believe that equality of representation is the cornerstone of procedural justice, which in turn is the foundation of substantive justice.[267] Proponents of greater pro se assistance and accommodation assert that the notion of an equal contest, however, is completely upset when one side is pro se—with the pro se party at a complete disadvantage.[268] They further argue that pro se litigants pose a fundamental challenge to the basic assumptions of the adversarial system of justice—a system of rules and roles designed by judges and lawyers which assume both parties have lawyers.[269] "When both sides appear without counsel, the traditional configuration of the adversarial system has been altered; when one side is represented and the other is not, it has broken down."[270] Just as "there can be no equal justice where the kind of trial a man gets depends on the amount of money he has,"[271] some proponents argue that there cannot be justice if the system works only for the represented.[272]

In summary, proponents for greater pro se assistance and accommodation argue that since the system designed to achieve justice is premised on parties being represented, if parties are not represented the goal of justice should not be changed, but rather the system designed to achieve it.[273]

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264. McLaughlin, *supra* note 19, at 1123-24; Young, *supra* note 154.

265. Kim, *supra* note 31, at 1644; *see* SPECIAL COMMITTEE ON RACE AND ETHNICITY, 64 GEO. WASH. L. REV. 189, 266 (1996) (stating that "[t]hese parties suffer a disadvantage in an adversary system that relies on the parties themselves to evaluate and present their claims."); McLaughlin, *supra* note 19, at 1123-24 (emphasizing that it is traditionally the lawyer's role, rather than the judge's, to frame the issues and propel the contest).

266. Young, *supra* note 154, at 558 (citations omitted).

267. *Id.*; *see also* McLaughlin, *supra* note 19, at 1123-24 (noting the adversarial system presumes a contest between equals).

268. *Id.*; *see also* Kim, *supra* note 31, at 1644 (concluding that the adversarial system may be unfair for those who cannot afford counsel and cannot adequately represent themselves).

269. *See* Engler, *And Justice for All*, *supra* note 7, at 1988, 2022, 2069 (suggesting that pro se litigants may be advantaged or disadvantaged, depending on the circumstances and accommodation by the court).

270. *Id.* at 2022; *see also* Bounds v. Smith, 430 U.S. 817, 826 (1977) (holding that access to a law library is an essential factor in considering whether a pro se litigant has had a fair chance to present his case).

271. *See* Rhode, *Equal Justice*, *supra* note 31, at 55 (quoting the Supreme Court's opinion in Griffin v. Illinois, 351 U.S. 12, 19 (1956)).

272. *See, e.g.*, *id.* at 61 (arguing that courts should at least consider whether unrepresented parties received "adequate justice," since access to equal justice is an implausible ideal).

273. *See* Engler, *And Justice for All*, *supra* note 7, at 2023 (suggesting that it makes no sense to alter the goal of achieving justice simply to justify retention of existing rules).

> If the courts hold out the promise of fairness and justice, but claim for practical reasons to be unable to achieve such a result, the advertising is false. It is hypocritical to claim to provide fairness to everyone through a system that is not prepared to do so for those without lawyers.[274]

While eliminating the adversarial system would not eliminate all of the problems faced by the unrepresented litigant, without doing so some argue that there can be no meaningful access for the unrepresented to the courts.[275]

D. The False Assumption as to Why Individuals are Pro Se[276]

The foundation for many of the arguments for greater accommodation and assistance for pro se litigants is the belief that the vast majority of pro se litigants are forced to represent themselves because they cannot afford counsel.[277] Unfortunately, the available data undermines this contention. While certainly there are many individuals who cannot afford counsel and must represent themselves in court, there are likewise many who, for a variety of reasons, choose to proceed pro se. For instance, in one survey, forty-five percent of pro se litigants stated that they *chose* to represent themselves because the case was simple, not because they could not afford an attorney; only thirty-one percent were pro se because they could not afford to retain counsel.[278] Almost half had the necessary funds to retain counsel, but chose not to.[279] Some litigants who could afford counsel

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274. *Id.* at 2031.

275. *See id.* at 2044 (asserting that development of rules for cases where only one party is unrepresented is necessary to remedy the "gaping hole" in the existing system).

276. *See generally* Swank, *supra* note 5 (exploring at greater length the myths and realities of why parties choose to represent themselves).

277. *See* Engler, *And Justice for All*, *supra* note 7, at 2027 (stating that "[a]lthough some litigants who could afford counsel refrain from doing so, the notion that most litigants choose to forego legal representation is fictitious in many contexts" and "a litigant's appearance without counsel must be presumed to be coerced, rather than voluntary."); *supra* notes 19-25 and accompanying text (surveying the common belief that pro se litigants forego counsel because of cost considerations).

278. Bruce D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS L.J. 553, 567 (1993); *see* Berenson, *supra* note 13, at 119 (concluding that many middle income litigants forego legal representation in simpler, less serious cases even though they would pay for representation in criminal cases); Rhode, *Connecting*, *supra* note 11, at 399-400 (attributing the increase in self-representation to the increased availability of do-it-yourself legal resources, cut-backs in legal aid, and simplification of certain legal procedures); Greacen, *supra* note 13, at 3-5 (reviewing studies from various states finding divergent trends in income, gender, and education of self-represented litigants). *But see* Deborah L. Neveils, *Florida's Vexatious Litigant Law: An End to the Pro Se Litigant's Courtroom Capers?*, 25 NOVA L. REV. 343, 346 (2000) (stating only twenty percent of pro se litigants can afford counsel but simply do not want to be represented); Henderson, *supra* note 22, at 573-74 (citing a direct correlation between the increase in divorce litigation costs and the numbers of litigants who chose self representation).

279. *See* Graecen, *supra* note 13, at 3 (noting that in one study almost half of pro se litigants had annual incomes of more than $30,000, and many had incomes over $50,000).

indicated that they would rather spend their money on other things.[280] There are many reasons for the growth of pro se litigation other than the cost of securing legal assistance. They include: (1) increased literacy rates and education;[281] (2) increased sense of consumerism;[282] (3) increased sense of individualism and belief in one's own abilities;[283] (4) an anti-lawyer sentiment;[284] (5) a mistrust of the legal system;[285] (6) a belief that the public defender in criminal cases is overburdened;[286] (7) a belief that nothing can be done about the situation;[287] (8) a belief that the court will do what is right whether the party is represented or not;[288] (9) a belief that litigation has been simplified to the point that attorneys are not needed;[289] (10) the advent of do-it-yourself publications, kits, and websites;[290] (11) a desire to save money and not share proceeds with an attorney;[291] and (12) as a trial strategy designed to gain either sympathy[292] or a procedural advantage over represented parties.[293]

But see Engler, *And Justice for All*, *supra* note 7, at 2027 (stating although some litigants who could afford counsel refrain from doing so, the notion that most litigants choose to forego legal representation is fictitious in many contexts).

280. *See* Berenson, *supra* note 13, at 119 (recalling that in one study twenty-two percent of pro se litigants could afford a lawyer but chose not to retain one); Sales, *supra* note 278, at 567 (presenting the complete data from the study cited by Berenson).

281. Goldschmidt, supra note 3, at 36; see also Mike Jay Garcia, *Key Trends In The Legal Profession*, 71 FLA. BAR J. 16, 20 (1997) (discussing how personal computers and Court TV have led to the increase of pro se litigants).

282. *See id.* (observing that clients have become more questioning and demanding).

283. *See id.* (describing one lawyer-authored book that aimed to imbue the reader with confidence by thoroughly explaining every step of the courtroom process); Healey, *supra* note 8, at 133 (suggesting some pro se litigants may have a blind belief in their own innocence and in the ability of the court to see their innocence); Sales et al., *supra* note 278, at 597 (positing that with proper forms and instructions the vast majority of people who wish to self-represent are capable of doing so).

284. Goldschmidt, *supra* note 3, at 1145; *see also* Bradlow, *supra* note 19, at 661-62 (noting many pro se litigants may harbor a mistrust of counsel); Greacen, *supra* note 13, at 4 (citing the belief that lawyers cause cases to be delayed); Healey, *supra* note 8, at 132 (referring to mistrust of lawyers and of the legal system in general); Berenson, *supra* note 13, at 122 (suggesting that litigants believe lawyers try to prevent amicable settlements and to drag out cases in order to increase their billable hours); Williams, *supra* note 12, at 816 (citing the belief that lawyers are incompetent and dishonest); Garcia, *supra* note 281, at 20 (referring to a general public suspicion of lawyers).

285. *See* Nichols, *supra* note 31, at 380 (noting many pro se litigants believe the system is inherently unjust); Healey, *supra* note 8, at 133.

286. Bradlow, *supra* note 19, at 661-62.

287. Rhode, *Connecting*, *supra* note 11, at 381.

288. *See* Healey, *supra* note 8, at 133 (referring to litigants' attitude toward the court as "blind belief").

289. *Id.* at 132; *see also* Williams, *supra* note 12, at 816 (citing pro se litigants who watch "Judge Judy" and believe it is simple to represent oneself).

290. Goldschmidt, *supra* note 3, at 1145.

291. Williams, *supra* note 12, at 816; Healey, *supra* note 8, at 132-33; *see also* Sales et al., *supra* note 278, at 567 (noting twenty-two percent of respondents said they had money to hire an attorney but preferred not to do so).

292. *See* Bradlow, *supra* note 19, at 662 (explaining that the accused may want create the image of a "lone defendant against the mammoth state").

293. *See* Healey, *supra* note 8, at 133 (explaining that self-representation may enhance a

Still another reason why individuals are pro se is that they are *advised* to proceed on their own.[294] According to one survey in Idaho, thirty-one percent of pro se litigants consulted counsel before trial and were advised either that their case was simple enough that they could handle it on their own, or by virtue of being uncontested, that they did not need an attorney.[295] Some pro se litigants, based upon repeated experiences with the legal system, may actually be able to represent themselves better in court than with counsel.[296] Most telling of all, according to one study, "[seventy-two percent] of pro se litigants indicated they would choose to represent themselves again in the future."[297] Not only are many pro se litigants choosing to represent themselves, they are choosing to do so again and again.

In some rural locations, even if a litigant is able to and wishes to hire an attorney there may be none to be found.[298] Likewise, there are some areas of the law in which very few attorneys practice, such as landlord tenant disputes and certain family law issues, resulting in litigants needing to represent themselves.[299] Ultimately, it may be the simplicity of the cases and the nature of the jurisdiction, more than the characteristics of the litigants, that determines whether individuals represents themselves or not.[300] It is important to note, however, that the only thing all pro se litigants have in common is that they have nothing in common.[301] According to available research, education and income levels vary widely among pro se litigants.[302] Some studies indicate that on average pro se litigants are younger than represented parties, have on average one to three years of college education, and have previously represented themselves.[303]

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litigant's opportunities for delay, mistrial, and confrontation of witnesses).

294. Thompson, *supra* note 79, at 1316.

295. *Id.*

296. *See* Healey, *supra* note 8, at 133 (suggesting that some litigants may have more court experience than some court appointed attorneys).

297. Beck & Sales, *supra* note 66, at 1039; *see* Sales et al., *supra* note 13, at 603-04 (noting that only a slightly higher percentage, seventy-nine percent, of attorney-represented clients would choose the same method of representation again).

298. *See* Thompson, *supra* note 79, at 1315 (observing that most Idaho attorneys live in cities, leaving a scarcity of lawyers in rural areas); Harrison, *supra* note 14, at 75 (reporting high utilization of family law facilitators by pro se litigants in rural areas).

299. *See* Thompson, *supra* note 79, at 1315 (explaining that the areas of law in which litigants most often self-represent are the areas with the greatest scarcity of lawyers); Engler, *And Justice for All*, *supra* note 7, at 2016 (citing the shortage of available lawyers for the poor).

300. *See* Sales et al., *supra* note 278, at 598 (indicating that litigants are less likely to self represent in divorce cases involving children because of the complex issues involved).

301. *See* Flaherty, *supra* note 101, at 92 (noting that people with different incomes and educational backgrounds opt for self representation); Henderson, *supra* note 22, at 574 (suggesting that there is no typical pro se litigant).

302. Flaherty, *supra* note 101, at 92; Henderson, *supra* note 22, at 574.

303. *See id.* (explaining that pro se litigants are likely to have at least one predictive characteristic, such as youth, lower income, and experience with self-representation); Sales

Other studies indicate that individuals with less education are more likely to be pro se.[304] Just as there is little consensus as to the profile of an "average" pro se litigant, as shown above, there is little consensus as to why people represent themselves in court.[305] Regardless of why they represent themselves, pro se litigants have shown to be more knowledgeable about their rights than originally thought to be.[306]

The arguments that pro se litigants should be given even more accommodation and assistance in court would be much stronger if it could be shown that the majority of pro se litigants are involuntarily representing themselves, versus doing so by choice.[307] If most, or even a substantial portion of pro se litigants, are choosing to represent themselves even though they have the means to hire counsel, why should the fundamental elements of the adversarial system of justice—such as the roles of the judge, clerk, rules of procedure and evidence—be altered?

E. The False Belief that Having Counsel Guarantees Access to Justice

The second fundamental flaw with the arguments advocating greater accommodation and assistance for pro se litigants hinges on the belief that "justice" is accessible only to those litigants with attorneys.[308] The harsh reality, however, is that justice is often inaccessible even for those *with* representation. All too often, attorneys fail to file matters, miss deadlines, or make other mistakes that prevent their clients' issues from being litigated on the merits.[309] Cases are legion of attorneys failing to lay proper

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et al., *supra* note 278, at 562 (indicating that in one study only eight percent of litigants under thirty years of age retained a lawyer).

304. *See id.* (finding that those with less education were more likely to self-represent, but only because, and to the extent, that their incomes were lower).

305. *See* Stanoch, *supra* note 13, at 297 (indicating that no one seems certain whether the increase is due to cuts in legal aid or perceptions of litigants that they can handle their cases without lawyers).

306. *See* Sales et al., *supra* note 278, at 574-76 (finding that self-represented litigants understood their rights as well as attorney-represented clients).

307. *See, e.g.*, Henderson, *supra* note 22, at 573 (advocating increased assistance to pro se divorce litigants given a study that showed seventy-two percent had forgone representation because they could not afford it).

308. *See* Engler, *And Justice for All*, *supra* note 7, at 2030-31 (rejecting criticisms of more active roles for judges when one litigant self-represents); Young, *supra* note 154, at 558 (suggesting that legal representation is critical for a fair trial); Henderson, *supra* note 22, at 575-76 (noting that the complexity of court processes and forms is a major barrier to pro se litigants); Rosenbloom, *supra* note 66, at 305 (observing that pro se litigants are often overwhelmed by the complexity of both procedural and substantive aspects of the law); Buxton, *supra* note 2, at 106 (explaining that pleading requirements in Federal courts are especially daunting to the unrepresented layman); Rhode, *Access to Justice*, *supra* note 35, at 1786 (calling the lack of legal assistance shameful); Lee, *supra* note 13, at 1266 (surveying the procedural pitfalls faced by pro se litigants); Bindra & Ben-Cohen, *supra* note 6, at 1 (noting that victory for pro se litigants is rare).

309. *See, e.g.*, H. Keith Morrison, *Legal Malpractice: The Law in Arkansas and Ways to Avoid Its Reach*, 55 ARK. L. REV. 267, 292 (2002) (indicating that malpractice most often arises in the context of litigation, such as when lawyers miss deadlines).

foundation[310] or of not understanding the rules of evidence,[311] and yet no one calls for the overhaul of the legal system because of it. Even a casual review of both criminal and civil cases will give examples of attorneys who are asleep, inebriated, or otherwise incoherent while representing their clients in court.[312] According to one source, for the approximately 35,000 clients who filed legal malpractice claims last year, and especially for the 12,000 (thirty-four percent) who recovered monetarily from their attorney, having a lawyer did not guarantee their ability to have access to justice.[313] These numbers are merely the tip of the iceberg: "[m]ost litigation misconduct and ineffective assistance of counsel goes unreported and unremedied."[314] For these clients and the thousands that did not file malpractice claims, there is often little redress for their attorney misconduct except against the attorney themselves—and as shown by the statistics, these actions are unlikely to prevail.[315]

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310. *See, e.g.*, Kesel v. UPS, 339 F.3d 849, 850 (9th Cir. 2003) (holding that the plaintiff had failed to show defendant's failure to comply with released valuation doctrine); United States v. Schnapp, 322 F.3d 564, 573 (8th Cir. 2003) (holding that the defendant had failed to show why impeachment testimony should not have been excluded); Alston v. King, 231 F.3d 383, 383 (7th Cir. 2000) (holding that a city sanitation director had failed to show he would not have been fired even if he had been given due process).

311. *See, e.g.*, People v. Pickens, 446 Mich. 298, 303 (1994) (holding that despite defense attorney's failure to comply with rules of evidence, defendant was not denied effective assistance of counsel).

312. *See, e.g.*, Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 B.Y.U. L. REV. 1, 7 (2002) (surveying extreme cases of attorney incompetence); Rhode, *Access to Justice*, *supra* note 35, at 1800 (stating "[c]onvictions have been upheld where lawyers spent less time preparing for trial than the average American spends showering before work").

313. *See Statistics on Legal Malpractice*, *at* http://www.legal-malpractice-lawyers-attorneys.com/legal_malpractice_statistics.html (last visited Aug. 14, 2005) (on file with the American University Law Review) (explaining that the largest number of malpractice claims arose in personal injury cases).

314. *See* Rhode, Colloquium, *supra* note 253, at 1556.

315. *See* Bell v. Eastman Kodak Co., 214 F.3d 798, 802 (7th Cir. 2000) (dismissing an appeal on the basis of untimely filing by the plaintiff's lawyer); Stanciel v. Gramley, 267 F.3d 575, 581 (7th Cir. 2001) (holding attorney's deficient performance did not warrant retrial); Sparrow v. Harlan Heller, 116 F.3d 204, 206 (7th Cir. 1997) (holding plaintiffs were not entitled to relief from judgment because error in asserting jurisdiction was due to inexcusable attorney negligence); Beaudry & Pischke v. Corrections Corp. of Am., 331 F.3d 1164, 1169 (10th Cir. 2003) (ruling that plaintiffs could not assert ineffective assistance of counsel because no Sixth Amendment right to counsel exists in civil cases); Cottman v. Aurora Pub. Sch., 85 Fed. Appx. 83, 88 (10th Cir. 2003) (holding that plaintiffs were not entitled to appeal or retrial where attorney failed to provide trial transcript to appellate court); Castrodad-Soto v. Rivera-Sanchez, 103 Fed. Appx. 401, 401 (1st Cir. 2004) (affirming trial court's dismissal of suit without considering allegations that prior counsel was negligent); Robinson v. S. Foods Group, 93 Fed. Appx. 176, 177 (10th Cir. 2002) (holding plaintiffs' attorney's incompetence was not a basis for reversing judgment); Glick v. Henderson, 855 F.2d 536, 541 (8th Cir. 1988) (ruling that proper remedy for alleged incompetence of plaintiffs' attorney would be a malpractice suit rather than a warrant for a new civil rights action); MacCuish v. United States, 844 F.2d 733, 735 (10th Cir. 1988) (holding that plaintiff was misapplying the Sixth Amendment right to counsel in seeking a new trial in a civil suit); Rhode, Colloquium, *supra* note 253, at 1555-56 (stating that ninety percent of bar complaints against attorneys are dismissed, and less than two percent result in

Even in clear cases of attorney misconduct there is seldom an opportunity to have a case reheard by a court. In criminal matters, ninety-nine percent of claims of ineffective assistance of counsel were unsuccessful in overturning a verdict and getting a new trial.[316] It is even worse for civil litigants. As there is generally no constitutional right to counsel in civil cases, there can be no constitutional right to effective assistance of counsel in a civil case.[317] Ineffective assistance of counsel in a civil case is not grounds for overturning a judgment, as it is in a criminal case. As stated by the Supreme Court in *Link v. Wabash Railroad Co*., a party's mistake of choosing the wrong person to represent them in court cannot serve as grounds to re-litigate the case; the party made a choice as to their representation, and if that choice was a bad one the other party should not be penalized.[318] This logic is true whether the person hired an attorney or had one appointed for them.[319]

Even when attorneys *make no mistakes*, their clients can be denied "justice." An example of this is the fact that innocent individuals are sometimes convicted and incarcerated—perhaps even executed—for crimes they did not commit, regardless of how well their attorneys represented them.[320] Normally these cases come to light through the use of

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public sanctions).

316. Rhode, *Equal Justice*, *supra* note 31, at 55 (referring to results from one study published in 1995).

317. *See, e.g.*, United States v. Sardone, 94 F.3d 1233, 1236 (9th Cir. 1996) (holding that alleged ineffective assistance of counsel in a prior civil action did not require dismissal of a related criminal indictment); Helm v. Resolution Trust Corp., 84 F.3d 874 (7th Cir. 1996) (ruling that a mortgager was not entitled to relief from judgment because attorney's inexcusable negligence was not an exceptional circumstance); *Sparrow*, 116 F.3d at 206-07 (holding that attorney's negligence in failing to assert proper jurisdictional amount did not entitle plaintiff to relief from adverse judgment), *Stanciel*, 267 F.3d at 580 (deciding plaintiff prisoner was not entitled to a retrial despite alleged attorney negligence); *Beaudry & Pischke*, 331 F.3d at 1164 (expressing confusion over the theory pressed by appellants and reminding them that there is no Sixth Amendment right to counsel in civil cases); Babcock v. Town of Camp Verde, 103 Fed. Appx. 309, (9th Cir. 2004) (rejecting appellant's contention that ineffective assistance of counsel represented a violation of his federally protected rights); *Cottman*, 85 Fed. Appx. at 83 (holding that ineffective assistance of counsel cannot form a basis of appeal in a civil case); Mayo v. Fowler Fitness, 110 Fed. Appx. 69, 71 (10th Cir. 2004) (holding in a discrimination case that an appellate court cannot reverse trial court's ruling on the basis of ineffective assistance of counsel because there is no right to counsel in such civil cases); *Robinson*, 93 Fed. Appx. at 176 (affirming the lower court's dismissal of a racial discrimination case and rejecting appellant's assertion of ineffective assistance of counsel); *Glick*, 855 F.2d at 536 (holding there is no constitutional or statutory right to counsel in civil cases); *MacCuish*, 844 F.2d at 733 (holding any incompetence by lawyer in medical malpractice case could not warrant a new trial).

318. 370 U.S. 626, 634 (1962).

319. *See Glick*, 855 F.2d at 536 (reasoning that since there is no constitutional right to appointed counsel in civil cases, there can be no right to effective counsel if an attorney is in fact appointed).

320. *See* Peter Neufeld, Symposium, *Preventing the Execution of the Innocent: Testimony Before the House Judiciary Committee*, 29 HOFSTRA L. REV. 1155, 1155 (2001) (recalling that there have been at least sixty-seven post-conviction exonerations based on

DNA evidence, and sometimes cost taxpayers millions of dollars in efforts to compensate the wronged-individual.[321] In San Francisco, one judge recently refused to hear a case regarding same-sex marriage because the petition had a semi-colon instead of a comma.[322] While the judge's statement that "I am not trying to be petty here, but it is a big deal. That semicolon is a big deal"[323] was in all likelihood a disingenuous attempt to avoid a highly controversial political issue, it nevertheless reflects an instance of when represented parties were denied access to justice for having the audacity of using a semi-colon in a pleading.

Despite the assertion that only with counsel can a litigant have meaningful access to the courts, the reality is that, for many litigants, even with proficient (let alone deficient) counsel, they are denied meaningful access or true "justice."[324] Calls for greater assistance and accommodation for pro se litigants to "level the playing field"[325] between pro se and represented parties are therefore inappropriate. For example, pro se litigants should not be allowed to relitigate based on errors they made[326]—

DNA evidence); Barry C. Scheck, Symposium, *Preventing the Execution of the Innocent: Testimony Before the Senate Judiciary Committee*, 29 HOFSTRA L. REV. 1165, 1165 (2001) (emphasizing that DNA evidence has helped identify the guilty and exonerate the innocent); Jean Coleman Blackerby, *Life After Death Row: Preventing Wrongful Capital Convictions and Restoring Innocence After Exoneration*, 56 VAND. L. REV. 1179 (2003) (noting that more than 100 death row inmates have been released pursuant to evidence of innocence since 1973). The result can be even more prevalent when attorneys make mistakes in capital cases. *See* Rhode, *Access to Justice*, *supra* note 35, at 1800 (stating that "defendants have been executed despite their lawyers' lack of any prior trial experience, ignorance of all relevant death penalty precedents, or failure to present any mitigating evidence.").

321. *See* Holly Schaffter, *Postconviction DNA Evidence: A 500 Pound Gorilla in State Courts*, 50 DRAKE L. REV. 695, 695 (2002) (heralding DNA evidence as a revolutionary forensic technique); Karen Christian, *"And the DNA Shall Set You Free": Issues Surrounding Postconviction DNA Evidence and the Pursuit of Innocence*, 62 OHIO ST. L.J. 1195, 1195 (2001) (arguing that convicts should automatically be granted DNA testing and a hearing in the case of favorable results); Craig M. Cooley, *Tort Reform and the Erroneously Convicted: Compensating For Lost Time and [Possibly Lost Lives]*, *at* http://www.law-forensic.com/tort_reform_wrongly_convicted.htm (last visited Aug., 15, 2005) (on file with the American University Law Review) (surveying various wrongful convictions and subsequent attempts to receive compensation).

322. *See* Kevin Drum, *Courtroom News*, *at* http://www.washingtonmonthly.com/archives/individual/2004_02/003296.php (Feb. 17, 2004) (on file with the American University Law Review) (documenting the judge's comments and posting various readers' reactions).

323. *Id.*

324. *See* Christian, *supra* note 321, at 1195 (describing the extent of wrongful convictions even where ineffective assistance of counsel was not alleged).

325. Esquivel, *supra* note 21, at 101; *see* Sheldon, *supra* note 189 (arguing that evidentiary rules should be disregarded in non-jury trials in order to make courts more accessible to non-lawyers); Goldschmidt, *supra* note 3, at 1158 (arguing that lawyers and legal assistants should be permitted to "ghost write" pleadings for pro se litigants); Rhode, *Access to Justice*, *supra* note 11, at 402 (lamenting the lack of effective access to courts for battered women without lawyers); Holt, *supra* note 18, at 167 (advocating for courts to provide greater assistance to pro se litigants); Rosenbloom, *supra* note 66, at 380 (stating "[t]he argument is that a pro se party is at such a disadvantage when opposing a represented party that judicial intervention may be warranted to maintain a level playing field.").

326. *See supra* notes 164-66 and accompanying text (reviewing arguments that

even if the mistake was based on bad advice—just as represented parties cannot. The other party should not have to litigate a matter twice merely because a party is pro se. Pro se litigants should neither garner a tactical advantage by proceeding pro se, nor obviously suffer any systemic impairment.[327] As one commentator wrote, "[i]f a represented litigant will be held accountable for the procedural mistakes of his lawyer, then why afford a pro se litigant more protection . . . ?"[328] Pro se litigants should be treated the same as represented litigants, for in the "eyes of the law" all litigants are equal.[329]

Clearly, many if not most pro se litigants will not be as articulate, nor as versed in procedural or substantive law as attorneys.[330] But not all attorneys are equal. There is no handicapping system to hold back a better attorney when litigating against an inferior one; some attorneys are better prepared, harder working, and more able than others. As Judge Posner once stated:

> "The court states: An underlying assumption of the adversarial system is that both parties will have roughly equal legal resources." This has never been an assumption of the adversarial system. We do not put a cap on the amount of money that a litigant can spend on lawyers; we do not inquire whether the litigants had roughly equal legal resources; we allow one to outspend the other by as much as he pleases. We count on the courts not to be overawed by the litigant with the higher-priced counsel.[331]

Likewise, not all pro se litigants are equal—some will do better in court than others.[332] Some will be prepared and coherent, others might just show up. "While a pro se litigant is not necessarily on equal terms with a litigant who is well represented, he may well be on such terms with a litigant who is poorly represented."[333] What many who call for "a level playing field" seem to fail to realize is that the courtroom is rarely, if ever, "level"—nor

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traditional rules should be revised to protect pro se litigants).

327. *See* Healey, *supra* note 8, at 133 (explaining that self-representation may enhance a litigant's opportunities for delay, mistrial, and confrontation of witnesses).

328. *See* Jessica Case, *Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law an Excuse?*, 90 KY. L.J. 701, 737 (2002) (arguing that providing special instructions to pro se litigants at the summary judgment stage would give them incentives to attempt to excuse mistakes they made even though no such excuse is available to represented litigants).

329. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 533-35 (1980) (Stevens, J., dissenting) (recalling the court's long-standing aversion to titles of nobility and legally enshrined distinctions based on race, since they tend to detract from impartial governance).

330. McLaughlin, *supra* note 19, at 1132-33 (identifying the inability of many litigants to obtain counsel as one of the most glaring failures of the system).

331. Merritt v. Faulkner, 697 F.2d 761, 771 (7th Cir. 1983) (Posner, J., dissenting).

332. Suzanne E. Elwell & Christopher D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433, 449-50 (1990) (stating that there can be power and ability imbalances between pro se litigants just as there can between pro se and parties represented by counsel).

333. Case, *supra* note 328, at 737.

in reality could it be. Between any two parties in court there can be power imbalances—whether two pro se litigants, two represented litigants, or between a pro se and a represented party.[334] Many suits, whether criminal or civil, possess one side with a much stronger case than their opponent's. If there is one truism of our justice system, it is that the outcome of most cases does not seem to hinge on the quality of advocacy alone; parties with better representation do not always prevail. The probability of a positive outcome is often increased by thorough research and preparation, a strong grasp of procedural, evidentiary, and substantive law, and persuasive advocacy—but in no way is a positive outcome ever guaranteed.

As unfortunately access to justice is not guaranteed by having counsel, it likewise is not guaranteed to those representing themselves. Ultimately, regardless of if a party is represented or pro se, what is needed is a realistic view of the concept of justice.

III. THE REALITY OF "JUSTICE"

"[T]he core of the American judicial system is the right to 'equal justice under law.' On a procedural level, the phrase has generally been taken to mean 'equal access to justice,' and thus equal access to law."[335] While the idea of ensuring, through greater assistance and accommodation, that all pro se litigants have the opportunity to have their legal issues heard on the merits is noteworthy, it ignores the most fundamental aspect of American jurisprudence: the law does not require that an individual receive a perfect trial, but only a fair one.[336] Denial of access to the courts does occur for all parties—represented and pro se—based on a mandate of societal interests.[337] Necessary restraints such as filing fees (which are sometimes waived) and certain needed procedural requirements do alienate some from the legal system.[338]

While it could be possible to create a system in which attorneys are provided free of charge to all civil litigants and every case is heard fully on the merits—it seems that most Americans' priorities are, legitimately, elsewhere.[339] If the average American was asked if they are against

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334. *See, e.g.*, Elwell & Carlson, *supra* note 332, at 449-50 (noting that involvement of attorneys in helping to prepare small claims court litigants' cases can help alleviate the disparities that naturally arise even though both parties are pro se).

335. Case, *supra* note 328, at 701-02.

336. *See* Michigan v. Tucker, 417 U.S. 433, 438 (1974) (recalling that presence of counsel at a post indictment line-up may be critical to provision of a fair trial).

337. Jeanne M. Janchar, *Give Me Your Poor . . . In Support of the Constitutionality of the Proposed Legal Services Fund*, 71 UMKC L. REV. 863, 869 (2003) (discussing the effects of high filing fees in dissuading litigants from filing suits).

338. *See id.* (explaining that competing societal interests, such as concerns over crowded court dockets, may lead to policies that tend to keep litigants away from court).

339. *See* Sean Swint, *Most Americans Very Concerned About Public Health Issues, at*

innocent people being wrongly convicted or if someone who cannot afford an attorney should still have access to the courts they will undoubtedly say "yes," just as they tend to report being "very concerned" about public health issues—even though most could not define "public health" or give an example of a public health issue.[340] Contrary to the desires of those calling for greater assistance and accommodation for pro se litigants, as long as there is a seven-trillion dollar federal deficit,[341] state budgets in crisis,[342] the need to fight unemployment, counter terrorism, fix social security, and all the rest, many Americans will probably not want to see their tax dollars used predominantly—or even remotely—to ensure pro se court access as opposed to being spent other issues.[343] As one commentator wrote, "[t]he general mandate of our judicial system, as stated in the Federal Rules of Civil Procedure, is to provide a 'just, speedy and inexpensive determination of every action.' . . . [i]n order to secure these values, we must recognize that judicial resources are limited . . . ."[344] Maintaining the traditional roles of judicial participants and the equal application of procedural and evidentiary rules for all cases provides for the just, speedy, and inexpensive determination of every action.[345]

A. In Defense of Traditional Roles

Fundamental to the American legal system is the concept of judicial neutrality. "Without such neutrality, the entire legitimacy of the legal system, indeed its reason for existence within the democratic experiment, fall."[346] The appearance of impartiality is just as important, if not more important, as the reality of impartiality.[347] If the goal is to ensure that all people have "effective, meaningful assistance of the courts" then in theory

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http://my.webmd.com/content/article/22/1728_56121?src=Inktomi&condition=home%20&%20Top%20Stories (Mar. 30, 2000) (on file with the American University Law Review) (listing public health, education, infrastructure, defense, and taxes as issues drawing concern by the American public).

340. *See id.* (reporting the results of a 1,200 person survey released by the CDC).

341. BUREAU OF THE PUBLIC DEBT, *at* http://www.publicdebt.treas.gov/opd/opdpenny.htm (last visited Mar. 3, 2005) (on file with the American University Law Review).

342. *See supra* notes 33-39 and accompanying text.

343. *See supra* notes 42-44 and accompanying text.

344. *See* Mueller, *supra* note 13, at 111-12 (explaining that the speed of the judicial system is directly related to its level of justice and efficiency).

345. *See id.* (adding that career plaintiffs who file an excessive number of complaints slow the system down and breed a disrespect for the law). These concerns are similar to those surrounding the issue of the court assisting the pro se litigant.

346. *See* Zorza, *supra* note 19, at 426 (viewing the vast and intricate rules of the legal system as protecting and ensuring neutrality).

347. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1997) (discussing a judge's duty to avoid impropriety and the appearance of impropriety). *See generally* Harrison, *supra* note 14, at 70 (discussing the reaction of a represented party observing the court assisting a self-represented party). *But see* Zorza, *supra* note 19, at 434 (discussing differences between the reality of impartiality and the perception of reality in the courtroom).

it should apply to all—whether represented or not. If a judge is going to help one party, he or she must be willing to help all parties equally, whether represented or not.[348] Just as it would be fundamentally wrong for a judge to assist only women and not men, or only African Americans and not Hispanics, it is likewise fundamentally wrong for a judge to choose to only help parties based on their representation status.[349] A represented party, because of ineffective representation of counsel, may be denied effective access to justice just as a pro se litigant might.[350] Either the court must aid all equally, or aid none equally—but it should not pick and choose whom to aid based on representation status, race, gender, or whom the court likes the best.[351]

While some proponents of greater pro se assistance and accommodation argue that judges and court staff have a duty to assist the self-represented litigant in exercising their constitutional right to access the courts,[352] there is nothing in the Constitution or federal law that places an explicit duty on judges, clerks, or other court staff to actively aid a party based on his or her representation status.[353] "In the area of judicial involvement in pro se litigation, as elsewhere, there is a line between a 'legitimate advisory role' and 'the improper role of an advocate.'"[354] That line is often blurry, and almost inevitably leads down a slippery slope. It is one thing for a judge to ask a question of a witness called by a party and another for the judge to choose which witnesses will appear on behalf of a party.[355] The only true

348. *See* Zorza, *supra* note 19, at 439 ("Whatever the judge does, engagement or passivity, inquiry or explanation, must be done in a consistent manner.").

349. *Cf.* Holt, *supra* note 18, at 170 (describing the balancing act required of judges, since they must ensure the pro se litigants right of access, and at the same time must remain impartial, favoring neither the represented nor unrepresented).

350. *See supra* notes 308-15 and accompanying text.

351. *See* Engler, *And Justice for All*, *supra* note 7, at 2015 (1999) (stating that a judge would be more likely to aid a sympathetic self-represented party than one who is annoying).

352. *See* Holt, *supra* note 18, at 168 (describing the Sixth Amendment right to be heard as relatively meaningless for those without sufficient legal knowledge or assistance).

353. *See* United States v. Pinkey, 548 F.2d 305, 311 (10th Cir. 1977) ("[T]he trial court is under no obligation to become an 'advocate' for or to assist and guide the pro se layman through the trial thicket."); Decker, *supra* note 62, at 552-53 (adding that there is no obligation for a judge to aid a pro se defendant, even if it is clear that the defense is inadequate).

354. McLaughlin, *supra* note 19, at 1124.

355. *See, e.g.*, *id.* at 1124-25 (discussing historically acceptable actions taken by courts during a trial to further the ends of justice); *Pinkey*, 548 F.2d at 308 (

> The adversary nature of criminal proceedings does not prohibit the trial judge from taking proper steps to aid and assist the jury in the truth finding quest leading to the proper determination of guilt or innocence. In the promotion of this goal, the trial judge has an obligation, on his own initiative, at proper times and in a dignified, and impartial manner, to inject certain matters into the trial which he deems important in the search for truth.

); *cf.* Quercia v. United States, 289 U.S. 466, 469 (1933) ("[T]he judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.").

way of ensuring that the line between judge and advocate would not be crossed would be to prohibit judges from giving advice to any party, represented or not.[356] As the U.S. Supreme Court concluded, a judge cannot effectively discharge both the role of being the judge and counsel for a party.[357] A judge's role must be that of a judge, and not a combination of judge and advocate/representative/counsel.[358] The court is under no obligation to guide a self-represented litigant through the trial process.[359] The self-represented party cannot shift the burden of litigating his case onto the court.[360] A self-represented litigant, "does not have a constitutional right to receive personal instruction from the trial judge . . . [n]or does the Constitution require," a judge to serve as an advocate for a self-represented party.[361] If the court were to assist a party, it would become a player in the adversary process rather than the referee.[362] When a judge takes on the role of advocate for a pro se litigant, it could bias the outcome against an opposing represented party in a manner completely unrelated to the merits of the case.[363]

If a court were to slide down the slope of actively assisting pro se litigants, it is an exceedingly dangerous and slippery one.[364] Even though proponents argue for judicial assistance of pro se litigants against opposing attorneys, to be truly fair should not the court be willing to help either side which is not performing well in court? Not all lawyers were created equal,

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356. *Cf.* Kim, *supra* note 31, at 1645 (reporting that courts do not see a need to guide or inform pro se litigants in areas of substantive law, instead holding them to the same standard as a licensed attorney).

357. Carnley v. Cochran, 369 U.S. 506, 510 (1962). *See generally* Case, *supra* note 328, at 727-40 (criticizing a rule requiring district court judges to notify pro se litigants of the procedures of the summary judgment rule).

358. *See* Kim, *supra* note 31, at 1646 ("Courts cannot be expected to assume the awkward position, not to mention the imposition, of serving as both adjudicator and counsel for the pro se litigant. Such a position would place the court in conflict with the very structure of the adversarial system.").

359. *Pinkey*, 548 F.2d at 311; *see* Jacobsen v. Filler, 790 F.2d 1362, 1366 n.10 (9th Cir. 1986) (stating that "merely taking the pro se status of litigants into account in determining compliance with technical pleading or procedural rules does not require the district court to inform the litigant of *how* to comply with the federal rules . . . .").

360. *See* Dozier v. Ford Motor Co., 702 F.2d 1189, 1194 (D.C. Cir. 1983) (seeing no need for special consideration for a pro se litigant who is seeking a monetary reward).

361. McKaskle v. Wiggins, 465 U.S. 168, 183-84 (1983). The Court added that a judge may ensure compliance with procedure in other ways, by finding no Sixth Amendment violation when a judge appoints standby counsel to assist a pro se defendant with routine procedure, even if the defendant objects to the assistance. *Id.* at 184.

362. *Jacobsen*, 790 F.2d at 1366; *see* Bradlow, *supra* note 19, at 671 (stating that "[e]xtending too much procedural leniency to a pro se litigant risks undermining the impartial role of the judge in the adversary system").

363. *See* Sales et al., *supra* note 278, at 558 (describing the ethical catch-22 for judges who must ensure that the pro se litigant is not disadvantaged, while at the same time not allowing this judicial assistance to disadvantage the opposing represented party).

364. *See* Kim, *supra* note 31, at 1646 (asserting that a judge who assists a pro se litigant risks coming into direct conflict with the structure of the adversarial system).

at least in terms of ability.[365] Should the judge help the weaker attorney to ensure that it was the merits of the case, and not legal knowledge or advocacy ability of the attorney that decides the outcome? If the weaker attorney cannot lay a proper foundation for the admission of evidence or asks the wrong questions on cross examination, should not the judge do it for the attorney just as some are advocating that the judge do so for pro se litigants? If a judge is going to help a self-represented litigant negotiate a settlement, will he or she also help an attorney negotiate with another attorney? If a pro se litigant is better at litigating or negotiating than an opposing attorney, should the judge aid the attorney against the pro se litigant? As absurd a scenario as it seems, it is the logical extension of a judge providing active assistance to a litigant to ensure his or her "access to justice."

Ultimately, those who advocate for judicial assistance for pro se litigants argue that judges should act one way when both parties are self-represented,[366] another when both are represented by counsel, and a third way when one party is represented and one is not.[367] True impartiality and equality, however, would only be achieved by either helping no parties or by helping all parties all the time. The first option of refusing to help any party would be the easiest to achieve and the most visibly impartial.[368] The second would be difficult to ensure that the same amount of assistance was consistently offered, and there might be times when parties—whether represented or not—may not wish to be aided by the court.[369] They or their counsel may have a very good reason for not asking a question, calling a witness, or introducing a certain piece of evidence. If a judge's "assistance" hurts their case, should that be grounds for a reversal on appeal—or a suit for damages against the judge? The parties to a suit, whether represented or not, are adults and they should be allowed to make choices.[370] Constant judicial "assistance" could potentially negate their ability to make choices, leading to the question as to whether the right to

365. *See supra* notes 308-15 and accompanying text.

366. *See* Engler, *And Justice for All*, *supra* note 7, at 2016-18 (suggesting that when both parties are self-represented the judge should act like an administrative law judge, handling the questions and developing the evidence of the parties).

367. *See* Zorza, *supra* note 19, at 434 (advocating non-passive, engaged judges when one side is represented and one is not).

368. *See id.* at 428 (alluding to the character of a television show judge who does no more than oversee the proceedings and responds only when called upon to do so by counsel).

369. *See* McKaskle v. Wiggins, 465 U.S. 168, 172-73 (1984) (involving a litigant who at times refused the assistance of court appointed counsel, even when such assistance was insisted upon by the court).

370. *See* Engler, *And Justice for All*, *supra* note 7, at 2030 (discussing court interference with a party's right to engage in a private contract).

access the courts also includes the right to be free from unwanted assistance from the court.[371]

Some commentators also worry that the existence of pro se assistance programs can discourage individuals who would otherwise seek legal help, and who need it, from seeking it.[372] As consumers become more resourceful and more skilled, they are in some cases becoming less trusting of legal service providers.[373] This, however, is the risk of any consumer-driven process: when consumers have choices, they may make the wrong choice.[374] This is true whether the individual is buying automobile repair parts, choosing dietary supplements, or filing a petition to institute a legal proceeding. Judicial paternalism should be discarded; merely because the individual may make a bad choice is no reason to deny them the opportunity to make choices.

"Trial courts generally do not intervene to save litigants from their choice of counsel;" a party that chooses to represent himself should be treated the same.[375] Self-represented litigants should bear the consequences of choices they make in litigation just as represented parties do.[376] While a represented party would have recourse against their attorney for malpractice, this does not compensate them for the loss of the opportunity to obtain trial on the merits of their case, especially if they were seeking declaratory or injunctive relief.[377] With apologies to personal injury and medical malpractice attorneys everywhere, it is not always about the money.[378] A represented party whose attorney fails to follow the rules resulting in the dismissal or loss of their suit suffers the same fate as the

371. *See McKaskle*, 465 U.S. at 187-88 (concluding that standby counsel cannot assist a pro se defendant in presenting a substantive defense if the defendant does not want court appointed assistance; however, since the court appointed standby counsel only assisted in minor procedural elements of the case the rights of the pro se defendant were not violated).

372. *See, e.g.*, Michael Robertson & Jeff Giddings, *Legal Consumers as Coproducers: The Changing Face of Legal Service Delivery in Australia*, 40 FAM. CT. REV. 63, 72 (2002) (expressing a concern that those taking advantage of self help services will not recognize their limitations); Bonnie Sudderth, *President's Column*, 38 CT. REV. 3 (2002) ("By making the legal system more easily maneuverable for pro se litigants, are we encouraging more self-representation than would otherwise occur in the system?").

373. *See* Robertson & Giddings, *supra* note 372, at 72-73 (listing eleven reasons for the growth of self-help legal services).

374. *See* Carl Howe et al., *The Problem of Too Much Choice*, *at* http://www.blackfriarsinc.com/totm.html (June 1, 2004) (on file with the American University Law Review) (believing that, when it comes to giving the average consumer a choice in which goods to buy, the less choice given the better off the consumer will be).

375. Jacobsen v. Filler, 790 F.2d 1362, 1364-65 (9th Cir. 1986).

376. *Cf. id.* at 1365 n.7 (explaining that should a court act on behalf of a pro se litigant it will call into question its impartiality and will discriminate against the opposing represented party).

377. *Jacobsen*, 790 F.2d at 1365 n.6.

378. *See, e.g.*, United States v. Melendrez, 389 F.3d 829, 835 n.12 (9th Cir. 2004) (arguing that identity theft, in addition to harming the victim's financial well being, can cause serious damage to the victim's reputation and convenience).

unrepresented party that likewise fails to follow the rules. Mistakes of attorneys are not perceived to deprive their clients of due process and access to the courts, even though the result can be losing or dismissal of a case.[379]

As with judges, the roles of clerks should not be deviated from in an effort to assist one group of litigants against another. As any litigator or judge would immediately declare, clerks and other court staff are absolutely essential to the courts and the judicial process.[380] Most clerks' office staff, however, are not trained attorneys, nor is there any requirement for them to be able to perform their important function of keeping the courts operating.[381] Lay-persons—whether deputy clerks, intake officers, or bailiffs—no matter how well meaning or adept at their job, cannot give comprehensive, competent, legal advice as a properly trained attorney can.[382] Their knowledge of the law and legal remedies comes from their observations of their courts—and can reflect that a little learning is a dangerous thing.[383] While many perform their functions admirably, sometimes under adverse conditions, "[c]lerks may not be equipped to provide the necessary advice and may give bad advice. The courts may increasingly be faced with litigants having relied to their detriment on poor advice from clerks, or on a misunderstanding of a clerk's accurate statements."[384] Incomplete legal advice, lacking full issue analysis and presenting to the individual a range of options with attendant ramifications explained, is tantamount to no advice at all.[385]

Even if the possibility of prosecution for the unauthorized practice of law and civil liability[386] were removed, the logic of the restrictions would still

379. *But see, e.g.*, Link v. Wabash R.R. Co., 370 U.S. 626, 647 (1962) (Black, J., dissenting) (sympathizing with a client who reasonably had no idea that his lawyer was careless and ineffective); Georcely v. Ashcroft, 375 F.3d 45, 50 (1st Cir. 2004) (mentioning that ineffective assistance from counsel can be a basis for relief in immigration cases); Ponce-Leiva v. Ashcroft, 331 F.3d 369, 377 (3d Cir. 2003) (allowing for the possibility of a claim for ineffective assistance of counsel when an alien in a deportation case shows prejudice); *In re* Jamie TT, 599 N.Y.S.2d 892, 895 (N.Y. App. Div. 1993) (holding that in a hearing to decide if a minor should be placed in the custody of an individual accused of sexually molesting her, the child has the right to effective assistance of counsel).

380. *See* Witter v. County Comm'rs, 100 N.E. 148 (Ill. 1912) (discussing the need for a court appointed probation officer in juvenile cases involving dependant, neglected, and delinquent children).

381. *See* Holt, *supra* note 18, at 170 (explaining that clerks are not allowed to give legal advice because they are not lawyers, and as such should be prevented from practicing law).

382. *See* Engler, *And Justice for All*, *supra* note 7, at 1997 (discussing the limits on a clerk's ability to assist a pro se litigant, and describing the quality of a clerk's legal advice as poor).

383. Harrison, *supra* note 14, at 70.

384. Engler, *And Justice for All*, *supra* note 7, at 2038.

385. *See* Holt, *supra* note 18, at 170-71 (worrying that a clerk's lack of expertise may prevent a pro se litigant from having proper access to the courts).

386. *See generally* Healey, *supra* note 8, at 129-30 (discussing the unauthorized practice of law in a law library context).

apply to prohibiting clerks and court staff from providing legal advice.[387] While the definitions and even rationale for prohibiting the unauthorized practice of law varies from state to state,[388] it generally seeks to protect the public from receiving legal advice from unqualified persons, no matter how well-intentioned or knowledgeable about court procedures they may be.[389] It does not matter that a clerk or court staff member would not likely be successfully prosecuted for providing legal advice in the course of their duties[390] or whether a judge sanctioned their actions or not.[391] What matters is that "[u]nrepresented litigants must have access to competent advice to help them decide whether they should bring their problems before the court, and, if so, what remedies they should seek."[392] They cannot get this from individuals who are not trained (and hopefully competent) attorneys. If the issue is that there are not enough licensed attorneys providing competent, comprehensive legal advice to the public, the solution is not to have individuals, no matter how well meaning, provide advice that in all likelihood is neither competent nor comprehensive.[393]

B. In Defense of Rules

Some proponents of greater pro se assistance and accommodation argue that it is unfair in litigation to have pro se litigants abide by the rules that govern represented parties—since they do not know the rules and are incapable of learning them.[394] Rules, however, exist for a reason. They provide stability, predictability and legitimacy to court proceedings.[395]

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387. *See generally* Holt, *supra* note 18, at 170-71 (reasoning that clerks are not allowed to give legal advice because they are not lawyers and could not provide complete legal advice).

388. *See generally* Goldschmidt, *supra* note 3 (listing opinions from Arizona, Indiana, Maryland, Massachusetts, and Oregon).

389. *See* Healey, *supra* note 8, at 139-40 (viewing the prohibition of the unauthorized practice of law as a way to ensure that a layperson only receive legal protection from those adequately trained to give it); Hurder, *supra* note 50, at 2243 (contending that protection of the public from harm is the main reason for unauthorized practice rules).

390. *See generally* Healey, *supra* note 8, at 139-42 (stating that lacking a pecuniary motive, it is unlikely that a person would be successfully prosecuted for the unauthorized practice of law).

391. Hurder, *supra* note 50, at 2242-43 (stating that Rule 5.5 of the ABA Model Rules of Professional Conduct makes it unethical for a lawyer to "assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."). Presumably, this prohibition would be applicable against judges, who are lawyers, as well.

392. Engler, *And Justice for All*, *supra* note 7, at 2038.

393. *See supra* note 385 and accompanying text.

394. Peter L. Murray & John C. Sheldon, *Should the Rules of Evidence Be Modified for Civil Non-Jury Trials?*, 17 ME. BAR J. 30 (2002) ("Many pro se litigants do not suspect the existence of rules of evidence, and practically all do not understand them.") (emphasis omitted).

395. *See* Sheldon, *supra* note 189, at 311-13 (discussing a criticism of the author's previous article advocating the abandonment of the rules of evidence in non-jury cases).

These are the hallmarks of our legal system and a requirement of any system that proffers to advance the cause of justice. This is a truism regardless of the representation status of the parties. In any event, criticism of the "rules" is nothing new, nor has that criticism been ignored.[396] Modern rules of both criminal and civil procedure have done a great deal to eliminate technicalities, create uniformity, and simplify court processes.[397] Efforts to remove the technicalities in pleadings and proceedings have been ongoing since the mid-1800s.[398]

Procedural law, however, is "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[399] Procedural and evidentiary rules developed over time to prohibit misleading and untrustworthy evidence.[400] The importance of the rules is clear:

> Under Rules-based law, judges apply pre-existing legal doctrines to the facts to reach what are supposed to be strictly rational and objective decisions, untainted by the personal views of the judge . . . . These doctrines are themselves deductions from other, more fundamental principles, and the entirety forms a logically consistent and intellectually sound body of law . . . . Even if some such rules (or instructions) seem unfair sometimes . . . their time-tested 'reasonableness,' endows them with credibility and with precedential value for later cases and, ultimately, establishes the credibility of the legal process itself.[401]

Judgments need to be based "on a strict, logical application of legal rules, without regard for the result."[402]

The ability to self-represent should therefore not be a license to ignore relevant rules of procedural and substantive law.[403] In *Logan v.*

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396. *See id.* at 311 (quoting from a published criticism against the author by two Arizona state judges, which directly responded to a disapproval of the "rules" by pointing to judicial assistance programs as a better way to assist pro se litigants than eliminating the "rules").

397. *See* United States v. Debrow, 346 U.S. 374, 376 (1953) (discussing the procedural simplicity of the Federal Rules of Criminal Procedure); Hanna v. Plumer, 380 U.S. 460, 472 (1965) (explaining that one of the goals of the Federal Rules of Civil Procedure is to create uniformity in federal courts).

398. *See* Dupont de Nemours & Co. v. Vance, 60 U.S. 162, 171-72 (1857) (explaining that, in admiralty cases, the rules of pleading are simple and do not have many of the technical requirements found in the common law at the time); *see also* Jackson v. Virginia Hot Springs Co., 213 F. 969, 974 (4th Cir. 1914) (declaring that the plaintiff did not need to address any possible defenses in his declaration).

399. Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

400. *See* Goldschmidt, *supra* note 3, at 40 (tying the rise in procedural sophistication to the rise of lawyers and the legal profession).

401. *See* Sheldon, *supra* note 189, at 304-05 (discussing a criticism of the author's previous article advocating the abandonment of the rules of evidence in non-jury cases).

402. *Id.* at 315.

403. *See* Faretta v. California, 422 U.S. 806, 835 n.46 (1974) (recognizing the constitutional right of self-representation in criminal cases); McKaskle v. Wiggins, 465 U.S. 168, 173 (1984) (finding the right to self-representation was not violated when an appointed standby counsel assisted with some procedural elements and did not prevent the defendant

Zimmerman Brush Co. the Supreme Court held that while due process grants a party the opportunity to present his case and have its merits fairly judged, if the party fails to comply with a reasonable procedural requirement, then the merits of the case do not have to be heard.[404] When an individual appears representing himself, he subjects himself to the established rules of practice and procedure.[405] With regard to the rules, self-represented litigants should be treated neither better, nor worse, than parties with attorneys.[406]

Ultimately, either our justice system will have rules that apply to all, or no rules at all. Any belief that there could be one set of rules for one group of people, and another set of rules for another group—and both systems would be equally fair and just—is doomed to failure. Separate but equal did not work for schools or drinking fountains; it will not work for our courts as well even if the discriminating factor is not race but rather representation status.[407] Having rules that apply to some parties, but not others, will produce inequitable and unjust results. Rules are fair when applied evenly to all; when they are to be followed by some, but not others, regardless of the criteria, they cease to be "rules" and undermine the legitimacy of the entire system.[408] Justice should not depend on which judge a litigant is assigned to; the system as a whole must provide it. As one author noted,

> It is illogical and unfair to tell a man 'everyone is charged with knowing the law,' and 'ignorance of the law is no excuse,' when we send him to prison for violating a law he did not know about . . . and then when in prison he sues someone, to say he is not charged with knowing the law governing procedure in his own lawsuit until we send him a personal

from presenting his own case); *see also* Case, *supra* note 328, at 707-08 (stating that only in the reading of initial pleadings are pro se litigants treated differently than represented parties).

404. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 433-37 (1982) (finding that the defendant's case had yet to be heard on the merits when, through no fault of the defendant's, a state official failed to comply with procedure).

405. *See generally* Carnley v. Cochran, 369 U.S. 506, 510-17 (1962) (finding that the defendant had not waived his right to an attorney; this need was highlighted by the fact that the defendant still had to meet the various rules of procedure, and had failed to do so); *see also* Birl v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981) (concluding that the pro se litigant did not merit an extension of the timely filing requirement merely because he was pro se).

406. *See* Decker, *supra* note 62, at 551-52 (providing examples of cases in which the judge was not required to, and indeed did not, provide assistance to a pro se litigant opposing a represented party).

407. *See* Engler, *And Justice for All*, *supra* note 7, at 2012-15 (expressing concerns that a judge assisting a pro se litigant, whose opponent is represented by counsel, may jeopardize the judge's ability to remain impartial, and may encourage more litigants to appear in court without counsel).

408. *Cf.* Zorza, *supra* note 19, at 426 ("Without [judicial] neutrality, the entire legitimacy of the legal system, indeed its reason for existence within the democratic experiment, fall.").

explanation.[409]

While it is true that "[t]he rules of the game were crafted by judges and lawyers"[410] they were not done so to exclude self-represented litigants. The rules "not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits."[411] If there truly is a desire, however, to level the playing field for all litigants—including the pro se—it can only be accomplished by consistent, even application of legal precedent and rules of procedure.[412] As one author stated, "[t]he opportunity of a pro se litigant to be heard need not be further advanced by eroding the purpose and meaning of the rules, nor by changing the nature of the adversary system or the role of judges in the nation's courts."[413]

CONCLUSION

While not as extreme as questioning whether there should be any pro se assistance,[414] this article argues that education and information programs—not the elimination of the adversarial system of justice or equal application of the law—are the best way to assist the self-represented without discriminating against the represented. The first and foremost goal of pro se assistance should not be to create a "level playing field," but rather to provide information and eradicate barriers so as to ensure that a pro se litigant can gain meaningful access to the courts. There is no effort to "level the playing field" for attorneys, even though bad attorneys can prevent their clients from getting access to justice. The Due Process Clause of the U.S. Constitution requires that "the burdens placed upon one group of litigants be no greater nor less than those placed upon others."[415] Pro se litigants should be treated neither better, nor worse, than represented parties

409. *See* Case, *supra* note 328, at 701 (quoting a dissent from a Ninth Circuit case).

410. Engler, *And Justice for All*, *supra* note 7, at 2069.

411. *See* Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966) (finding that there was no Rule 23(b) strike suit, and that a trial on the merits was required, when a petitioner with a limited knowledge of the English language relied on her son-in-law's explanation of the facts before signing a complaint in a stockholder derivative suit).

412. *See* Smith v. Litton Loan Servicing, No. CIV.A.04-02846, 2005 U.S. Dist. LEXIS 1815, at *45, 2005 WL 288827 (E.D. Pa. Feb. 4, 2005) (asserting that legal precedent and legal rules allow the poor an even footing with the rich, the small with the large, and the novice with the expert); *see also* Case, *supra* note 328, at 740-41 (quoting two Supreme Court cases that stressed the importance of adhering to procedural requirements and maintaining the dignity of the courtroom).

413. Case, *supra* note 328, at 706.

414. *See* Sudderth, *supra* note 372 (figuring that, if lawyers should be discouraged from representing themselves in court, then certainly those not trained in the law should not be encouraged or assisted in representing themselves in court).

415. *See generally* Mueller, *supra* note 13, at 116 (explaining that since all people have a right of court access, a right that the Supreme Court found to be identical for all people, then no one person should have less of a burden simply because they are not represented by counsel).

in this or any other respect. The Constitution does not make an exception when dealing with individuals who voluntarily or involuntarily represent themselves.

All litigants, whether represented or pro se, deserve the same due process rights, including among others the opportunity to be heard, given adequate notice, to have a neutral and detached decision maker, to be able to present evidence, and the opportunity to confront and cross-examine witnesses at trial.[416] If the trial court were to help one side of a lawsuit rather than another solely because of the status of their legal representation, it would necessarily implicate the court's impartiality and discriminate against the party with counsel.[417] If self-represented litigants in general have problems with the rules, the solution is to re-write them to be more clear and understandable; the solution is not to eliminate the rules for them entirely nor have judges abandon the role of the neutral decision maker to become an advocate for one party against the other. "While it may be enticing to dumb-down the rules of evidence, the siren song of protecting pro se litigants should not come at the expense of sacrificing those fundamental principles upon which those rules have been based, and the protections they provide."[418]

Sometimes, despite the best devised forms or the most perfectly explained procedures, meaningful access to the courts requires the representation of counsel.[419] There are some cases that are so complex, or in areas of the law so arcane, that only experienced, competent counsel could effectively litigate them. Likewise, there will be some individuals that due to language or mental impairment, will be unable to represent themselves successfully in court. Neither of these reasons justify, however, eliminating the rules and roles or the adversarial system of justice. Rather, they are the scenarios that legal assistance models offering representation must be designed and funded to support.

Pro se assistance efforts, such as making easily comprehendible forms in appropriate languages and guides for conducting one's case and self in court, make it possible for pro se litigants to abide by the rules. If pro se litigants choose to ignore the rules and requirements, their cases should be dismissed just the same as if they were an attorney who ignored them. For

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416. *See* Bradlow, *supra* note 19, at 676 (contending that in order for a pro se litigant to receive a meaningful opportunity to be heard he is entitled to, at a minimum, a liberal construction of his pleadings).

417. Jacobsen v. Filler, 790 F.2d 1362, 1365 n.7 (9th Cir. 1986).

418. Sheldon, *supra* note 189, at 311 (quoting an article written by two Arizona state judges while discussing a criticism of the author's previous article advocating the abandonment of the rules of evidence in non-jury cases).

419. Merritt v. Faulkner et al., 697 F.2d 761, 763 (7th Cir. 1983) (citing Powell v. Alabama, 287 U.S. 45, 68-69 (1932)). Some cases require a level of expertise that even an intelligent layman cannot meet. *Powell*, 287 U.S. at 69.

the system to be fundamentally fair, all must be treated the same by the rules, the judges, the clerks, and the opposing attorneys.