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Foreign Solutions to the U.S. Pro Se Phenomenon

Tiffany Buxton

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FOREIGN SOLUTIONS TO THE U.S. *PRO SE* PHENOMENON

Tiffany Buxton *

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* B.A., Duke University (1995); J.D., *magna cum laude*, Case Western Reserve University (2002). I owe a million words of gratitude to my parents, Clifford and Alma Buxton, and my siblings, Allan, Amanda, Travis and Trevor, without whose love, support, and guidance my degree would not have become a reality. I would also like to express my sincere thanks to Professor Hiram Chodosh and Shannon Krasnokutski, their comments and analysis inspired, challenged, and improved both my writing and beliefs. Finally, I would like to thank the professors and staff of the Milton A. Kramer Law Clinic Center; their delicate yet zealous advocacy on behalf of many who would be pro se provides a vivid reminder of why I wrote this paper in the first place and inspires me to seek out new opportunities to assist those in need.

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INTRODUCTION

Access to justice as an overriding theme rose to the forefront of legal scholarship in the 1960s and continues to present issues of global concern even today.¹ The predominating concern is the effect on a nation's perception of its judiciary when people are precluded from pursuing claims through existing judicial mechanisms simply because of factors like cost, delay, and corruption. In particular, scholars have focused in considerable detail on the prohibitive effects of cost and the means of addressing the role cost ultimately plays in determining whether a party can find adequate representation.² As a result, access to justice often presents itself as synonymous with a concern regarding access to representation.

Many countries, including the United States, initially addressed this problem by providing a mechanism within the judicial system that allows a party to proceed with his claim without retaining the services of a trained attorney. The party acts as his own representative, and is often referred to as *pro se*, meaning a litigating party who proceeds in an action without the aid of counsel. *Pro se* status has also traditionally referenced as *in forma pauperis*, which means to proceed in the character or manner of a pauper.

¹ See generally Mauro Cappelletti, *Foreword* to ACCESS TO JUSTICE vii (Mauro Cappelletti & Bryant Garth, eds., Dott. A Guiffre, Editore 1978) (discussing the history of the access to justice movement).

² *Id.* at vii.

While these mechanisms for accommodating the *pro se* litigant appear in several contrasting forms, each form ultimately seeks to provide what is often missing for the poor or impoverished sections of society – access to justice.

In the United States, the Constitution and its Sixth Amendment guarantees led immediately to a strong focus on, and increased protection of, the *pro se* rights of criminal defendants. To ensure that the constitutional rights of this select group remained squarely within the focus of the judiciary, courtroom procedures were modified at both the federal and state levels without concern for the time and expense that might be required to maintain these safeguards. In comparison, although civil litigation has experienced a considerable growth in the appearance of *pro se* parties over the last decade, protections for *pro se* litigants involved in civil litigation have developed very slowly. Although small claims courts were initially created to deal with traditional *pro se* issues at the state level, the categories of claims pressed by self-represented litigants have mushroomed from small claims and personal injuries to more serious issues, such as domestic relations issues of divorce and child custody. The recent surge in *pro se* litigation is not limited to the state court arena. The federal court system has witnessed its own surge in *pro se* plaintiffs, particularly in the areas of civil rights claims such as employment discrimination and fair housing issues. Unlike the state court system, however, the federal court system has no existing mechanism comparable to small claims court, a venue that is specifically designed to meet the needs of un-represented parties.

The prohibitive cost of obtaining counsel remains the primary reason for the increased number of litigants appearing *pro se*, a fact supported by the American Bar Association's report on non-lawyer activity in law-related situations.³ The report noted that no legal action was taken with regard to thirty-eight percent of the legal needs for low-income families, and twenty-six percent of the legal needs for moderate-income families.⁴ Twenty-four percent of the low-income families and twenty-three percent of the moderate-income families attempted to resolve the problem on their own, however, with no outside legal assistance or advice.⁵ Factors contributing to the problem of inadequate representation include the meager government assistance offered to people of limited means who need

³ Herbert M. Rosenthal, *Non-Lawyer Activity in Law-Related Situations: A Report with Recommendations*, 1995 A.B.A. SEC. PUB. 34.

⁴ *Id.* at 35.

⁵ *Id.*

representation in a civil case.⁶ Indeed, until the 1960's, there was very little government assistance for representation in civil litigation at all.⁷

The primary problem faced by *pro se* litigants is the complexity of our domestic judicial system, not only at the state level but also particularly at the federal level. Litigation, even before the trial phase, involves pleadings and motions that a layman is hard pressed to produce accurately. Studies confirm that a large number of *pro se* claims never reach trial solely because the *pro se* party fails to survive a procedural motion. As a result, the *pro se* litigant loses their case due to technicalities instead of a meaningful review of the merit of their claim. Yet, even in the face of the unique concerns and problems that *pro se* litigants face, their increasing presence before the judiciary, as well as the dismal failure rate of their claims, did not receive the same level of scrutiny as criminal *pro se* defendants until very recently.

While the origins of *pro se* representation are found in a court history of modifying the procedural rules for these parties, the current system disfavors implementing any sort of procedural flexibility that could be used at the judge's discretion. Instead, the judiciary – at both the state and federal level – has endorsed educational programs for *pro se* litigants. This narrow focus on educating the layman litigant has resulted in a system that recognizes the need for access to justice through the courts yet simultaneously preempts any opportunity for a meaningful review of the *pro se* claims placed before it. This is largely due to the system's rigid adherence to the procedural motions and process of traditional litigation. As a result, although the procedural mechanism of proceeding *pro se* technically allows a large portion of our population to proceed with their claims, the net effect of this mechanism denies those choosing to proceed *pro se* a truly meaningful review of their claims.

In contrast to the U.S.'s educational paradigm for handling *pro se* litigants, other countries have successfully combined institutional, procedural, and educational reforms to broaden the methods in which their judiciaries successfully accommodate the complex needs of the *pro se* party. This paper surveys the traditional problems associated with the appearance of *pro se* litigants and the domestic countermeasures currently in place to assist *pro se* parties. Specifically, Sections II and III discuss the origins of the right to proceed in litigation *pro se* and the current justifications for its continued use respectively. Section IV discusses the primary problems presented by *pro se* parties. Section V's outlines the educational remedies sponsored by the judiciary and the limited scope of assistance these programs provide the *pro se* litigant.

⁶ Richard L. Marcus, *Malaise of the Litigation Superpower*, in *CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE* 93 (Adrian A.S. Zuckerman ed., 1999).

⁷ *Id.*

Section VI looks at comparative methods for accommodating *pro se* litigants, with a strong focus on institutional and procedural reform that effectuate a greater access to the courts. In particular, this section looks to England, Norway, Germany, Nigeria and Japan for alternatives that may be easily adaptable to the U.S. context. Section VII suggests that our domestic tools for handling *pro se* litigants are too limited and surveys the likely success of broadening the U.S. approach by considering multiple foreign approaches as possibly effective within the framework of our multi-level judiciary. These possible foreign approaches include the advent of court-sponsored petition drafting and mandatory mediation procedures. This paper argues ultimately that the *pro se* phenomenon would be best served by a broadening of U.S. methods beyond the purely educational approach currently utilized, to include institutional and procedural reforms for the handling of *pro se* litigants.

I. ORIGINS OF THE RIGHT TO PROCEED *IN FORMA PAUPERIS*

The American judicial system derived its roots from the common-law system of Great Britain. Thus the right to proceed as a litigant without professional representation similarly finds its beginnings in British common law. Early in the thirteenth century, the Magna Carta proclaimed, "To no one will we sell, to no one will we refuse, or delay, right or justice."⁸ This passage is now recognized by the Supreme Court as one of the bases for the United States constitutional guarantees of due process and equal protection.⁹ Although the wording of the Magna Charta seems clear, legal relief for paupers in Great Britain was not given effect by a subsequent statutory scheme. Instead, legal relief for the indigent was largely court created,¹⁰ thereby making "justice" the functional equivalent of access to the courts.

The courts in Great Britain focused primarily on removing court-imposed fees that might function as financial barriers to litigants.¹¹ This court-fashioned relief continued until late in the fifteenth century, when the Statute of 11 Henry VIII formally recognized paupers' rights to the waiving of court fees and assignment of legal counsel.¹² A subsequent Act of Parliament in 1535 buttressed the rights of pauper plaintiffs by exempting them from payment of a defendant's court costs even where they failed to prove their cases.¹³ These broad rights, however, were strictly interpreted

⁸ SIDNEY L. MOORE, JR., INSTITUTE FOR RESEARCH ON POVERTY, RELIEF OF INDIGENTS FROM FINANCIAL BARRIERS TO EQUAL JUSTICE IN AMERICAN CIVIL COURTS 1 (1971).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 1-2 (citing Statute of 11 Henry VII, 1495, 11 Hen 7, c. 12).

¹³ *Id.* at 2 (citing 23 Hen. 8, c.15 (1535)).

by the courts, resulting in stringent requirements regarding a pauper's net worth and requiring a professional's voucher that the claim had merit before access to the judicial system in *forma pauperis* was granted.¹⁴ These strict regulations, combined with the fact that there was no administrative machinery established to execute the provisions mentioned above, resulted in a rather conservative treatment of litigants who sought to proceed in *forma pauperis*.¹⁵ As a result, the use of the cost-exempt status was limited.

A. *U.S. Relief at the State Level*

The conservative court treatment in England provided the precedent for the American colonies,¹⁶ most of which chose to similarly relieve the poor litigant of court fees or costs and provide the court with the option of assigning counsel. Most colonies effectuated pauper relief by direct adoption of the Statutes of Henry VII and Henry VIII, as did South Carolina in 1712.¹⁷ Other colonies enacted legislation that contained similar wording and effect, such as New Jersey, which granted the trial court "at [its] discretion," the right to "issue writs and process, assign counsel and waive the payment of costs for 'every poor person, as shall have cause of action against any person in this state....'"¹⁸ Finally, colonies like Georgia and Pennsylvania effected the English practice regarding *in forma pauperis* litigants by their general adoption of the common law.¹⁹

Of the original colonies, only Connecticut and Delaware made no provision for poor plaintiffs or defendants,²⁰ contrary to the majority trend toward equal court treatment for all. Unlike Connecticut and Delaware, most of the new states or territories arising from the westward expansion followed the majority trend. As a result, by the late 1800's, twenty or more states and territories provided some measure of relief for the pauper litigant.²¹ These provisions generally waived or modified the court's traditional financial processes, so that an individual's financial status did not function as a bar to any claim.

The English precedent, however, was not controlling upon the colonies. Consequently, most colonies could have refused to adopt the English practice of *in forma pauperis*, choosing instead to strictly enforce the already existing statutes that generally imposed costs and fees upon

¹⁴ *Id.*

¹⁵ *See id.* at 2, 3.

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 3, 4 (*citing* 1712 S.C. Acts 321; 1837 S.C. Stats. at Large 456-62).

¹⁸ *Id.* at 3 (*citing* 1800 N.J. Laws 339).

¹⁹ *Id.* at 4.

²⁰ *Id.* at 7.

²¹ *See id.*

litigants.²² As a result, the creation in the United States of paupers' rights has also been attributed alternately to the doctrines of fairness and just treatment.²³ These doctrines rely on the general theory that financial status should not have a substantial impact on the outcome of litigation. In one of its early decisions, the Texas Supreme Court formalized these notions when it stated: "[N]o man should be prevented from prosecuting a suit, seeking redress for an outrage upon his person, on the ground of his poverty."²⁴ These doctrines, however, highlight one of the major faults of the English common law practice and early American efforts to imitate it: namely that the *in forma pauperis* provisions generally applied only to plaintiffs,²⁵ excluding those who might have been called as defendants.

Although the pauper defendant was not traditionally affected by filing fees, services costs, and securing of judgments (since these costs were generally imposed on the plaintiff), his need for adequate representation faced a similar limitation – his financial inability to retain counsel.²⁶ Although the Fifth and Fourteenth Amendment guarantees of "due process" were generally construed to protect a defendant's right to notice and opportunity to be heard,²⁷ the impact of court-imposed financial obligations on a pauper's rights to due process was not considered until 1897. In *Hovey v. Elliott*,²⁸ the United States Supreme Court determined that denial of a hearing for a defendant's failure to pay court-imposed costs during a civil suit violated the defendant's right to due process. Subsequent Supreme Court cases clarified the scope of this right by declaring that due process is violated only when a defendant is unable to pay and not when a defendant refuses or merely fails to pay court-required costs.²⁹ In the end, these decisions placed the constitutional right to defend in a civil case and a criminal case on an equal footing,³⁰ formally extending pauper's rights to defendants as well as plaintiffs through the due process guarantee of the Constitution.

B. *U.S. Relief at the Federal Level*

At the federal level, the right to proceed as a self-represented litigant in a civil case first presented itself in the Judiciary Act of 1789.³¹ Congress

²² See *id.* at 8.

²³ See *id.* at 8-9.

²⁴ *Id.* at 9 (citing *Hickey v. Rhine*, 16 Tex. 577 (1856)).

²⁵ *Id.* at 13.

²⁶ *Id.*

²⁷ *Id.* at 13, 14.

²⁸ 167 U.S. 409 (1897).

²⁹ See Moore, *supra* note 8, at 15.

³⁰ *Id.*

³¹ Judiciary Act of 1789, ch. 20, §35, 1 Stat. 73, 92 (1789).

enacted a revised version of this Act in 1948, granting parties the right to "plead and conduct their own case personally" in any court of the United States.³² Because the self-represented litigant is often an impoverished party as well, Congress codified the right to proceed *in forma pauperis* at the same time. Pursuant to 28 U.S.C. § 1915, enacted in 1948, "any court of the United States" has the discretion to authorize the commencement, prosecution or defense of any civil or criminal action or proceeding without prepayment of fees or security, provided that the party seeking to proceed *in forma pauperis* submits a personal affidavit that includes a statement of all assets and a statement specifically indicating that the party is unable to pay the required fees.³³ The code contains no specific requirements for a party to meet in order to be considered indigent. Affidavits following the language of § 1915, however, should ordinarily be accepted for trial purposes where: the party personally makes the statement;³⁴ there is no question of misrepresentation;³⁵ and the affidavit states the affiant's poverty with some particularity, definiteness, and certainty.³⁶ It is important to note that financial standing is the sole characteristic upon which the leave to proceed *in forma pauperis* is measured; the merit of the claim bears no impact on the determination.³⁷

Section 1915 also grants the court the right to "request" an attorney represent any person unable to afford counsel³⁸ and provides that court officers shall issue and serve process where required.³⁹ Finally, in accordance with its overall purpose of providing access to justice and preventing discrimination against the impoverished applicants, the statute reminds the court that its officers shall perform all their duties, thereby ensuring that "the same remedies shall be available as are provided by law in other cases."⁴⁰

In sum, the eighteenth and early nineteenth centuries' progress towards pauper's rights was achieved primarily by the passage of legislation establishing *in forma pauperis* procedures.⁴¹ In comparison, the last 100

³² 28 U.S.C. § 1654 (1994).

³³ 28 U.S.C. § 1915(a)(1)(b) (2000).

³⁴ *Pothier v. Rodman*, 261 U.S. 307, 309 (1923).

³⁵ *Adkins v. E.I. DuPont De Nemours & Co.*, 335 U.S. 331, 339 (1948).

³⁶ *Jefferson v. United States*, 277 F.2d 723 (9th Cir. 1960). Note also that a showing of complete destitution is not required to support an application for leave to proceed *in forma pauperis*. *Adkins*, 335 U.S. at 339; *in re Smith*, 600 F.2d 714, 716 (8th Cir. 1979); *Ward v. Werner*, 61 F.R.D. 639, 640 (M.D. Pa. 1974).

³⁷ See *Ragan v. Cox*, 305 F.2d 58, 60 (10th Cir. 1962).

³⁸ 28 U.S.C. § 1915(e)(1).

³⁹ *Id.* at § 1915(d).

⁴⁰ *Id.*

⁴¹ Moore, *supra* note 8, at 57.

years shows that relief at the state level for an impoverished litigant emanated primarily from the courts' waiver of its mandatory fees and costs. Federal rights similar to those found at the state level were codified in the mid-twentieth century. Although the rationales behind the rights to press suit *pro se* or *in forma pauperis* may differ, ranging from common law practice to due process to equity principles, they are bound together by the courts' attempt to reach the fairest result for the litigant under the circumstances.⁴²

II. CURRENT JUSTIFICATIONS FOR THE *PRO SE* RULE

Traditionally, the high cost of litigation, with regard to both finances and time, comprised the primary barrier that excluded private parties in lower income brackets from participating in the judicial process. The focus on cost as *the* prohibitive factor is best evidenced by the origins of the *in forma pauperis* provisions in the waiver of prepayment of court-imposed fees and costs. Although access to the courts was a prevalent concern in the past, a family in the low or moderate-income ranges often faced very few problems that required legal intervention. Thus, these families had less need for access to the legal system. This disparity of need justified the courts' more strict interpretation of *in forma pauperis* status. In today's world, however, even the judiciary recognizes that most people will need the courts at some point in order to accomplish the ordinary things in life, including family issues such as adoption and divorce or personal issues such as civil damages and disputes.⁴³

Largely because of the technological and financial innovations of the last sixty years, legal services have become more of a necessity and less of a luxury when compared to the past. It has become apparent that our increasingly mobile society, where even familial relations are more transitory, has become less dependent on neighborhood relations and community trust and resorts much more to the legal system for resolution of conflicts than in previous decades.⁴⁴ Yet, the cost of legal services remains, even today, so prohibitive that even the middle class cannot afford to retain counsel for the smallest legal matters.⁴⁵

A recent report by the ABA Commission on Non-Lawyer Activity in Law Related Services indicated that "there are currently insufficient sources of affordable legal help for all low- and moderate-income persons," citing

⁴² *Id.*

⁴³ Jona Goldschmidt, *How are the Courts Handling Pro Se Litigants?*, 82 JUDICATURE 13, 19 (1998).

⁴⁴ David Nuffer, *The Future of Legal Systems, the Legal Profession and the Rule of Law: A Paradigm for a Season of Change*, UTAH B.J., May 2000, at 9, 12.

⁴⁵ *Id.* at 10.

nationally unmet needs for legal help in nineteen million cases.⁴⁶ This may seem like a small number of cases, yet it is all the more alarming because the low and moderate-income group is so large.⁴⁷ Further, assistance from legal services programs has become a scarce resource, largely due to the dramatic reductions in government funding.⁴⁸ Even where government subsidies exist, it is often difficult, if not impossible, for these programs to provide equal protection to the financially disadvantaged, again due to the high cost of litigation.⁴⁹ The net result, then, of imposing the financial burdens of litigation upon low-income persons is to deny those litigants the ability to obtain a remedy or present a defense.⁵⁰

This lack of access to justice through the traditional attorney-client relationship has become the critical motivating factor, especially in civil cases, for the recent surge in the number of *pro se* litigants. The American Bar Association's Comprehensive Legal Needs Study reported that fewer than three in ten of the legal problems of low-income households were brought to the justice system.⁵¹ Moderate-income households suffered at a similar rate, bringing only four in ten of their legal problems to the courts.⁵² Significantly, the study also found that "in seventy-nine percent of the low-income households having legal problems, *no* lawyer was involved."⁵³ A study by the Federal Judicial Center of ten U.S. district courts found that non-prisoner *pro se* cases constituted thirty-seven percent of all cases filed over the course of a three-year period.⁵⁴ Data from the Administrative Office of the U.S. Courts shows the number of *pro se* litigants in federal appeals courts increased by forty-nine percent within two years.⁵⁵

A recent statistical analysis of non-prisoner *pro se* litigation at the district court level in the Northern District of California discovered 683 actions that involved at least one *pro se* party over a time frame of one year.⁵⁶ Of the 227 cases analyzed from the sample, seventy percent of the

⁴⁶ *Id.* at 11.

⁴⁷ *Id.*

⁴⁸ Helen B. Kim, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to Be Heard*, 96 YALE L.J. 1641, 1648 (1987).

⁴⁹ Nuffer, *supra* note 44, at 13.

⁵⁰ Moore, *supra* note 8, at 74.

⁵¹ Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879, 1883 (1999).

⁵² *Id.*

⁵³ *Id.* at 1884 (emphasis added).

⁵⁴ Goldschmidt, *supra* note 43, at 14 (studying the time frame from 1991 to 1994).

⁵⁵ *Id.* (studying the time frame from 1991 to 1993).

⁵⁶ Spencer G. Park, *Providing Equal Access to Equal Justice: A Statistical Study of Non-Prisoner Pro Se Litigation in the United States District Court for the Northern District of*

parties never applied for leave to proceed *in forma pauperis* under 28 U.S.C. § 1915.⁵⁷ Although one explanation may be the lack of information regarding the *in forma pauperis* application,⁵⁸ the low application rate could also be the result of the traditionally stringent standards created by the courts for attaining indigent status under 28 U.S.C. § 1915.⁵⁹ Further, this surge in *pro se* litigation crosses not only regional boundaries, but boundaries that might be imposed by types of claims. For example, in 1994, thirty percent of the general civil actions filed in Chicago with damages worth less than \$10,000 were filed *pro se*.⁶⁰ One year later, twenty-five percent of *all* new civil suits were filed *pro se*.⁶¹

Recent cases demonstrate how the courts' restrictions on the indigent status required to petition for court-appointed counsel may make the *pro se* status more attractive to lower income parties. This is because restrictive court interpretations generally refuse to grant *in forma pauperis* status to plaintiffs with enough assets to be sold to raise required court fees. For instance, in a California case, a plaintiff was permitted to proceed *in forma pauperis* where he was employed on a part-time basis; had no money in his private checking and saving accounts; owned no real estate, automobiles, or property of value; and had debts totaling three thousand dollars.⁶² This treatment is representative of judicial determinations across the circuits,⁶³

California in San Francisco, 48 HASTINGS L.J. 821, 824 (1997) (analyzing statistical data for the year 1993).

⁵⁷ *Id.* at 823, 824.

⁵⁸ *Id.* at 830.

⁵⁹ 28 U.S.C. § 1915(a)(1)(b) (providing any court of the United States with the ability to authorize "commencement, prosecution or defense of any suit, action or proceeding – civil or criminal – or appeal without prepayment of fees or security therefore by a person who submits an affidavit that includes a statement of all assets, that the person is unable to pay, and states the nature of the action, defense or appeal, and the affiant's belief that the person is entitled to redress.") (emphasis added). [See footnotes 63 and 64 for a sampling of case precedent interpreting this provision.]

⁶⁰ JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 9 (1998).

⁶¹ *Id.*

⁶² *Jefferson v. United States*, 277 F.2d 723 (9th Cir. 1960), *cert. denied*, 364 U.S. 896 (1960).

⁶³ See *In re Broady*, 96 B.R. 221, 223 (Bankr. W.D. Mo. 1998) (debtor did not establish poverty where she had a monthly income of \$495, but had detailed monthly expenses of \$448, food stamps may have diluted his enumerated monthly grocery expenses and she owned unencumbered vehicles with a value of at least \$1500); *c.f.* *Potnick v. Eastern State Hospital*, 701 F.2d 243, 244 (2d Cir. 1983) (plaintiff with monthly income of \$181 in welfare benefits, \$41 in food stamps, checking account balance of less than \$60 and an automobile on which he owed \$3,600 as well as other debts totaling \$10,000 met the pauper status under 28 U.S.C. § 1915); *Mertz v. United States Custom Serv.*, 746 F. Supp. 1107, 1108 (Ct. Int'l. Trade 1990) (litigant did not demonstrate degree of poverty required for in

which show that it is not unusual for courts to deny *in forma pauperis* status to a party who can raise the required funds by offloading valuable assets.⁶⁴

The ability to dispose of assets in order to fund litigation costs, however, should be balanced against the primary legal concerns that demonstrate the surge in *pro se* participation – divorce, child custody, paternity, landlord-tenant, fair housing, and employment discrimination. These areas represent a large group of our population who may be unwilling or unable to part with assets such as homes or automobiles as a prerequisite to having their claims heard. As a result, these families view the time and filing costs associated with proceeding *pro se* as minimal inconvenience when compared to proceeding *in forma pauperis*.

III. PRIMARY PROBLEMS ASSOCIATED WITH THE *PRO SE* LITIGANT

A. *Judicial Detriments: Efficiency and Neutrality*

Pro se litigants are most often attacked for the judicial inefficiencies many judges, attorneys, and observers believe they create. *Pro se* litigants are more likely to neglect time limits, miss court deadlines, and have problems understanding and applying the procedural and substantive law pertaining to their claim.⁶⁵ Although *pro se* pleadings are viewed with tolerance, a *pro se* litigant is generally held to the same standard of conduct and compliance with court rules, procedures, and orders as are members of the bar.⁶⁶

When a *pro se* case succeeds in reaching trial on the merits, the process is often complicated by the *pro se* party's unfamiliarity with evidentiary rules, which many judges have noted often leads to a failure to meet the burden of proof and "an embittered *pro se* litigant."⁶⁷ These same judges also noted that a *pro se* litigant's lack of knowledge of legal

forma pauperis status when presently employed at annual salary of \$30,000, owned stocks and bonds worth \$15,000, owned a house and lot with value of \$46,000 and an automobile valued at \$12,000).

⁶⁴ See *Failor v. Califano*, 79 FRD 12, 13 (1978) (although plaintiff had low monthly income, plaintiff has asset of home that was too substantial to grant proceeding in forma pauperis in light of minimal costs of litigation).

⁶⁵ *Park*, *supra* note 56, at 821.

⁶⁶ *Newsome v. Farer*, 708 P.2d 327, 331 (N.M. 1985). See also DAVID G. KNIBB, *FEDERAL COURT OF APPEALS MANUAL: A MANUAL ON PRACTICE IN THE UNITED STATES COURTS OF APPEALS* §24.2, AT 437 (4th ed. 2000) (specifying that all *pro se* parties are "required to comply with all relevant rules of procedure and substantive law") (emphasis added).

⁶⁷ *Goldschmidt*, *supra* note 43, at 18. See also Judge John L. Kane Jr., *Debunking Unbundling*, COLO. LAW., Feb. 2000, at 16.

terminology and trial tactics typically results in the opposing attorney “taking control” of the process, as well as additional time spent by the judge explaining the terms and their import to the *pro se* litigant.⁶⁸ Represented parties may also bear greater burdens, such as procedural delays, increased court time, and the costs associated with it when *pro se* parties are involved.⁶⁹

Finally, the needs of a *pro se* party present a significant threat to the notion of a neutral, third party adjudicator that governs our judicial system. Judges bear the responsibility of acting to prevent an injustice arising solely from procedural errors that substantially impinge upon the substantive legal rights of any party.⁷⁰ These prevention tactics range from teaching courtroom procedures and conducting research for the parties to dealing with the emotions that can arise in both the *pro se* litigant and the professional attorney.⁷¹ The net result is that judges are often faced with the delicate task of balancing fairness and equal treatment for the *pro se* litigant against the practical fact that the substance of the complaint may have been couched in the wrong terms.⁷² The court itself then takes on the role of litigating the claim on behalf of the *pro se* party, bearing the burdens of litigation through the costs and time incurred and, perhaps more importantly, threatening the court’s neutrality.⁷³ This neutrality is perhaps most burdened by the sort of proactive judicial assistance many *pro se* litigants expect the court to exhibit.⁷⁴

B. Party Detriments: Insufficient Knowledge and Waiver of Rights

The costs or detriment incurred by the *pro se* litigant equal, if not outweigh, the costs incurred by or detriment to the judiciary and its impartiality. One obvious concern is that *pro se* litigants are denied the knowledge and advice of experienced trial lawyers.⁷⁵ Their inability to seek this professional advice contributes to the filing of frivolous or meritless claims, which in turn affects the players in the judicial system and their perception of *pro se* litigants. Such claims may also lead to case law precedent that makes the pursuit of claims even more difficult for subsequent *pro se* litigants.

⁶⁸ Goldschmidt, *supra* note 43, at 18.

⁶⁹ J. Kane, *supra* note 67, at 16.

⁷⁰ Cassell v. Shellenberger, 514 A.2d 163, 165 (Pa. 1986).

⁷¹ Goldschmidt, *supra* note 43, at 18.

⁷² KNIBB, *supra* note 66, at 438.

⁷³ See Goldschmidt, *supra* note 43, at 16.

⁷⁴ See *id.* at 22.

⁷⁵ Darrell W. Ringer, *Pro Se Litigants*, W. VA. LAW., Mar. 2000, at 4, 5.

In the California study mentioned earlier, fifty-six percent of the *pro se* claims were unable to survive a preliminary motion to dismiss.⁷⁶ *Pro se* claims also frequently fall in the face of summary judgment motions. These results can be attributed primarily to the complexity of the procedural format and substantive laws the judicial process requires. The *pro se* litigants' lack of familiarity with means of research, terminology, and pleading forms renders the system virtually unintelligible at times. Consequently, the legal system becomes incomprehensible to its users and is no longer a serviceable means of seeking redress.⁷⁷

Another reason the burdens on *pro se* parties may outweigh the burden on the judiciary is that the inefficiency feared by critics of *pro se* litigation may actually be less burdensome than it appears. The fact that the claims of most *pro se* litigants fail early in the proceedings shortens the actual time spent, so that the perceived delay or inefficiencies these claims may cause the judiciary does not often exist.⁷⁸ Because a motion to dismiss or summary judgment motion may preclude a plaintiff from pressing his claim a second time, the nature of such motions work in combination with a *pro se* party's costs in time away from work and effort to generally preclude the *pro se* litigant from pursuing his claim, even where permissible. As a result, the plaintiff thus bears an even greater detriment.

The *pro se* litigant may also fall victim to the judge's reluctance to act in a manner that casts doubt on his impartiality. Many cases involving unrepresented parties settle, usually under pressure from the court.⁷⁹ Indeed, the *pro se* survey of San Francisco's Northern District Court showed a surprisingly high rate of settlement at just over fifteen percent of the sample.⁸⁰ These settlements receive a cursory inquiry from the judge and are rarely undone when subsequently challenged.⁸¹ Perhaps more alarming, these settlement agreements routinely involve the waiver of significant rights by *pro se* parties.⁸² Even where cases do not settle, unrepresented parties still routinely forfeit important rights due to the absence of counsel.⁸³

⁷⁶ Park, *supra* note 56, at 835.

⁷⁷ Nuffer, *supra* note 44, at 10.

⁷⁸ See Park, *supra* note 56, at 836, 837, whose study noted that the average non-prisoner *pro se* action lasts approximately only six months from the date of filing to termination, requires in general only twenty entries to the docket, and results in an appeal approximately eleven percent of the time.

⁷⁹ Russell Engler, *And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1988 (1999).

⁸⁰ Park, *supra* note 56, at 823.

⁸¹ Engler, *supra* note 79, at 1988.

⁸² *Id.* at 1989.

⁸³ *Id.*

Finally, despite the extensive time and effort already expended by court clerks and even judges in assisting *pro se* litigants, the self-represented party must be viewed as having made choices about his or her claim based on limited information and advice.⁸⁴ This especially is the case when one considers the advice rarely, if ever, continues through the course of the proceedings.⁸⁵ The net result is the typical *pro se* litigant is treated as having received trained and expert counseling regarding the existence and merits of his or her potential claims when in fact he or she has not. Consequently, in light of such limited knowledge about both the substance and process of pressing a claim, *pro se* litigants incur a greater amount of self-inflicted damage than the amount of inefficiency pressed upon the courts that handle their claims.

IV. JUDICIAL COUNTERMEASURES TO THE *PRO SE* PHENOMENON

As in the past, many of the changes in today's handling of *pro se* litigants originate within the judiciary. Judges are perhaps more willing to change than other segments of the legal system because they are not only privy to the unique problems *pro se* litigants experience but also benefit directly in terms of time and responsibility from any attempts to cure the inefficiencies and threats to the court's neutrality. Demands on staff to explain procedures played a key role in making legal process and substantive counseling available to *pro se* litigants.⁸⁶ The essential need for docket control, however, leaves judges and their staff with little incentive to spend *substantial* amounts of time and resources educating and protecting un-represented litigants.⁸⁷ Regardless of the motivating factors, however, programs have been created to make the *pro se* litigant's journey easier.

The roots of the *pro se* movement are embedded in precedent set by courts that perceived a need for procedural flexibility when dealing with financially impaired litigants. Today's courts, however, are less willing to cede the procedural integrity of the judicial process to the greater sense of participatory justice that is achieved by the few successful *pro se* litigants. Although the Supreme Court has guaranteed *pro se* litigants the right to have courts liberally construe their pleadings,⁸⁸ the Court limited the ruling to the construction of pleadings. This limitation, however, is read differently by each court in terms of how liberally, and to which pleadings the rule applies. This results in inconsistent treatment of *pro se* litigants in

⁸⁴ *Id.* at 1998.

⁸⁵ *Id.* at 2002.

⁸⁶ Nuffer, *supra* note 44, at 15.

⁸⁷ Engler, *supra* note 79, at 1989.

⁸⁸ Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 671 (1988) (citing *Haines v. Kerner*, 404 U.S. 519 (1972)).

the lower courts.⁸⁹ For example, some courts rely upon the Supreme Court's rationale in *Haines v. Kerner*⁹⁰ to fashion a relaxed set of *pro se* standards for procedural conformity, particularly when dealing with summary judgment proceedings, compliance with discovery rules, the imposition of sanctions, and the introduction of evidence.⁹¹ A greater number of courts, however, take a more traditional approach and extend this sort of pleading leniency only to the substantive issues raised, while continuing to strictly enforce compliance with procedural requirements by *pro se* litigants.⁹²

As a result of this emphasis on strict procedural compliance, the focus of judicial efforts along *pro se* lines has been on sponsoring a variety of approaches that attempt to educate *pro se* litigants in order to provide access to justice through the courts. In theory, educating *pro se* parties about how the system works also ensures that procedural conformity is not sacrificed due to the court's desire to provide the *pro se* litigant with a fair and just trial. A national conference held in November of 1999 signaled the rising importance of the *pro se* litigant, as forty-nine states sent teams of judges, bar leaders and administrators to discuss ways of making the court system more accessible to *pro se* litigants.⁹³ In addition, a survey of judges and court managers conducted by the American Judicature Society and the Justice Management Institute showed that forty-five percent of the responding court administrators indicated their jurisdictions have established some sort of *pro se* assistance program or service.⁹⁴ In an unusual move, the New York State Family Court adopted new rules in June of 1997 that expanded public access to proceedings by opening them to the media.⁹⁵ The court did so with the express goal of informally educating future participants about the family court format and procedures.⁹⁶

While the *pro se* programs take a variety of forms, these programs consistently represent the desire of the judiciary to educate the *pro se* litigant about the process of proceeding with a suit, as opposed to evaluating the processes themselves. This section explores common

⁸⁹ See *id.* at 671-72.

⁹⁰ 404 U.S. at 520-21 (finding plaintiff prisoner's *pro se* complaint sufficient enough to call for the opportunity to offer supporting evidence, even though it was inartfully pleaded).

⁹¹ J. Kane, *supra* note 67, at 15.

⁹² See KNIBB, *supra* note 66, §24.2, at 438 (stating that "[a] court will search for the substance in a *pro se* appellant's mislabeled papers or statements couched in the wrong terminology. If it finds that substance, it may excuse a failure of literal compliance") (emphasis added).

⁹³ Deborah M. Tate, *If We Build It Will They Come?*, R.I. B.J., Feb. 2000, at 3, 3.

⁹⁴ Goldschmidt, *supra* note 43, at 14, 20.

⁹⁵ Barry, *supra* note 51, at 1910.

⁹⁶ *Id.*

programs adopted to deal with the problems presented by *pro se* litigants and the degree of success these types of programs have achieved.

A. *Generic Information and Form Pleadings*

Many jurisdictions rely on this general form of assistance to *pro se* litigants because it is traditionally low in cost to maintain. Efforts in this area vary across the board, ranging from the provision of instructional brochures, to offering kits containing instruction sheets and court forms, to videotaped programs.⁹⁷ Informational offices, such as the Denver District Court's Information and Referral Office, often make these materials available in a bilingual format and offer basic paralegal assistance from its staff in completing the forms when necessary.⁹⁸ In comparison, the Self-Help Center founded by the family courts of Ventura, California, does not provide advice to *pro se* litigants, instead limiting its activities to providing general information on self-representation.⁹⁹ The Center does, however, employ a document examiner who reviews documents for the public and ensures that they comply with local court rules before a judge receives them.¹⁰⁰

1. Automated Methods

In 1993, the Arizona Supreme Court implemented an automated form of the general help desk called QuickCourt in order to provide information on a variety of court procedures to individuals seeking assistance.¹⁰¹ Statewide, twenty-eight kiosks containing touch-screen computer systems use text and graphics to communicate step-by-step instructions to potential *pro se* litigants.¹⁰² Instructions are available in English or Spanish on case types such as small claims, enforcement of child support judgments, landlord-tenant rights, and alternative dispute resolution.¹⁰³ The system also provides information on legal aid agencies within the state.¹⁰⁴ QuickCourt also provides an overview of the Arizona court system,¹⁰⁵ which aids those who eventually end up in the courtroom. QuickCourt is remarkable because it also can produce complete legal documents that are

⁹⁷ Goldschmidt, *supra* note 43, at 20.

⁹⁸ *Id.*

⁹⁹ Barry, *supra* note 51, at 1905.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1893. See also Goldschmidt, *supra* note 43, at 20-21.

¹⁰² See Barry, *supra* note 51, at 1893, 1894.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1894.

acceptable for use in Arizona court proceedings.¹⁰⁶ Although some services provided by QuickCourt require the assessment of a small fee,¹⁰⁷ the system has completed over 24,000 transactions to date and has significantly reduced the demand for assistance from court staff.¹⁰⁸ Recently, the state courts of Utah¹⁰⁹ and Colorado also implemented a similar kiosk system.¹¹⁰

Arizona's Maricopa County Superior Court took the automated self-help concept one step further in 1995 when it launched its Self-Service Center. Like Denver District Court's Information and Referral Office, the Self-Service Center familiarizes litigants with procedures by distributing simply written court-approved forms, samples, and instructions.¹¹¹ Personalized assistance is also available onsite from pro bono attorneys.¹¹² Unlike Denver's system, however, the program is available in two locations and is open to litigants twenty-four hours a day, seven days a week, via its multilevel approach.¹¹³ In addition to the characteristics described above, Maricopa County's Self-Service Center features a website that contains court forms and instructions, an automated telephone information system, and a computer bulletin board that provides *pro se* parties with the names of mediators and attorneys who will provide unbundled legal services.¹¹⁴ As a result, approximately four hundred people per day use the Center to access information.¹¹⁵ Visitors to the Center may also receive referral information on community service providers, volunteer attorneys and alternative dispute resolution experts who are willing to give *pro se* parties brief advice on court procedures.¹¹⁶

Some courts, like Florida's Supreme Court, are beginning to follow Arizona's lead in providing internet-based services. As part of its access initiative, the Florida Supreme Court maintains an Internet Self-Help Center that offers a large number of books, brochures, and forms explaining state

¹⁰⁶ *Id.*

¹⁰⁷ Goldschmidt, *supra* note 43, at 21.

¹⁰⁸ Barry, *supra* note 51, at 1894.

¹⁰⁹ Engler, *supra* note 79, at 2000.

¹¹⁰ ELEANOR LANDSTREET & MARIANNE TAKAS, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEVELOPING EFFECTIVE PROCEDURES FOR THE PRO SE MODIFICATION OF CHILD SUPPORT AWARDS 20 (1991).

¹¹¹ Barry, *supra* note 51, at 1892.

¹¹² Goldschmidt, *supra* note 43, at 22.

¹¹³ Barry, *supra* note 51, at 1893.

¹¹⁴ Goldschmidt, *supra* note 43, at 21-22. Goldschmidt defines the unbundling of legal services as assistance with discrete tasks, such as petition drafting or consultation only, provided at a more modest fee than usual. *Id.*

¹¹⁵ Barry, *supra* note 51, at 1892-93.

¹¹⁶ *Id.* at 1893.

law and provides step-by-step instructions for *pro se* litigants.¹¹⁷ The next phase of the project will involve implementing an interactive software program that will help *pro se* litigants fill out legal forms and file them on-line with the clerk's office.¹¹⁸

2. Dedicated Staff

California and Minnesota offer examples of states implementing similar plans to disseminate generic information through the use of dedicated staff. Since 1997, each California state court employs an attorney as a Family Law Facilitator who assists litigants with the preparation of court documents and supplies information on courtroom procedures.¹¹⁹ Although some Facilitators also meet with litigants to mediate issues like spousal or child support, the *pro se* litigants are required to sign a disclosure indicating they understand the Facilitator is not acting in a representative capacity.¹²⁰ The King County Superior Court of Seattle, Washington, offers a similar service at two locations.¹²¹ Approximately thirty to fifty *pro se* litigants are assisted every day.¹²² Minnesota's Hennepin County District Court's Self-Help Center already offers generic information and trained staff to assist in preparing court documents. Based on the success of the staff in helping *pro se* parties produce appropriate court documents, the Hennepin County District Court plans to implement a family court facilitator project similar to that in California to supply the missing procedural element. Family Court Facilitators "will provide on-site, non-legal family law procedural assistance to un-represented parties in family law cases, with a particular focus on post-decree motions."¹²³

The success of these general forms of assistance is likely to continue since it provides an un-represented party with a more sure-footed approach to commencing litigation. Because these types of programs are cost-efficient and require low maintenance, these self-help devices are likely to be the first option for courts facing increased numbers of *pro se* litigants.

B. Pro Se Clinics

While some jurisdictions employ special law clerks or paralegals to provide *pro se* litigants substantive counseling before their claims are

¹¹⁷ Goldschmidt ET AL., *supra* note 60, at 90.

¹¹⁸ *Id.*

¹¹⁹ Barry, *supra* note 51, at 1904.

¹²⁰ *Id.* at 1904-05.

¹²¹ See GOLDSCHMIDT ET AL., *supra* note 60, at 102-03.

¹²² *Id.* at 103.

¹²³ Hon. John N. Stanoch, *Working with Pro Se Litigants: The Minnesota Experience*, 24 WM. MITCHELL L. REV. 297, 309 (1998).

filed,¹²⁴ this type of assistance often becomes too costly to maintain.¹²⁵ Aside from the general help desk, the second most common educational tool is the *pro se* clinic. This assistance also takes many different forms, but it traditionally involves programs or sessions led by pro bono attorneys, law students, paralegals, or court staff, for the purpose of offering instruction to un-represented litigants on court procedures and forms.¹²⁶ This type of clinic usually focuses on specific case types.¹²⁷ It is essentially the equivalent of a one-day teaching session similar to those sponsored by the Bureau of Motor Vehicles. Clinics may have a variety of sponsors, including the local court system or bar association members, which assists the clinic in drawing the appropriate experts in the field to lead the training sessions.

1. Court-sponsored Clinics

a. Issue-Specific Educational Sessions

The courts in Ventura, California, sponsor the Family Law Pro Per Clinic, which conducts weekly clinics for up to 75 litigants, often as evening sessions.¹²⁸ Within a period of six months, the Pro Per Clinic serviced more than seventeen hundred *pro se* litigants.¹²⁹ The Clinic session begins with a mandatory orientation for all participants to explain how the family court works, what forms need to be prepared, what to do when the court calls a party's case, and what happens as a case proceeds through the system.¹³⁰ An overhead-aided presentation follows orientation, giving participants the appropriate instructions for filling out forms pertinent to the evening's topic.¹³¹ After the group completes the general information session, the *pro se* parties who do not exhibit a need for individual assistance are directed to self-help binders and given further assistance if requested.¹³² Non-English speaking or bilingual supplicants are given individualized assistance.¹³³ All assistance originates from volunteer attorneys, law students and paralegals practicing within the

¹²⁴ Bradlow, *supra* note 88, at 674.

¹²⁵ Barry, *supra* note 51, at 1892.

¹²⁶ Goldschmidt, *supra* note 43, at 21.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See GOLDSCHMIDT ET AL., *supra* note 60, at 82.

¹³⁰ *Id.* at 81.

¹³¹ *Id.*

¹³² *Id.* at 82.

¹³³ See *id.* at 81.

parameters of family law.¹³⁴ Before the parties leave the clinic, a filing clerk examines the pleadings for completeness and then files them for the litigant that evening, eliminating the *pro se*'s need to return to the court the following day.¹³⁵

b. Bazaar-Style Information Sessions

New Mexico's District Court in the Eleventh Judicial District also opened a *pro se* clinic in January of 1998.¹³⁶ In comparison to Ventura's Family Law Pro Per Clinic, this clinic offers a wider range of services available to any litigant before the court. Booths specializing in a variety of legal issues are set up in the courthouse three evenings a week.¹³⁷ The clerk's office booth provides court-approved forms and procedural information on filing documents, in addition to extending filing hours during the clinic to accommodate the *pro se* parties who wish to file their claims.¹³⁸ Notably, the clinic also incorporates other county offices that are essential to most *pro se* issues such as the Sheriff's Office, which assists parties in effecting service, and the County Clerk's Office, which instructs litigants on how to transfer property.¹³⁹ This program thus makes a greater attempt, than programs such as Ventura's Family Law Clinic, to provide *pro se* litigants with all the tools they may need to participate successfully in the court system.

2. Bar-sponsored Clinics

a. Single-issue Educational Sessions

In Florida, a group composed of legal services offices, bar associations, and private attorneys worked together to form *pro se* dissolution clinics that now operate out of the Legal Aid and Legal Service Offices in six Florida counties.¹⁴⁰ All instructors are either private or legal aid attorneys and each clinic is designed to instruct the participants on how to proceed in a simplified dissolution case.¹⁴¹ While the number and length of the sessions varies throughout each county, the average session runs two to three hours in length and is held monthly or bimonthly.¹⁴² In comparison

¹³⁴ *Id.* at 82.

¹³⁵ *Id.*

¹³⁶ Barry, *supra* note 51, at 1908.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1908-09.

¹³⁹ *Id.* at 1909.

¹⁴⁰ *Id.* at 1894, 1895.

¹⁴¹ *Id.* at 1895.

¹⁴² *Id.* at 1896.

to the California and New Mexico programs, the local courts in Florida have little to no contact with the clinic operations other than the provision of forms.¹⁴³

b. Advisory Hotlines

Clinics may also take on the non-traditional form of a hotline, as does Maryland's Family Law Clinic. Founded by the Women's Law Center and the State Bar Association, the hotline provides free legal information to Maryland residents who meet income eligibility guidelines and are seeking assistance with family law issues.¹⁴⁴ Local attorneys provide legal advice to callers from across the state, referring them to social service programs, publications or a lawyer referral service when appropriate.¹⁴⁵ The Women's Law Center also operates a Legal Forms Helpline, which may be accessed by any *pro se* litigant without having to meet income eligibility guidelines.¹⁴⁶ Because the second helpline responds to a high demand for procedural advice, it operates fifteen-and-a-half hours a week, four days a week, assisting three thousand callers annually.¹⁴⁷

3. School-sponsored Clinics

a. Student Staffers for On-going Programs

Students are not allowed to give advice through the Women's Law Center clinic programs; however, Maryland's Legal Aid Bureau operates a *pro se* divorce project staffed entirely by law students from the University of Baltimore and the University of Maryland law school clinics.¹⁴⁸ This program originated in 1996 at the request of the Maryland Court of Appeals.¹⁴⁹ Students from the schools meet with clients in their respective districts, helping them to identify their claims, explaining basic court procedures and making referrals when necessary to pro bono or private attorneys.¹⁵⁰ Given its success in assisting the Baltimore City Circuit courts with a more efficient handling of pending divorce suits, the project serves as a model for the provision of unbundled legal services.¹⁵¹

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1901.

¹⁴⁵ *Id.* at 1901-02.

¹⁴⁶ *Id.* at 1902.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1903, 1904.

¹⁴⁹ *Id.* at 1903-04.

¹⁵⁰ *Id.* at 1904.

¹⁵¹ *Id.* See Kane, *supra* note 67 (defining unbundled legal services as the provision of services in a piecemeal or disconnected fashion in order to best meet the needs of the client).

b. In-house Student Services

Finally, law schools themselves often incorporate pro bono clinics into their curricula, where students work with impoverished litigants from the local community under the guidance of skilled attorneys and professors. Although these clinics work to address the lack of access to justice, their means and staff are often limited in the number of litigants they can assist. Some projects, such as the Family and the Law Clinic at the Columbus School of Law in the District of Columbia, recognize this problem and have also begun to offer self-help clinics on family law issues such as dissolution on a limited basis,¹⁵² very similar to those sponsored by the courts. Students from the school teach the program sessions under the guidance of seasoned attorneys who practice in the area of family law.¹⁵³

C. Additional Internet-based Services

As previously mentioned, self-help centers like the one in Arizona's Maricopa County Courts are beginning to recognize the appeal of the ever-present website and Internet technology as another communication tier in which to distribute materials.¹⁵⁴ *Pro se* litigants, however, are also establishing their own organizations on the world-wide-web.¹⁵⁵ While some sites are oriented for a wider audience, such as the one maintained by the American Pro Se Association, other sites are state specific, such as the one maintained by Texas's "Utopia Foundation," which contains material from Texas law governing domestic relations cases and its own creed for the *pro se* litigant.¹⁵⁶ Commercial sites offer everything from video libraries on self-litigation,¹⁵⁷ to document services, to legal software ready for home use.¹⁵⁸ Finally, law schools like the University of Maryland School of Law are using the Internet to assist *pro se* litigants with court forms and other information through their clinic programs.

V. COMPARATIVE METHODS OF ACCOMMODATING *PRO SE* LITIGANTS

As demonstrated previously, domestic attempts to address the unique system-oriented issues presented by *pro se* litigants focus primarily on educating the self-represented party about the procedural workings of our judicial system. In comparison, international efforts to address similar self-representation problems follow two primary patterns. Both patterns

¹⁵² See *id.* at 1912, 1920-21.

¹⁵³ See *id.* at 1914.

¹⁵⁴ See discussion *supra* Section III(a).

¹⁵⁵ Goldschmidt, *supra* note 43, at 15.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See Nuffer, *supra* note 44, at 12.

demonstrate a far greater willingness to re-evaluate judicial processes prior to implementing a remedy. The first approach utilizes institutional reforms such as the creation of new adjudicating fora and court officers as a means of effectuating procedural changes for *pro se* party actions, while the second approach relies upon effectuating procedural changes within the existing judicial systems. This section discusses several unique approaches from the international arena that utilize either institutional or procedural reforms to address the concerns presented by *pro se* litigants, as well as the degree of success these types of programs have achieved.

A. *Institutional Reforms that Implicate Procedural Elements*

1. England's Tribunal System

A private person in England holds the constitutional right of proceeding within the courts as a *pro se* party.¹⁵⁹ Litigation, however, has remained inconvenient, slow, and expensive since the late 1800's,¹⁶⁰ with cost being the overriding prohibitive factor.¹⁶¹ Private tribunals were fashioned as early as the 1880s by local chambers of commerce to serve as a local forum for dispute adjudication in order to address England's growing business needs.¹⁶² The private tribunals, however, did little to help a poor person, who was further precluded from pursuing a claim by a decision to make the *in forma pauperis* procedure unavailable to those using the county courts or magistrate courts.¹⁶³

After World War II, the large expansion of governmental activities and responsibilities in England spurred the formal development of a tribunal system.¹⁶⁴ The tribunal system was eventually codified within the Tribunals and Inquiries Act of 1957.¹⁶⁵ An official report conducted by the Committee on Administrative Tribunals and Inquiries preceded the Tribunals Act and addressed each of the issues commonly faced by *pro se*

¹⁵⁹ I. H. Jacob, Q. C., Access to Justice in England, in 1 Access to Justice: A World Survey 417, 442 (Mauro Cappelletti & Bryant Garth eds., 1978) (*pro se* status is generally referred to in England as proceeding "in one's own person").

¹⁶⁰ BRIAN ABEL-SMITH & ROBERT STEVENS, IN SEARCH OF JUSTICE 23 (1968). See also Paul Michalik, *Justice in Crisis: England and Wales*, in CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE, *supra* note 6, at 117, 142, 143 (Adrian A.S. Zuckerman ed., 1999) (stating that more than a year passes in even the fastest county courts; average mean time in a higher court is close to three years).

¹⁶¹ Jacob, *supra* note 157, at 442.

¹⁶² ABEL-SMITH & STEVENS, *supra* note 158, at 23.

¹⁶³ *Id.* at 27.

¹⁶⁴ Jacob, *supra* note 157, at 456.

¹⁶⁵ *Id.*

or lower-income litigants.¹⁶⁶ Specifically, it recommended that each tribunal have its own code of procedure with the characteristics of these procedures being (1) inexpensive costs, (2) accessibility, and (3) freeing the tribunal chairmen from having to maintain a detailed technical and expert knowledge of the claims presented.¹⁶⁷ The Act gave the administrative tribunals a great number of functions that would formerly have been entrusted to the courts,¹⁶⁸ and achieved a breadth of responsibility that was aided by the subsequent reorganization of the social services in England.¹⁶⁹ Today's tribunals govern areas ranging from national insurance and industrial injuries to matters concerning rent and divorce.¹⁷⁰

The tribunal system has since become "an essential feature of the English judicial process," with approximately 2000 tribunals providing vast numbers of lower-income people with access to justice that otherwise would remain unavailable.¹⁷¹ Although the tribunals cover a broad variety of subjects, the system's outstanding feature has been its accessibility,¹⁷² which is often achieved by its informality. The tribunal members make every effort to be less formidable than their more formal judicial counterparts.¹⁷³ Adjudicating members do not wear robes¹⁷⁴ and, in most cases, the witnesses do not take oaths and are not generally bound by strict rules of evidence.¹⁷⁵

The tribunals are subject to the supervisory jurisdiction of the courts.¹⁷⁶ The opportunity for judicial review not only provides the courts with a way to control the application and development of points of law but also provides the tribunal users with a means of making an appeal when necessary. The supervisory role the courts play also works to ensure that litigants, who opt to use the tribunal system, whether due to cost or the appeal of its informality, are not penalized from pursuing their claims solely because of their choice.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ ABEL-SMITH & STEVENS, *supra* note 158, at 34.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Jacob, *supra* note 157, at 457.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

2. Norway's Mandatory Pre-Trial Conciliation

In Norway's judicial system, all civil litigants must submit their disputes to a mandatory mediation process before they can pursue their claims in the county or city court systems.¹⁷⁷ There are very few exceptions to the requirement of an attempt at conciliation before the Board of Conciliation.¹⁷⁸

Known as the "*Forliksråd*," the Conciliation Board finds its roots in Scandinavian colonial treatment of the Danish West Indies as early as 1755.¹⁷⁹ At that time, *all* civil claims were subject to mediation before Commissions of Conciliation before they could be filed in the courts.¹⁸⁰ Commissions were generally comprised of the town priest and a well-respected farmer.¹⁸¹ Norway was formed as an independent state in 1824 and subsequently formalized the *forliksprocess* in 1863 as a formal court system designed to handle small debt cases.¹⁸² The Civil Process Reform of 1915, however, expanded the *forliksprocess* to almost all civil cases and implemented a more efficient system across the country.¹⁸³ Today, the *forliksråd* functions as the preliminary step in litigation, requiring mediation of almost all civil suits dealing with real property, monies owed, boundary disputes, and property damage,¹⁸⁴ with exceptions for suits against the government and cases dealing with marriage, ancestry or landlord-tenant issues.¹⁸⁵ The *forliksråd*, however, is not limited solely to mediation, as it may also render default judgments.¹⁸⁶

There are currently four hundred and fifty-five *forliksrådene* throughout Norway, with at least one Board of Conciliation for each of its four-hundred-and-forty-three municipalities.¹⁸⁷ While municipality population varies to a great extent,¹⁸⁸ a *forliksråd* handles an average of fifteen hundred cases annually.¹⁸⁹ Each *forliksråd* is governed by three Justices of the Peace known as "*forliksmannen*," who are typically

¹⁷⁷ EDWARD J. SHAUGHNESSY, CONFLICT MANAGEMENT IN NORWAY: PRACTICAL DISPUTE RESOLUTION 19 (1992).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 18, 19.

¹⁸⁰ *Id.* at 18.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 19.

¹⁸⁴ *Id.* at 19-20.

¹⁸⁵ *Id.* at 19.

¹⁸⁶ *Id.* at 39.

¹⁸⁷ *Id.* at 25.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 26.

reputable individuals from the community invited to serve by the town council.¹⁹⁰ While the position of *forliksman* is not an elected one, the board's period of service runs with the municipal government, generally a term of four years.¹⁹¹ As a result, the Board of Conciliation is comprised of laymen rather than trained judges or attorneys; in fact, practicing attorneys are not eligible for appointment.¹⁹² In addition, there is no organized training or education required to hold the position of conciliator; the only formal requirement is that the members be older than the age of twenty-five.¹⁹³ Once the *forliksmannen* have accepted their positions, the municipal government appoints one of the councilmen as chairperson.¹⁹⁴

Some *forliksrådene*, usually the ones located in urban areas, operate four days a week, five hours a day,¹⁹⁵ while others in rural areas handle ten to twenty cases on a monthly basis.¹⁹⁶ The number of cases brought before the *forliksrådene*, however, continues to rise.¹⁹⁷ All *forliksrådene* assess a small fee for their services that ranges from the equivalent of two to seventeen dollars.¹⁹⁸ Based on a sliding scale that accounts for the nature and amount of the case, the fees are used to provide a stipend for the *forliksmannen*, while an additional fee for the cost of mailing and paperwork supplements the other costs of the board.¹⁹⁹ Because the costs of litigating within the *forliksrådene* are so low when compared to the city courts, the Ministry of Justice does not waive fees incurred by indigent litigants at this level, although they may be waived when these litigants reach the civil courts.²⁰⁰

A case begins when a party files a complaint with the Board of Conciliation. The complaint must contain the names of the disputing parties and a brief explanation of the dispute.²⁰¹ The complaint may be written by the party or by an attorney, since it usually contains a definite legal citation referencing the basis of the complaint.²⁰² Once the complaint has been signed and filed, the chairman of the *forliksråd* reviews it to

¹⁹⁰ *Id.* at 21, 27.

¹⁹¹ *Id.* at 27.

¹⁹² *Id.* at 32.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 27.

¹⁹⁵ *Id.* at 26, 30.

¹⁹⁶ *Id.* at 32.

¹⁹⁷ *Id.* at 45.

¹⁹⁸ *Id.* at 27.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 55.

²⁰¹ *Id.* at 37.

²⁰² *Id.*

ensure all the appropriate paperwork has been completed. Then, after setting a date and place for a hearing, the Chairman issues a summons to mediation for all of the parties involved in the claim.²⁰³

Both parties must be present at the Conciliation Board meeting. Although a party may bring representation, an attorney may not sit in proxy for either party.²⁰⁴ A party may, however, designate the *forliksråd* bailiff or a family member to represent his case before the board,²⁰⁵ which at times impedes the conciliation process because the interested parties are not all present.²⁰⁶ When the complaining party fails to appear, the complaint is dismissed.²⁰⁷ When the defending party fails to appear, the plaintiff may request the case be transferred to the city or county court or the Conciliation Board may award him judgment by default. A default judgment is the option more frequently selected by the Board.²⁰⁸ Default judgments of the *forliksråd* are given to a process-server for delivery to the absent defendant.²⁰⁹

When both parties are present, mediation occurs in a closed environment, much like court-annexed alternative dispute resolution in the United States. This process operates under the assumption that parties will speak more freely, thereby enhancing the likelihood of resolving the claim.²¹⁰ Each party is allowed an opportunity to present his case verbally, which may include the presentation of witnesses and other physical evidence. When physical evidence is involved, both parties must agree upon it before it may be admitted.²¹¹ Expert witnesses may also be presented, although this is rare.²¹² After both sides have explained their respective positions, mediation begins.

Although the law grants the Board the power to assist the parties in reaching a settlement that comports with common sense, fairness and equity, the *forliksråd* cannot force the parties to settle.²¹³ If the parties decide not to conciliate, the record notes their decision and the *forliksråd* sends the case to civil court.²¹⁴ Where conciliation is successful, however,

²⁰³ *Id.* at 38.

²⁰⁴ *Id.* at 38-39.

²⁰⁵ *Id.* at 38-39.

²⁰⁶ *Id.* at 39.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 48.

²¹⁰ *Id.* at 40.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

this decision to conciliate is usually reached by the parties, who are generally relaxed and talk with one another directly without the presence of legal counsel.²¹⁵

Once the parties have reached a decision, the Conciliation Board ratifies it,²¹⁶ records it, and presents it for signature by both parties.²¹⁷ The Board is not required at any time to rule on the points of law presented, and in fact, is discouraged from doing so due to the lay status of its members.²¹⁸ Once a settlement has been signed, it carries the same effect as a court decision,²¹⁹ so failure to pay or comply can result in the garnishment of wages or attachment of property.²²⁰ The estimated compliance rate, however, is better than ninety-seven percent.²²¹ Cases settled in the *forliksrådene* may be appealed to the civil court, but less than one-half of one percent ever reach the civil courts,²²² indicating a relatively high degree of satisfaction with the outcomes.²²³ The limited data available indicates that, when appealed, the *forliksrådene* are rarely reversed.²²⁴

In the last reported year, the *forliksrådene* handled 117,285 cases.²²⁵ While only 4601 conciliations were successful, a success rate of approximately four percent, 32,123 cases were dismissed due to either an earlier resolution or failure to appear; 65, 852 default judgments were entered in favor of the one appearing party. Only 13,450 cases were referred to the civil courts.²²⁶ While some judicial officials are ambivalent about the *forliksrådene* due to the low rate of conciliation,²²⁷ the high rate of default judgments is not as alarming as it may seem. Parties often fail to appear when they have accepted the requested judgment in the complaint through a prior agreement with the complaining party to honor this judgment, regardless of the outcome of the proceedings.²²⁸ On a larger scale, the procedural modification represented by the *forliksråd* concludes almost ninety percent of the workload once handled solely by the civil

²¹⁵ *Id.* at 40-41.

²¹⁶ *Id.*

²¹⁷ *Id.* at 42.

²¹⁸ *Id.* at 41.

²¹⁹ *Id.* at 42.

²²⁰ *Id.* at 48.

²²¹ *Id.*

²²² *Id.* at 54.

²²³ *Id.* at 33.

²²⁴ *Id.*

²²⁵ *Id.* at 26.

²²⁶ *Id.* at 53.

²²⁷ *Id.* at 51.

²²⁸ *Id.* at 39.

courts²²⁹ and gives more than two hundred thousand parties a greater sense of not only participation in the judicial system but also of obtaining personal justice.

3. Germany's Office of the *Rechtspfleger*

In Germany, the court office of the *Rechtspfleger* evolved from a court reporter to a legal administrator possessing independent decision-making powers. In fact, the term *Rechtspfleger* literally means "legal caretaker" or "administrator."²³⁰ Today, the *Rechtspfleger* is a specialized court officer whose authority, as a matter of first instance, supplants that of the judge for a limited sphere of legal activity.

Prior to the development of the *Rechtspfleger*, judges in German courts were assisted solely by courtroom reporters with no legal training and limited responsibilities during the course of the proceedings.²³¹ Increasing judicial burdens, however created by the numerous activities requiring limited legal expertise and strictly procedural work, led to the assignment of new duties for the court reporters, later termed *Rechtspflegers*.²³² Court reporters holding this position were gradually assigned even more of the difficult tasks that had previously been entrusted to judges,²³³ such as acting as preliminary administrator for the judge, determining costs in legal actions, declaring orders of payment executable, and maintaining the land register.²³⁴ The *Rechtspfleger* became a statutorily codified position in the German courts in 1957 with the enactment of the *Rechtspfleger Law*,²³⁵ which conferred even greater duties upon the office.

Currently, fifteen thousand people hold the office of *Rechtspfleger*, which means there is approximately one *Rechtspfleger* for each judge.²³⁶ To hold the office, a person must complete six semesters at a trade school or college, during which time the theoretical training is interspersed with periods of practical training.²³⁷ The duties of the *Rechtspfleger* cover two

²²⁹ *Id.* at 54.

²³⁰ Rolf Bender & Helmut Eckert, *The Rechtspfleger in the Federal Republic of Germany*, in 2 ACCESS TO JUSTICE 477, 479 (Mauro Cappelletti & John Weisner eds., Dott. A. Giuffrè Editore, 1979).

²³¹ *Id.* at 479.

²³² *Id.*

²³³ *Id.* at 480.

²³⁴ *Id.* at 479.

²³⁵ *Id.*

²³⁶ *Id.* at 480.

²³⁷ *Id.*

primary areas: (1) preparing and concluding adversary proceedings and (2) handling certain legal proceedings that are not adversarial in nature.²³⁸

With regard to adversary proceedings, the *Rechtspfleger's* duties are those activities that traditionally precede or follow the trial phase of litigation.²³⁹ This includes areas known as the Legal Motion Bureau, the dunning process, and forced sales, as well as the power to conduct execution of judgments.²⁴⁰ The *Rechtspfleger's* duties outside of adversarial proceedings are largely administrative in nature.²⁴¹ They include responsibility for public records such as the land register, overseeing bankruptcy proceedings and settlements with creditors, and guardianship and inheritance matters.²⁴²

The *Rechtspfleger* may only resolve or dispose of certain types of claims, such as when he presides over the Legal Motion Bureau, a lower court that handles appeals for non-contentious proceedings and appeals in criminal matters.²⁴³ If, when handling these matters, the *Rechtspfleger* sees a demand for special expertise, he then records the proceedings and his determination in preparation for review by the higher courts.²⁴⁴

The *Rechtspfleger* also assists creditors in obtaining executable judgments through the dunning process,²⁴⁵ a summary procedure for obtaining an order against an individual requiring him or her to pay the specified debt. The *Rechtspfleger* wields a considerable amount of power through the dunning process. The office rules on approximately four million applications each year – in comparison to the one million civil proceedings handled by the judiciary.²⁴⁶ During the dunning process, the *Rechtspfleger* conducts an examination of the facts to determine if the claim is legally justified.²⁴⁷ If the claim is justified and the facts are uncontested, the *Rechtspfleger* enters an order in favor of the creditor, and later assists the creditor in obtaining executable judgments through the administrative functions of the *Rechtspfleger's* office.²⁴⁸

²³⁸ *Id.* at 481.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 485-86.

²⁴⁴ *See id.*

²⁴⁵ *See id.* at 486-87.

²⁴⁶ *See id.* at 486. In 1996, this number had risen to more than 8.1 million pending dunning proceedings. Peter Gottwald, *Civil Justice Reform: Access, Cost, and Expedition. The German Perspective*, in *CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE* 207, 208 (Adrian A.S. Zuckerman ed., 1999).

²⁴⁷ *Id.* at 487.

²⁴⁸ *See id.* at 486-87.

The *Rechtspfleger* offers the civil court system several benefits. The judicial system exhibits greater efficiency because the judges have been freed of administrative constraints. This in turn provides a quicker service time for the adversarial processes. In addition, because the areas of the *Rechtspfleger's* activity are largely controlled by strict regulations,²⁴⁹ the *Rechtspfleger* is left with little chance to exercise broad discretion.²⁵⁰ This results in consistent application of the law in his areas of specialty. In addition, the expenses associated with proceedings involving the *Rechtspfleger* have not increased to the same extent as those associated with adversarial proceedings,²⁵¹ which assists in eliminating the traditional cost barrier of litigation.

Experience has also shown that the average person seeking legal assistance approaches the *Rechtspfleger* more readily than he does the judge or other court personnel.²⁵² This is primarily because appearances before the *Rechtspfleger* do not require representation by an attorney,²⁵³ as compared to a majority of the higher courts.²⁵⁴ This specialized handling of smaller claims allows parties to handle *pro se* the legal matters that typically arise in the course of daily life. In addition, the problems of the average person, as well as his lay understanding of the law, are traditionally better understood by the *Rechtspfleger*.²⁵⁵ As a result, the *Rechtspfleger* has become a well-known and heavily used source of general legal information and counseling – especially for people of moderate means.²⁵⁶

B. Procedural Modifications for Pro Se Litigants

1. Institution of Fee Caps in English Courts

As referenced previously, a private person in England also holds the constitutional right of proceeding within the courts as a *pro se* party.²⁵⁷ A legislatively enacted limitation on solicitors' costs attempts to encourage plaintiffs with a small claim to proceed *pro se* by discouraging solicitors

²⁴⁹ *Id.* at 485.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 483.

²⁵² *Id.* at 482.

²⁵³ *Id.*

²⁵⁴ *Id.* at 485 (where professional representation is mandatory in order for a claim to be heard).

²⁵⁵ *Id.* (noting, however, that this may no longer be true given the advent of state-sponsored education).

²⁵⁶ *Id.* at 486.

²⁵⁷ Jacob, *supra* note 157, at 256 (generally referred to as proceeding "in his own person").

from actively seeking to represent plaintiffs in such matters.²⁵⁸ In cases where the claim is one hundred pounds or less, the rule bars solicitor charges above and beyond the costs stated in the summons and any costs certified by the court that were incurred due to the unreasonable conduct of the defendant.²⁵⁹ The fee cap achieves greater access to justice with respect to small claims by limiting the expense²⁶⁰ that traditionally bars a litigant of weaker financial status. In addition, because the fee cap attaches to a relatively small claim amount, its absence when dealing with potentially large claims may also help to ensure that lower-income parties whose claims require legal counsel are similarly not made unattractive to solicitors.

2. Mandatory *In Forma Pauperis* Status & Court Controlled Fee Awards in Nigeria

The practice of proceeding as a *pro se* party does not exist in Nigeria. Instead, Nigeria's court system follows the traditional *in forma pauperis* model for litigants who are unable to afford legal services. Civil procedure in Nigeria is governed by the Rules of the High Court, which were enacted pursuant to statutory power given to the rule-making authorities in each of the nineteen territories.²⁶¹ While this system does allow for some variance in the rules,²⁶² ten of the nineteen states comprising the Federation of Nigeria utilize the Rules of Court that originated from the now-defunct Supreme Court of Nigeria in their High Courts.²⁶³ The following account is based primarily on the procedure of the High Court, although the procedures of the magistrate and district courts are very similar.²⁶⁴

Any person who wishes to proceed *in forma pauperis*, as either a plaintiff or defendant, makes an application (comparable to a motion in U.S. courts) to the judge in chambers.²⁶⁵ The application requires an affidavit, which details the facts upon which his claim will be based or defended and all the facts that may satisfy the judge's determination that the applicant's means do not permit him to employ legal aid in his case.²⁶⁶ The judge reviews the application and, if he finds it to have merit, refers it to a local solicitor for certification that the applicant has a valid cause of action

²⁵⁶ *Id.* at 452, 453.

²⁵⁷ *Id.* at 452-53.

²⁵⁸ *Id.* at 453.

²⁵⁹ B.O. NWABUEZE, *THE MACHINERY OF JUSTICE IN NIGERIA* 245 (1963).

²⁶⁰ *Id.*

²⁶¹ T. AKINOLA AGUDA, *PRINCIPLES OF PRACTICE AND PROCEDURE IN CIVIL ACTIONS IN THE HIGH COURTS OF NIGERIA* vii (1976).

²⁶² Nwabueze, *supra* note 260, at 246.

²⁶³ AGUDA, *supra* note 262, at 68.

²⁶⁶ *Id.*

or defense.²⁶⁷ Solicitor certification is required for the applicant to proceed, at which time the judge assigns any solicitor willing to act for the applicant.²⁶⁸ This duty generally falls to the certifying solicitor; however, the rules do not preclude a judge from assigning another solicitor if he so chooses.²⁶⁹ Once a solicitor has been assigned to the *in forma pauperis* litigant, he may not be dismissed by the applicant without leave of the court.²⁷⁰

An applicant's attaining *in forma pauperis* status allows the court to remit or waive any and all court fees in whole or in part as the court deems necessary.²⁷¹ Unlike other systems, however, the Court Rules in Nigeria not only insulate an *in forma pauperis* litigant from liability for payment of judgment but also preclude the applicant from being entitled to receive any costs.²⁷² The rules also preclude any solicitor assigned as counsel from taking or seeking payment from the applicant or any other person connected with the application or cause of action.²⁷³ Judges may rescind applications upon discovery of a payment arrangement, regardless of its origination.²⁷⁴ This safeguard works to ensure that *in forma pauperis* status is reserved for those parties most in need.

Finally, the court retains strict control of the outcome of the suit through the application, which forbids either the applicant or his solicitor from discontinuing, settling, or compromising the cause of action without leave of the court.²⁷⁵ This further ensures that financial considerations have less of an impact on the litigant's receipt of adequate representation or the outcome of his suit. This safeguard is buttressed by the judge's discretion to order payment for the solicitor's services out of any award recovered by the applicant.²⁷⁶

Although the system employed by Nigeria's courts leaves room for the judge to exercise discretion, the process of initiating a civil suit as an *in forma pauperis* party requires a much higher burden of proof than the typical American *in forma pauperis* proceeding. The court's choice, however, to assign counsel instead of allowing a party to proceed *pro se* results in the litigant's receiving professional legal advice and a more equal

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* at 67.

²⁷² *Id.* Note that this runs contrary to U.S. practice which does allow for the award of costs to parties proceeding *pro se* under the *in forma pauperis* provisions.

²⁷³ *Id.* at 69.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

footing for his participation in the judicial process. Perhaps more importantly, the judge's strict control over the financial matters of the applicant's legal representation ensures the advice and counsel received by the would-be *pro se* party is not merely adequate, but constitutes an appropriate and vigorous defense.

3. Initial Oral Pleadings in Japan

Japan's legislature revised its Code of Civil Procedure in 1996 and effected the changes in January of 1998.²⁷⁷ The overall goal of the reforms was to offer the substantial number of ordinary citizens who wished to appear *pro se* comprehensive²⁷⁸ civil justice²⁷⁹ that was both plain and accessible. Although many of the reforms were geared towards courtroom procedures that aid the judges in identifying the genuine issues and obtaining evidence,²⁸⁰ an interesting feature that provides greater access to the traditional litigant of modest means was accomplished by resurrecting an old right that was no longer practiced – namely, the right to commence an action by oral presentation.

A plaintiff may file his complaint in one of two venues: summary court or district court.²⁸¹ Any party, whether plaintiff or defendant, has the right to proceed in person,²⁸² a right frequently exercised due to the insufficiency of legal aid²⁸³ and scarcity of practicing attorneys.²⁸⁴ Although judges are expected to intervene and assist *pro se* litigants when necessary,²⁸⁵ the numbers of *pro se* litigants are overwhelming. In 1997, for instance, litigants in person comprised fifty-eight percent of the caseload at the district court level,²⁸⁶ which governs claims that exceed 900,000 yen or involve immovable property.²⁸⁷ Summary courts have jurisdiction over both civil and criminal claims. This jurisdiction, however, is limited to civil claims not exceeding 900,000 and small claims

²⁷⁷ Yukiko Hasebe, *Civil Justice Reform: Access, Cost and Expedition, The Japanese Perspective*, in *CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE*, supra note 6, at 235 (Adrian A. S. Zuckerman ed., 1999).

²⁷⁸ See *id.* at 236.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 235.

²⁸¹ *Id.* at 236.

²⁸² See *id.* at 258.

²⁸³ See *id.* at 248.

²⁸⁴ See *id.* at 257.

²⁸⁵ *Id.* at 258.

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 238.

procedures involving monetary claims of 300,000 yen or less.²⁸⁸ In comparison with the district court figures, ninety-nine percent of the cases at the summary court level involved at least one *pro se* party, with ninety percent involving litigants in person on both sides of the issue.²⁸⁹

Under the revised code, a plaintiff at the summary court level is not required to file a written complaint; instead, the plaintiff may go to the court office and commence his action by oral presentation.²⁹⁰ While this right existed under the former Code, it was rarely exercised because the plaintiffs were required to model their oral complaint on the more complex written complaint still required by the district courts.²⁹¹ Under the new Code, the plaintiff does not have to state a legal cause of action, but must only make the essence of his case clear to the court officer.²⁹² The complaint is drafted by a judicial scrivener,²⁹³ a member of an alternate tier of legal professionals in Japan qualified to handle conveyancing and drafting forms for filing in the courts.²⁹⁴ The complaint is then filed by the plaintiff, who is no longer barred from pressing suit solely because of his lack of vocabulary or inability to frame the legal issues appropriately. While this measure does little to assist the large number of *pro se* litigants at the district court level, it at the very least eliminates additional competition for the few available attorneys, and represents progress in the direction of greater access to the judicial process.

VI. POSSIBLE ADAPTATIONS TO U.S. COURTS

As these international models suggest, a greater degree of success in aiding un-represented litigants is generally possible when the judiciary yields procedural integrity and becomes more flexible when handling *pro se* parties.²⁹⁵ Thus, *pro se* litigants would be better served by our domestic

²⁸⁸ *Id.* at 236. 900,000 yen is approximately \$US 6,852 and 300,000 yen is approximately \$US 2,284.

²⁸⁹ *Id.* at 258.

²⁹⁰ *Id.* at 239.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at 238. Note, however, that judicial scriveners are not allowed to act as legal representatives in any court. *Id.*

²⁹⁵ In the face of limited data, it may be difficult to ascribe a degree of success to the reforms discussed in the preceding section that can be described as a sum certain. The information available for the reforms discussed is qualitative in nature, and details primarily the number of people choosing to use or being procedurally diverted into the alternate mechanisms. While this gives the reader an accurate picture of the efficiency and time gains that may be realized, it does not specify with particularity the impact on the number of *pro se* claims filed per year nor the reactions of *pro se* parties to their treatment. Consequently, the potential value for the suggested adaptations should instead be measured instead in terms

court system if its continued assistance were rooted in procedural and institutional reforms rather than expansion of its current educational programs. Procedural modifications take on greater significance when one considers that education assists a *pro se* party primarily during the initial pleadings and appearances before the court. Affecting procedural and institutional changes to the course of a *pro se* party's suit, however, provides benefits to a point further along in the course of litigation, regardless of whether that point reaches to trial or settlement. Indeed, many members of the U.S. Judiciary support the idea of reform, including John L. Kane, a United States Senior District Court Judge, stating that "[c]ourts need to make fundamental changes or face the continuing prospect of having *pro se* litigants forfeit their legal rights."²⁹⁶ The judiciary has even specifically called for procedural reform, noting that we need to "create an entirely new methodology" and "redesign civil procedure from the ground up so that access to justice is available to all, rich and poor alike."²⁹⁷ This section discusses possible adaptations of the international methods of handling *pro se* parties to the U.S.'s judicial processes and the potential effects of these reforms on the current issues presented by *pro se* litigation.

A. *Procedural Alternatives*

1. Assignment of Counsel through the *In Forma Pauperis* Statute

Adoption of a more stringent treatment of *pro se* parties as indigent litigants under the *in forma pauperis* provisions of 28 U.S.C. § 1915 may seem redundant given that the provisions for treating parties in this way may be invoked by any litigant, at any time, under the existing *in forma pauperis* statute. Treating *pro se* parties, regardless of their request, as indigent parties under the *in forma pauperis* provisions provides an easily implemented solution to the primary problems of the court's neutrality and the *pro se*'s lack of knowledge.

Although the U.S. equivalent is not as strict in its specification of procedures or requirements for attaining *in forma pauperis* status as Nigeria's *in forma pauperis* provisions, the two statutes both confer the power to provide the un-represented party with counsel.²⁹⁸ In fact, the U.S.

of gains from the U.S.'s current status quo in order to render a more accurate picture of the intermediate gains that may be achieved.

²⁹⁴ J. Kane, *supra* note 67, at 16.

²⁹⁵ *Id.* See also William W. Schwarzer, Viewpoint, *Let's Try a Small Claims Calendar for the U.S. Courts*, 78 JUDICATURE Mar.-Apr. 1995, at 221, 221 (calling for the formation of a federal small claims calendar).

²⁹⁶ See 28 U.S.C. § 1915 (e)(1) (2000) (which provides that "[t]he court may request an attorney to represent any person unable to afford counsel.").

version appears to reach even further, conferring upon the court and its officers the duty of issuing and serving all process for these cases and reminding the court that it must "perform all [of its] duties in such cases."²⁹⁹

A large number of *pro se* litigants, however, are unable to invoke this statutory right to assignment of counsel since they fail to apply for indigent status, a precursor to invoking the assignment of counsel privilege. In San Francisco's study of non-prisoner *pro se* litigation, for example, seventy percent of the *pro se* litigants did not apply for indigent status.³⁰⁰ Of those applying, only eight percent requested the assignment of counsel.³⁰¹ The courts, however, granted three of every five requests for those *pro se* litigants requesting *in forma pauperis* status.³⁰² Notably, seventy-two percent of those parties receiving indigent status were not legally "indigent" as defined under the statutory terms of § 1915.³⁰³ This indicates the more stringent standards for indigent status imposed by the courts may be waning in the face of the judiciary's realization that there is a growing cross-section of the population that cannot afford counsel, even though they manage to support themselves and their families.

A continued effort by the judiciary to relax the criteria for attaining indigent status may be one means of making the *in forma pauperis* status more attractive than proceeding *pro se*, especially in the face of the current risk of mandatory forfeiture of assets. Dissemination of general information regarding the assignment of counsel privilege to *pro se* litigants may also increase the number of parties willing to submit applications to the court. Finally, Congress and state legislatures should revise § 1915 and its equivalents in order to allow the judiciary to raise this issue *sua sponte*, thus providing a mechanism to insure provision of counsel for those *pro se* litigants raising more complex and sophisticated causes of actions, such as civil rights and employment discrimination cases.

Whether *in forma pauperis* status is mandatorily imposed or simply relied upon to a greater extent than currently, this type of reform raises the question of who will compose the pool of attorneys available for assignment to represent the growing number of un-represented parties. This question increases in significance when we compare the recent surge in *pro se* litigation against the ratio of the US population to the number of lawyers, two-hundred-and-sixty-seven to one.³⁰⁴ This is the highest ratio of

²⁹⁷ 28 U.S.C. § 1915(d).

²⁹⁸ Park, *supra* note 56, at 830.

²⁹⁹ *Id.* at 833.

³⁰⁰ *Id.* at 831.

³⁰¹ *Id.*

³⁰² Marcus, *supra* note 6, at 82.

general population to lawyers of any nation in history.³⁰⁵ Even where courts are granted statutory authority to appoint counsel, this right may be limited given the recent successful challenge of federal and state court power to compel representation.³⁰⁶ Practicing attorneys and local bar associations must rise to the challenge issued not only by the judiciary but also commentators like the American Bar Association (“ABA”) to expand their pro bono services in order to meet these needs. Initially, increases in pro bono service should focus on those areas of the law exhibiting the greatest concentrations of *pro se* litigants, such as domestic relations and employment discrimination.³⁰⁷ Subsequent developments should focus on increasing access to the services of an attorney across the board.

2. Court-drafted Documents from Oral Pleadings

Although many of the clinic-based educational programs currently provide a mechanism for review of a *pro se* plaintiff’s paperwork, this review generally relies upon the use of form pleadings that ensure the plaintiff’s minimum burden regarding the legal elements is met. This approach often results in a factually barren pleading that meets a court’s minimum requirements. This type of pleading, however, fails to allow the party an opportunity to allege additional facts that might have a greater impact upon the claim. In comparison, the Japanese tradition of oral pleading not only allows the *pro se* party to focus on the factual elements of his or her claim but also ensures that the pleading contains all of the necessary legal elements. Given that an overwhelming number of *pro se* claims fail to survive a preliminary motion to dismiss,³⁰⁸ the institution of even initial oral pleading could significantly reduce the survival rate of *pro se* claims in the face of these motions.

The Family Courts of New York City recently recognized the possible benefits of oral pleading and instituted Petition Preparation, with the goal of providing assistance in document preparation to the self-represented litigant.³⁰⁹ Participation in the program is available to any civil litigant in Family Court, regardless of his or her financial status;³¹⁰ the program currently staffs one hundred petition clerks trained in framing the allegations litigated before the Family Courts.³¹¹ Typical areas represented by the petitions drafted include orders for protection, child and spousal

³⁰³ J. Kane, *supra* note 67, at 16, n.1.

³⁰⁴ Kim, *supra* note 48, at 1647.

³⁰⁷ See GOLDSCHMIDT ET AL., *supra* note 60, at 112.

³⁰⁸ See Park, *supra* note 56, at 835 (citing a forty-four percent survival rate of *pro se* claims in the face of a preliminary motion to dismiss).

³⁰⁹ GOLDSCHMIDT ET AL., *supra* note 60, at 100.

³¹⁰ *Id.*

³¹¹ *Id.*

support, establishment of paternity, custody or visitation, and petitions for guardianship.³¹² The appropriate pleadings are drafted and reproduced by the petition clerk during the course of an interview with the *pro se* litigant, based on statements made by the party.³¹³ Although the Family Court works closely with several service agencies, petition clerks are located within the offices of the court they serve.³¹⁴ Consequently, the Petition Preparation program assists litigants in achieving a meaningful review of their cause of action in a greater number of claims than previously observed in this very personal area of the law.

The institution of a similar sort of oral pleading also counters the judiciary's prevalent concern that the judge or other court officers often function as attorneys in the *pro se* litigant's stead. Ironically, when *pro se* litigants reach the courtroom, a judge essentially relies upon the party's oral representations during his or her decision-making process, substituting the judge's personally translated "legal" version of the *pro se*'s statements into the balancing required for legal determinations. It is this substitution of terms that most threatens judicial neutrality. Viewed from this perspective, extension of the ability to file oral pleadings seems less extreme. Indeed, extending a simplified version of oral pleading to subsequent motions before the court may further bolster the *pro se* party's ability to garner a meaningful review of his claim while eliminating the primary threat to the court's neutrality.

Finally, institution of oral pleadings in the United States would not require the creation of a new group or class of legal professionals to fill the role of judicial scrivener. In many educational settings, *pro se* litigants actually receive their legal education from paralegals and social workers,³¹⁵ a growing source of concern for many members of the private bar.³¹⁶ Petition Preparation provides the appropriate legal training, requiring a minimum high school education (most of the petition clerks, however, hold at least a college degree) for employment.³¹⁷ In comparison, paralegals provide an easily accessible base for filling this institutional role and, depending on their experience, would exhibit a minimal learning curve. Indeed, the ABA recently recommended expansion of the traditional role of the paralegal in its Report on Non-Lawyer Activity in Law-Related Situations.³¹⁸ Further, the cost in implementing this sort of procedural

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *See id.* at 101.

³¹⁵ *See generally* Engler, *supra* note 79, at 1998-2007; Barry, *supra* note 51, at 1889-90; *infra* Section IV.

³¹⁶ *See* Kim, *supra* note 48, at 1650.

³¹⁷ GOLDSCHMIDT ET AL., *supra* note 60, at 100.

³¹⁸ Rosenthal, *supra* note 3, at 94, 161.

mechanism is also minimal,³¹⁹ especially when compared to the time and efficiency costs cited by the judiciary as the chief problem posed by *pro se* litigants, or the suggestion of creating an additional calendar for small claims in the federal courts.³²⁰

In sum, the institution of oral pleading – whether limited to initial pleading or extended to subsequent motions – would be a viable option for addressing concerns about pleading deficiencies and the court’s neutrality in both the state and federal court systems. Notably, the ABA specifically sanctioned this option of “document preparer” for state court use as a possible countermeasure to non-lawyer activity in the legal arena,³²¹ lending additional credence to its viability.

B. Institutional Alternatives

1. Creation of Court Officer for Specialized Claims

Underlying of the judicial system’s efforts to educate *pro se* litigants lies a growing concern that this education movement, regardless of the form and the mix of those providing educational services, essentially sanctions the unauthorized practice of law by the myriads of courtroom staff who function as advisors for the growing number of *pro se* litigants.³²² Both the American Judicature Society and the ABA have recommended that state legislatures revisit their current approach to unauthorized practice of law or judicial immunity. Specifically, these organizations suggested that states confer an immunity similar to judicial immunity upon court officers other than judges in order to preserve the minimum level of assistance that flows from these positions.³²³

Transforming the responsibilities of these courtroom officers, however, into those indicative of an intermediary legal professional, similar to the *Rechtspfleger* in Germany, may present an opportunity to optimize preexisting judicial resources while also addressing the unique demands of *pro se* litigants. Corresponding to the operational duties of the *Rechtspfleger*, the officer could be endowed with a limited ability to resolve disputes and handle matters that are post-judicial resolution, such as execution of claims or enforcement orders. Increasing the scope of the administrative duties entrusted to courtroom personnel would not only assist a judicial system already faced with a continuing problem of

³¹⁹ See GOLDSCHMIDT ET AL., *supra* note 60, at 100 (citing Petition Preparation costs limited to annual salary of \$35,000 and computer maintenance).

³²⁰ See Schwarzer, *supra* note 295, at 221.

³²¹ Rosenthal, *supra* note 3, at 151.

³²² See Nuffer, *supra* note 44, at 9; See GOLDSCHMIDT ET AL., *supra* note 60, at 112; Rosenthal, *supra* note 3, at 125, 150.

³²³ GOLDSCHMIDT ET AL., *supra* note 60, at 113; Rosenthal, *supra* note 3, at 161.

overcrowded dockets but also eliminate in many instances the need for *pro se* parties to pursue claims past their initial pleadings by providing an immediate dispute resolution, thereby addressing the complaints of time, efficiency and sufficiency, frequently raised by courtroom personnel.

For example, the U.S. Department of Health and Human Services' Administration for Children and Families has suggested the modification for child support orders be entrusted to a standardized *pro se* procedure due to the increase in modification actions and the regular need to update this type of order.³²⁴ Those states currently running programs of this sort rely on a mixture of form pleadings and standard documentation to assist the *pro se* party in formulating his or her request based on detailed explanations of the ability for change within the state's statutorily provided calculations.³²⁵ This sort of statutorily governed area provides an ideal forum for the use of a specialized court officer for claim disposition.

The primary concerns presented by these formalized *pro se* procedures are the complexity of the forms, the scope of the forms, literacy or language barriers, and the development and application of uniform rules.³²⁶ For instance, the area of child support enforcement is controlled by strict legislative guidelines, much like the area of responsibility entrusted to the *Rechtspfleger*. This leaves little room for the court officer to exercise discretion and provides a well-defined environment that promotes consistent application of the rules. The expense associated with any trial procedure would be decreased because of the summary nature of the court officer's review and decision. This decrease in expense could effectively eliminate or reduce one of the primary barriers to the court systems for many un-represented litigants – cost.

In addition, the *pro se* party involved is already likely to have approached the court officer previously while seeking assistance, creating a sense of familiarity that may ease the rigors of the legal process for the *pro se* litigant. Finally, the vesting of such responsibilities, after providing additional training, removes the specter of unauthorized or illegal provision of legal services or advice, thereby freeing courtroom personnel to give greater amounts of aid to those un-represented parties seeking their assistance.

This remedy, however, poses a greater organizational challenge than does the imposition of *in forma pauperis* status or even the institution of oral pleadings – one which the judiciary may not be ready for given the likely amount of resources and initial training it would require to create a new class of legal professionals within the judiciary. What the *Rechtspfleger* speaks to, however, is not necessarily a specialized office but instead a means of achieving specialized handling of the claims posed by

³²² LANDSTREET & TAKAS, *supra* note 108, at 1-4.

³²³ *Id.* at 15-30.

³²⁴ *Id.* at 26-28.

pro se parties. At the federal level at least, this specialized review could be achieved with no modifications to the existing functions of courtroom personnel by entrusting more *pro se* actions to magistrate judges or special masters. Cases involving a *pro se* party could be initially referred to the magistrate or special master as a matter of procedure, in their totality or simply for the initial pleadings and motions for dismissal or summary judgment.

Magistrates and special masters traditionally exhibit lighter caseloads than district court or appellate court judges;³²⁷ thus they may be better suited to give more time and attention to a *pro se* litigant who necessarily demands a greater degree of attention. While there is a perception that this funneling of *pro se* actions actually occurs, data suggests that federal judges are reluctant to refer these cases,³²⁸ preferring to handle *pro se* litigants themselves, thus contributing to their own docket crowding. Although the introduction of a specialized court officer would involve significant modification of procedural rules as well as significant training at its outset, the assimilation of such an office provides the courts with a better means to offer specialized attention to *pro se* litigants without jeopardizing judicial resources or the neutrality of the primary fact-finder.

2. Specialized Mediation of Claims Involving a *Pro Se* Party

Although the introduction of an intermediate mediation system into the existing domestic court system could not be effectuated in a manner that would provide an immediate result, Norway's Board of Conciliation offers a valuable message regarding the presumed motivations of *pro se* litigants. Even though the conciliation rate is lower than five percent, the *forliksråd* stands for the proposition that often parties are content with a mechanism that simply provides them a forum in which to be heard, regardless of whether the claim is settled privately prior to appearing before the Board or by the more formal conciliation process.

Domestically, the willingness of *pro se* litigants to settle was demonstrated in San Francisco's study of non-prisoner *pro se* civil litigation, which discovered a settlement rate of just over fifteen percent³²⁹ – belying the notion that *pro se* parties necessarily want time in court. Settlements were most often reached in actions involving allegations of employment discrimination, tort, and labor cases.³³⁰ Where the rates of settlement were analyzed by type of claim, the rate of settlement was

³²⁷ Park, *supra* note 56, at 834.

³²⁸ *Id.*

³²⁹ *Id.* at 835.

³³⁰ *See id.* at 843.

virtually identical to the rate in the general sample of represented parties.³³¹ If, as this study suggests, *pro se* litigants are more willing to settle than previously believed, alternative dispute resolution options could be applied as a mandatory starting point in order to meet the rising surge of *pro se* litigants.

Although civil procedure calls for an initial settlement discussion once an action proceeds to trial, a mandatory mediation mechanism would provide a more aggressive means for eliminating virtually all of the problems posed by the *pro se* litigant. If successful, the need for sufficient pleading beyond the initial complaint would disappear, as would the time and efficiency demands imposed on courtroom personnel in assisting a *pro se* litigant in navigating the course of litigation and its accompanying motions. Additionally, the threat to the court's neutrality would be less direct since mediation would likely be handled by private personnel, as is customary in traditional alternative dispute resolution matters. This removal of resolution from the courtroom may also allow the parties to pursue more aggressive settlement tactics than a judge is comfortable pursuing, as judges must balance the perception of the *pro se* litigant against his normal course of action.

At least one state court system has recognized the value of using alternative dispute resolution methods an intermediate step in the course of *pro se* litigation. Minnesota's Hennepin County District Court's *pro se* initiative involved the creation of a conciliation court mandatory mediation pilot project.³³² The pilot project was conducted over a six-month period in 1996 and 1997. It mandated mediation for all *pro se* litigants referred to the project but at no additional cost to the parties.³³³ Special conciliation calendars were held two mornings each week, hosting no more than twenty cases, with those cases that were unable to reach a settlement given a fast track to a contested hearing.³³⁴ Over the course of the pilot session, 927 cases were scheduled, 658 of which were disposed of at the initial hearing date.³³⁵ Of the resolved cases, 400 were mediated, forty-three percent of which reached a settlement that very morning (174 cases).³³⁶ Of those cases settled, only twenty-six (approximately fifteen percent) resulted in a subsequent filing requesting an order of compliance.³³⁷

³²⁹ *Id.* at 841.

³³⁰ Stanoch, *supra* note 121, at 309.

³³¹ *Id.* at 310.

³³² *Id.*

³³³ *Id.* at 311.

³³⁴ *Id.* The remaining two-hundred-and-fifty-eight cases were resolved by default judgment or dismissal. *Id.*

³³⁵ *Id.*

Ninety percent of the participants completed an exit evaluation, which reported a satisfaction rate of ninety percent.³³⁸ Based on the success rate of the cases actually mediated, as well as the positive experiences of the participants, the Hennepin County District Court requested authority from the Minnesota Supreme Court to continue the mandatory mediation program.³³⁹ This result strongly suggests that both the federal and state court systems could successfully implement an aggressive mediation approach to *pro se* litigants that would result in not only satisfactory results for all of the parties but also impart a greater sense of participatory justice, particularly for the *pro se* parties.

VII. CONCLUSION

Although the right to proceed as a self-represented party finds its origins in the courts' perception that adjusting court procedure was the primary means of assisting a *pro se* litigant pursue his claim, today's judiciary has entrenched its efforts to assist *pro se* parties in an educational movement designed to maintain the procedural integrity of the domestic court system. This narrow focus on educating the layman litigant has resulted in a system that recognizes the need for access to justice through the courts, yet simultaneously preempts any opportunity for a meaningful review of the *pro se* claims placed before it due to its rigid adherence to the procedural motions and process of traditional litigation. Although one of the major concerns underlying the *pro se* movement is a lack of access to adequate legal counsel, availability of pro bono services and legal aid presents an on-going problem with no clear end in sight.

As the recent surge of *pro se* litigation and the problems associated with it is not likely to ebb in the near future, measures must be taken in the interim to insure the increasing number of self-represented parties is not foreclosed from a *pro se* process that may provide the sole means of access to the justice. This paper proposes that the *pro se* phenomenon would be best served by the consideration of both institutional and procedural reforms within the judicial system, in particular the advent of court-sponsored petition drafting and mandatory mediation procedures, in order to broaden the tools available for handling the unique concerns posed by *pro se* litigants beyond the educational sphere of influence.

³³⁶ *Id.*

³³⁷ *See id.* at 312.

