
ACCESS TO JUSTICE FOR UNREPRESENTED LITIGANTS: A COMPARATIVE PERSPECTIVE

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The problem of access to justice is one that affects the ordinary American who cannot afford an attorney and is disqualified from receiving free legal aid, and thus must rely on self-representation in court. But, the unrepresented litigant often does not stand a chance against the represented litigant. Herein lies the problem—unequal access to justice. Self-help centers, alternative dispute resolution options, and the unbundling of legal services have not adequately addressed this problem. Judges may be able to help unrepresented litigants, but under the American adversarial system of justice, stringent limitations on judicial activism prohibit such interference. In contrast, in many civil law countries, the legal system and the role of the judge are construed differently, resulting in greater access to justice for ordinary citizens. There are aspects of the civil law system that the American system may borrow in its effort to expand access to justice for all.

I. INTRODUCTION

In the United States, individuals of ordinary means often cannot effectively access the legal system because they cannot afford to hire private counsel but make too much money to qualify for assistance from legal service organizations.¹ Individuals who may qualify

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1. Legal aid is available to those whose income falls below 125 percent of the Federal Poverty Income Guidelines. This is not to suggest that persons who qualify for legal services are able to access the justice system in a meaningful way. A lot has been written about the need for increased legal services for the poor. In 1998, about 44.5 million Americans were eligible for services, and under 3,500 attorneys were available to help them, according to a study by the Legal Services Corporation. LEGAL SERVS. CORP., *SERVING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS: A SPECIAL REPORT TO CONGRESS* (2000).

financially for assistance from legal services organizations often face similar problems when they do not actually receive such assistance due to the organizations' funding limitations. Attempts to solve this problem—self-help centers, the unbundling of legal services, and alternative dispute resolution—are generally perceived to have been only partially successful. This Article explores why the problem remains so widespread in the United States and looks to other countries for possible solutions. In particular, this Article compares access to justice for individuals of ordinary means under the American adversarial system with access under the civil law inquisitorial system, examining the different roles of judges in the two systems and their ability, training, and inclination to handle cases involving unrepresented litigants in ways more likely to produce justice for all.

The great legal character Atticus Finch said, “Our courts have their faults, as does any human institution, but in this country our courts are the great levelers, and in our courts all men are created equal.”² Like Atticus Finch, I am not an idealist. Courts are great levelers, but only if ordinary folk have access to them. Access to justice is a multidimensional problem. This Article focuses on one small part: what happens when unrepresented ordinary people, neither rich nor poor, attempt to use the justice system to solve their problems or are forced to deal with that system against their will.

In particular, this Article examines the role of judges in the system. A judge-centered approach to ensuring access to justice was initially suggested in an essay by Russell G. Pearce titled *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*.³ Russell Engler and Richard Zorza have similarly argued that judges have the ultimate responsibility to ensure that justice is served.⁴ Engler, in particular, has urged that judges should consider it part of their jobs to “assist the unrepresented litigant in developing a full, factual record, and to help the litigant with matters of

2. HARPER LEE, *TO KILL A MOCKINGBIRD* 218 (1960).

3. Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 *FORDHAM L. REV.* 969, 977–78 (2004) (proposing that making judges “active umpires” would be an important step in the search for access to justice).

4. *Id.* at 976.

procedure and substantive law.”⁵ His suggestion, made over ten years ago, has not yet had the kind of impact he clearly would have liked.

Part II of this Article briefly describes relevant aspects of the American adversarial system, the problem of access to that system, and some of the remedial measures that have been attempted. It then looks at the role of judges—including their training, experience, and actions—in implementing this system. Part III undertakes a similar examination of the civil law inquisitorial system.⁶ Part IV explores how our system might profitably borrow from the civil law system to assure more effective access to justice for ordinary Americans—the people our government is, in theory, supposed to serve.

Change is difficult, but our system is far from ideal. We can change, and we must do a better job of bringing access to justice to all.

II. AMERICAN-STYLE JUSTICE

A. *The Adversarial System*

Over 100 years ago, Roscoe Pound wrote that the American legal system reflected a “sporting theory of justice.”⁷ Under such a theory, civil litigation consists of private brawlers fighting things out with a judge serving simply as a referee. Judge Kevin Burke observed that this paradigm is “so rooted in the legal profession in America that many of us take it for a fundamental legal tenet.”⁸ He went on to observe, quite rightly, that the paradigm leads even “the most conscientious judge to believe that he or she is merely to decide the contest, as attorneys present it, according to the rules of the game, and not to search independently for truth and justice.”⁹ Ellen Seward agreed that “[t]he adversary system is characterized by party

5. Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators and Clerks*, 67 *FORDHAM L. REV.* 1987, 2029 (1999).

6. As has been noted by others, the term “inquisitorial system” raises the specter of a frightening sort of Spanish Inquisition and is in part responsible for the instant American distrust of the civil law approach.

7. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 *A.B.A. REP.* 395 (1906), reprinted in 35 *F.R.D.* 241, 273–91 (1964).

8. Kevin S. Burke, *A Judiciary That Is as Good as Its Promise: The Best Strategy for Preserving Judicial Independence*, 41 *CT. REV.* 4, 6 (2004).

9. *Id.*

control of the investigation and presentation of evidence and argument, and by a passive decision maker who merely listens to both sides and renders a decision based on what she has heard.”¹⁰

Our adversarial system has been defended on two principal grounds: (1) that it is the best way to arrive at the truth; and (2) that it best protects individual autonomy and dignity.¹¹ An intensely individualistic style of adjudication also fits nicely with our strongly individualistic society. Supporters of adversarial systems argue that because the parties have control, each party has a strong motivation to present its best possible case. Judges who know nothing about the cases are perceived as being more impartial. If judges undertake their own investigations, it is arguable that they may make up their minds too early in the process. On the other hand, the adversarial system expects parties to be selfish in their arguments, creates incentives to hide evidence, and rewards parties whose attorneys are the most skilled and well-funded.¹²

There has been much criticism of our system in the years since Roscoe Pound made his observations, but little has changed. Supporters of the American system continue to point to the need for impartial judges, unbiased by their own factual investigations or interest in the outcome.¹³ In the meantime, however, empirical research has cast doubt on the premise that judges are really unbiased, suggesting that what is really at stake is only the appearance of impartiality.¹⁴ In addition, it has come to be appreciated that in the inquisitorial system, decision makers are expected to be impartial as well, deciding the case on the facts and the law, not on extraneous factors.¹⁵ Judges who are willing to help both sides, as needed, do not necessarily have to be perceived as biased.¹⁶ Passivity and impartiality are not the same thing.

10. Ellen Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 *IND. L.J.* 301, 302 (1989).

11. *Id.*

12. *Id.* at 313.

13. *Id.* at 308–09.

14. See JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 151–56 (1949).

15. Sward, *supra* note 10, at 314.

16. Engler, *supra* note 5, at 2030.

B. Problems with Access and Attempted Remedies

A great deal of attention has been given to the problem of providing equal access to justice for low-income individuals and families. Many middle-income individuals and families, however, face similar problems securing such access.¹⁷ A 1994 American Bar Association report found almost no difference in the problems low- and middle-income individuals have in securing access to justice, with an increasing number of middle-income individuals choosing to resolve their legal issues without the help of a lawyer.¹⁸

The self-represented litigant is widely perceived as being both a cause and a casualty of problems in the judicial system. Observers often blame such litigants for many of the delays and inefficiencies that congest the courts and deplete scarce resources.¹⁹ Research has shown that litigants who represent themselves are indeed more likely to neglect time limits and miss court deadlines.²⁰

The increase in self-represented litigants is not limited to the United States. Other common law jurisdictions have experienced similar trends. In Hong Kong, for example, although precise numbers are unavailable, the increase is perceived to be significant.²¹ The concern has been voiced in all major common law jurisdictions, including the United Kingdom, Canada, Australia, and New Zealand.²²

The rise of pro se litigants has been seen as a “sign of system breakdown,”²³ the implication being that the system needs more—or less expensive—lawyers. We should consider the possibility,

17. In 1999, the median household income was \$40,816. U.S. Census Bureau Historical Income Tables—Households, Table H-6: Regions—All Races by Median and Mean Income, <http://www.census.gov/hhes/www/income/histinc/h06AR.html> (last visited Sept. 5, 2009). The U.S. Census Bureau defined the “middle class” as having an annual household income between \$17,000 and \$79,000. THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN* 87 (2004) (defining the middle class as the middle 60 percent of income earners).

18. See Consortium on Legal Services and the Public, *Legal Needs and Civil Justice: A Survey of Americans: Major Findings from the Comprehensive Legal Needs Study* (1994), available at <http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf>.

19. Drew A. Swank, *The Pro Se Phenomenon*, 19 *BYU J. PUB. L.* 373, 384 (2005).

20. *Id.*

21. Camille Cameron & Elsa Kelly, *Litigants in Person in Civil Proceedings: Part I*, 32 *H.K.L.J.* 313, 313 (2002).

22. *Id.* at 315.

23. Melinda Buckley, *The Legal Aid Crises: Time for Action* 45 (June 2000), <http://www.cba.org/CBA/Advocacy/pdf/Paper.pdf>.

however, that a system that only works when every party is represented by competent and equal counsel is not a system worth saving.

Regardless, it is clear that a lack of legal assistance places the pro se litigant at a fundamental disadvantage and effectively limits his or her access to justice. An extensive recent survey confirmed these disadvantages, noting that pro se litigants had greater difficulty, not only in understanding and applying the finer points of the substantive law, but even in conceptualizing the key claims or defenses of their cases.²⁴ Another survey found that self-represented litigants were often less effective in adducing evidence and in articulating their positions.²⁵ In all, more than 86 percent of pro se litigants suffered a problem in forming or arguing their case.²⁶

In a study of lawsuits seeking protective orders in Baltimore, Professor Jane C. Murphy found that women represented by lawyers had an 83 percent chance of getting such orders, compared to only 32 percent of unrepresented women.²⁷ An investigation of litigation in New York City's Housing Court found that an unrepresented tenant had a 28 percent likelihood of defaulting, compared to the 16 percent chance of default by a tenant represented by counsel.²⁸ Final judgments were entered more than twice as often against those who were unrepresented: 51 percent against unrepresented tenants, as opposed to 22 percent against those with counsel.²⁹

Arcane procedural rules, perhaps defensible if both parties are represented by advocates experienced in such rules, often augment this disadvantage.³⁰ Indeed, in the classic adversarial model, it

24. See generally RICHARD MOORHEAD & MARK SEFTON, LITIGANTS IN PERSON: UNREPRESENTED LITIGANTS IN FIRST INSTANCE PROCEEDINGS 153–80 (2005), available at <http://www.law.cf.ac.uk/research/pubs/repository/1221.pdf> (discussing various issues facing pro se litigants in English courts).

25. Paul Lewis, *Litigants in Person and Their Difficulties in Adducing Evidence: A Study of Small Claims in an English County Court*, 11 INT'L J. EVIDENCE & PROOF 24, 26 (2007).

26. *Id.* at 32.

27. Jane C. Murphy, *Engaging the State: The Growing Reliance on Lawyers and Judges to Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 511–12 (2003).

28. Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 426–27 (2001).

29. *Id.* at 419.

30. See Geoffrey C. Hazard, Jr., *After Legal Aid Is Abolished*, 2 J. INST. FOR THE STUDY OF LEGAL ETHICS 375, 378–82 (1999).

sometimes seems more important for a judge to enforce procedural rules than to enforce the substantive law.³¹

Attempts within the adversarial system to alleviate problems faced and caused by the pro se litigant in civil cases fall into three principal categories: (1) expanding the availability of attorneys; (2) altering the system itself to make it less dependent upon attorneys and more accessible to pro se litigants; and (3) preparing individuals to better represent themselves.³² Such attempts have included small claims courts, community courts, mediation and arbitration, self-help centers, and the unbundling of legal services.

1. Expanding the Availability of Attorneys

Reforms within the first category—expanding attorney availability—do not significantly aid the litigant who appears pro se by choice. They do, however, provide relief for at least some who appear unrepresented solely because they cannot afford legal fees.³³ Moreover, expanding the availability of attorneys may arguably be the most effective reform in assisting those who thereby can obtain competent representation, since it may do the most to level the playing field. In contrast, reforms in the second and third categories may make the system more user-friendly but continue to leave an unrepresented party facing a represented opponent at a disadvantage, especially in an adversarial system.

One overriding concern has been the possibility that justice is meted out unequally according to the parties' relative wealth or income. Notably, one study in the United States found that a majority of all pro se litigants proceeded without legal assistance due

31. *See id.* at 383–84.

32. Deborah J. Cantrell, *Justice for Interests of the Poor: The Problem of Navigating the System Without Counsel*, 70 *FORDHAM L. REV.* 1573, 1574 (2002). The Tennessee Supreme Court launched the most recent “Access to Justice” campaign with a public meeting. Some of the problems and suggestions in the meeting included the need for more education about legal issues and availability of more information to people who represent themselves in court. The group also discussed the shortage of lawyers in rural areas and the possibility of requiring all lawyers to take on at least some pro bono cases every year. General Sessions Judge Hugh Harvey said he thinks high schools should teach classes on contracts and basic legal issues. Judge Harvey stated: “Most of the people that come to my courtroom don’t understand very basic legal issues. . . . By teaching them about collections law, we could head them off before they come to court.” Mariann Martin, *Campaign Seeks to Bring Legal Services to State’s Poor*, JACKSON SUN (Tenn.), Jan. 22, 2009, at 1.

33. *See Swank, supra* note 19, at 378.

to financial constraints.³⁴ As a result, many reforms have focused on providing more attorney assistance.

Bar associations, in particular, have focused a great deal of energy and effort on providing pro bono legal services. Pro bono representation has helped many pro se litigants and has effected real systemic change in many contexts. It is, however, clearly inadequate to address the problem as a whole.

A second approach—known as “civil *Gideon*”—has been to urge that a right to counsel be recognized in at least some civil cases. But, the U.S. Supreme Court held in *Lassiter v. Department of Social Services of North Carolina*³⁵ that constitutional due process does not create a right to counsel in civil cases, even when an individual’s parental rights are at stake.³⁶ Only a handful of states provide a right to counsel in their state constitution or by statute. Generally, this right is limited to circumstances related to parental rights.³⁷

Attempts to establish a right to representation in civil matters are ongoing. Two amicus briefs filed by retired judges in Washington and Alaska outline the serious consequences of the lack of representation in our adversarial civil justice system.³⁸ They argue that, at its most basic level, the “impact of a lawyer is an impact on winning.”³⁹ Indeed, Rebecca L. Sandefur, a noted Stanford University sociologist, concluded that “a litigant with a lawyer is five times more likely to succeed than someone who is self-represented.”⁴⁰

Limited-scope representation, or unbundling, occurs when a client hires an attorney for help with only specific portions of a legal problem, such as legal advice, document review, or limited

34. *Id.* at 378 n.44.

35. 452 U.S. 18 (1981).

36. *Id.* at 32–33.

37. See Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 *FORDHAM INT’L L.J.* S83, S87 (2000).

38. Brief Amicus Curiae of Retired Washington Judges in Support of Appellant at 4, *King v. King*, No. 57831-6-I (Wash. Ct. App. Mar. 21, 2007), available at http://brennan.3cdn.net/a6906665ac25a77b80_yrm6by9qg.pdf; Brief of Retired Alaska Judges as Amici Curiae in Support of Appellee Jonsson at 2, *Office of Public Advocacy v. Alaska Court System*, No. S-12999 (Alaska Nov. 19, 2008), available at <http://www.civilrighttocounsel.org/pdfs/Alaska%20Retired%20Judges%20Amicus%20Brief.PDF>.

39. Brief of Retired Alaska Judges, *supra* note 38, at 20; accord Brief Amicus Curiae of Retired Washington Judges, *supra* note 38.

40. Brief of Retired Alaska Judges, *supra* note 38, at 14.

appearance.⁴¹ The client then represents himself or herself in all other regards. Unbundling is seen as an attractive alternative for clients who may not have the means to pay for complete representation, especially when the legal issue is relatively uncomplicated.⁴² For example, the California Rules of Court specifically allow an attorney to prepare documents for a client without disclosing his or her identity in the documents or appearing in court on behalf of the client.⁴³

However, unbundling poses serious ethical issues for lawyers willing to attempt to provide such services. The Model Rules of Professional Conduct require competence⁴⁴ and diligence⁴⁵ when a lawyer represents a client. While Model Rule 1.2 allows a lawyer to limit the scope of his or her representation, such a limitation must be reasonable under the circumstances, and the lawyer must always be competent to handle the matter.⁴⁶ Several state bar associations have set forth guidelines for lawyers involved in limited-scope representation, providing advice on how best to represent clients while fulfilling their ethical duties. For example, the California Commission on Access to Justice has stated that the client must give written informed consent to the limited-scope representation, changes in scope of representation must be documented, and the lawyer has an affirmative duty to advise the client on matters related to the representation, even if not asked.⁴⁷

Unbundling is only a limited and partial solution. First, it is most helpful in less complex matters, such as family law and probate; it is unlikely to be helpful in matters involving personal injury or medical malpractice, for example. Second, if potential clients do not know that unbundling is an option, they will not even consider consulting an attorney before going to court. Finally, even with the reduced cost, the price of legal services may still be too prohibitive for many middle-income litigants. This is especially true

41. CALIFORNIA COMMISSION ON ACCESS TO JUSTICE, FAMILY LAW LIMITED SCOPE REPRESENTATION: RISK MANAGEMENT MATERIALS 8 (2004).

42. See Mary Helen McNeal, *Redefining Attorney-Client Roles: Unbundling and Moderate-Income Elderly Clients*, 32 WAKE FOREST L. REV. 295, 336-37 (1997).

43. Cal. R. Ct. 5.70(a) (2007).

44. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2009).

45. *Id.* R. 1.3.

46. *Id.* R. 1.2.

47. CALIFORNIA COMMISSION ON ACCESS TO JUSTICE, *supra* note 41, at 10.

if the issues involved are complex and require more time and consultation.

The California Bar Association has noted several situations in which a lawyer should be cautious about agreeing to represent a client on a limited-scope basis. First, a lawyer should avoid agreeing to limited-scope representation in matters implicating areas of law with which the lawyer is not familiar, even if the limited-scope representation itself is within the lawyer's expertise.⁴⁸ This is because the lawyer remains subject to the duty to advise the client of important matters outside the scope of the agreed-upon representation.

Second, unbundling may not be appropriate for all clients. Limited-capacity clients, for example, may not be able to give informed consent before agreeing to limited-scope representation. Similarly, a client who is a victim of domestic violence may not benefit from unbundling in a case involving the batterer because the client may not be able to handle the portions of the case in which she remains unrepresented.⁴⁹

Third, the California Bar Association urges lawyers to be especially wary of clients who take a "musical chairs" approach to legal representation⁵⁰—clients who involve multiple lawyers in different aspects of the same unbundled case. Multiple uncoordinated representation is obviously problematic. A client who consults multiple lawyers on a limited-scope basis may place each lawyer in an ethically awkward position. This may also, of course, indicate that the client has a difficult or controversial case—one that limited-scope representation is particularly unsuited to resolve.⁵¹ For this reason, a lawyer should only agree to limited-scope representation after a detailed intake interview and careful questioning of his or her client's motives and goals.

Finally, lawyers remain responsible for ensuring that the scope of their representation is reasonable.⁵² This may include advising the

48. *Id.* at 11.

49. *Id.*

50. *Id.*

51. *See id.*

52. *Id.* at 12.

client to seek other counsel or advising him or her that the lawyer cannot work on the case from beginning to end.⁵³

Unbundling creates its own set of problems as well. Lawyers are trained in the ethics of full representation; lawyers undertaking limited-scope representation may fail to fulfill their ethical obligations, either intentionally or unintentionally, and therefore may cause more harm than good.⁵⁴ This is particularly problematic where, as is likely, the lawyer represents clients unfamiliar with the legal system—clients who may have no way of knowing whether their lawyer is engaging in unethical or illegal behavior. Some clients may also find unbundled legal services convenient in the beginning, but come to a point where they realize they cannot proceed through the rest of the case without more help, and yet still not have the resources to pay for that help.⁵⁵ Finally, even if unbundling opens access to the legal system to some clients, it may have negative systemic effects.⁵⁶ Unbundled representation of tenants, for example, would have been unlikely to produce an implied warranty of habitability benefiting tenants on a general level because there would be no overall assessment of any systemic problems.

2. Making the System More Accessible to Pro Se Litigants

A second category of attempts to alleviate the problems faced or created by unrepresented litigants involves altering the system itself to make it less dependent upon attorneys and more accessible to pro se parties. Examples include community courts, small claims courts, and mediation services. The New York State Unified Court System, for example, includes seven community courts.⁵⁷ Community courts typically address problems that might otherwise be resolved by traditional courts—landlord-tenant disputes, domestic violence, juvenile delinquency, and quality-of-life offenses like prostitution,

53. *See id.*

54. *See, e.g.,* McNeal, *supra* note 42, at 318–30 (illustrating the ethical issues associated with unbundled representation).

55. *See id.* at 335.

56. *See id.* at 334.

57. Problem-Solving Courts, Community Courts Locations, New York State Unified Court Systems, http://www.nycourts.gov/courts/problem_solving/cc/courts.shtml (last visited Sept. 5, 2009).

graffiti, and shoplifting⁵⁸—by bringing together elements of the justice system, citizen action, and community service programs.⁵⁹ In criminal matters, such courts typically impose nontraditional sentences, like community service or drug treatment,⁶⁰ and make other services available to help individuals break the cycle of crime, including job training and placement, drug treatment, and homelessness outreach.⁶¹

A study of the nation's first community court, the Midtown Community Court in Manhattan, suggested that the court was successful in reducing crime and improving the safety of the surrounding community.⁶² After the court opened, prostitution arrests fell by 56 percent, and illegal vending arrests fell by 24 percent.⁶³ The study also found the community court had saved the traditional court system \$1.3 million annually since its creation.⁶⁴ Since the creation of the Midtown Community Court in 1993, over thirty other community courts have opened across the United States.⁶⁵

Many state court systems also include small claims courts. California, for example, allows claims for less than \$7,500 to be brought in small claims court.⁶⁶ An individual must be mentally competent and either eighteen years old or an emancipated minor in order to bring such a claim.⁶⁷ If an individual is not mentally competent, the court appoints a guardian ad litem to represent him.⁶⁸ Nevertheless, lawyers are not allowed to represent either party during the proceedings themselves.⁶⁹ Filing fees range from \$30 to \$75,

58. *See id.*

59. *See* The Center for Court Innovation, Community Court, <http://www.courtinnovation.org> (follow "Community Court" hyperlink) (last visited Sept. 5, 2009).

60. *See* Problem-Solving Courts, *supra* note 57.

61. *Id.*

62. *See* DANA KRALSTEIN, CENTER FOR COURT INNOVATION, COMMUNITY COURT RESEARCH: A LITERATURE REVIEW 3 (2005).

63. *Id.*

64. *Id.*

65. The Center for Court Innovation, *supra* note 59.

66. California Courts, Self-Help Center: Small Claims, <http://www.courtinfo.ca.gov/selfhelp/smallclaims/scbasics.htm> (last visited Sept. 5, 2009).

67. *Id.*

68. *Id.*

69. *Id.*

depending on the size of the claim.⁷⁰ If the losing party did not file the original claim, he or she can file an appeal, with a \$75 fee, within thirty days of the judgment.⁷¹ Lawyers can typically represent the parties on appeal.⁷²

Mediation is another way of attempting to make the court system less dependent on attorneys and more accessible to pro se parties. Two current examples of court-sponsored mediation services are those provided by Santa Barbara County Superior Court Family Mediation Services⁷³ and the Crown Heights Community Mediation Center in Brooklyn, New York.⁷⁴ Family mediation services at the Santa Barbara courts are provided free of charge for individuals dealing with child custody and visitation disputes.⁷⁵ Mediation results are confidential, and the mediator will only make a recommendation to the court if both parties agree in advance.⁷⁶ Additionally, the courts offer free child custody and visitation classes.⁷⁷

The Crown Heights Community Mediation Center provides a wide range of services beyond those offered through typical court programs, including community resource guides, leadership classes, and training on topics such as diversity, conflict resolution, and family mediation.⁷⁸ The Center also provides facilitation services to bring together community members to discuss common problems. One such initiative, for example, involved bringing together local criminal justice agencies, faith-based organizations, and residents to discuss possible solutions to gun violence and crime prevention.⁷⁹

70. *Id.*

71. *Id.*

72. *Id.*

73. Santa Barbara County Superior Court, Family Mediation Services, http://www.sb.courts.org/special_programs/fam_med.htm (last visited Sept. 5, 2009).

74. The Center for Court Innovation, Crown Heights Community Mediation Center, <http://www.courtinnovation.org/index.cfm?fuseaction=Page.ViewPage&PageID=601¤tToPTier2=true> (last visited Sept. 5, 2009).

75. Santa Barbara County Superior Court, *supra* note 73.

76. *Id.*

77. Santa Barbara County Superior Court, Free Family Law Classes, http://www.sb.courts.org/special_programs/fam_law_classes.htm (last visited Sept. 5, 2009).

78. The Center for Court Innovation, Crown Heights Trainings, <http://www.courtinnovation.org/index.cfm?fuseaction=page.viewPage&pageID=655&nodeID=1> (last visited Sept. 5, 2009).

79. *Id.*

Another program, Youth Court, aims to use positive peer pressure to encourage young people to make better choices.⁸⁰ Youth Court trains local teens to be judges, jurors, and advocates, who then choose the appropriate sanctions or punishments for other teens who have admitted responsibility for school infractions or low-level criminal offenses.⁸¹ The emphasis of this program is on community restoration and helping teens escape a cycle of crime.⁸²

3. Preparing Pro Se Litigants for Better Self-Representation

A final approach to alleviating problems faced by—and caused by—pro se litigants consists of preparing individuals to better represent themselves. This may include providing self-help centers, education, and advocacy training. Many courts now have facilities to assist unrepresented people in filling out forms and to help them understand the civil justice process. Examples include the Family Law Information Center (“FLIC”) within the Los Angeles Superior Court system⁸³ and CourtHelp within the New York State court system.⁸⁴

FLIC is available to any litigant not currently represented by a lawyer. The program assists litigants with a variety of family law issues, including marital dissolutions, legal separations, annulments, summary dissolutions, paternity lawsuits, and domestic violence prevention cases.⁸⁵ Members of the FLIC staff are available to answer questions about court processes, court rules, and the preparation of court documents. The program also provides free informational videos, access to the Internet and reference materials, and referrals to Family Court Services, the District Attorney’s Office, the Office of the Family Law Facilitator, various nonprofit family law organizations, guardianship clinics, and other community agencies.⁸⁶

80. *Id.*

81. *Id.*

82. *Id.*

83. Los Angeles County Superior Court, Family Law: Self Help, <http://www.lasuperiorcourt.org/familylaw/> (last visited Sept. 5, 2009).

84. New York CourtHelp, A Website for Unrepresented New Yorkers, <http://www.courts.state.ny.us/courthelp/index.html> (last visited Sept. 5, 2009).

85. Los Angeles County Superior Court, *supra* note 83.

86. *Id.*

CourtHelp is an online project of the New York State Unified Court System. The Web site includes information about the law, court facts, free court forms, and links to lawyer referral services.⁸⁷ The section titled “Court Facts” includes information on courthouse locations, their hours of operation, where to go to find help within the courthouse, which courts handle certain issues such as family law or probate, and contact information for court managers.⁸⁸ CourtHelp also provides answers to frequently asked questions on a variety of legal issues, including housing, family law, criminal matters, and small claims.⁸⁹ The Web site also has a glossary of common legal terms and links to local law libraries.⁹⁰ All court forms are available for download from the Web site. Finally, the Web site includes links to lawyer referral services by county.⁹¹

It is not clear, however, that this self-help system has any beneficial effect on outcomes for pro se litigants. A recent study showed that unrepresented litigants who sought help at a self-help center were just as likely to lose their cases as those who did not seek such help.⁹²

C. The Role of Judges in the American System

Unlike civil law judges, American judges are, first and foremost, lawyers. Almost all judges in the United States have first practiced as lawyers, generally for many years. In law school, judges study to be lawyers, not judges. Indeed, most law schools in the United States make no attempts to prepare their students to serve on the bench. The process by which American judges are chosen does little to remedy this problem: American judges are either popularly elected or appointed by popularly elected executives who may have no legal training themselves and are not part of the judicial branch.

87. New York CourtHelp, *supra* note 84.

88. New York CourtHelp, Court Facts, <http://www.courts.state.ny.us/courthelp/cfacts1.html> (last visited Sept. 5, 2009).

89. *Id.*

90. New York CourtHelp, The Law, <http://www.courts.state.ny.us/courthelp/thelaw2.html> (last visited Sept. 5, 2009).

91. New York CourtHelp, Lawyers, <http://www.courts.state.ny.us/courthelp/lawyers.html> (last visited Sept. 5, 2009).

92. Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 LOY. L.A. L. REV. 913, 919–20 (2009).

It is only once they have been elected or appointed that most judges begin their training. Many states have their own judicial training courses, but these are typically quite modest.⁹³ In California, for example, newly selected judges attend two programs totaling only three weeks of training.⁹⁴ The first week is an orientation presented by the California Judicial Education and Research Association, which focuses mostly on attitude, fairness, and judicial temperament. A new judge then attends the State Judicial College, a two-week training course that covers more substantive areas of law.⁹⁵ And that is that. The new judge then ascends the bench and begins refereeing procedural and substantive fights between other lawyers.

American judges can, of course, obtain further training. They are encouraged to attend continuing legal education programs and are trained separately whenever they receive a new assignment.⁹⁶ Most importantly, the National Judicial College in Nevada offers graduate programs in judicial studies, with more than 2,500 judges enrolled from all fifty states, all U.S. territories, and more than 150 countries.⁹⁷ To place this number in context, the United States has a total of about 51,000 judges, magistrates, and others performing similar judicial functions.⁹⁸ Although this graduate program is an extremely valuable asset to judicial preparedness, judges generally are not required to attend the program to be appointed to the bench or to continue serving in their judicial capacity.

Perhaps because they are trained primarily as lawyers and not as judges, American judges tend to view their role as that of a neutral and impartial referee, consistent with the sporting theory of justice. They perceive their main job to be procedural—to ensure that the adversary system, quintessentially a contest between lawyers, operates efficiently and effectively.⁹⁹

93. See BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, 2008–2009 EDITION, JUDGES, MAGISTRATES AND OTHER JUDICIAL WORKERS, Dec. 18, 2007, <http://www.bls.gov/oco/ocos272.htm>.

94. Interview with Hon. Richard Fruin, Judge, Cal. Superior Court, in L.A., Cal. (Feb 3, 2009).

95. *Id.*

96. *Id.*

97. The National Judicial College, The NJC Experience, <http://www.judges.org/about.html> (last visited Sept. 5, 2009).

98. BUREAU OF LABOR STATISTICS, *supra* note 93.

99. Interview with Hon. Richard Fruin, *supra* note 94.

The formal rules that govern judicial behavior do nothing to change this mindset. American judges are subject to codes of conduct adopted by their respective states. Most of these codes are based on the American Bar Association's Model Code of Judicial Conduct (the "Model Code").¹⁰⁰ Canon 2 of the Model Code says simply that "a judge shall perform the duties of judicial office impartially, competently, and diligently."¹⁰¹ Rule 2.2 of the Model Code says that "a judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."¹⁰² The opening sentence of the preamble to the Washington State Code of Judicial Conduct similarly states: "Our legal system is based upon the principle that an independent, fair, and competent judiciary will interpret and apply the laws that govern us."¹⁰³ But exactly what role is this "independent, fair, and competent judiciary" supposed to play in the context of an adversary system?

One thing is clear: the judge sets the standard for courtroom behavior. This responsibility requires the judge, among other things, to appear completely impartial in the presence of the jurors.¹⁰⁴ Because the jurors look to the judge as a model, they are also likely to look to the judge for clues as to which side they should favor. It is therefore vital that judges, regardless of their personal feelings, rule strictly on the law and facts while showing as little favoritism or undue emotion as possible. When judges exhibit contempt or bias, they stray from their position as neutral umpires and can affect outcomes in a way the adversary system does not intend.¹⁰⁵

An overly combative or poorly trained attorney can severely strain a judge's ability to remain neutral.¹⁰⁶ Even if an attorney harms rather than helps his or her client's case, the assigned judge must only intervene as may be necessary to avoid an egregious outcome. In any event, the judge must undertake any such intervention so as to minimize its impact on the jury's opinion of the lawyer and his or her case. Judges are instructed to call a recess and

100. MODEL CODE OF JUDICIAL CONDUCT (2007).

101. *Id.* Canon 2.

102. *Id.* R. 2.2.

103. WASH. CODE OF JUDICIAL CONDUCT pmb. (1995).

104. MODEL CODE OF JUDICIAL CONDUCT pmb. (2007).

105. *Id.* R. 2.3.

106. *Id.* R. 2.15 cmts. 1 & 2.

physically leave the bench if they become so frustrated that they can no longer rule or comment without risking being perceived as biased.¹⁰⁷

Pro se litigants can present an even greater challenge. On the one hand, many judges do value the goal of universal access to justice. That goal would be frustrated if pro se litigants were denied the outcome to which they are entitled as a matter of law solely because they are not familiar with the complexities of adversarial procedure. As a result, judges sometimes give pro se litigants leeway as to the formalities of in-court mechanics, such as addressing the judge and approaching the bench.¹⁰⁸ Paperwork submitted by self-represented litigants is subject to a different standard of judicial review than paperwork submitted by lawyers. In general, courts will construe pro se filings as liberally as possible in favor of the litigant, searching them for any statement that could constitute a meritorious claim or defense.¹⁰⁹ Judges may even go so far as to read back pro se litigants' own questions to them on direct examination.¹¹⁰

In addition, judges sometimes handle pro se litigants with particular solicitude to preserve the legitimacy of the system they are charged with administering. Becoming a pro se litigant is often the only way ordinary folk experience the legal world firsthand, short of going to law school and passing the bar.¹¹¹ Judges are therefore motivated to ensure that pro se litigants are at least treated with respect.¹¹²

On the other hand, any special treatment for pro se litigants can be perceived as a violation of a judge's neutral role. American judges will therefore commonly inform a pro se litigant at the outset that they cannot give them legal advice. A judge may go out of his

107. *Id.* R. 2.3.

108. *Id.* R. 2.2 cmt. 4.

109. Jona Goldschmidt, *Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience*, 17 MICH. ST. J. INT'L L. 601 (2009) (citations omitted).

110. *See generally* Miller v. L.A. County Bd. of Educ., 799 F.2d 486 (9th Cir. 1986) (holding that allowing a pro se plaintiff to submit his direct examination questions in advance was not a violation of his due process rights).

111. *See generally* Goldschmidt, *supra* note 109 (providing a general overview of the pro se litigation experience).

112. Interview with Hon. John R. Hickman, Judge, Wash. Superior Court, in Tacoma, Wash. (Dec. 23, 2008).

or her way to make clear to pro se litigants that as a judge, he or she is not their friend or attorney. And in general, self-represented litigants are held to the same standard as attorneys.¹¹³ Promulgating a new set of forms for use in uncontested divorce and paternity cases in New Mexico, for example, the New Mexico Supreme Court recently approved Form 4A-201, which states: “A self-represented person must abide by the same rules of procedure and rules of evidence as lawyers. It is the responsibility of self-represented parties to determine what needs to be done and to take the necessary action.”¹¹⁴ Similarly, “appellate courts will not relieve a self-represented litigant of the consequences of a default, such as failure to object to an instruction or ruling by the trial court.”¹¹⁵

Judges reconcile concessions they make to pro se litigants with the need to maintain the appearance of impartiality by noting that it is usually not in the interest of opposing counsel to stop the judge from helping the pro se litigant as much as the judge properly can. Without such solicitude, there is a danger that the jury will come to view opposing counsel as a bully. In addition, for many attorneys, jurors, and judges, efficiency is often an overriding concern. Judges are therefore usually willing to grant pro se litigants continuances, especially to permit them to secure outside counsel. Because a case is likely to proceed much faster and more seamlessly if both parties have representation, such continuances are often welcomed by opposing counsel.

The rules governing judicial behavior reflect this balancing act, all within a sporting theory of justice. The comments to Rule 2.2 of the Model Code state:

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded. . . .

[4] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.¹¹⁶

113. See Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 *JUDGES' J.* 16, 16 (2003).

114. Domestic Relations Forms for Self-Represented Parties: Responsibility of Self-Represented Party, Form 4A-201, N.M. STAT. ANN. app. (West 2009) (reprinting state court rules and forms).

115. Albrecht, *supra* note 113, at 20 (containing a useful collection of cases dealing with this issue).

116. MODEL CODE OF JUDICIAL CONDUCT R. 2.2 cmts. 1, 4 (2007).

The American Judicature Society's Recommendation 7 similarly provides that "[j]udges should assure that self-represented litigants in the courtroom have the opportunity to meaningfully present their case. Judges should have the authority to insure that procedural and evidentiary rules are not used to unjustly hinder the legal interest of self-represented litigants."¹¹⁷

Other rules provide that judges shall not be biased and must use due diligence and competence in performing their duties.¹¹⁸ With regard to a judge's role in settlement negotiations, Rule 2.6 of the Model Code states:

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.¹¹⁹

The comments then explicitly address the issue of unrepresented parties:

[2] The judge plays an important role in overseeing the settlement of disputes, but should be careful that efforts to further settlement do not undermine any party's right to be heard according to law. The judge should keep in mind the effect that the judge's participation in settlement discussions may have, not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Among the factors that a judge should consider when deciding upon an appropriate settlement practice for a case are (1) *whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions*, (2) *whether the parties and their counsel are relatively*

117. AMERICAN JUDICATURE SOCIETY, REVISED PRO SE RECOMMENDATIONS FROM THE AMERICAN JUDICATURE SOCIETY 4 (2002).

118. MODEL CODE OF JUDICIAL CONDUCT R. 2.3 & cmts. 1-2 (2007) (requiring judges to refrain from bias, prejudice, or harassment, and to ensure that lawyers in proceedings before the court act in the same manner); *see also id.* R. 2.4 & cmt. (discussing the requirement that judges avoid allowing external influences to affect their judicial conduct); *id.* R. 2.5 & cmts. 1-4 (discussing the judicial requirements of competence and diligence).

119. *Id.* R. 2.6.

sophisticated in legal matters, (3) whether the case will be tried by the judge or a jury, (4) *whether the parties participate with their counsel in settlement discussions*, (5) *whether any parties are unrepresented by counsel*, and (6) whether the matter is civil or criminal.

[3] Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate.¹²⁰

Much more stringent limitations are placed on any role judges might be tempted to play in factual investigation. Rule 2.9 of the Model Code, which characterizes the problem as one of "ex parte communications," provides:

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, *which does not address substantive matters*, is permitted

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, *provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record*, and does not abrogate the responsibility personally to decide the matter.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify

120. *Id.* cmts. 2-3 (emphases added).

the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) *A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.*¹²¹

The relevant comment explains that “[t]he prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.”¹²²

Characterization of independent judicial investigation as just another form of *ex parte* communication reflects the extraordinary hold the sporting model of justice has on American views of the appropriate role of judges.¹²³ The commission that drafted the Model Code viewed the judge’s duty to consider only the evidence presented *by the parties* to be a defining feature of the judge’s role in an adversarial system. Indeed, the commission amended the rule to explicitly prohibit independent factual inquiries by the judge.¹²⁴

Judges are accorded only slightly greater leeway with respect to matters of law. The majority view seems to be that, in general, self-represented litigants are to be treated no differently from attorneys.¹²⁵ In *Plummer v. Reeves*,¹²⁶ for example, the Texas Court of Appeals dismissed an appeal because the *pro se* appellant failed to file a brief with citations to legal authority supporting her position after several opportunities to do so.¹²⁷ The court wrote:

Finally, as judges, we are to be neutral and unbiased adjudicators of the dispute before us. Our being placed in the position of conducting research to find authority supporting legal propositions uttered by a litigant when the litigant has opted not to search for same runs afoul of that

121. *Id.* R. 2.9 (emphases added).

122. *Id.* cmt. 6.

123. *See id.* R. 2.9.

124. *Id.* R. 2.9 app. B, cmt. 7.

125. *See* Albrecht, *supra* note 113, at 43; *see also* *Plummer v. Reeves*, 93 S.W.3d 930, 931 (Tex. 2003).

126. 93 S.W.3d 930 (Tex. 2003).

127. *Id.* at 931.

ideal, however. Under that circumstance, we are no longer unbiased, but rather become an advocate for the party.¹²⁸

The premise that an unrepresented litigant has “opted” not to provide legal citations might strike some as unrealistic. In any event, *Plummer* and its kin extend the sporting theory of law to substantive law itself. Judges, apparently, cannot even express their views with regard to substantive law until the parties have taken their own positions. Even then, a judge’s role is that of a referee. From this view, if an unrepresented party, through ignorance, fails to assert a theory that might support her claim or defense, the judge cannot appropriately consider that theory.

Rule 2.9(A) of the Model Code provides one explicit escape hatch with respect to matters of law:

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.¹²⁹

There is no evidence, however, that this escape hatch is commonly used in cases involving unrepresented litigants.

The federal courts, together with the state courts in a few states, have taken a somewhat different approach. So long as there is no prejudice to the opponent, these court systems conclude that judges can and should go out of their way to assist unrepresented litigants.¹³⁰ Even in majority-rule jurisdictions, exceptions are more likely to be made in cases involving prisoners or in cases in which the self-representation seems to be unwanted.¹³¹

The Second Circuit, for example, has emphasized the importance of a more active role for the trial judge. In 1983, the court reversed the denial of a self-represented litigant’s motion to vacate an entry of default. The court held that the trial court had abused its discretion, stating:

128. *Id.*

129. MODEL CODE OF JUDICIAL CONDUCT R. 2.9.

130. Albrecht, *supra* note 113, at 43.

131. *See, e.g.,* Waushara County v. Graf, 480 N.W.2d 16, 19–20 (Wis. 1992) (indicating that Wisconsin limits the lenient approach to prisoners).

Implicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training. While the right “does not exempt a party from compliance with relevant rules of procedural and substantive law,” it should not be impaired by harsh application of technical rules. Trial courts have been directed to read *pro se* papers liberally and to allow amendment of *pro se* complaints “fairly freely.”

The court’s duty is even broader in the case of a *pro se* defendant who finds herself in court against her will with little time to learn the intricacies of civil procedure.¹³²

The court applied the same approach in *Ortiz v. Cornetta*,¹³³ holding that an incarcerated prisoner’s complaint should be deemed filed at the time of initial filing, in spite of the fact that it was returned for correction of a default and then later re-filed after the statute of limitations had run. The court said:

At the outset, we note the general standards—some of which have only recently emerged from both Supreme Court and second circuit decisions—which hold a *pro se* litigant to less stringent standards than those governing lawyers. Such has long been the case with rules governing *pro se* complaints, but it has only been in the past year that courts have extended this principle to form a general standard. Once a *pro se* litigant has done everything possible to bring his action, he should not be penalized by strict rules which might otherwise apply if he were represented by counsel.¹³⁴

A recent California case illustrates the difficult line U.S. trial judges are expected to walk.¹³⁵ Holding that a judge must take special care when dealing with a self-represented litigant, the California Court of Appeal reasoned as follows:

132. *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983) (citations omitted).

133. 867 F.2d 146 (2d. Cir. 1989).

134. *Id.* at 148 (citations omitted).

135. *Gamet v. Blanchard*, 111 Cal. Rptr. 2d 439 (Ct. App. 2001).

We further note that pro per litigants are not entitled to special exemptions from the California Rules of Court or Code of Civil Procedure. They are, however, entitled to treatment equal to that of a represented party. Trial judges must acknowledge that pro per litigants often do not have an attorney's level of knowledge about the legal system and are more prone to misunderstanding the court's requirements. When all parties are represented, the judge can depend on the adversary system to keep everyone on the straight and narrow. When one party is represented and the other is not, the lawyer, in his or her own client's interests, does not wish to educate the pro per. The judge should monitor to ensure the pro per is not inadvertently misled, either by the represented party or by the court. While attorneys and judges commonly speak (and often write) in legal shorthand, when a pro per is involved, special care should be used to make sure that verbal instructions given in court and written notices are clear and understandable by a layperson. This is the essence of equal and fair treatment, and it is not only important to serve the ends of justice, but to maintain public confidence in the judicial system.

The confusing, indeed misleading, nature of the various orders and communications that Gamet received from the trial court is particularly important in light of Gamet's (involuntary) pro per status. As noted above, pro per litigants are not entitled to any special treatment from the courts. But that doesn't mean trial judges should be wholly indifferent to their lack of formal legal training. Clarity is important when parties are represented by counsel. How much more important is it when one party may not be familiar with the legal shorthand which is so often bandied around the courtroom or put into minute orders?

There is no reason that a judge cannot take affirmative steps—for example, spending a few minutes editing a letter or minute order from the court—to make sure any communication from the court is clear and understandable, and does not require translation into normal-speak. Judges

are charged with ascertaining the truth, not just playing the referee. A lawsuit is not a game, where the party with the cleverest lawyer prevails regardless of the merits. Judges should recognize that a pro per litigant may be prone to misunderstanding court requirements or orders—that happens enough with lawyers—and take at least some care to assure their orders are plain and understandable. Unfortunately, the careless use of jargon may have the effect, as in the case before us, of misleading a pro per litigant. The ultimate result is not only a miscarriage of justice, but the undermining of confidence in the judicial system.¹³⁶

The dissenting judge attacked the internal incoherence of the majority's reasoning. He pointed out that the majority first asserted that "pro per litigants are not entitled to any special treatment,"¹³⁷ and then set forth a list of special accommodations pro per litigants should be given. The dissent's ultimate point was unobjectionable: instead of handling the problem on a case-by-case basis, the court should amend the rules to provide clear guidance as to how trial judges should deal with self-represented litigants.¹³⁸

The American position may be extreme. Jurists in other common law jurisdictions are not always expected to be as passive as American judges. One survey, for example, found that English jurists "raise[d] points of law which favoured unrepresented litigants" when they could, "although with a certain wariness of their position as [unbiased] adjudicators."¹³⁹

In a recent article, Cynthia Gray, the director of the American Judicature Society's Center for Judicial Ethics, offers a proposed set of best practices for cases involving self-represented litigants.¹⁴⁰ Other scholars have made similar efforts.¹⁴¹ The ultimate question,

136. *Id.* at 445–46.

137. *Id.* at 447 (Bedsworth, J., dissenting).

138. *Id.*

139. RICHARD MOORHEAD & MARK SEFTON, LITIGANTS IN PERSON: UNREPRESENTED LITIGANTS IN FIRST INSTANCE PROCEEDINGS 185–86 (2005).

140. Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 97 (2007).

141. Albrecht, *supra* note 113, at 18. Minnesota has developed the following protocol to be used during hearings involving pro se litigants:

1. Verify that the party is not an attorney, understands that he or she is entitled to be represented by an attorney and chooses to proceed pro se without an attorney.
2. Explain the process. "I will hear both sides in this matter. First I will listen to what the Petitioner wants me to know about this case and then I will listen to what the Respondent wants me to know about this case. I will try to give each side enough time and opportunity to tell me their side of the case, but I must proceed in the order I indicated. So please do not interrupt while the other party is presenting their evidence. Everything that is said in court is written down by the court reporter and in order to insure that the court record is accurate, only one person can talk at the same time. Wait until the person asking a question finishes before answering and the person asking the question should wait until the person answering the question finishes before asking the next question."
3. Explain the elements. For example, in Order for Protection (OFP) cases: "Petitioner is requesting an Order for Protection. An Order for Protection will be issued if Petitioner can show that she is the victim of domestic abuse. Domestic abuse means that she has been subject to physical harm or that she was reasonably in fear of physical harm or that she was reasonably in fear of physical harm as a result of the conduct or statements of the Respondent. Petitioner is requesting a Harassment Restraining Order. A Harassment Restraining Order will be issued if Petitioner can show that she is the victim of harassment. Harassment means that she has been subject to repeated, intrusive, or unwanted acts, words, or gestures by the Respondent that are intended to adversely affect the safety, security, or the privacy of the Petitioner."
4. Explain that the party bringing the action has the burden to present evidence in support of the relief sought. For example, in OFP cases: "Because the Petitioner has requested this order, she has to present evidence to show that a court order is needed. I will not consider any of the statements in the Petition that has been filed in this matter. I can only consider evidence that is presented in court today. If Petitioner is unable to present evidence that an order is needed, then I must dismiss this action."
5. Explain the kind of evidence that may be presented. "Evidence can be in the form of testimony from the parties, testimony from witnesses, or exhibits. Everyone who testifies will be placed under oath and will be subject to questioning by the other party. All exhibits must first be given an exhibit number by the court reporter and then must be briefly described by the witness who is testifying and who can identify the exhibit. The exhibit is then given to the other party who can look at the exhibit and let me know any reason why I should not consider that exhibit when I decide the case. I will then let you know whether the exhibit can be used as evidence."
6. Explain the limits on the kind of evidence that can be considered. "I have to make my decision based upon the evidence that is admissible under the Rules of Evidence for courts in Minnesota. If either party starts to present evidence that is not admissible, I may stop you and tell you that I cannot consider that type of evidence. Some examples of inadmissible evidence are hearsay and irrelevant evidence. Hearsay is a statement by a person who is not in court as a witness: hearsay could be an oral statement that was overheard or a written statement such as a letter or an affidavit. Irrelevant evidence is testimony or exhibits that do not help me understand or decide issues that are involved in this case."
7. Ask both parties whether they understand the process and the procedure.
8. Non-attorney advocates will be permitted to sit at counsel table with either party and provide support but will not be permitted to argue on behalf of a party or to question witnesses.
9. Questioning by the judge should be directed at obtaining general information to avoid the appearance of advocacy. For example, in OFP cases: "Tell me why you believe you need an order for protection. If you have specific incidents you want to

however, remains whether true access to justice is ever possible for self-represented litigants in a courtroom based on a sporting theory of justice. Judge Kevin Burke argues in the negative. In his view, a more radical move towards “problem-solving courts” and “therapeutic justice” is required to solve the problem.¹⁴² Interestingly, his view is supported by the comments to Rule 2.9 of the Model Code, which substantially relax prohibitions on ex parte communications in less traditional dispute-resolution forums: “A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.”¹⁴³

III. FOREIGN LAW APPROACHES TO ACCESS TO JUSTICE

A. *The Civil Law System*

Nations with a civil law tradition,¹⁴⁴ by contrast, adhere to what Americans call an “inquisitorial” model in which judges are called upon to take a more active investigative role with the goal of achieving substantive justice.¹⁴⁵ In an inquisitorial system, the judge actively supervises the gathering of evidence; the judge is therefore not a passive decision maker.¹⁴⁶ In Germany, as in the United States, a lawsuit is initiated by the filing of a complaint setting forth facts, legal theories, and remedies requested.¹⁴⁷ Thereafter, however, German and American procedures differ substantially. In their initial

tell me about, start with the most recent incident first and tell me when it happened, where it happened, who was present, and what happened.”

10. Whenever possible the matter should be decided and the order prepared immediately upon the conclusion of the hearing so it may be served on the parties.

Id. Idaho is also working on such a protocol. *Id.*

142. Burke, *supra* note 8, at 6.

143. MODEL CODE OF JUDICIAL CONDUCT R. 2.9 cmt. 4 (2007).

144. Civil law countries include most of Western Europe and Latin America.

145. See Leonard L. Cavise, *Essay: The Transition from the Inquisitorial to the Accusatorial System of Trial Procedure: Why Some Latin American Lawyers Hesitate*, 53 WAYNE L. REV. 785, 792 (2007).

146. Sward, *supra* note 10, at 313.

147. John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 827 (1985).

filing, German lawyers will include the basic elements of their proof insofar as they are known—for example, hospital records and names of witnesses. The lawyer is not expected to have done much investigation; investigation is the job of the judge.¹⁴⁸ The judge examines the documents submitted by both sides, requests further evidence, and may schedule the first of many hearings. This procedure allows many cases to be resolved quickly. In any event, it gives the judge an immediate sense of the issues to be resolved. If an issue requires expertise, the judge—not the parties—will arrange for and hire the necessary experts.¹⁴⁹

Most inquisitorial systems have checks and balances to ensure that the process remains fair and unbiased. It is the parties who generally suggest areas of fact investigation, and many systems have at least one level of *de novo* review.¹⁵⁰ Nevertheless, the judge plays a much larger role in developing the case, both factually and legally. Accordingly, at least in theory, a litigant's presentation and advocacy skills matter significantly less in a civil law system.¹⁵¹ In addition, since civil law courts do not generally consider case law precedent, litigants have less of a need for expertise in finding and citing such precedent.¹⁵²

Some civil law systems have taken the inquisitorial model further, in part to further alleviate the need for attorneys.¹⁵³ Judges in Chile, for example, are empowered to add documents to the record, order sworn statements by parties on central questions of fact, order expert testimony, personally inspect property at issue, recall witnesses for the purpose of clarifying earlier testimony, and take any other steps necessary to “better resolve the controversy.”¹⁵⁴ Presumably, this final catchall authority permits a Chilean judge to

148. *Id.*

149. *Id.*

150. Sward, *supra* note 10, at 314.

151. See John Samuel Scott, *Access to Civil Justice in the United States and the Soviet Union: A Comparative Analysis*, 1 AM. U. J. INT'L L. & POL'Y 215, 243 (1986).

152. *See id.*

153. DAGMAR SOENNECKEN, “JUSTICE SERVED?” LEGAL AID AND ACCESS TO THE COURTS FOR REFUGEES IN A COMPARATIVE CONTEXT 8 (2004).

154. Richard B. Cappalli, *Comparative South American Civil Procedure: A Chilean Perspective*, 21 U. MIAMI INTER-AM. L. REV. 239, 255–56 (1990). Notably, however, these judicial powers may be underutilized due to the limited resources and time constraints faced by judges.

call a potential witness apparent in the record but not called by either party.¹⁵⁵

B. Problems with Access and Attempted Remedies

Foreign jurisdictions face many of the same problems that arise in the United States with regard to access to justice. To address problems related to the lack of representation, jurisdictions worldwide have used a variety of approaches, including attempts to reduce the cost of engaging an attorney, constitutionally or statutorily mandating a right to counsel, providing alternative forums for resolving disputes, and seeking to improve the public's legal literacy.

To increase access to attorneys, most jurisdictions outside the United States set upper limits on the fees attorneys may charge for their services.¹⁵⁶ Germany, for example, has established a statutory fee schedule, making any deviation in excess of the prescribed amount illegal and therefore void.¹⁵⁷ Under standard economic theory, however, price controls should, in the long run, reduce the supply of attorneys by making the profession less attractive to existing practitioners and new entrants alike. If so, this approach may actually exacerbate perceived shortages of legal professionals.

Permitting attorneys to self-fund their services by means of contingency fee arrangements represents an alternative way of expanding attorney access without negatively affecting the supply of lawyers. Most nations currently prohibit this practice due to a perception that contingency fee arrangements encourage litigation.¹⁵⁸ From an American perspective, contingency fee arrangements might be viewed as a concern because they permit *too much* access to justice. Nevertheless, if a trend exists, it probably favors the contingency fee. The United Kingdom entirely barred such a payment arrangement until 2000, when it instituted a variant known as the conditional fee.¹⁵⁹ Belgium¹⁶⁰ and Lithuania¹⁶¹ also recently

155. *Id.*

156. Lua Kamál Yuille, *No One's Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe*, 42 COLUM. J. TRANSNAT'L L. 863, 909 (2004).

157. *Id.*

158. George Steven Swan, *Economics and the Litigation Funding Industry: How Much Justice Can You Afford?*, 35 NEW ENG. L. REV. 805, 808 (2001).

159. Tamara Goriely, *The English Approach to Access to Justice* 7–8, Dec. 11, 2002, <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EnglandWhales.pdf>.

allowed the use of contingency fee agreements or something similar, bringing the total number of nations permitting such arrangements to a dozen.¹⁶²

Legal insurance is another funding mechanism in widespread use in several foreign jurisdictions.¹⁶³ Unlike the prepaid legal plans that are typical in the United States, subscribers of these insurance plans receive any and all needed legal services, usually by an appointed lawyer, on an annual basis.¹⁶⁴ Such plans are common in Germany, Sweden, and France,¹⁶⁵ with more than 40 percent of households receiving coverage in Germany, the largest market.¹⁶⁶ Notably, the involvement of insurance companies helps to control costs for the represented litigants,¹⁶⁷ which may place downward pressure on attorney fees in general. Such plans do not, however, directly increase access to attorneys for the indigent because the poor are less likely to have the disposable income to purchase insurance policies in the first place.¹⁶⁸

A salient feature of many foreign legal systems is the recognition that severe injustice may occur—both in civil proceedings and criminal trials—if litigants are denied access to legal counsel. Some countries, such as Nigeria, resolve this issue by allowing litigants, criminal or civil, to pursue or defend claims only through an attorney, and are provided an attorney.¹⁶⁹ In many other countries, citizens who are unable to afford an attorney are guaranteed legal aid for civil claims by constitutional provision or statute. While perhaps a majority of countries recognize a right to

160. Winand Emons, *Conditional Versus Contingent Fees*, 59 OXFORD ECON. PAPERS 89, (2007), available at <http://oep.oxfordjournals.org/cgi/reprint/59/1/89>.

161. Linas Sesickas, *Access to Justice in Lithuania*, 24 FORDHAM INT'L L.J. 159 (2000).

162. The others, identified in a 2004 study, are Australia, Brazil, Canada, the Dominican Republic, France, Greece, Ireland, Japan, New Zealand, and, of course, the United States. See HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 258–59 (2004).

163. John Flood & Avis Whyte, *What's Wrong with Legal Aid? Lessons from Outside the UK*, 25 CIV. JUST. Q. 80, 92–93 (2006).

164. *See id.*

165. Yuille, *supra* note 156, at 909.

166. Flood & Whyte, *supra* note 163, at 93.

167. *Id.* at 92.

168. *Id.* at 93.

169. See Tiffany Buxton, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 135 (2002).

legal aid to defend severe criminal charges, the constitutions of only a handful of countries—among them Italy, the Netherlands, Portugal, Spain, and South Africa—contain provisions explicitly extending this right to civil cases.¹⁷⁰ In several other countries, notably Switzerland and Germany, the highest court has held that constitutional equal protection or due process provisions—expressed in language similar to the comparable clauses in the U.S. Constitution—guarantee indigent litigants in civil cases the right to free counsel.¹⁷¹

Some Western European nations, including the Czech Republic, Hungary, Poland, and Romania, that do not provide civil litigants a constitutional right to counsel do provide such a right by statute,¹⁷² at least in some contexts.¹⁷³ A decision by the European Court of Human Rights bolsters this right for indigent civil litigants in countries that are signatories to the European Convention on Human Rights, which include all the states of Western Europe.¹⁷⁴ In *Airey v. Ireland*,¹⁷⁵ a woman sought legal aid to secure representation to obtain a legal separation from her abusive spouse.¹⁷⁶ In essence, the court held that a state may be compelled to provide legal services to indigents in civil actions that implicate either complex legal or procedural issues¹⁷⁷ in order to guarantee every individual an “effective right” to court access to defend his or her civil rights and obligations, as the language of the convention requires.¹⁷⁸ The court recognized that simplifying procedural rules in local courts might represent an alternative means to achieve this same objective.¹⁷⁹

170. See, e.g., Symposium, *Access to Justice: Does It Exist in Civil Cases?*, 17 GEO. J. LEGAL ETHICS 455, 459 (2004) (discussing Italy, the Netherlands, and South Africa); Yuille, *supra* note 156, at 879–80 (discussing Portugal and Spain); see also Keith S. Rosenn, *Civil Procedure in Brazil*, 34 Am. J. Comp. L. 487 (1986).

171. Johnson, *supra* note 37, at S89–S90.

172. Yuille, *supra* note 156, at 881–82.

173. See Sesickas, *supra* note 161, at 179–80.

174. See Yuille, *supra* note 156, at 882–84 & n.105.

175. 32 Eur. Ct. H.R. 4 (Ser. A) (1979).

176. *Id.* at 3–4.

177. See Earl Johnson, Jr., *Will Gideon's Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. SOC. JUST. 201, 217–18 (2003).

178. PUB. INTEREST LAW INITIATIVE IN TRANSITIONAL SOCIETIES, PURSUING THE PUBLIC INTEREST 221 (Edwin Rekosh et al. eds., 2001).

179. See Johnson, *supra* note 177, at 218.

A constitutional or statutory guarantee places the financial burden of providing legal services to the indigent squarely on the shoulders of the public institutions. Many countries devote substantially greater resources to support legal aid for indigent civil litigants than does the United States. One study compared legal aid expenditures in the United States with those in Germany, France, Australia, Canada, England and Wales, the Netherlands, and New Zealand.¹⁸⁰ The study found that each of the comparison nations spent, as a percentage of gross national product, between 2.5 times and 23.5 times the budget of the Legal Service Corporation, the principal provider of public legal aid in the United States.¹⁸¹

Legal aid in Canada and Australia is provided at the provincial or state level, respectively, but the regional agencies cited in the study spent more than four times the comparable figure for the United States.¹⁸² The trend in most countries in the United Kingdom and Northern Europe, moreover, is to increase public spending on civil legal services.¹⁸³ By contrast, as of 2000, spending for this purpose in the United States had yet to recover fully from the deep cuts of the early 1980s.¹⁸⁴ The nations with the best legal aid programs in terms of coverage are the Netherlands, Finland, and Sweden, which extend legal aid eligibility to more than 45 percent, 50 percent, and 80 percent of their populations, respectively.¹⁸⁵

It should come as no surprise that constitutional and statutory commitments to provide free legal services to the poor are not always supported by sufficient government funding. Colombia falls well short of the ideal of full coverage expressed in its constitution, largely reflecting the nation's *laissez-faire* approach to the problem and consequent failure to implement any public institutional mechanisms.¹⁸⁶ Venezuelan law mandates appointment of a free attorney to individuals who lack representation but makes no

180. See Flood & Whyte, *supra* note 163, at 84.

181. *Id.*

182. *Id.*

183. See *id.* at 83, 87.

184. *Id.* at 94.

185. Yuille, *supra* note 156, at 888–89.

186. See Cappalli, *supra* note 154, at 245.

provision for payment, instead unsuccessfully depending on pro bono services from the legal community.¹⁸⁷

Even where the right to counsel is granted statutorily, legislatures may limit its availability. Applicants for legal aid must generally pass a means test; some nations also impose a precondition that the applicant's claim or defense be meritorious.¹⁸⁸ In addition, a number of legal aid programs limit coverage to specific types of civil claims. England, for example, does not provide legal aid for personal injury plaintiffs,¹⁸⁹ though, as noted above, that country now permits a form of contingency fee arrangement to help fill the resulting void.¹⁹⁰ In certain foreign legal systems, cost-shifting rules require the loser in a lawsuit to pay the winner's legal expenses.¹⁹¹ Pro se litigants, however, are generally only able to recover actual expenses of litigation and not the cost of their time in defending or pursuing their cases.¹⁹² Accordingly, lower-income individuals may be reticent to pursue even robust claims when the likely recovery does not include any forgone income. To solve this problem, England and, more recently, Canada have recognized a right for lay litigants to recover the opportunity costs of self-representation.¹⁹³

Another solution has been to establish less formal forums designed to be user-friendly and thus more accessible to the unrepresented litigant. Such forums are often created to handle the kinds of matters in which parties are more likely to proceed without legal representation, such as family matters or disputes in which the amount in controversy is small.¹⁹⁴ Indeed, the small claims courts of many jurisdictions—including South Africa¹⁹⁵—forbid attorneys from appearing on behalf of parties. Lawyers in England are not entirely barred from appearing in small claims courts, but the

187. Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. INT'L L. 167, 207 n.174 (1995).

188. See, e.g., David McQuoid-Mason, *Access to Justice in South Africa*, 17 WINDSOR Y.B. ACCESS JUST. 230, 239 (1999).

189. Goreily, *supra* note 159, at 7.

190. See *id.*

191. Swan, *supra* note 158, at 814.

192. Robert Flannigan, *Costs for Self-Represented Litigants: Principles, Interests and Agendas*, 33 ADVOCATES' Q. 447, 448 (2007).

193. See *id.* at 461.

194. See McQuoid-Mason, *supra* note 188, at 244.

195. *Id.* at 245.

statutory legal-fee limitations discourage them from actively seeking such engagements.¹⁹⁶

In addition to small claims courts, England offers an alternative dispute resolution forum: the tribunal. English tribunals began as private institutions before being given official status by an act of Parliament in the mid-1950s.¹⁹⁷ Notably, under the act, each tribunal has the power to write its own code of procedure.¹⁹⁸ Two of the stated objectives of the tribunals are to minimize costs and to provide an accessible forum.¹⁹⁹ The informality and low cost of tribunal proceedings are thought to expand access to the less well-off and to pro se litigants in general.²⁰⁰

Community courts, often overseen by community members rather than legal professionals or jurists, represent another dispute resolution alternative.²⁰¹ In several post-colonial countries, community courts were created to empower indigenous populations as well as to provide a more accessible forum.²⁰² Granting control of the judiciary to the community should theoretically expand local access to justice, but the experience in the post-colonial world has been mixed, with some village courts in Zimbabwe and Mozambique periodically devolving into illegitimacy.²⁰³ Attempts in India to revive a traditional legal institution known as the “Panchayat” have suffered a similar fate in some communities.²⁰⁴

India has had greater success with an innovative judicial forum known as the “Lok Adalat.”²⁰⁵ Lok Adalats are intended to provide a no-cost forum to resolve disputes through conciliation and compromise.²⁰⁶ In essence, they provide court-sanctioned mediation services with a twist: the principal players are not “eminent judges

196. Buxton, *supra* note 169, at 134–35.

197. *Id.* at 126.

198. *Id.*

199. *Id.* at 127.

200. *See id.*

201. *See* McQuoid-Mason, *supra* note 188, at 244.

202. Marc Galanter & Jayanth K. Krishnan, “*Bread for the Poor*”: *Access to Justice and the Rights of the Needy in India*, 55 HASTINGS L.J. 789, 793–95 (2004).

203. *See* McQuoid-Mason, *supra* note 188, at 244.

204. Galanter & Krishnan, *supra* note 202, at 793; *see also* Rohit Mullick & Neelam Raaj, *Panchayats Turn into Kangaroo Courts*, TIMES INDIA, Sept. 9, 2007.

205. *See* Galanter & Krishnan, *supra* note 202, at 799 (describing the incredibly high volume of cases that have been resolved by Lok Adalats in the relatively short time they have existed).

206. *Id.*

and prominent lawyers, but district judges, social workers, and local advocates,” which may help foster compromise.²⁰⁷ Notably, the structure is intended to be accessible to pro se litigants—indeed, presiding judges in some Lok Adalats are openly hostile to attorneys.²⁰⁸ In a country with a legal system characterized by inordinate delay and extortionate costs, Lok Adalats provide an official process by which claimants can secure their rights quickly and inexpensively, although compromise is generally required in return.²⁰⁹ Notably, public sector agencies and government departments have adopted similar mechanisms to resolve minor disputes with consumers and other matters.²¹⁰

To a certain extent, the emergence of the Lok Adalat is part of a larger global movement favoring alternative dispute resolution mechanisms. Before proceeding to court in Norway, for example, almost all litigants in civil suits must first submit to mandatory mediation proceedings overseen by justices of the peace drawn from the citizenry rather than the judiciary.²¹¹ In Latin America, mediation and arbitration have also increased access to justice, especially for the poor, as an alternative to formal court systems plagued by corruption and delays.²¹²

A lack of knowledge of legal rights and options is often a significant impediment to access to justice. To rectify this problem, some governments have initiated basic legal literacy programs.²¹³ India, for one, is in the midst of a massive five-year legal literacy campaign, while South Africa’s local justice centers are specifically tasked with the responsibility of educating the public. Chile has located legal informational centers in the most impoverished areas of the country.²¹⁴

207. *Id.* at 800.

208. *Id.* at 815–16.

209. *Id.* at 808.

210. *Id.* at 800–01.

211. Buxton, *supra* note 169, at 128.

212. Dakolias, *supra* note 187, at 200.

213. Frank S. Bloch, *Access to Justice and the Global Clinical Movement*, 28 WASH. U. J.L. & POL’Y 111, 119 (2008).

214. Michael A. Samway, *Access to Justice: A Study of Legal Assistance Programs for the Poor in Santiago, Chile*, 6 DUKE J. COMP. & INT’L L. 347, 365 (1996).

C. The Role of Judges in Civil Law Systems

Civil law judges are, first and foremost, judges. They are generally educated separately from lawyers. They are usually part of the civic government and are appointed in a manner consistent with civil service employment. Civil law judges will typically begin their careers in the lower courts and work their way up to a leadership role or a higher court.²¹⁵ In consequence, the sporting theory of justice beloved by American lawyers is much less likely to affect judicial behavior in civil law countries.

Judges in civil law jurisdictions generally assume a more active role when overseeing cases than their counterparts in common law jurisdictions. As has been noted, in an inquisitorial system, the judge actively supervises the gathering of evidence. After a case is filed, the judge examines any documents the parties have submitted, requests further evidence, and undertakes investigatory hearings.²¹⁶ If an issue requires expertise, it is the judge that hires the experts. In sum, in civil law systems, the judge is trained to, expected to, and does play a substantial role in developing the case. Accordingly, unrepresented litigants should be at less of a disadvantage than they are in adversarial courts.

This also means, however, that more judges are required. As a result, the number of judges in civil law countries is generally much higher per lawyer or per capita than in the United States.²¹⁷ Germany, for example, has nine times more judges per capita than the United States.²¹⁸

215. RUDOLF SCHLESINGER, ET AL., *COMPARATIVE LAW* 180–82 (5th ed. 1988).

216. There is a split among civil law countries as to how much of a proceeding may be oral as opposed to written. Most European countries have a strong preference for oral and public hearings. *Id.* at 417. This is a reaction to the medieval system, which was in place from the thirteenth to eighteenth centuries, where proceedings were conducted in secret and all evidence had to be reduced to writing. *See id.*; *see also* ENGELMANN-MILLAR, *A HISTORY OF CONTINENTAL CIVIL PROCEDURE* 457–58 (1927). In Spain and Latin America, much of the proceedings are still similar to the medieval processes, especially as to the use of only written evidence. MARTHA FIELD & WILLIAM FISHER, *LEGAL REFORM IN CENTRAL AMERICA: DISPUTE RESOLUTION AND PROPERTY SYSTEMS* 22–23 (Harvard Univ. Press 2001). This is changing slowly. Cavise, *supra* note 145, at 786. The movement towards “oralidad” (or oral trials) will bring with it many challenges. It will be interesting to see whether Latin America can add an oral tradition without adding the procedural apparatus of an adversary system.

217. Schlesinger, *supra* note 215, at 183 & n.13.

218. Interview with Dr. Thomas Lundmark, Professor of Law, Westfälische Wilhelms-Universität Münster (Dec. 2008).

A cadre of judges in India adopted an even more proactive role in the early 1980s in an attempt to implement theretofore unfulfilled constitutional promises of justice.²¹⁹ The group implemented a number of initiatives that would likely be viewed as radical in the United States, going as far as to relax standing rules and assume jurisdiction over matters raised by third parties, with the goal to protect excluded and powerless groups.²²⁰ Taking a similar approach, France and Germany have recently implemented more permissive rules for standing to allow third parties to bring actions when usual standing rules appear to be counterproductive.²²¹

In a somewhat less dramatic exertion of judicial power, judges in Japan—a mixed legal system with elements adopted from both the U.S. common law system and the German civil law system—are generally “expected to intervene and assist *pro se* litigants.”²²² The Japanese system permits claimants to make their initial pleading in a relatively informal oral manner; they are required to convey only the factual circumstances of their case. The court then confirms that all of the necessary legal elements are present to state a cause of action.²²³ Both measures are tailored to aid the *pro se* litigant.

IV. WHAT THE AMERICAN SYSTEM CAN BORROW FROM CIVIL LAW SYSTEMS

It is unrealistic to ask that American courts abandon a system of adjudication that works well, more or less, for parties with representation simply because significant portions of the American polity cannot afford such representation. Nor would such wholesale change necessarily be desirable. Nevertheless, a number of concrete steps suggested by the civil law system may merit consideration.

First, American law schools commonly treat the role of judges as referees as if that role is written in stone. The Langdellian focus on appellate opinions relegates the trial process to relative obscurity. Law becomes an intellectual game—perhaps even, in Robert Bork’s immortal words, an “intellectual feast”—and not the life-and-death matter it actually is for many litigants. Since most judges in the

219. Galanter & Krishnan, *supra* note 202, at 795.

220. *Id.*

221. Yuille, *supra* note 156, at 910.

222. Buxton, *supra* note 169, at 137.

223. *Id.* at 141.

United States are trained as lawyers, it might make sense to rethink the role of law schools in that training process. During the first year, when law students are inculcated in the values of our system, we might at least talk about the range of ways disputes can be resolved and the different roles lawyers and judges can play in different dispute resolution processes. Many law schools offer courses on lawyering; we might perhaps consider offering courses on judging. It may also be useful to expose students more systematically to the problems faced by unrepresented litigants. Mandatory pro bono service requirements are sometimes justified on this basis.

Second, when training newly appointed or elected judges, we should deemphasize the sporting theory of justice and reemphasize the importance of justice itself. Many, if not most, judges appointed in the United States were excellent advocates—excellent players of the sport of law, if you will.²²⁴ Like other human beings, judges tend to place a high value on things they themselves are good at—in this case, the procedural give and take of trial. To some extent, therefore, judges need to unlearn the skills and values that made them good lawyers. Judicial training should focus on reorienting judges from the practice of law to the practice of dispensing justice.

Third, we should consider creating tracks in courts of general jurisdiction for unrepresented litigants, and we should identify courts of special jurisdiction in which lack of representation is particularly common. Judges in such tracks and courts should receive special training in dealing with the problems of the unrepresented. They should also be granted greater leeway by courts of review to exercise discretion and initiative in pursuit of just outcomes; they should not be held to the same passive ideal to which judges presiding over contests between fully represented parties are held.

Fourth, we should rethink the Model Code, at least as applied to such tracks and courts. Rule 2.9 of the Model Code, which generally characterizes independent investigation as *ex parte* communication *per se*, is particularly problematic. As noted above, Rule 2.9 substantially relaxes prohibitions on such *ex parte* communications in nontraditional dispute resolution forums, as authorized by law: “A judge may initiate, permit, or consider *ex parte* communications

224. See National Association of Former United States Attorneys, Directory, http://www.nafusa.org/directory_home.php (last visited Sept. 5, 2009).

expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.”²²⁵ If the rules of the Model Code themselves are not to be changed, legislation should be considered that will allow greater freedom to judges in such tracks or courts to take affirmative steps to ensure that all relevant facts are available and all relevant law has been considered before judgment is entered.

Fifth, such tracks and courts need substantially greater funding.²²⁶ If we want judges to be more active and involved in seeking the truth, we need to reduce judicial caseloads. Much has been written about the high caseloads of social workers and public defenders; there has been remarkably little public outcry about judicial caseloads. At the moment, of course, the trend is moving in the other direction. In Minnesota, for example, the governor has proposed at least a 5 percent cut in funding for the courts, which have already been underfunded for years.²²⁷ Under this budget-cutting plan, “Legal Aid would lose \$1 million in one-time funding, plus 5 percent of its base state funding, or about another \$600,000.”²²⁸

Finally, we should work with trial judges to develop clearer rules and guidelines for judges in the assistance of self-represented litigants, and we should continue experimenting with alternative dispute resolution forums where judges can be given greater freedom to be active in the search for truth and justice.

V. CONCLUSION

Scholars who worry about access to justice can easily become reflexively pessimistic. It is important, however, to not fall into the trap of thinking that change is impossible. The norms of the sporting theory of justice may make change difficult. Behaviors nevertheless

225. MODEL CODE OF JUDICIAL CONDUCT R. 2.9 cmt. 4 (2007).

226. Edward A. Adams, *Economy & Politics Threaten State Courts, ABA House Told*, ABA JOURNAL, Feb. 16, 2006, available at http://abajournal.com/news/economy_politics_threaten_state_courts_aba_house_told/ (“Massive state budget shortfalls threaten the ability of courts to continue to operate”).

227. Mark A. Cohen, *Will Justice Crumble?*, MINN. LAWYER, Jan. 30, 2009.

228. *Id.*

can and do evolve. An example of the possibility of radical cultural change is recounted by Malcolm Gladwell in his new book, *Outliers*, in which he explained the recent transformation of the Korean airline industry.²²⁹ In 1997, Korean airlines had a terrible record of crashes.²³⁰ In his exhaustive account of an accident that took place that year, Gladwell noted that hierarchical cultural norms impeded the ability of the pilots to communicate. To solve this aspect of the problem, Korean Air brought in David Greenberg, a long-time American airline executive, to work on flight operations. As Gladwell explained it,

Greenberg wanted to give his pilots an alternate identity. Their problem was that they were trapped in roles dictated by the heavy weight of their country's cultural legacy. They needed an opportunity to step outside those roles when they sat in the cockpit, and language was the key to that transformation. In English, they would be free of the sharply defined gradients of Korean hierarchy: formal deference, informal deference, blunt, familiar, intimate and plain. Instead, the pilots could participate in a culture and language with a very different legacy.²³¹

I do not suggest that American judges begin speaking French. I do suggest, however, that cultural change is possible, even in the face of deeply ingrained patterns of behavior.

Solving the problems of unrepresented litigants in American courts will likely require such cultural change. Unlike the civil law system, where the judge takes an active role in the investigation of facts and in the resolution of the case, the American adversary system calls for the judge to play a largely passive role, serving primarily as referee.²³² Many judges have internalized this role so deeply that they view it as natural and inevitable. It is neither. Judges need to be reminded that their job ultimately is to administer justice.

229. MALCOLM GLADWELL, *OUTLIERS* 179–82 (2008).

230. *Id.*

231. *Id.* at 219.

232. Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 NEB. L. REV. 251, 264 (2000).

