THE GROWING CHALLENGE OF PRO SE LITIGATION

by
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This Article addresses the already substantial and rapidly growing docket of pro se cases in both state and federal courts. Despite the long-standing recognition of the right to self-representation in the Anglo-American legal tradition, its effects on the legal system are still poorly understood. Pro se cases pose inherent problems: they can cause delays, increase administrative costs, undermine the judges' ability to maintain impartiality and can leave the often unsuccessful litigant feeling as though she has been treated unfairly. These problems are likely to worsen since pro se cases already account for approximately forty-three percent of all appeals in the federal courts of appeal each year. Around fifty-four percent of these filings involve petitions brought by prisoners, but more than 10,000 are non-prisoner appeals.

Two broad factors may be responsible for the large volume and growth of pro se litigation. First, multiple trends have made legal services increasingly unavailable at an affordable price. The legal profession has tilted away from representing individuals and towards representing businesses. Federal support for legal services for the poor has declined by a third over the last twenty years. Tort reform has set caps on damages awards thereby reducing available contingent fees, and the power of the courts to require the provision of counsel has been narrowed. Second, American culture has long celebrated the notion of the "noble amateur." Do-it-yourself legal guides are a thriving industry, providing self-help manuals for everything from wills to divorces. Many laypeople believe that with the right guidebook they can master whatever legal challenge they face. At the same time the legal community's investment in the adversarial method has delayed reform. The organized bar has a long history of protecting its monopoly on the practice of law and has resisted measures that could broaden competition to provide legal services.

The Author advocates the adoption of a set of initiatives guided by the goal of giving pro se litigants a genuine opportunity to voice their views to a responsive decision maker. Courts should adopt practices that are transparent and acknowledge both sides. In many cases, however, there is no substitute for legal representation. Policy-makers should consider more robust use of the appointment authority along with the creation and maintenance of a pool of lawyers willing to accept appointment.

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I. INTRODUCTION—THE GENESIS OF A PROBLEM

In 1940, the world was thrilled by an innovative movie from Walt Disney Studios that presented a series of cartoon interpretations of great classical music scores. For the film entitled *Fantasia,*[1] the Disney artists paired works by Bach, Tchaikovsky, Dukas, Stravinsky, and Beethoven, among others, with animated material.[2] One of my favorites is the nine-minute Dukas segment[3] in which Mickey Mouse is presented as a hapless sorcerer's apprentice who gets into trouble by using his master's magic to enchant a broomstick into filling a cistern with water for him. Mickey discovers, too late, that he does not know how to stop the broomstick's ever more manic efforts. As the floodwaters start to rise, Mickey takes an ax to his nemesis. This proves ill-advised as the number of enchanted broomsticks multiplies and the torrent of water grows. Total disaster is only averted when Mickey's master returns, commands the waters to recede and restores order.

Today, America's courts appear to be facing an inexorably rising tide of pro se litigation. We have neither enchantment to blame for our dilemma nor a magician to set things right. The purpose of this Article is to explore how we came to face so substantial a pro se challenge and what options we might consider in addressing it. At the outset, it should be noted that such a task is seriously complicated by the shortage of data about pro se litigation. It is only in the last few years that we have even begun to consider the matter in a rigorous fashion. Presently, we have only the most fragmentary information about pro se trends and those who occupy the ranks of the self-represented.

The bits and pieces we have accumulated, however, seem to point toward a burgeoning pro se caseload. Turning first to the state courts, much of what we know is based on studies of specialized courts, most particularly those dealing with domestic relations. The National Center

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[1] FANTASIA (Walt Disney 1940).

[2] The music was performed by the Philadelphia Orchestra under the direction of Leopold Stokowski. *Id.*

[3] PAUL A. DUKAS, L'APPRENTI SORCIER [THE SORCERER'S APPRENTICE] (1897).

for State Courts found, based on 1991–1992 data, that in eighteen percent of domestic relations cases neither side had counsel and that in only twenty-eight percent of cases were both sides represented.[4] Those numbers are comparable to the figures reported in a number of states. Based on data from the early 1990s, it has been determined that sixty-seven percent of domestic relations court litigants on one side or the other proceeded without counsel in California.[5] In Maricopa County, Arizona, a pro se litigant appeared in eighty-eight percent of divorce cases in 1990. In 1985 the figure was forty-seven percent, and in 1980 it was twenty-four percent.[6] In other words, over the course of ten years the percentage of pro se litigants virtually quadrupled.

Domestic relation courts are far from unique. In Montana's civil courts in 2004, 9.4 percent of all non-prisoner civil filings came from self-represented litigants.[7] In New Hampshire in 2004, eighty-five percent of district court filings and forty-eight percent of superior court filings were by unrepresented litigants.[8] When New York University social scientist Tom Tyler polled 1575 Chicago residents for a 2006 book about obedience to the law, 147 said they had recent experience as litigants and seventy-one percent of them did not have counsel.[9] A California court survey in 2005 asked 2414 residents whether "the cost of hiring an attorney (kept/might keep) you from going to court."[10] An astounding sixty-nine percent agreed with this proposition.[11]

The situation in the federal courts appears to be similar although, again, the data are patchy and only occasionally longitudinal. A Federal Judicial Center Study of ten district courts between 1991 and 1994 reported that twenty-one percent of all filings were by pro se litigants and

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[4] JOHN A. GOERDT, DIVORCE COURTS: CASE MANAGEMENT, CASE CHARACTERISTICS, AND THE PACE OF LITIGATION IN 16 URBAN JURISDICTIONS 48 (Nat'l Center for State Courts 1992), *cited in* JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANGERS 8 n.8 (American Judicature Society 1998) [hereinafter MEETING THE CHALLENGE].

[5] MEETING THE CHALLENGE, *supra* note 4, at 8.

[6] *Id.* at 8–9.

[7] Nina Ingwer VanWormer, Note, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 990 (2007). In conformity with the general approach in the field, I will not focus on prisoner litigants. For an excellent analysis of prisoner litigation, see Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003).

[8] VanWormer, *supra* note 7, at 990.

[9] TOM R. TYLER, WHY PEOPLE OBEY THE LAW 12 (1990).

[10] *See* Tom R. Tyler & Nourit Zimerman, The Psychological Challenges of Pro Se Litigation 33 (July 14, 2008) (unpublished draft manuscript, on file with author). These data do not indicate what percentage of Californians have proceeded pro se, but suggest an inclination to do so among the population of the state.

[11] *Id.*

thirty-seven percent of these were non-prisoner cases.[12] Perhaps the best snapshot of district court pro se litigation was provided by a student note in the 1996–1997 volume of the *Hastings Law Journal* which analyzed 1993 San Francisco filings in the Northern District of California.[13] The note identified 683 non-prisoner pro se cases filed in 1993 and closed by the end of 1995.[14] Of these, a sample of 227 was closely scrutinized.[15] In fifty-two percent of the sample there was a pro se plaintiff.[16] Surprisingly, seventy percent of pro se litigants did not seek *in forma pauperis* status under 28 U.S.C. § 1915.[17] Only 8.5 percent of self-represented litigants filed a request for the appointment of counsel,[18] and about eight percent actually got cousel.[19] The success rate for pro se litigants in San Francisco in 1993 was not very high, 76.2 percent of them had judgment entered against them.[20] Pro se litigants won only 3.5 percent of their cases while another 20.3 percent were settled or transferred to another forum.[21] Among the sampled cases, pro se litigants lost on the basis of a preliminary motion to dismiss fifty-six percent of the time.[22] A total of 67 of the 227 studied cases involved pro se civil rights claims.[23] Other legal areas in which there were ten or more claims included contract, labor, social security, and tort cases.[24] On average, in a number of these categories, pro se cases had more docket entries and took longer to resolve than typical non-pro-se filings.[25]

This snapshot is skewed by the vagaries of the single city and district in which it was conducted, by the use of an arguably non-random sample of 227 of the 687 cases,[26] and by the exclusion of cases that had not closed by February of 1996.[27] This last consideration is especially significant because it means that the longest-lived pro se cases were not included in the sample, thereby driving down case duration statistics and lawsuit survival rates and, in all likelihood, understating win and/or

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[12] Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?*, 82 JUDICATURE 13, 14 (1998).

[13] Spencer G. Park, Note, *Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L.J. 821 (1997).

[14] There were actually a total of 725 non-prisoner pro se cases, but 42 had not closed by February of 1996, the termination date of the study. *Id.* at 848 n.41.

[15] *Id.* at 824.

[16] *Id.* at 823.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 834.

[20] *Id.*

[21] *Id.* at 834–35.

[22] *Id.* at 835.

[23] *Id.* at 832.

[24] *Id.*

[25] *Id.* at 837.

[26] *Id.* at 847.

[27] *See supra* note 14.

settlement percentages as well. It is troubling that we have little more than a single student piece to help us understand the pro se experience in federal district court.

In the federal courts of appeal, we have greater information because the Administrative Office of the United States Courts has been gathering data about self-represented litigants for more than a decade. What the data indicates for 2006 and 2007 is that pro se filings in the courts of appeal are substantial—approximately forty-three percent of all appeals.[28] Around fifty-four percent of these filings involve petitions brought by prisoners.[29] This still leaves a very substantial number of non-prisoner pro se appeals—over 10,000 per year.[30]

The sorts of factors that may be responsible for the large volume and apparent growth of pro se litigation are diverse but may be grouped under two broad headings: the first having to do with the operation of the justice system and the second arising outside the system in society at large. At the very top of almost every list of the justice-system-based causes is the unavailability of legal services at an affordable price. Virtually every study and report about the pro se issue makes this point.[31] As already noted, sixty-nine percent of Californians polled in 2005 saw the cost of retaining counsel as a significant deterrent to "going to court" at all rather than proceeding unaided.[32] Their perception about the difficulty of finding counsel to assist them is borne out by changes in the legal profession that have tilted the market away from individuals toward corporate clients.[33] Professor Marc Galanter has provided some statistics concerning the shift in the legal profession. In 1967, fifty-five percent of lawyer time was devoted to individuals and thirty-nine percent to businesses.[34] By 1992, these numbers had been reversed with individuals getting forty percent of 'lawyers' attention while businesses commanded fifty-one percent.[35] In the second of the famous Heinz and Laumann studies of the Chicago bar (focusing on 1995) the distribution is even

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[28] *See* JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 49 (2007).

[29] *Id.*

[30] *Id.*

[31] *See, e.g.*, MEETING THE CHALLENGE, *supra* note 4, at 10; NINTH CIRCUIT JUDICIAL COUNCIL TASK FORCE ON SELF-REPRESENTED LITIGANTS, FINAL REPORT 26 (2005) [hereinafter NINTH CIRCUIT FINAL REPORT].

[32] *See* Tyler & Zimerman, *supra* note 10.

[33] *See* Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System,* 98 MICH. L. REV. 953, 956–57 (2000).

[34] MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE 281 n.81 (2005).

[35] *Id.*

more lopsided. Business gets sixty-four percent of lawyer effort while individuals only get twenty-nine percent.[36]

That many people with legal needs are too poor to hire an attorney has long been acknowledged. Despite this, over the past 20 years the amount provided by the federal government to support legal services for the poor has declined by a third.[37] Today it is generally agreed that four out of five poor people cannot get their legal needs met and that the same difficulty affects three out of five members of the middle class.[38] Moreover, two litigation-based methods of securing counsel have been substantially narrowed during the same period. In a number of states, contingent fees have been reduced by the imposition of caps on pain and suffering awards, as well as other sorts of damages.[39] The upshot in places like California[40] and Texas[41] has been the withdrawal of counsel from fields like medical malpractice despite the existence of sound and often poignant claims.[42] The power of the courts to recognize the need for and require the provision of counsel has also been substantially narrowed. In *Lassiter v. Department of Social Services of Durham County*, the Supreme Court held that a mother facing the termination of parental rights was not constitutionally entitled to the appointment of counsel.[43] That decision requires case-by-case consideration of due process claims for appointment and indicates the Supreme Court's disinclination to require appointment.[44] The effect of all these developments has been to place an attorney out of reach for a substantial segment of the population—even when potential litigants have meritorious claims or an urgent need for assistance.

Economic and doctrinal barriers are not all that explains why a growing number of citizens have turned to self-representation. One of the most provocative pieces of information to come out of the *Hastings*

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[36] John P. Heinz, Robert L. Nelson & Edward O. Laumann, *The Scale of Justice: Observations on the Transformation of Urban Law Practice*, 27 ANNUAL REVIEW OF SOCIOLOGY 337, at 340 (2001).

[37] *See* Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1543 (2005) [hereinafter *In Defense of Rules*].

[38] *See* Tiffany Buxton, Note, *Foreign Solutions to the U.S.* Pro Se *Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 112 (2002).

[39] *See, e.g.*, Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 (2004).

[40] *Id.* at 1279–80. *See also* NICHOLAS M. PACE ET AL., CAPPING NON-ECONOMIC AWARDS IN MEDICAL MALPRACTICE TRIALS: CALIFORNIA JURY VERDICTS UNDER MICRA 30–33 (Rand 2004).

[41] *See* Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Justice System*, 55 DEPAUL L. REV. 635, 635–36, 662(2006).

[42] *See* Finley, *supra* note 39, at 1279–80.

[43] 452 U.S. 18, 33 (1981).

[44] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 639 n.42 (7th ed. 2004).

study is that seventy percent of pro se litigants in the Northern District of California sample did not seek to proceed *in forma pauperis*.[45] There may be a number of overlapping reasons for this (including the presence of a large number of lawyers facing disbarment in the sample) but the fact still remains that a sizeable body of pro se litigants was able to go forward without financial assistance. Anecdotal observation of the presence among pro se litigants of a number of individuals who can afford counsel but choose not to hire a lawyer has been made in both the law review literature[46] and case law.[47] The *Hastings* study noted that even when *in forma pauperis* status was sought, the court denied it about forty percent of the time,[48] again, at least implicitly, signaling the availability of resources.

The reasons litigants may go forward alone vary. The citizenry of the United States is fairly well educated. In light of this basic level of competence, lawyers, reportedly, have felt it appropriate to advise certain potential litigants that their problem is "simple" and that they can handle it on their own.[49] In an Idaho study, thirty-one percent of pro se litigants decided to go pro se after consulting counsel.[50] The advice to do it on your own plays into two popular notions in American culture; that the "Home Depot" do-it-yourself method applies to a lot more than house repairs and that in the internet era, the "noble amateur" can do just about anything as well as the expert.[51] The "Home Depot" attitude has produced a thriving industry of publishers providing self-help manuals and computer training programs for everything from wills to divorces.[52] When a leading legal manual publisher, Nolo Press, was challenged by the Texas Bar because of the alleged unauthorized practice of law,[53] not only did it succeed in overcoming regulator objections to self-help materials, but the matter provoked the Texas Legislature to pass a statue declaring:

> 'practice of law' does not include the design, creation, publication, distribution, display, or sale, including publication, distribution,

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[45] *See supra* note 17 and accompanying text.

[46] *See, e.g.*, Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 378 (2005). "In one survey, forty-five percent of pro se litigants stated that they chose to represent themselves because their case was simple . . . . Only thirty-one percent stated they were pro se because they could not afford to retain counsel. Almost half implied that they had the necessary funds to hire an attorney, but chose not to." *Id.*

[47] *See, e.g.*, Bauer v. Comm'r, 97 F.3d 45, 49 (4th Cir. 1996).

[48] *See* Park, *supra* note 13, at 831. "[T]he overwhelming majority of pro se litigants, 72%, were not legally 'indigent' . . . ." *Id.*

[49] *In Defense of Rules*, *supra* note 37, at 1575.

[50] *See* Francis H. Thompson, *Access to Justice in Idaho*, 29 FORDHAM URB. L.J. 1313, 1316 (2002).

[51] *See* ANDREW KEEN, THE CULT OF THE AMATEUR, HOW TODAY'S INTERNET IS KILLING OUR CULTURE 35 (Doubleday 2007) (emphasis omitted).

[52] *See* Dashka Slater, *Sue Yourself*, LEGAL AFFAIRS, Sep.–Oct. 2003, at 10.

[53] *In re* Nolo Press/Folk Law, Inc., 991 S.W.2d 768, 769 (Tex. 1999).

> display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney.[54]

The reaction of the Texas legislature speaks volumes about social and political attitudes toward the pro se decision. With respect to the internet, it has been observed that devotees are inclined to rail against "the dictatorship of expertise" and extol the virtues of the "noble amateur" in all sorts of information-based contexts.[55] It seems likely that these views are connected with the choice of at least some self-represented litigants to do their own legal work.

Popular entertainment has emphasized similar themes. Television shows featuring charismatic "kadi" judges[56] have become wildly popular. *The People's Court* and *Judge Judy* vie on a daily basis with each other and similar shows for viewers' attention. Their not too subtle message is that the wise (and wisecracking) judge, with the assistance of the litigants, can sort out any legal problem. Counsel is never in evidence on these shows and things still turn out just fine. This message, in turn, plays into a widely held and long established set of anti-lawyer attitudes among the general public. Professor Galanter has collected jokes about lawyers into a brilliant volume.[57] That volume suggests how intense anti-lawyer feeling has become. It also makes clear that the feeling is often translated into a go-it-alone attitude. Consider the following joke reproduced by Galanter:

> "Have you a lawyer?" asked the judge of a young man brought before him.
> "No, sir," was the answer.
> "Well, don't you think you had better have one?" inquired His Honor.
> "No, sir," said the youth. "I don't need one. I am going to tell the truth."[58]

From the jokester's point of view only liars need lawyers—representatives whose stock in trade seems to be untruthfulness. Americans have been saying such things about attorneys since the founding of the Republic.[59] Many have concluded that we have returned,

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[54] TEX. GOV'T CODE ANN. § 81.101 (Vernon 2005).

[55] *See* KEEN, *supra* note 51.

[56] *See* MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 976–78 (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., Univ. of Cal. Press 1978) (defining "kadi" justice as unsystematic, lacking governing principles, and offering inconsistent results). *See also* Terminiello v. Chicago, 337 U.S. 1, 11 (1949) (Frankfurther, J., dissenting) ("This is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.").

[57] *See* GALANTER, *supra* note 34.

[58] *Id.* at 34.

[59] *See* ANTON-HERMANN CHROUST, 2 THE RISE OF THE LEGAL PROFESSION IN AMERICA 16–17 (1965), *quoted in* GALANTER, *supra* note 34, at 4.

with a vengeance, to our lawyer-bashing ways.[60] The logical response is, if at all possible, to avoid hiring an attorney. While more might be said about the cultural underpinnings of pro se thinking, these suggestions should suffice to indicate that such notions are deeply anchored in America's current social outlook and prior history.

II. WHY WE HAVE DELAYED RESPONDING

The pro se tide has been rising for some time but we, like the slumbering Mickey in the *Sorcerer's Apprentice*, have taken a long time to notice. Our tardy response is understandable both because of our social attitudes and a number of system-based impediments to action. Judges, bar leaders, and legislators all apparently share the pro se litigant's faith in self-help and have, therefore, held back from more energetic intervention. The courts, when they act, have been drawn to solutions that focus on providing the self-represented with the rudiments of case preparation through educational programs and one-off advising sessions. These, so the theory goes, will prepare intelligent laypersons to navigate the legal system. This faith is the same one that fills the bookstore shelves with "how-to" manuals and fills the court advising kiosks with willing customers who believe they can master the challenge. Rather than consider systemic change we have banked on education in the hope that pro se litigants can help themselves.

We have inclined this way not simply because of our faith in self-help, but also because of our firm belief in the adversarial approach to adjudication. Judges and lawyers are acculturated to think in adversarial terms. This means that both groups favor arrangements in which neutral and essentially passive decision makers preside over contests in which the burden of choosing and presenting proofs is assigned to the litigants.[61] Advocates of alternative dispute resolution (ADR) have long complained about the legal system's preoccupation with adversarial methods.[62] While their alternatives leave a great deal to be desired,[63] their complaint has merit. Our adversarial ideology has led us to view the presence, or absence, of counsel as a private problem that must be left in each litigant's hands. This is nowhere more clearly signaled than in cases like *Link v. Wabash Railroad Co.*, where the Supreme Court declared that ineffective assistance of counsel in civil matters is not a basis for reversal

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[60] *See* GALANTER, *supra* note 34, at 6–9.

[61] *See* STEPHAN LANDSMAN, THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE 1 (1984).

[62] *See* Suzanne J. Schmitz, *Giving Meaning to the Second Generation of ADR Education: Attorneys' Duty to Learn About ADR and What They Must Learn*, 1999 J. DISP. RESOL. 29, 30 (1999).

[63] *See* Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593, 1608 (2005).

but the consequence of a binding personal choice by the litigant.[64] The matter of failed representation is, thus, one for each party, not society, to deal with.

Even if reformers were invited to address the procedural defects that impede the handling of pro se claims, they would encounter substantial resistance from three key groups of players: rule makers, bar leaders and judges. The process by which the federal courts go about rule making has evolved in such a way that sweeping change or radical reform is virtually unimaginable.[65] Each proposed rule change is reviewed as many as a dozen times and draws the most intense scrutiny from judges, academics, interest groups, and legislators.[66] Neither speed nor dramatic restructuring have been the hallmarks of the system. If the pro se challenge requires major changes, the prospects of their coming through the present rule-making process are *de minimis*. This was the conclusion reached by the Ninth Circuit Task Force that looked at the question in 2005.[67] For its part, the bar has offered a different kind of resistance to the sorts of changes that might address the pro se challenge. The organized bar has a long history of protecting its monopoly on the practice of law.[68] It has resisted virtually every reform that expands the competition to provide legal services.[69] The charge of "unauthorized practice of law" is one heard frequently and it has scuttled even modest reforms proposed in response to the pro se problem.[70] The dispute between Nolo Press and the Texas bar neatly illustrates the bar's approach. Many judges too look upon pro-se-friendly procedures with a jaundiced eye. Commentators have regularly noted that at least some judges are inclined to view the self-represented as "crazies" or "weirdos"[71] and to believe that they are not seeking legal redress but "personal"

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[64] 370 U.S. 626, 633–34 (1962).

[65] *See* Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 910 (2002).

[66] *Id.* at 913–19.

[67] NINTH CIRCUIT FINAL REPORT, *supra* note 31, at 13 ("Realistically, the Task Force recognized that no such major changes in the administration of justice were likely to result from its work. The federal rules are here to stay.").

[68] *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976).

[69] *See, e.g.*, Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (holding that attorney advertising is protected by the First Amendment in response to Arizona Supreme Court ruling that such activity violated state bar rules); Goldfarb v. Va. State Bar, 421 U.S. 773 (1975) (holding that a minimum fee schedule for residential real estate transactions imposed by state and county bar rules was a violation of the Sherman Act).

[70] MODEL RULES OF PROF'L CONDUCT R. 5.5 (2008); DEBORAH L. RHODE, ACCESS TO JUSTICE 88–89 (2004).

[71] *See* NAT'L CTR. FOR STATE COURTS ET AL., 2 NATIONAL JUDICIAL CONFERENCE ON LEADERSHIP, EDUCATION AND COURTROOM BEST PRACTICES IN SELF-REPRESENTED LITIGATION: COURTROOM CURRICULUM 3 (2007) [hereinafter CONFERENCE ON SELF-REPRESENTED LITIGATION, VOLUME TWO].

objectives.[72] Much of this mistrust may arise from judges' experience in the criminal courts where counsel is guaranteed and where most judges view pro se litigants as a radical and troublesome fringe.[73] Such wariness about the self-represented serves as a powerful deterrent to proactive intervention.

III. THE PRICE OF IGNORING THE PRO SE CHALLENGE

In light of the substantial resistance to change, might it not be a good strategy to ignore the problem? The brief answer is that we can no longer afford to do so. The rising volume of pro se cases and the difficulties they present make such an approach unworkable. The growing stream of self-represented claimants slows the clearing of court dockets.[74] Pro se litigants today cause delays and increase administrative costs.[75] They are likely to miss or be unprepared for scheduled courtroom sessions, thereby forcing adjournments and rescheduling.[76] They are non-professionals in a professional system. They often do not know what is expected and force deviation from court routines designed for the efficient handling of cases.[77] When polled about the amount of time they spend on pro se litigation, eleven percent of a group of about 100 court clerks from around the country reported that they devote more than fifty percent of their time to the unrepresented; and, another twenty-three percent said they use somewhere between twenty-six and fifty percent of their available hours on such individuals.[78] The *Hastings* study found that many types of pro se cases take longer to resolve than the average non-pro-se case.[79] While this data is not definitive, it lends support to the impression of most court personnel that the pro se administrative burden is serious, growing and needs to be addressed.

More than nine out of ten judges surveyed in 1997 by the American Judicature Society and the Justice Management Institute stated "that their courts had no general policy addressing the manner in which pro se litigants should be handled in the courtroom or in the litigation process

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[72] MEETING THE CHALLENGE, *supra* note 4, at 52.

[73] *See* 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, 452 (2004).

[74] *See* NAT'L CTR. FOR STATE COURTS ET AL., 3 NATIONAL JUDICIAL CONFERENCE ON LEADERSHIP, EDUCATION AND COURTROOM BEST PRACTICES IN SELF-REPRESENTED LITIGATION: LEADERSHIP CURRICULUM 4 (2007) [hereinafter CONFERENCE ON SELF-REPRESENTED LITIGATION, VOLUME THREE].

[75] *Id.*

[76] *See* VanWormer, *supra* note 7, at 993.

[77] *See* Tyler & Zimerman, *supra* note 10, at 5, 8.

[78] MEETING THE CHALLENGE, *supra* note 4, at 122.

[79] *See* Park, *supra* note 13, at 837.

generally."[80] It would appear that throughout the country, courts deal with unrepresented litigants in an *ad hoc* manner. This has yielded strikingly inconsistent treatment of such parties.[81] Courts, generally, have followed the direction of the Supreme Court in *Haines v. Kerner* to review civil pro se pleadings with liberality, holding them "to less stringent standards than formal pleadings drafted by lawyers . . . ."[82] Some courts have carried this principle beyond the pleading stage and have relaxed requirements relating to service of process, motions to dismiss, summary judgment, compliance with discovery rules, and introduction of evidence.[83] The motivation for doing so seems to be the laudable judicial desire to facilitate pro se litigants being heard on the merits. One of the leading decisions taking this approach is *Balistreri v. Pacifica Police Department*, in which the Ninth Circuit rejected an argument that a pro se plaintiff's failure to satisfy the briefing requirements of Federal Rule of Appellate Procedure 28 should lead to the dismissal of her appeal.[84] The Circuit Court stated: "This court recognizes that it has a duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirements."[85]

Balistreri's strong language regarding "duty" has not been accepted by all courts or in all situations. There is a raft of judicial decisions declaring that rules should not and will not be bent for the self-represented. The seminal decision on the right to proceed in *propria persona* in criminal cases is *Faretta v. California*,[86] which will be discussed in greater detail below. In that case, after finding that a criminal defendant has a Sixth Amendment right to proceed on her or his own, the Court stated: "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law."[87] This proposition has been reiterated and amplified upon by the Supreme Court and lower courts in a series of criminal and civil cases. In *McKaskle v. Wiggins*, the Court, in the course of approving judicial insistence on the presence of "standby counsel" at a criminal trial, stated that there is no "constitutional right to receive personal instruction from the trial judge on courtroom procedure."[88] That language was picked up and expanded upon in 2004 when the High Court in *Pliler v. Ford* decided that trial

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[80] Goldschmidt, *supra* note 12, at 19.

[81] *See* Julie M. Bradlow, Comment, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659–60 (1988).

[82] 404 U.S. 519, 520 (1972).

[83] *See* John L. Kane, Jr., *Debunking Unbundling*, 29 COLO. LAW. 15 (2000), *cited in* Buxton, *supra* note 38, at 118 n.91; Bradlow, *supra* note 81, at 672–73.

[84] 901 F.2d 696, 698–99 (9th Cir. 1990).

[85] *Id.* at 699.

[86] 422 U.S. 806 (1975).

[87] *Id.* at 834–35 n.46.

[88] 465 U.S. 168, 183 (1984). The stringency of such a rule was mitigated in *McKaskle* by the presence of "standby counsel."

judges in *habeas corpus* proceedings have no duty to warn the unrepresented of the potentially fatal procedural pitfalls they may face because of a set of litigation choices placed before them by the trial judge.[89] These restrictive ideas have been interpreted by a number of courts as warranting the abandonment of pro se litigants to their own devices after the pleading stage.[90]

In the end, the two streams of cases seem to give the trial judge virtually unfettered discretion to enforce or waive various procedural requirements.[91] The inevitable result is inconsistent decisions—some lenient and others strict. The trouble with this approach is that it is unpredictable and likely to give the onlooker the impression of unprincipled decision making. Such impressions are likely to erode the courts' credibility and serve as an invitation to citizen cynicism and legislative intervention.

There are a number of other reasons why the pro se problem cannot be ignored. Perhaps most important, the experiences of the self-represented appear in a substantial number of cases to produce frustration, anger, and even violence. As the number of pro se litigants grows, these difficulties are likely to increase, rendering our courts less satisfying and potentially more dangerous places. Trial judges tell us that many self-represented litigants come to court expecting significant assistance and a hearing on the merits.[92] When those expectations are not fulfilled (which is the case most of the time, if the *Hastings* data and similar analyses are to be believed) the self-represented are likely to come away feeling a "sense of unfairness, helplessness, and futility."[93] After surveying the available empirical data, Tom Tyler and Nourit Zimerman suggested that the pro se courtroom experience often produces a sense of "frustration" and distrust.[94] The consequence of this is heightened anger and hostility. What is more, the absence of counsel deprives the pro se litigant of a "reality check" to reign in unrealistic expectations.[95] The absence of an attorney also removes the sort of lawyerly counseling that can temper strong emotions arising out of the underlying dispute. Furthermore, the pro se litigant has no interest in a long-term relationship with the court and little motivation to "adhere to rules of appropriate conduct."[96] Litigant volatility is, for all these reasons, likely to

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[89] 542 U.S. 225, 227 (2004).

[90] *See, e.g.,* United States v. Pinkey, 548 F.2d 305, 305 (10th Cir. 1977); Dozier v. Ford Motor Co., 702 F.2d 1189, 1189 (D.C. Cir. 1983); Jacobsen v. Filler, 790 F.2d 1362, 1364–35 (9th Cir. 1986).

[91] *See* Goldschmidt, *supra* note 12, at 16.

[92] *See* MEETING THE CHALLENGE, *supra* note 4, at 53 ("Judges often encounter self-represented parties who expect the court to assist them.").

[93] MEETING THE CHALLENGE, *supra* note 4, at 53.

[94] *See* Tyler & Zimerman, *supra* note 10, at 23–24, 32.

[95] NINTH CIRCUIT FINAL REPORT, *supra* note 31, at 9.

[96] Tyler & Zimerman, *supra* note 10, at 5.

be heightened. It is, therefore, no surprise that those who have thought most carefully about the management of pro se litigants have emphasized the need to train judges to manage angry litigants and prepare for the possibility of violence.[97] The Ninth Circuit's Task Force on Self-Represented Litigants acknowledged the safety problem when it suggested that expenditures for the training of court personnel to handle pro se litigants might be placed "within the category of improving court security."[98] That the risk of violence is real is, unfortunately, beyond doubt. The heinous attack by a pro se litigant upon a federal judge's family in 2005 provides all too vivid a reminder of the possible risks involved.[99]

Pro se litigants present another sort of challenge to judges—a testing of their ability to maintain impartiality. It has already been observed that many trial judges think of the self-represented as "weirdos" or worse. Their presence can provoke hostility and even biased treatment by court personnel.[100] Judges tend to see the special demands created by pro se litigants as potentially embroiling them in the proceedings in ways that suggest partiality.[101] Justice Thomas articulated this concern in *Pliler v. Ford*, when he declared that requiring a district judge to explain "the details of federal habeas procedure" to a pro se litigant "would undermine district judges' role as impartial decisionmakers."[102] Other courts too have expressed such fears. Those concerns are lent enhanced credibility by cases like *Oko v. Rogers*,[103] in which a represented litigant sought appellate reversal of a decision in favor of a physician who had represented himself because the judge had assisted and allegedly favored the doctor.

Courts involved in cases with the self-represented may be tempted to assume a paternalistic attitude toward the litigants before them—abandoning adversarial neutrality in favor of a fatherly or motherly effort to do "what is best" for all concerned. This is particularly likely where one party is represented and the other is not. Many judges will, in such a situation, "bend over backwards to keep [the] pro se litigant from being

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[97] *See* CONFERENCE ON SELF-REPRESENTED LITIGATION, VOLUME TWO, *supra* note 71, at 173 (outlining steps for dealing with "angry litigants").

[98] NINTH CIRCUIT FINAL REPORT, *supra* note 31, at 45.

[99] On February 28, 2005, the husband and mother of Federal District Judge Joan Lefkow were murdered by Bart Ross, a pro se plaintiff in a medical malpractice case pending in the judge's court. A lawyer who had once represented an attorney Ross was suing said: "As his legal remedies were becoming fewer, as he had less success, he became more angry, more agitated." Don Babwin, *Police: Wisconsin Death Has Lefkow Tie*, CHICAGOTRIBUNE.COM (March 11, 2005).

[100] *See* Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting Roles of Judges, Mediators, and Clerks,* 67 FORDHAM L. REV. 1987, 1997 (1999).

[101] *See* MEETING THE CHALLENGE, *supra* note 4, at 29 ("The data collected in this study show that the most serious concern of trial judges is their perceived inability to assist a pro se litigant due to their duty to maintain impartiality.").

[102] *Pliler v. Ford*, 542 U.S. 225, 231 (2004).

[103] 466 N.E.2d 658, 660 (Ill. App. Ct. 1984).

taken advantage of."[104] In his dissent in *Indiana v. Edwards*, Justice Scalia expressed concern about judicial paternalism in the context of the mentally impaired criminal defendant.[105] He decried what he perceived to be the Court's restriction of the constitutional right to self representation "for [a litigant's] own good," arguing for judicial respect for the right to choose one's own fate.[106] Those concerns are pertinent for civil, as well as criminal, litigants.

Failure to recognize and respond to the needs of pro se litigants can fuel not only litigant anger but also social upheaval. When courts appear to curtail access, to avoid the merits, or to act against an identifiable group of litigants, they are likely to kindle onlooker skepticism about judicial legitimacy. Tyler and other social scientists tell us that outside observers tend to base legitimacy judgments on the apparent fairness of observed proceedings.[107] To the non-professional eye, the handling of the self-represented (which seldom results in reaching the merits, let alone winning) is not particularly likely to seem fair and may render the courts vulnerable to attack. A number of fringe groups appear inclined to exploit this situation—most particularly the so-called "common-law activists."[108] They have championed a series of dubious assertions, all based on the alleged illegitimacy of the courts which, they say, thwart the wishes and needs of the people. When the Ninth Circuit Task Force held public hearings about pro se litigation, it faced a sharp challenge from constituents of such groups calling for "the abolition of judicial immunity and criticiz[ing] the availability of immunity for judges as a recent and pernicious violation of litigants' rights to seek redress."[109] Such attacks are deeply concerning and underscore the need to maintain the appearance as well as the reality of justice.

In an intriguing article published in 2000, Curtis Milhaupt and Mark West examined the Japanese justice system.[110] They found a system with too few attorneys, too little opportunity for ordinary citizens to secure legal representation, and extremely high transaction costs. To meet the needs of those with a range of common legal problems, such as recovery for injuries suffered in automobile accidents, it was found to be common for the Japanese to turn to organized criminal gangs, the so-called

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[104] MEETING THE CHALLENGE, *supra* note 4, at 53 (alteration in original).

[105] 128 S. Ct. 2379, 2389–94 (2008) (Scalia, J., dissenting).

[106] *Id.* at 2394.

[107] *See* Stephan Landsman, *A Chance to Be Heard: Thoughts About Schedules, Caps, and Collateral Source Deductions in the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 393, 410–11 (2003).

[108] For a description of some of these movements and their views about the justice system, see Daniel Lessard Levin & Michael W. Mitchell, *A Law Unto Themselves: The Ideology of the Common Law Court Movement*, 44 S.D. L. REV. 9, 18 (1999).

[109] NINTH CIRCUIT FINAL REPORT, *supra* note 31, at 11.

[110] Curtis J. Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41 (2000).

Yakuza, to secure compensation.[111] Of course, this system does not rely on the rule of law but on the threat of violence.[112] It is a dramatic illustration of what can happen when a system denies access and fails to address the legal needs of its citizens. It underscores the importance of responding to the pro se challenge.

IV. PROHIBITING THE PRO SE PROSECUTION OF CIVIL CASES

In light of all the problems posed by pro se litigants, it is tempting to consider whether parties might be barred from proceeding in court without representation. Setting aside the administrative difficulties of such a scheme, American legal tradition and present law both make it abundantly clear that such a strategy is impermissible. The right to represent oneself has long been recognized in the Anglo-American legal tradition. The one glaring exception was England's Star Chamber, which required counsel's signature to validate pleadings and considered the absence of counsel as the functional equivalent of a confession.[113] That body was eventually discredited and its methods have become synonymous with legal oppression. The American colonies strongly supported the concept of pro se litigation.[114] Immediately after the drafting of the Constitution, Congress, in the Judiciary Act of 1789, embraced self-representation, declaring the right of all parties to "plead and manage their own causes personally or by the assistance of . . . counsel."[115] The Judiciary Act was recodified in 1948, but the opportunity for self-representation remained unaltered, as it does to this day in 28 U.S.C. § 1654.

In a series of criminal cases, the Supreme Court has confirmed the broad reach of the right to represent oneself, anchoring that right in the Sixth Amendment to the Constitution. The seminal decision was *Faretta*. Justice Stewart, writing for the Court in 1975, reviewed at length the history of a defendant's right to represent him or herself.[116] Justice Stewart found that right deeply embedded in our legal tradition.[117] Although *Faretta* is a criminal case supported by the Sixth Amendment, it has been viewed as affecting civil litigation as well.[118] This is the continuation of an approach established in the Judiciary Act of 1789 and embraced in such early cases as *Osborn v. Bank of the United States* where, in 1824, the Court stated "[n]atural persons may appear in Court, either

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[111] *Id.* at 69 (describing the work of Yakuza *jidanya* [settlement specialists]).

[112] *Id.* at 50–51.

[113] *See* Faretta v. California, 422 U.S. 806, 821–22 (1975).

[114] *Id.* at 826–28.

[115] *Id.* at 831 (quoting 28 U.S.C. § 1654).

[116] Id. at 812.

[117] Id. at 832.

[118] *See, e.g.*, Eagle Eye Fishing Corp. v. U.S. Dep't of Commerce, 20 F.3d 503, 506 (1st Cir. 1994) (relying on *Faretta* for the proposition that pro se status does not relieve a litigant of the burden of complying with procedural and substantive rules).

by themselves, or by their attorney."[119] The opportunity to proceed pro se also seems to undergird the liberal pleading rule announced in *Haines v. Kerner*.[120] Recently, the American Bar Association (ABA) has added its voice to those supporting self-representation. In the new ABA Model Code of Judicial Conduct, Rule 2.6 states: "a judge shall accord [all] . . . the right to be heard . . . ."[121] This rule is reinforced by the Commentary to ABA Rule 2.2 which assures judges that assistance rendered to pro se litigants for the purpose of ensuring that their claims are heard is not a breach of strictures requiring judicial impartiality.[122] While legal tools exist in federal court for the early termination of pro se cases brought *in forma pauperis* and for those involving prisoners,[123] no such mechanism exists for other types of cases pursued by litigants on their own behalf. The banning of the unrepresented from court seems beyond the authority of the judiciary and perhaps of the legislative branch as well.

V. OPTIONS AVAILABLE TO RESPOND TO THE PRO SE CHALLENGE

A. Educating the Self-Represented

Probably the most popular option for addressing the pro se challenge is expansion of programs designed to teach the self-represented how to manage their own cases. This response capitalizes on our widely shared individualist and do-it-yourself attitudes. Clearly, there are substantial benefits to be gained by expanding educational programs and a particular need to make such programs available where they do not exist. Yet, education by itself seems unlikely to solve the pro se dilemma. First, educational programs require funding, and resources for such efforts seem in short supply. Second, it is doubtful that any amount of education will overcome the high attrition rates suffered by pro se litigants at every step in the litigation process.[124] Education programs cannot turn laymen into lawyers—there is a ceiling on lay efficacy. Third, as the National Judicial Conference on Leadership, Education and Courtroom Best Practices in Self-Represented Litigation (held at Harvard in 2007 and hereinafter referred to as the Conference on Self-Represented Litigation) concluded in its curricular materials: "No matter how good the self help is, some litigants really need representation."[125] The same conference suggested that what happens in the courtroom,

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[119] 22 U.S. 738, 829 (1824).

[120] Haines v. Kerner, 404 U.S. 519, 520–21 (1972).

[121] MODEL CODE OF PROF'L CONDUCT R. 2.6(A) (2007).

[122] *Id.* at R. 2.2 cmt. 4.

[123] *See* NINTH CIRCUIT FINAL REPORT, *supra* note 31, at 13.

[124] *See In Defense of Rules*, *supra* note 37, at 1557–58.

[125] *See* CONFERENCE ON SELF-REPRESENTED LITIGATION, VOLUME THREE, *supra* note 74, at 29.

rather than in education sessions, is critical and that the judge, rather than the litigants, is the crucial player in this regard.[126]

Intimately tied to the self-help approach is the installation of automated systems like Arizona's "Quickcourt" mechanism to help pro se litigants draft pleadings and other documents that, when completed, will be accepted for filing by the courts.[127] A step beyond this sort of help might be achieved with the introduction of computer programs that assist litigants in preparing briefs and assembling proofs. Yet, the likelihood of software taking the place of lawyers in civil litigation still seems a substantial ways off. It also raises the most serious questions about the unauthorized practice of law, underscoring the "tension between providing information and legal advice . . . ."[128] Moreover, new problems arise as one approaches the advising threshold, most particularly related to the provision of unsound or misleading advice.[129]

B. Shifting Toward an Inquisitorial System

Critics of the educational solution suggest that it will never meet the needs of pro se litigants, and that procedures must be revised to provide the judge with a mandate to seek out the facts underlying each claim.[130] What these suggestions are really urging is a shift toward an inquisitorial system in which the judicial officer is charged with finding the truth.[131] In such a system, lawyers become far less important as judges ask more questions, call more witnesses, and firmly control the process. It is interesting to note that many of the recommendations of the Conference on Self-Represented Litigation, including heightened activity on the judge's part and judicial interrogation of witnesses, seem to tend in an inquisitorial direction.[132] This is not the place to rehearse all the weaknesses of an inquisitorial system, but Lon Fuller's observations about the risk of prejudgment[133] and the appreciable reduction of litigant control, with its attendant drop in litigant satisfaction,[134] should not be disregarded.

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[126] *See* CONFERENCE ON SELF-REPRESENTED LITIGATION, VOLUME TWO, *supra* note 71, at 58.

[127] MEETING THE CHALLENGE, *supra* note 4, at 76.

[128] NINTH CIRCUIT FINAL REPORT, *supra* note 31, at 44.

[129] *See* Engler, *supra* note 100, at 2026.

[130] For a summary of these arguments, see *In Defense of Rules*, *supra* note 37, at 1560–73.

[131] *See* STEPHEN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 38 (1988).

[132] *See generally* CONFERENCE ON SELF-REPRESENTED LITIGATION, VOLUME TWO, *supra* note 71.

[133] *See* Lon Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW 39–45 (H. Berman ed. 1971)

[134] *See* JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 83 (1975).

There is substantial reason to believe that attempting to engraft inquisitorial mechanisms into a judicial system with an adversarial orientation will present substantial difficulties. As noted above, American judges have, because of their training and outlook, resisted suggestions that they become more actively involved in proof gathering and advising. Concerns about impartiality have served as a substantial deterrent to engagement in other contexts as well. Such hesitancy may be glimpsed in federal judges' reactions to Federal Rule of Evidence 706, which allows a court to appoint expert witnesses.[135] In *United States v. Craven*, the First Circuit observed that the introduction of experts untested by adversary methods and relied upon in decision making into the adjudicatory process is deeply troubling.[136] The risks inherent in such initiatives include *ex parte* communications between the expert and the judge and the surrender of the task of appraising the facts to strangers to the litigation who have no stake in its outcome. Judge Jack Weinstein in his evidence treatise reiterates the *Craven* criticisms and goes on to note that court designation of experts is likely to undermine adversary mechanisms like cross-examination.[137] All of this has resulted in the court appointment of experts being "a rare occurrence,"[138] displaying quite dramatically the resistance of adversarily-trained judges to inquisitorial mechanisms. It is likely that many judges would react similarly to the proposed use of inquisitorial techniques on behalf of pro se litigants.

C. A Synoptic Approach

It is unlikely that there is a quick or easy fix for the pro se litigant problem. What is needed is the employment of a diverse set of initiatives. While wide ranging, these initiatives should all be guided by an insight derived from recent empirical work on procedural justice—that participants in the legal system tend to experience greater satisfaction when they feel that they have been given a genuine opportunity to voice their views to a decision maker who is listening and responsive to their input.[139] Where litigants are given "voice," they tend to be far more satisfied with the process, no matter the outcome. This proposition has been confirmed in a number of contexts from tort claims[140] to felony

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[135] FED. R. EVID. 706.

[136] 239 F.3d 91,102–03 (1st Cir. 2001).

[137] *See* JACK B. WEINSTEIN & MARGARET A. BERGER, 4 WEINSTEIN'S FEDERAL EVIDENCE § 706.02 (Joseph M. McLaughlin ed., 2d ed. 2008).

[138] *Id.*

[139] *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 170 (1988).

[140] E. Allen Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y. REV. 953, 980 (1990).

criminal trials in which substantial prison sentences are fixed.[141] The methods by which this might be accomplished in the pro se context are not mysterious and form the foundation of many of the recommendations presented at the Conference on Self-Represented Litigation. They include offering each litigant a chance to be heard on the merits; avoiding legal jargon and procedural mystification that may silence pro se litigants; encouraging behaviors that demonstrate the judge's careful attendance to each party's points; and preparing decisions that acknowledge the claims made by losing litigants as well as victors.[142] The research data suggest that processes which lend litigants "voice" not only enhance their satisfaction but strongly influence onlookers, who tend to base their judgments about legitimacy and fairness on what they see taking place in the courtroom.[143]

To address the needs of many pro se litigants, all that is needed is the adoption of a set of best practices that provide them with useful training and respectful treatment in the courts. These have been outlined in the Conference on Self-Represented Litigation materials, and the goal should now be an education effort that makes judges throughout the country aware of what works in assisting pro se litigants to manage their own cases. The ABA Litigation Section and Judicial Division are presently preparing such a training package and would be grateful for any assistance that might be offered.[144] Along with better techniques, the judicial system needs to be more transparent to allow justice to be seen.[145] When adjudicatory processes are hidden from view, they tend to breed suspicion and distrust. Along with transparency, there is a need for in-court explanation so that self-represented litigants know what is going on and why.[146] Training and dialogue should go a long way, especially with pro se litigants who have a solid educational background.

For a significant number of pro se litigants, however, such approaches will not suffice. For them, it will be necessary to consider a more robust use of the appointment authority provided in 28 U.S.C. § 1915(e)(1).[147] As things now stand, courts tend, in civil matters, to use

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[141] Jonathan D. Casper, *Having Their Day in Court: Defendant Evaluations of the Fairness of Their Treatment*, 12 LAW & SOC'Y. REV. 237, 248 (1978).

[142] *See generally* CONFERENCE ON SELF-REPRESENTED LITIGATION, VOLUME TWO, *supra* note 71.

[143] LIND & TYLER, *supra* note 139, at 170.

[144] I am involved in that effort, as well as in the organization of an ABA Litigation Section Symposium held in Atlanta in mid-December of 2008, to rethink a range of questions concerning access to counsel in civil proceedings.

[145] *See* Zorza, *supra* note 73, at 436.

[146] *Id.* at 438.

[147] "The court may request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1) (2006).

the appointment power only in "exceptional" situations.[148] Such a crabbed approach needs to be reconsidered and significant impediments to change need to be overcome. The first stumbling block is finding counsel willing to serve. The Supreme Court has, in *Mallard v. United States District Court*, held that an unwilling attorney can refuse appointment.[149] What is needed is a concerted effort on the part of the courts, with the assistance of the organized bar, to create and maintain a pool of lawyers willing to accept appointment *pro bono* or with modest support. Such programs will have to address the special challenges to appointment posed by the need for an effective withdrawal mechanism and for reasonable malpractice protection.[150] When the Ninth Circuit surveyed its districts, it found that some courts wall off certain categories of pro se cases from the appointment of counsel.[151] The idea that some sorts of cases should be favored and others excluded is troubling. It is not required by the statute and denies judges a chance to intervene in pro se cases where such action may be critical because of fairness concerns.

While this may be neither the place nor the time for an extended discussion of the subject, the rule fixed in *Lassiter v. Department of Social Services of Durham County*, that there is no constitutional right to the appointment of counsel in civil cases not involving liberty,[152] may warrant eventual re-examination. Litigant competence, serious life-affecting consequences, educational deprivation, and involuntary involvement in litigation may all be factors that, in some cases, warrant the extension of *Gideon v. Wainwright* [153]and its progeny (albeit not because of the mandate of the Sixth Amendment) to at least some corners of the civil realm. Such a right has been recognized in a number of other countries including England.[154]

Finally, voluntary programs that offer pro se litigants an opportunity to choose specially tailored adjudicatory processes should be tested. Judge William Schwarzer has recommended something of the sort through the institution of a "small claims calendar" in federal court.[155] This seems an approach worth testing.

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[148] *See, e.g.*, United States v. $292,888.04 in Currency, 54 F.3d 564, 569 (9th Cir. 1995); Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Miller v. Simmons, 814 F.2d 962, 966 (4th Cir. 1987); Bradlow, *supra* note 81, at 662.

[149] 490 U.S. 296, 298 (1989).

[150] *See* NINTH CIRCUIT FINAL REPORT, *supra* note 31, at 36–38.

[151] *Id.* at 26–29.

[152] 452 U.S. 18, 33 (1981).

[153] 372 U.S. 335 (1963).

[154] *See* Buxton, *supra* note 38, at 126.

[155] William W. Schwarzer, *Let's Try a Small Claims Calendar for the U.S. Courts*, 78 JUDICATURE 221 (1995).

VI. CONCLUSION

There is a great deal we do not know about the pro se challenge. Data is desperately needed to appraise the nature of the challenge and what sorts of responses will prove effective. We have only just begun to grasp the nature of the pro se challenge. A great deal remains to be learned. Perhaps now is the time to consider a serious commitment to the study of the problem with any eye toward fashioning effective reforms.