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Jessica K. Steinberg

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## Adversary Breakdown and Judicial Role Confusion in “Small Case” Civil Justice

Jessica K. Steinberg\*

*This Article calls attention to the breakdown of adversary procedure in a largely unexplored area of the civil justice system: the ordinary, two-party case. The twenty-first century judge confronts an entirely new state of affairs in presiding over the average civil matter. In place of the adversarial party contest, engineered and staged by attorneys, judges now face the rise of an unrepresented majority unable to propel claims, facts, and evidence into the courtroom. The adversary ideal favors a passive judge, but the unrealistic demands of such a paradigm in today’s “small case” civil justice system have sparked role confusion among judges, who find it difficult to both maintain stony silence and reach merits-based decisions in the twelve million cases involving unrepresented parties.*

*This Article contends that the adversary ideal is untenable in the lower civil courts. Appellate courts and ethics bodies have virtually ignored this problem, with the result that judges are left to improvise a solution. Indeed, it is now routine for judges to flout tradition and doctrine by concocting ad hoc and unregulated procedures that assist the unrepresented with fact development and issue creation. This Article argues that such efforts should be formalized and regularized through an affirmative duty on judges to develop the factual record in cases that arise in lower civil courts. In complex federal litigation, adversary norms have evolved, and the judicial role has been greatly enhanced to manage the unique pre- and post-trial needs of cases with numerous parties and high public impact. This Article argues for a parallel framework to enlarge the role of the judge in small, two-party civil cases. An affirmative duty may chafe against orthodox notions of the judge as a “passive arbiter,” but it would harmonize the disparate procedural practices already in use in the lower courts, and go a long way toward resurrecting the procedural*

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*values of accuracy, impartiality, party voice, and transparency in civil adjudication.*

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## I. INTRODUCTION

This Article calls attention to the breakdown of adversary procedure in a largely unexplored area of the civil justice system: the ordinary, two-party case. The twenty-first century judge confronts an entirely new state of affairs in presiding over the average civil matter. In place of the adversarial party contest, engineered and staged by attorneys, judges now face the rise of an unrepresented majority unable to propel claims, facts, and evidence into the courtroom. The adversary ideal favors a passive judge, but the unrealistic demands of such a paradigm in most civil cases have sparked role confusion among judges, who find it difficult to both maintain stony silence and also reach merits-based decisions in the sixteen million cases involving unrepresented parties.<sup>1</sup> In complex civil litigation, the role of the judge has been greatly enhanced to respond to the unique needs of cases with multiple parties and high public impact.<sup>2</sup> This Article argues for a parallel framework to enlarge the role of the judge in the “small case” civil justice system.

In the classic portrayal of American adversary procedure, parties and judges each have distinct and well-defined roles. Parties are expected to control investigation, define the issues at stake in the case, and present evidence and argument to the court.<sup>3</sup> Judges, by contrast, serve as passive and impartial arbiters who weigh the parties’ competing claims from a neutral perch. In an oft-cited metaphor, judges are like “umpires” calling balls and strikes—they make decisions based on the facts and theories advanced by the parties, but play no independent role in shaping the content or outcome of cases.<sup>4</sup>

Though adversary theory continues to represent the guiding framework for criminal and civil cases, it is now widely recognized that the traditional depiction of the passive judge is incomplete. In “big”

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1. NAT’L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 31–33 (2015), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx> [hereinafter THE LANDSCAPE OF CIVIL LITIGATION].

2. *See infra* Part II.

3. *Id.*

4. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 20–21 (1993).

litigation—namely, cases involving multiple parties, far-reaching remedies, or matters of great public importance—an enhanced, and more active, judicial role has become the norm. In her seminal work, Judith Resnik discussed the rise of the “managerial” judge who is deeply involved in pre-trial discovery disputes, class certifications, and settlement.<sup>5</sup> Likewise, Abram Chayes depicted a judge who plays an active post-trial role in public law cases, particularly in those that call for the restructuring of large public institutions such as schools or prisons.<sup>6</sup> In addition, scholars have pointed out that appellate courts sometimes depart from adversary norms in furtherance of their important law development function.<sup>7</sup> Where a case will bind a large segment of the American public, appellate judges might raise a legal issue *sua sponte*, or rely on extra-record facts, so as to ensure the issuance of a proper, and well-informed, statement of the law.<sup>8</sup> Adversary departures are often justified as an appropriate response to the growing complexity of civil litigation as well as the courts’ now-central role in public law enforcement.

Beyond “big” or “important” litigation, however, adversary norms in the civil justice system are largely expected to operate in conformity with traditional notions. Consider a simple consumer case, in which New Bank sues Kathleen for \$2,500 in credit card debt. In such a matter, none of the typical justifications for departures from adversary procedure exist. First, pre-trial proceedings are likely to be minimal. New Bank and Kathleen are the only two parties to the litigation, making it unnecessary for the judge to actively manage technical procedures such as joinder or class action certification. Second, the sole issue in the case—liability for the debt—is not complex and, therefore, the parties are unlikely to engage in extensive discovery requiring judicial intervention. Third, any court-ordered remedy can be privately enforced by New Bank, without the judicial monitoring that would be required in a large public law case. And last, the judge in the New Bank case primarily fulfills a dispute-resolution function, rather than a law development function, eliminating the

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5. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–79 (1982).

6. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1298 (1976) [hereinafter Chayes, *Role*].

7. *See infra*, Section II.B.

8. Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 447, 461–62 (2009).

need for the court to raise issues or facts not brought forward by the parties. In short, a basic debt collection case is neither complex, nor does it invoke a matter of public importance. The presumption thus holds that, across the lifespan of a simple, two-party matter, the twin adversary norms of “party control” and “passive judging” do—and should—govern the proceedings.<sup>9</sup>

This Article challenges the validity of that presumption, asserting that, far from a segregated phenomenon affecting only large and important cases, active judging has become routine in many small, two-party cases as well. Matters like the New Bank case may not raise issues of complexity or public importance, but they are part and parcel of a sea change in the civil trial courts that has greatly affected procedural methods: the emergence of an unrepresented majority. In the past twenty years, skyrocketing figures of unrepresented, or *pro se*, litigants have swamped the civil courts, primarily in ordinary, two-party matters at the state level. Based on a survey of nearly one million cases in 152 courts, The National Center for State Courts recently estimated that seventy-six percent of cases in the civil justice system now involve an unrepresented party.<sup>10</sup> In some case types, such as consumer law, housing, or domestic violence, *pro se* parties may be featured in up to ninety percent of matters.<sup>11</sup> It is therefore highly likely that at least sixteen million unrepresented parties cycle through the civil justice system annually.<sup>12</sup> This Article connects mass-scale lack of representation to an observable, yet overlooked, breakdown in adversary procedure in run-of-the-mill cases. In doing so, this Article suggests that departures from adversary procedure may run far deeper than previously recognized.

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9. By “small” and “simple,” I do not mean to suggest that the cases lack significance. They are critically important to people’s lives, but relatively easier to adjudicate due to simple issues of fact and law. See David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 413–14 (2011) (discussing the simple nature of eviction cases, as compared to other civil and criminal cases).

10. THE LANDSCAPE OF CIVIL LITIGATION, *supra* note 1, at 31–32 (finding that, in the subset of 649,811 cases where courts reported representation status for both parties, only 24% of cases involved representation for the plaintiff and defendant).

11. See *infra* notes 86–97 and accompanying text.

12. In 2013, 22.1 million civil and domestic relations cases were filed in the state courts. I derive the sixteen million figure by taking seventy-six percent of 22.1 million. See NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS 7 (2015), [http://www.courtstatistics.org/~media/Microsites/Files/CSP/EWSC\\_CSP\\_2015.ashx](http://www.courtstatistics.org/~media/Microsites/Files/CSP/EWSC_CSP_2015.ashx) [hereinafter EXAMINING THE WORK OF STATE COURTS].

The pro se crisis is well recognized,<sup>13</sup> but its profound implications for the viability of the adversary system at large are not. The adversary norm of party control requires that parties draft court papers, parse through substantive law, master procedural and evidentiary rules, and articulate a coherent, legally relevant narrative to a judge. However, lay parties, who now dominate the civil dockets, are frequently unable to perform any of these functions. They regularly omit relevant facts. They fail to advance cognizable legal theories. They botch procedural and evidentiary rules. And they request improper remedies.<sup>14</sup> In a domino-like effect, when parties lack skill and cannot harness the norm of party control to develop or present their claims, the passive judging model no longer functions as an effective corollary. A judge who abides by the passive norm in presiding over a contemporary civil docket would likely spend the majority of her day briskly dismissing the claims of unrepresented parties—a result that hardly seems consistent with the adversary system’s overarching goal to produce fair and merits-based decisions. Yet a dilemma exists: if that judge intervenes in a case to elicit facts and frame legal theories—to supplant, in essence, the duties typically carried out by the parties—she has then abandoned her neutral and impartial perch.

The various entities that regulate judicial conduct have grappled poorly with the catch-22 that arises for the judge when an unrepresented party cannot fulfill the norm of party control. For starters, few ethics rules or appellate decisions even address the issue, despite how pervasive it has become in everyday litigation. In addition, the guidance that has emerged is inadequate. Courts often issue opinions laden with stock language advising judges to adhere to adversary procedure but also to ensure that substantial justice is achieved—yet instruction on how to strike this balance is typically

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13. See Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439 (2009); Joy Moses, *Grounds for Objection: Causes and Consequences of America’s Pro Se Crisis and How to Solve the Problem of Unrepresented Litigants*, CTR. FOR AM. PROGRESS (June 2011), <https://cdn.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/objection.pdf>; LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (Sept. 2009), <http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGaInAmerica2009.authcheckdam.pdf>.

14. Jessica K. Steinberg, *Demand Side Reform in the Poor People’s Court*, 47 CONN. L. REV. 741, 755–56 (2015)

scarce.<sup>15</sup> New amendments to the Model Code of Judicial Conduct purport to resolve the dilemma by advising judges that it is not a violation of adversary norms to extend low-level “accommodations” to pro se litigants in order to promote their participation in a case.<sup>16</sup> However, the recommended accommodations—limited to relaxing the use of jargon, making referrals to a lawyer, and explaining basic procedure<sup>17</sup>—do little to help develop meritorious claims or nudge judges closer to accurate decisions. Indeed, courts and ethics bodies seem to cleave to the assumption that, with a small dose of judicial explanation or civility, unrepresented litigants will go on to competently present the facts and issues in their cases—and thus, the delicate ecology of the adversary system remains intact.

Scholars have celebrated the accommodation approach for injecting a measure of flexibility into the judicial role, but in fact, it papers over the depth of adversary process failure in the civil trial courts. It is true that the unrepresented are inexperienced in the procedural realm, and a judicial accommodation may tackle that issue at the margins. However, many unrepresented parties struggle to fulfill a far more important and fundamental task: developing the legal and factual content of their cases. It is not uncommon for a pro se litigant to stare blankly at a judge and utter the words “I’m not sure what to do next.” Even more frequently, unrepresented parties deliver unfocused narratives, skip over key legal elements, or offer information that lacks sufficient specificity to meet the requisite burden of proof. To return to the New Bank case, a judicial accommodation might help Kathleen—a debtor who is highly likely to be unrepresented—amend her complaint,<sup>18</sup> format her pleading,<sup>19</sup> or digest the contents of a ruling laden with legal terminology.<sup>20</sup> But it will not ensure that Kathleen is able to raise the defense that the debt calculation is wrong, the debt is owed by someone else, or the statute of limitations has expired. Furthermore, a procedural accommodation will not assist Kathleen in amassing evidence and case law to support her position in court. In short, the accommodation doctrine grossly over-simplifies

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15. *See infra* Section IV.A.

16. *See infra* Section IV.B.

17. *See infra* Section IV.B.

18. *Breck v. Ulmer*, 745 P.2d 66, 75 (Alaska 1987).

19. *Collins v. Arctic Builders*, 957 P.2d 980, 982 (Alaska 1998), *aff’d*, 31 P.3d 1286 (Alaska 2001).

20. *Gamet v. Blanchard*, 91 Cal. App. 4th 1276, 1284–85 (2001).



the breakdown of the party control norm and the appropriate judicial response.

This Article argues that scholars, courts, and ethics bodies have perpetuated an adversary mirage in small case civil justice at a significant cost. Drawing on examples from the field, I contend that, in many small, two-party cases, judges are responding to an inflexible passive norm by abandoning it entirely. In some matters, judges extensively question parties and witnesses. In others, they relax or eliminate procedural and evidentiary rules. In still others, they raise new legal theories to fit the parties' facts or order relief not requested. Judicial reliance on a range of disparate strategies is ad hoc and inconsistent across cases involving the unrepresented. A single judge might treat two unrepresented litigants in back-to-back proceedings entirely differently, or offer more assistance to certain parties than to others similarly situated. One may debate whether the "active" judicial practices I detail are fair, or likely to produce an accurate result, but it should not be controversial to assert that basic hearing procedures are best not carried out in extemporized, unregulated fashion.

In the narrative of American procedure, the simple, two-party case has been cast as the foil to complex litigation—the setting in which adversary norms continue to thrive without the need for substantial modification. The reality is that, in a preponderance, if not a large majority, of two-party civil cases, adversary norms are breaking down, and upholding the passive "ideal" only deepens judicial role confusion, forces judges to operate in the shadow of unworkable standards of conduct, and fragments procedure into a collection of changing rules. In big litigation, adversary theory and doctrine have evolved to redefine the role of the judge and set new cultural expectations for active court involvement in case development. A similar transformation is needed in small cases to account for the millions of unrepresented parties who cannot advance their own facts and legal theories.

This Article argues that the best available option is the imposition of an affirmative duty on judges to develop the factual and legal record in cases involving unrepresented parties in "majority pro se courts."<sup>21</sup>

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21. I borrow the term "majority pro se courts" from Professor Benjamin Barton, who has used it to describe courts in which most litigants are consistently unrepresented. Benjamin H. Barton, *Against Civil Gideon (and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1227 n.2 (2010).

The affirmative judging model I suggest is closely aligned with procedures already employed at Social Security disability hearings and would regularize judicial practices that are currently guided by instinct and knee-jerk reaction. Some judges are already pursuing this option out of sheer necessity—as they must if they aim to base their decisions on the relevant facts and law. Active judicial development of the record may chafe against orthodox notions of adversary procedure, but would go a long way toward resurrecting the basic procedural values of uniformity, transparency, impartiality, and party voice in small case civil justice.

Part II of this Article describes traditional adversary procedure, focusing on the typical presumption that it functions optimally in two-party cases—despite departures that have become standard in the arena of big litigation. Part III challenges the accuracy of that presumption, contending that the unrepresented majority in today’s civil justice system has triggered a collapse in adversary norms in regular, everyday litigation. Part IV examines the insufficient judicial role modifications proposed by courts and ethics bodies to prop up the flagging adversary system and suggests that the over-simplified response has obscured the degree of process failure in many two-party matters. In Part V, I identify three major costs of imposing outdated adversary theory and doctrine on the lower civil courts. First, judges depart sharply from the passive norm—and do so in an ad hoc manner. Second, their improvised procedures do not always advance a fair result. And third, a divide between theory and practice provokes judicial role confusion and aggravates the trend toward rogue judging. Lastly, Part VI proposes the affirmative judging framework. It is critical that judges gather the information they need to decide cases fairly, and yet, it is also important that judges are guided by an above-board standard of conduct that can be reviewed and honed by the appellate courts. An affirmative duty brings together these strands. Further, it promotes procedural values that existing norms of conduct do not, and encourages a type of adversary evolution that has long been documented—and justified—in “big” or “important” cases.

## II. ADVERSARY PROCEDURE: TRADITIONS, DEPARTURES, AND PRESUMPTIONS

### *A. Traditions*

Adversary procedure underpins the American civil justice system. In the idealized rendering, the parties are in charge of all aspects of litigation and the judge refrains from active participation in the case until a decision must be issued.<sup>22</sup> The norm of party control, as it is sometimes called, is a shorthand way of expressing the expectation that parties will assume full responsibility for investigating their cases, presenting evidence through examination and cross-examination of witnesses, and determining the nature and sequence of legal issues to be decided by the court.<sup>23</sup> In conjunction, the passive judging norm expresses our collective understanding that the proper role of the judge is to receive and process evidence and argument, but not to be actively involved in investigating or shaping the development of either.<sup>24</sup> Adversary procedure is often contrasted with inquisitorial procedure—common in Europe—where the judge investigates facts, determines which evidence and witnesses will play a role in the proceedings, and is charged with ferreting out the truth through active examination of the parties.<sup>25</sup>

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22. See Frost, *supra* note 8, at 457–58 (“Party control over case presentation is described as an essential aspect of the American adversarial system.”); Resnik, *supra* note 5, at 382 (stating that the main idea behind the adversary system is that “parties, not the judge, have the major responsibility for and control over the definition of the dispute.”); Ellen E. Sward, *Values, Ideology and the Evolution of the Adversary System*, 64 *IND. L.J.* 301, 302 (1988) [hereinafter Sward, *Values*] (“The adversary system is characterized by party control of the investigation and presentation of evidence and argument . . .”).

23. Frost, *supra* note 8, at 457–58; Resnik, *supra* note 5, at 382; Sward, *supra* note 22, at 302.

24. See Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 *U. PA. L. REV.* 1031, 1038 (1975); STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 2–4 (1988) [hereinafter LANDSMAN, READINGS].

25. See Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour d’Assises*, 2001 *U. ILL. L. REV.* 791, 797–98, 801–02 (2001); MARY ANN GLENDON, PAOLO G. CAROZZA & COLIN B. PICKER, *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 98 (3rd Ed.2008).

In the traditional depiction of adversary procedure, the judge remains passive throughout the life of a legal case.<sup>26</sup> In the pre-trial period, this means that the judge refrains from engaging the facts and issues in a case. The parties might file a complaint and answer, conduct fact investigation, propound discovery, and discuss settlement—all without the case being brought before a judge.<sup>27</sup> Similarly, at trial, the parties have wide latitude to determine which evidence and issues to bring to the court's attention, and judges are expected to hold back from interjecting in the parties' presentation of facts and arguments.<sup>28</sup> Finally, in post-judgment proceedings, the judge's role continues to be passive. Any relief awarded, either through settlement or court order, is up to the prevailing party to enforce. The judge is not permitted to investigate compliance or assist a party in obtaining a court-ordered remedy, except within the bounds of a formal enforcement action that itself is governed by adversary procedure.<sup>29</sup>

Adversary norms are premised on the notion that passive judges are better able to remain neutral in adjudicating a matter.<sup>30</sup> An active judge risks formulating theories of liability before all evidence has been adduced, and might inadvertently elicit information from the parties in a way that simply builds upon early assumptions.<sup>31</sup> The tendency to seek out information that affirms one's beliefs, known as "confirmation bias," has the potential to compromise impartial decision-making.<sup>32</sup> Lon Fuller best expressed the hazards of

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26. Stephan A. Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 714–15 (1983) [hereinafter Landsman, *Brief Survey*].

27. See Frankel, *supra* note 24, at 1042; Resnik, *supra* note 5, at 384–85.

28. The Supreme Court regularly refers to the principle that courts are "limited to addressing the claims and arguments advanced by the parties." *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011).

29. Chayes, *Role supra* note 6 at 1042 (contrasting public law litigation with traditional litigation, where a judgment terminates the judge's involvement in the matter).

30. See Frankel, *supra* note 24, at 1045 n.27; LANDSMAN, READINGS, *supra* note 24, at 2, 77.

31. See Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW 44 (Harold J. Berman ed., 1961 rev. vol. 7) ("An adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known."); Landsman, *Brief Survey*, *supra* note 26, at 713–15; see also Monroe Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 76 (1998).

32. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 305–07 (discussing the Central Park Jogger Case).

diminishing the parties' role in favor of greater judicial control.<sup>33</sup> He warned that "at some early point a familiar pattern will seem to emerge from the evidence," and a judge who controls case development might not search for evidence that runs counter to her preliminary assessment of the case.<sup>34</sup> Adversary norms hold that a judge who has no prior exposure to the facts or issues in the case at the time formal proceedings commence will be able to withhold judgment until the parties have set forth their legal theories and supported them in full.<sup>35</sup>

Adversary theory retains both historical and present-day currency, and is often articulated as a fundamental tenet of American adjudication. The twin norms of party control and passive judging date back to the founding, and reflect the views of the framers who aimed to both check the power of the State and "vest substantial adjudicatory power in the people."<sup>36</sup> Modern adversarial theory and practice consolidated in the eighteenth and nineteenth centuries, with the adoption of evidentiary rules and "highly structured forensic procedure[s]" that governed the manner in which parties could present their cases orally in court.<sup>37</sup> Formal procedure made it possible to cabin the role of the judge and construct the proper barrier between the decision-maker and the parties.<sup>38</sup>

Scholars have depicted adversary procedure as the "hallmark of American adjudication," with "[t]he virtues . . . so deeply engrained in the American legal psyche that most lawyers do not question it."<sup>39</sup> Others have noted that the "adversarial ethic is a pervasive influence—almost a religion unto itself—that permeates our legal system."<sup>40</sup> Some

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33. See Fuller, *supra* note 31, at 44.

34. See *id.*

35. See Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 527 (1992) (quoting Lord Green as asserting that when a judge questions a witness, he "descends into the arena and is liable to have his vision clouded by the dust of the conflict").

36. Resnik, *supra* note 5, at 381; see generally Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1212–13 (2005).

37. LANDSMAN, READINGS, *supra* note 24, at 15–21.

38. Landsman, *Brief Survey*, *supra* note 26, at 734.

39. Sward, *Values*, *supra* note 22, at 301.

40. John S. Dzienkowski, *Lawyering in a Hybrid Adversary System*, 38 WM. & MARY L. REV. 45, 61 (1997).

have even characterized American adjudication as an “extreme form[]” of adversary process.<sup>41</sup>

There is no question that our cultural self-conception heavily favors the party contest and the silent, impartial judge.<sup>42</sup> Often, the mere mention of the judge-controlled inquisitorial model is surrounded with an “aura of dread and mistrust.”<sup>43</sup> David Sklansky has argued that adversary norms are so embedded in the American psyche that the Supreme Court regularly invokes “anti-inquisitorialism” to drive the development of constitutional doctrine.<sup>44</sup> He cites to several recent cases in which the Court held that procedures reducing party control were so evidently un-American, no further explanation was needed to declare them invalid.<sup>45</sup>

Amalia Kessler also describes courts’ reflexive aversion to inquisitorial elements in procedure.<sup>46</sup> She points to a recent decision by the D.C. Circuit in which the appointment of a post-trial master was struck down on the basis that judicial investigation into the parties’ compliance with a court order “simply is not permissible under our adversarial system of justice . . . .”<sup>47</sup> Although the adversary norms of party control and passive judging do not have direct constitutional lineage, courts typically grant them great deference in determining the proper division of labor and authority in American litigation.<sup>48</sup>

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41. Van Kessel, *supra* note 35, at 407–08.

42. With a skeptic’s eye, Judge Marvin Frankel writes that “for most of us trained in American law, the superiority of the adversary process over any other is too plain to doubt or examine.” Frankel, *supra* note 24 at 1052.

43. Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 557–58 (1973).

44. David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1668–69 (2009).

45. *Id.* at 1636–37. Sklansky cites the cases of *Crawford v. Washington*, 541 U.S. 36 (2004) (striking down use of out-of-court statements as a violation of the Confrontation Clause), *Blakely v. Washington*, 542 U.S. 296 (2004) (striking down mandatory sentencing that relies on judicial fact-finding), and *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (upholding procedural default rules), as examples of the Court developing criminal procedure doctrine on the basis of procedural conformity with pure adversary norms, rather than offering well-reasoned justifications for its holdings).

46. Kessler, *supra* note 36, at 1195 n.66, 1258.

47. *Id.* at 1182–83 (quoting *Cobell v. Norton*, 334 F.3d 1128, 1143 (D.C. Cir. 2003)).

48. Most adversary norms are not enshrined in the Constitution, although some are. These include the Seventh Amendment’s right to a jury trial and the Sixth Amendment’s right to confront adverse witnesses in criminal cases.

*B. Departures*

Though adversary procedure retains its potency in most aspects of American adjudication, complex litigation has transformed the traditional passive judging model.<sup>49</sup> In recent decades, the role of the judge has evolved to meet the demands of newer forms of litigation, particularly those arising out of the increased use of the class action lawsuit and the expansion of constitutional rights in the 1960s and 1970s.<sup>50</sup>

In one embodiment of this evolution, active judicial management of pre-trial proceedings has become the norm in big litigation.<sup>51</sup> Commentators have pointed to the various ways that multiple parties, mountains of discovery, and complicated choice of law and venue questions may combine to thrust the judge “into the trenches” of the case even before formal adjudication begins.<sup>52</sup> For instance, a judge may be called upon to decide whether potential class members have experienced common injuries, or to determine whether an interrogatory properly requests a relevant document. In both instances, judicial intervention in the case occurs well before trial and creates an opportunity for the judge to gain exposure to the facts and issues in the case, or even to actively shape the trajectory of the litigation.

Provisions of the Federal Rules of Civil Procedure and the Civil Justice Reform Act have enshrined an active pre-trial role for judges.<sup>53</sup>

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49. See Chayes, *Role supra* note 6, at 1283–84, 1298; Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1985 (1999); Resnik, *supra* note 5 at 376–78; William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 372 (2001).

50. See Abram Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 6 (1982).

51. See Resnik, *supra* note 5, at 378. Judith Resnik first identified this trend and coined the term “managerial judges” to describe active judicial involvement in pre-trial affairs. See also Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027, 1029–30 (2013).

52. Resnik, *supra* note 5, at 391.

53. The Civil Justice Reform Act urges judges to communicate regularly with attorneys during pre-trial proceedings, engage in early settlement and case management conferences, and to pursue early involvement with litigation events. See 28 U.S.C. § 471 (2012). The Federal Rules of Civil Procedure likewise empower judges to make use of pre-trial conferences, to facilitate settlement, and to establish “early and continuing control” over a case. See FED. R. CIV. P. 16.

These provisions create wide latitude for the judge to preside over settlement talks, issue scheduling orders, and require parties to attend case management conferences.<sup>54</sup> Arthur Miller refers to pre-trial judicial management as a “significant modification, and perhaps an unquantifiable debilitation, of the historic bilateral adversary system.”<sup>55</sup> Nonetheless, these pre-trial judicial management devices are now seen as indispensable to the efficient handling of large-scale disputes.<sup>56</sup>

In a similar vein, an active post-trial role for judges has become typical in major public law cases.<sup>57</sup> Judges now frequently investigate and monitor the enforcement of remedies, particularly where relief involves forward-looking reform of large public institutions.<sup>58</sup> For instance, take the police misconduct case of *Allen v. City of Oakland*, in which well over 100 plaintiffs alleged multiple counts of excessive force.<sup>59</sup> The resulting consent decree awarded not only damages to the aggrieved plaintiffs but also required the police department to implement several institutional reforms.<sup>60</sup> In keeping with what has become regular practice in such cases, the judge appointed a special master to investigate police compliance with the required institutional

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54. *Id.*

55. Arthur R. Miller, *Simplified Pleadings, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 296–97 (2013).

56. See Steven Baicker-McKee, *Reconceptualizing Managerial Judges*, 65 AM. U. L. REV. 353 (2015) (recommending that judicial management of pre-trial litigation activities be required, rather than simply encouraged).

57. See Chayes, *Role*, *supra* note 6, at 1298, 1301; MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* 12–13 (1998); Kessler, *supra* note 36, at 1186; Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 399–400 (2003) [hereinafter Sward, *History*]; David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1018–21 (2004); John Choon Yoo, *Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1137 (1996).

58. Kessler, *supra* note 36, at 1194; Zaring, *supra* note 57, at 1018–21.

59. *Allen v. City of Oakland*, No. C00-4599, 2012 WL 5949619 (N.D. Cal. Nov. 28, 2012).

60. The consent decree required the implementation of more than fifty reforms, including timely internal investigations of police misconduct, integrity testing for officers who are the subject of repeated complaints, sanctions for officers who do not relay citizen complaints to the department, and adoption of a policy to accept anonymous citizen complaints. Order, *Allen v. City of Oakland*, No. C00-4599, 2012 WL 5949619 (N.D. Cal. Nov. 28, 2012).



reforms.<sup>61</sup> The court has retained jurisdiction over the *Allen* case for more than twelve years, and the judge will likely exercise active control over the affairs of the Oakland Police Department into the foreseeable future.<sup>62</sup> This sort of post-trial management is *de rigueur* in civil rights cases, as implementation of even agreed-upon injunctive relief can prove elusive. Although some scholars contend that institutional reform litigation is on the wane,<sup>63</sup> it “remains a vibrant and active part of the law, governing a variety of different types of local institutions.”<sup>64</sup>

Last, scholars have observed that, in important appellate matters, judges have a semi-regular habit of raising a legal issue or fact the parties omitted.<sup>65</sup> These practices—*sua sponte* judicial issue creation and reliance on facts untested through the adversary process—are not necessarily new modes of judicial activism, but they serve as equally notable departures from adversary norms. Judges are most likely to engage in these departures when the resulting decision will issue “broad guidelines for future conduct.”<sup>66</sup> Amanda Frost provides an example of judicial issue creation in the case of *Dickerson v. United*

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61. For the reports prepared by the independent monitor regarding the Oakland Police Department's compliance with the consent decree, see List of reports for *Allen v. City of Oakland*, Case No. C00-4599, N.D. CALI., <http://www.cand.uscourts.gov/pages/964>, (last visited Sept. 21, 2016).

62. *Id.*

63. In particular, public law cases aimed at prison reform and school desegregation have been stymied by Congressional and Supreme Court activity limiting available remedies. See Prison Litigation Reform Act, 18 U.S.C. § 3626(b)(1)(A) (2012) (permitting prisons to seek termination of injunctive relief after a short period of judicial monitoring); *Freeman v. Pitts*, 503 U.S. 467, 490, 492 (1992) (granting lower courts discretion to return a school to local control where the school district has substantially complied with a desegregation order).

64. Zaring, *supra* note 57, at 1021 (noting that “vast numbers of government institutions throughout the country continue to be subject to the supervision of district courts”).

65. Frost, *supra* note 8, at 455, 461–62 (addressing the courts' habit of raising legal issues); Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 27 (2011) (discussing the courts' propensity for considering facts not brought forward by the parties); Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, 1255 (2002) [hereinafter Barry Miller, *Sua Sponte*] (referring to the regularity with which courts raise issues the parties have not presented and argued).

66. Barry Miller, *Sua Sponte*, *supra* note 65, at 1273; see also Frost, *supra* note 8, at 509 (noting that judicial issue creation is necessary when a court must reframe an issue because a party has misrepresented the law “either intentionally or by mistake”).

*States*.<sup>67</sup> In *Dickerson*, a criminal confession case, both the defendant and the government framed their arguments to the Fourth Circuit around a Miranda issue: the defendant sought to suppress his confession on the basis that he was never read his Miranda rights, while the government asserted that the police had substantially satisfied their constitutional obligations.<sup>68</sup> Despite the parties' arguments, the Fourth Circuit disregarded the Miranda issue and *sua sponte* invoked a controversial federal statute to decide the case.<sup>69</sup> Neither party had briefed or raised the statutory issue, but the court found it dispositive.<sup>70</sup>

As an example of extra-record fact-finding, Brianne Gorod points to *Citizens United v. FEC*.<sup>71</sup> In that case, the Supreme Court reached beyond the facts brought forward by the parties to support a key aspect of its ruling. Specifically, the Court relied on an amicus brief and an IRS bulletin to find that the creation of a political action committee was “burdensome,” and therefore, did not constitute an alternative mechanism through which corporations could speak.<sup>72</sup> The parties did not introduce these facts into the record, nor did the Court ask the parties to test them through the adversary process before granting them substantial weight.<sup>73</sup> In other high-profile cases, the Court has followed a similar process, often obtaining extra-record empirical evidence to inform its decisions, even where those facts are the subject of debate and discovered outside any formal filing in the case.<sup>74</sup> Judicial issue creation and fact-finding fall outside traditional adversary norms, but have been defended as necessary departures for courts that

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67. Frost, *supra* note 8, at 468–96; *see* *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999).

68. *See Dickerson*, 166 F.3d 667, 673–76.

69. *Id.* at 692.

70. *Id.* at 686; *see also* Sarah M. R. Cravens, *Involved Appellate Judging*, 88 MARQ. L. REV. 251 (2004); Barry Miller, *Sua Sponte*, *supra* note 65, at 1255 (listing several famous examples of Supreme Court cases in which the Justices raised and decided a new legal issue).

71. Gorod, *supra* note 65, at 28–29.

72. *Id.*

73. *Id.*

74. Gorod also discusses the Prop 8 case, in which the Ninth Circuit looked outside the record for information on how children of same-sex parents fare. *Id.* at 40–41.

engage in law development and are expected to produce accurate, fully informed decisions with high precedential value.<sup>75</sup>

### C. Presumptions

Despite well-recognized departures from adversary procedure, the consensus is that our system “generally lives up to [the] adversarial ideal”<sup>76</sup> and is “more adversarial than most.”<sup>77</sup> Active judging has been cast as a “big case” phenomenon, rather than an evolution of adversary norms throughout the entire civil justice system.<sup>78</sup> As the trend of managerial judging mushroomed in the 1980s, John Langbein was quick to point out that the importance of the development should “not be overstated,” as “many American courtrooms” were left “untouched” by increasing judicial control.<sup>79</sup> More recently, Ellen Sward has argued that departures from adversary procedure remain limited to certain contexts.<sup>80</sup> She notes that “[c]omplex litigation, involving multiple parties or difficult scientific or social issues, is the area where the adversary system has undergone the most significant modification.”<sup>81</sup> Jay Tidmarsh has likewise suggested that variations

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75. Judicial issue creation and fact-finding are particularly prevalent in the highest levels of the judicial system. See Michael Abramowicz & Thomas B. Colby, *Notice-And-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 972 (2009) (noting that courts regularly resolve cases “by employing legal reasoning and citing legal authorities not suggested by the parties” and discussing a study of 112 cases decided by a state supreme court in a single year which found that about half of all legal authorities cited by the court were not mentioned by counsel in briefs or arguments).

76. Gorod, *supra* note 65, at 3.

77. Resnik, *supra* note 5, at 382.

78. See LANDSMAN, READINGS, *supra* note 24, at 30 (discussing the evolution of judicial passivity in complex litigation); see also Erichson, *supra* note 49, at 1985; Gorod, *supra* note 65, at 26–27; Kessler, *supra* note 36 at 1186; Rubenstein, *supra* note 49, at 371–72; Sward, *Values* *supra* note 22, at 327, 346–51. Judith Resnik suggests that the managerial judge also appears in regular litigation; however, she cites a large products liability case as regular despite its potential to affect thousands of consumers and the financial bottom line of multinational corporations. Resnik, *supra* note 5, at 386–91. This Article refers to a different kind of “regular” case—one that involves two parties and very little money, and only affects the individuals that are party to the suit. It is difficult to find reference to a managerial or active judge that emerges within such a case.

79. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 858, 860 (1985).

80. Sward, *Values*, *supra* note 23, at 326.

81. *Id.*

from adversarial process are most prominent in a “set of cases,” principally those that can be defined as “polycentric,” “sprawling,” and “complex.”<sup>82</sup> Indeed, active judging is often defended precisely because supporters view it as a model that is selectively used, born of necessity, and relied upon only in significant cases affecting large classes of future litigants.<sup>83</sup>

By contrast, the typical presumption is that the adversary paradigm continues to thrive in ordinary, two-party cases where the judge “is focused on dispute resolution”<sup>84</sup> and “applies settled law.”<sup>85</sup> The courts themselves relegate discussions of adversary evolution to the realm of complex litigation. The major source of official guidance on active judging, the Manual for Complex Litigation, developed by the Federal Judicial Center and now in its fourth incarnation, identifies its goal as addressing “the trial judge’s heightened role” in big, multi-party federal cases affecting such areas as mass torts, antitrust, securities, and patent law.<sup>86</sup> It is regularly updated to take into account the ever-increasing complexity of litigation and to set forth best practices for the judge to “exercise extensive supervision and control” over pre-trial, trial, and post-trial aspects of large-scale cases.<sup>87</sup> No similar manual discusses modification of the judicial role in two-party settings. In fact, the Manual itself indicates that state courts might find its contents useful primarily in handling cases that converge with a federal matter.<sup>88</sup>

At a theoretical level, there is every reason to expect that adversary norms would perform well in the “small case” civil justice system. Many two-party cases tend to be relatively simple, implicating small amounts of money or raising disputes with discrete issues that affect

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82. Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 563–65 (2006). Other commentators have also taken the position that non-adversarial elements most commonly infuse “high stakes cases that [a]re especially complex.” See Kessler, *supra* note 36, at 1196–97; see also Erichson, *supra* note 49, at 1988 (referring to changes in the adversarial model in mass tort cases due to the complexity of these matters); Rubenstein, *supra* note 49, at 371–73 (discussing the private law class action as joining other complex private and public law disputes as cases in which an active judge is necessary).

83. Frost, *supra* note 8, at 509–10; Barry Miller, *Sua Sponte*, *supra* note 65, at 1273.

84. Frost, *supra* note 8, at 495.

85. Gorod, *supra* note 65, at 10.

86. MANUAL FOR COMPLEX LITIGATION (FOURTH) 1 (2004) [hereinafter MANUAL].

87. See *id.* § 10.1.

88. See *id.* at 1.

only the parties to the litigation. A child support case, for example, involves basic fact-finding around the parents' income and the financial needs of the child, all in accordance with well-established guidelines.<sup>89</sup> A landlord-tenant case revolves, on average, around a single month of missed rent payment, often totaling less than \$1000.<sup>90</sup> Neither of these case types—nor most others in the civil justice system—requires a judge to manage novel issues, numerous parties, complex discovery, expert testimony, or wide-ranging remedies. Furthermore, these cases do not invoke the need for the issuance of broad principles that will bind large categories of non-parties well into the future; judges function squarely in their dispute resolution roles.<sup>91</sup> As such, it appears perfectly feasible to rely on the parties to advance their bread-and-butter cases with minimal judicial intervention—or so the thinking goes.

Moreover, the relatively unchanging nature of small cases over the course of American history also provides reason to think that adversary norms would remain relevant in this arena. The adversary system emerged in the eighteenth and nineteenth centuries as a method of adjudicating disputes involving two parties, and most of the matters in today's trial courts still fit that general mold.<sup>92</sup> Whereas the large-scale private or public law case is a recent, and dramatic, development requiring new modes of adjudication, ordinary, two-party matters have undergone no similar transformation.<sup>93</sup> Perhaps scholars and

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89. CARMEN SOLOMON-FEARS, CONG. RESEARCH SERV., RS22380, CHILD SUPPORT ENFORCEMENT: PROGRAM BASICS 4 (2013), <https://www.fas.org/sgp/crs/misc/RS22380.pdf>. For an example of a state statute setting forth child support guidelines, see 1987 Fla. Sess. Law Serv. 419–36 (West).

90. See Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 551, 555 n.61 (1992) (reporting that seventy-eight percent of eviction cases in Baltimore revolved around missed rent payment of one month). The fair market rent in Baltimore for FY2015 was \$985. See U.S. DEP'T OF HOUS. & URBAN DEV., FINAL FY 2015 FAIR MARKET RENT DOCUMENTATION SYSTEM, <https://www.huduser.gov/portal/datasets/fmr/fmrs/docsys.html?data=fmr15>.

91. Frost, *supra* note 8, at 494–95; Gorod *supra* note 65, at 10.

92. See JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW 691–92, 751–54 (2009) (providing depictions of early adversary trials in the criminal context); see also Mark H. Lazeron, *In the Halls of Justice the Only Justice is in the Halls*, in THE POLITICS OF INFORMAL JUSTICE 119, 123 (Richard L. Abel ed., 1982) (noting that, in New York, summary proceedings have existed in landlord-tenant cases since 1820).

93. Sward, *History*, *supra* note 57, at 396, 406 (asserting that trials in 1836 looked quite similar to trials today); see also Lawrence M. Friedman & Robert V. Percival, *A Tale of Two*

courts have seen no reason to re-assess the viability of adversary norms in ordinary litigation, as this is the very setting in which they were initially designed to operate.

The presumption that adversary norms hold constant in regular, two-party litigation is a presumption that nearly ninety-nine percent of civil cases operate in this tradition.<sup>94</sup> However, as Part III demonstrates, a quick detour to the state courts reveals that this presumption fails to account for a major and recent upheaval in the civil justice system: the rise of an unrepresented majority.

### III. ADVERSARY NORMS AND THE UNREPRESENTED MAJORITY

The state courts are flooded with cases related to consumer debt, divorce, child custody and support, paternity, wage and hour, landlord-tenant, abuse and neglect, probate, and domestic violence.<sup>95</sup> In most jurisdictions, commercial contract disputes and tort matters occupy a minority, but still significant, portion of the civil dockets as well.<sup>96</sup> It is in this context—and in these matters—that the norms of party control and passive judging are still expected to define the contours of litigation.<sup>97</sup>

Increasingly, however, a great majority of litigants in the state courts are unrepresented by counsel.<sup>98</sup> In some case types, such as

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*Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 267, 280–83 (1975) (reporting that a similar mix of property, contract, family law, and tort cases occupied the courts both in 1890 and in 1970, although the frequency of each case type has changed significantly).

94. In 2013, there were 22.1 million civil cases filed in the state courts and 271,950 civil cases filed in the federal courts, meaning the adversary presumption applies to nearly ninety-nine percent of cases. See EXAMINING THE WORK OF STATE COURTS, *supra* note 12, at 7; *Federal Judicial Caseload Statistics 2013*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2013>.

95. See Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 743 (2015).

96. EXAMINING THE WORK OF STATE COURTS, *supra* note 12, at 1, 11 (reporting that six percent of matters in the state courts are tort cases); STATE OF CONN. JUDICIAL BRANCH, (reporting that, in Connecticut, in 2013, 4.4 percent of new civil cases were non-collection contracts cases).

97. Certainly, there are two-party cases in the federal courts as well. However, the vast majority of two-party cases, and the largest problems with lack of representation, occur in the state courts.

98. Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOYOLA L. REV. 869, 869–70, (2009). This figure is also on the rise in the federal courts. See Victor D. Quintanilla,

family law, a high proportion of cases involve two unrepresented parties.<sup>99</sup> In other matters, such as consumer debt, one party (the debtor) is almost certain to lack attorney representation, while the other party (the creditor) is very likely to be represented. For instance, The Task Force to Expand Legal Services in New York reported in 2011 that ninety-nine percent of borrowers in “hundreds of thousands” of consumer credit cases are unrepresented.<sup>100</sup> Other representative statistics include a seventy-five percent pro se rate for tenants in Maine;<sup>101</sup> a ninety-four percent incidence of unrepresented parties in domestic violence cases in Arkansas;<sup>102</sup> and an eighty percent rate of pro se litigants in family law cases in one Wisconsin County.<sup>103</sup> In New Hampshire, eighty-five percent of *all* civil cases in the district courts involve an unrepresented party.<sup>104</sup> Perhaps the only two-party case types, in which unrepresented parties are not now the dominant norm, are tort and commercial contract matters,<sup>105</sup> which, together, typically comprise about ten percent of a court’s docket.<sup>106</sup>

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et al., *The Signaling Effect of Pro Se Status*, 8 LAW & SOC. INQUIRY (forthcoming 2016) (on file with author).

99. BOSTON BAR ASS’N TASK FORCE ON UNREPRESENTED LITIGANTS, REPORT ON PRO SE LITIGATION 1, 5, <https://www.bostonbar.org/prs/reports/unrepresented0898.pdf> (last visited Sept. 23, 2016).

100. JONATHAN LIPPMAN, THE STATE OF THE JUDICIARY 2011: PURSUING JUSTICE 1, 4 (2011), <http://www.nycourts.gov/admin/stateofjudiciary/SOJ-2011.pdf>.

101. See John C. Sheldon, *Thinking Outside of the Box About Pro Se Litigation*, 23 ME. BAR J. 90, 91 (2008).

102. JOHN M. GREACEN, SERVICES FOR SELF-REPRESENTED LITIGANTS IN ARKANSAS: A REPORT TO THE ARKANSAS ACCESS TO JUSTICE COMMISSION 2, 10 (2013), <http://www.arkansasjustice.org/sites/default/files/file%20attachments/Arkansas%20Final%20Report%207-26-13.pdf> (basing the statewide statistics on a survey of three counties).

103. Marsha M. Mansfield, *Litigants Without Lawyers: Measuring Success in Family Court*, 67 HASTINGS L.J. 1389, 1401 (2016) (stating that in Dane County, Wisconsin 1664 out of 2084 new family law cases were filed by pro se parties).

104. N.H. SUPREME COURT TASK FORCE ON SELF-REPRESENTATION, CHALLENGE TO JUSTICE: A REPORT ON SELF-REPRESENTED LITIGANTS IN NEW HAMPSHIRE COURTS 1, 2 (2004), <http://www.courts.state.nh.us/supreme/docs/prosereport.pdf>.

105. For instance, in Washington state, the pro se rate in tort and commercial cases remained flat at two to three percent over a period of six years. JUDICIAL SERVS. DIV. ADMIN. OFFICE OF THE COURTS, AN ANALYSIS OF PRO SE LITIGANTS IN WASHINGTON STATE 1995–2000 1, 3 (2001), [https://www.courts.wa.gov/wscpr/docs/Final%20Report\\_Pro\\_Se\\_11\\_01.pdf](https://www.courts.wa.gov/wscpr/docs/Final%20Report_Pro_Se_11_01.pdf) (extrapolating from data available from ten counties).

106. See note 96 and accompanying text.

The Achilles heel of adversary theory, as it applies to ordinary cases, is that litigants must have skill and resources—and be equally matched in those departments—in order for the party-controlled contest to achieve fair results.<sup>107</sup> For this reason, it is typically assumed that a party advancing a matter within the adversary system will need to rely on an attorney to pilot a course through intricate legal questions and mechanisms.<sup>108</sup> Some have noted that the unequal capabilities of two attorneys may undermine fairness in ordinary litigation, as the more skillful attorney might be able to achieve superior results on grounds unrelated to the merits of the case.<sup>109</sup> In today's climate, however, most parties in the civil courts are unrepresented *entirely*, and yet the impact of mass-scale lack of representation on adversary procedure has been almost completely overlooked.

The unrepresented majority in the civil justice system has ruptured adversary norms in a series of chain reactions, which I will set forth. To bring or defend a case, the norm of party control requires that the litigant have the requisite knowledge to articulate legal theories, identify and admit key evidence, and make proper requests for relief. However, unrepresented parties often do not understand which issues are important to raise, and cannot, on their own, get all relevant facts and requests before the court.<sup>110</sup> In turn, a passive judge, who relies on the parties to perform the basic tasks of litigation, is often unable to arrive at a reasonably accurate determination of the facts and issues in the case. When unrepresented parties are unable to execute their case duties effectively, the passive norm no longer holds legitimacy as a pathway to a fair, merits-based result.<sup>111</sup>

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107. LANDSMAN, READINGS, *supra* note 24, at 4.

108. *Id.*; Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1285 (1975); Nancy Leong, Gideon's *Law-Protective Function*, 122 YALE L. J. 2460, 2469 (2013).

109. LANDSMAN, READINGS, *supra* note 24, at 4.

110. See Steinberg, *supra* note 95, at 801; Super, *supra* note 9, at 407; PUB. JUSTICE CTR., JUSTICE DIVERTED: HOW RENTERS ARE PROCESSED IN THE BALTIMORE CITY RENT COURT 1, 20, 33 (2015), [http://www.publicjustice.org/uploads/file/pdf/JUSTICE\\_DIVERTED\\_PJC\\_DEC15.pdf](http://www.publicjustice.org/uploads/file/pdf/JUSTICE_DIVERTED_PJC_DEC15.pdf).

111. Some have argued that a judge within the adversary system has only a "limited duty" to pursue the truth or "do justice," as the appearance of judicial impartiality is far more important. Van Kessel, *supra* note 35, at 527. While this may be true in individual cases, a justice system cannot be considered sound or valid if, as a whole, it fails to produce accurate results in most cases. Therefore, it is at least an implied goal of adversary process, and certainly an explicit



The case of *Lombardi v. Citizens National Trust & Savings Bank* illustrates the profound effects of pro se litigation on the passive judicial norm.<sup>112</sup> Mr. Lombardi, an unrepresented party, brought an action against the executor of an estate to recover on a rejected claim. At trial, Mr. Lombardi produced a letter purportedly signed by the decedent in which she acknowledged a debt to Mr. Lombardi. Opposing counsel objected to admission of the letter into evidence for failure to lay the proper foundation. Mr. Lombardi attempted to introduce a second letter from a witness attesting to the authenticity of decedent's signature. The second letter was excluded as hearsay. Finally, Mr. Lombardi appealed to the court for assistance in establishing the authenticity of his proposed exhibit. He said to the judge, "I don't know what to do."<sup>113</sup> The judge responded, "You will have to proceed or not proceed, that is all. I cannot help you."<sup>114</sup> Following this exchange, Mr. Lombardi rested and his opponent moved successfully for dismissal of the suit.<sup>115</sup>

These dynamics, in which the unrepresented party lacks the technical and substantive skill to fulfill the norm of party control and yet the judge remains passive, destabilize a fair adjudicatory process. Mr. Lombardi was shut out of his own case, even though he had in his possession a potentially determinative document. He appealed to the judge for assistance in overcoming the objections of his skilled opponent, but was greeted with stony silence. Ultimately, implementation of adversary procedure in Mr. Lombardi's case left the judge unable to perform his key fact-finding role, as only one party's evidence made it into the record.

Not every case is as stark as *Lombardi*, and yet even where the judge is more permissive and the unrepresented party has some ability to trudge through case presentation, the passive norm remains equally

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goal of many judges, that fair outcomes are reached. See Frankel, *supra* note 24, at 1033 (noting that the "paramount objective" of a trial is "the truth").

112. See *Lombardi v. Citizens Nat'l Tr. & Sav. Bank of L.A.*, 289 P.2d 823 (Cal. App. 1955).

113. *Id.* at 824.

114. *Id.*

115. *Id.* *Lombardi* is an early case but represents the continued approach of many courts today, even though the pro se rate has increased exponentially. Despite this being an old case, I chose to include it as an example because the appellate decision includes an unusual amount of dialogue from the trial court that presents a clear picture of the types of interactions judges often have with unrepresented parties today.

problematic. Consider this hypothetical case example, drawn from practice, which brings a more nuanced adversary breakdown into sharper focus:

Anita, a long-term renter in a low-income housing complex, files suit against her landlord for breach of the implied warranty of habitability. She obtains a building inspector's report, which details multiple violations of the housing code, and a month prior to filing her lawsuit, sends it to her landlord along with her rent check. Even though the report documents bedbug and rodent infestation, broken locks and windows, and a leaky bathtub that has caused mildew to spread throughout the apartment, the landlord does not acknowledge receiving the report and makes no repairs.

At the evidentiary hearing in her case, Anita appears without counsel. She has a full-time job as a cashier at a local drugstore but, at minimum wage, she makes less than \$16,000 a year and cannot afford an attorney. The judge presiding over the matter asks Anita if she would like contact information for an attorney; he offers to continue the case for a month to allow her time to seek representation. Anita declines, as the week prior she had taken off a day from work to visit a Legal Aid office, and was told the wait to see an attorney would be more than six months.<sup>116</sup> The judge allows Anita to testify in narrative form, but advises that he cannot assist her in presenting her case. Anita speaks to the substandard conditions in her unit, her frustration at her landlord's recalcitrance in responding, and the asthma attacks suffered by her son, which his doctors believe are exacerbated by the mildew and rodents. She also swerves off on a lengthy tangent, speaking at some length about a dispute she had with her landlord a year ago regarding a guest staying in her unit—and the judge allows her to air her unrelated grievance.

Anita neglects to mention that she sent her landlord a copy of the building inspection report more than a month ago; she does not know that “notice” of the conditions is a required legal element in her habitability case. The judge does not ask her to elaborate on this issue, or even flag it as relevant. When Anita attempts to introduce the inspector's report into evidence, the landlord's attorney objects on the

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116. Anita's experience is not uncommon in this regard. There is only one federally funded lawyer available for every 6,415 eligible low-income individuals. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS I (2009), <http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGapInAmerica2009.authcheckdam.pdf>.

basis that she has failed to authenticate it. The judge sustains the objection and asks Anita if she would like to try again. He explains that she would need to provide information on the report's author, when it was produced, and its chain of custody. Flustered, Anita moves on.

At the conclusion of the case, Anita tells the judge she just wants the landlord to make repairs. She is unaware that, in her jurisdiction, damages are the only prescribed remedy in habitability matters—injunctive relief is not available. While Anita has experienced financial loss, she does not produce a medical report documenting a connection between the housing conditions and her son's health issues, nor does she bring a record of medical bills. The judge asks Anita if there is anything else she would like to add, and she shakes her head. The judge utters “judgment for landlord” into the record and tells Anita that she failed to establish the statutory element of “notice,” and also failed to bring forward sufficient evidence of both the violations and her financial losses.

Anita's case is illustrative of many cases on a modern-day civil docket, and it underscores the declining feasibility of adversary norms to adjudicate cases fairly in a majority pro se court. Even in a substantively simple proceeding, like a habitability matter—in which a few statutory elements and a handful of documents govern the case—Anita could not propel critical evidence into the judge's line of sight or connect the dots between her injury and an obtainable form of relief. In Anita's example, the judge was flexible and patient, and yet the overriding norm of party control worked at odds with an accurate case result. Anita had an opportunity to share her narrative, but in the process, committed factual, legal and procedural errors that doomed her case, despite its potential merit. She failed to provide testimony on a legal element she had satisfied, was unable to comply with procedural rules, failed to seek admission of readily available medical reports and bills, and did not request a legally cognizable remedy. Indeed, the judge in Anita's case might be viewed as a high-level procedural gatekeeper, rather than a skilled fact-finder, as he placed greater emphasis on enforcing the rules than he did on bringing forward facts and evidence that were readily available.

Anita and *Lombardi* are not outlier examples, but two iterations of a much larger phenomenon. Researchers have noted that unrepresented parties routinely struggle to develop their cases. The

National Center for State Courts has compiled a list of 140 discrete barriers that pro se parties must overcome to successfully litigate a case to completion.<sup>117</sup> These include using proper legal language in a pleading, recalling accurate and specific details about a past event, producing “legitimate” documents as evidence, comprehending the ramifications of multiple pending cases, and taking action to enforce a judgment.<sup>118</sup> Through in-court observations, researchers have concluded that unrepresented parties perform few of these tasks well.<sup>119</sup>

Trial judges who preside over majority pro se dockets often recount the difficulties faced by litigants in their courtrooms. In significant studies conducted under the auspices of the American Bar Association,<sup>120</sup> the American Judicature Society,<sup>121</sup> and the State Justice Institute<sup>122</sup> up to ninety percent of judges indicate that unrepresented parties are likely to commit errors in carrying out the major tasks expected of them within the adversary system—namely, production of evidence, compliance with procedural rules, and examination of witnesses. Judges are also candid in expressing the concern that, as a result of substantive or procedural mistakes, the unrepresented are often barred from legal redress.<sup>123</sup>

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117. See Ronald W. Staudt & Paula L. Hannaford, *Access to Justice for the Self-Represented Litigant: An Interdisciplinary Investigation by Designers and Lawyers*, 52 SYRACUSE L. REV. 1017, 1028 (2002).

118. See *id.* at 1035–47.

119. See *id.*; see also Steinberg, *supra* note 95, at 754–59 (summarizing the available research on outcomes and experiences for pro se litigants).

120. LINDA KLEIN, ABA COALITION FOR JUSTICE, REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS 2 (2010), [http://www.abajournal.com/files/Coalition\\_for\\_Justice\\_Report\\_on\\_Survey.pdf](http://www.abajournal.com/files/Coalition_for_Justice_Report_on_Survey.pdf).

121. Ryan C. Munden, *Access to Justice: Pro Se Litigation in Indiana*, AM. JUDICATURE SOC'Y, Fall 2005.

122. Jona Goldschmidt et al., *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Managers*, AM. JUDICATURE SOC'Y 3, 9 (1998), [cdm16501.contentdm.oclc.org/cdm/ref/collection/accessfair/id/106](http://cdm16501.contentdm.oclc.org/cdm/ref/collection/accessfair/id/106).

123. See Beverly W. Snukals & Glen H. Sturtevant, Jr., *Pro Se Litigation: Best Practices from a Judge's Perspective*, 42 U. RICH. L. REV. 93, 95 (2007) (stating that pro se parties often fail to obtain remedies because “. . . they neglect to file a bill of complaint within the applicable statute of limitation, suffer a default judgment for failing to file their answer within the applicable statutory deadline, or have their case dismissed on a demurrer for failing to adequately plead their cause of action.”); see also Dorothy J. Wilson & Miriam B. Hutchins, *Practical Advice From the Trenches: Best Techniques for Handling Unrepresented Litigants*, 51 CT. REV. 54, 57 (2015) (advising that procedural and technical deficiencies in a pro se filing can lead to legally inaccurate results, as the pleadings “. . . may contain rambling narratives about any number of matters . . .

Enhancements to the judicial role, such as those present in complex litigation, have been regarded as irrelevant or inappropriate in low-level state court cases where features such as multiple parties, voluminous discovery, expert testimony, and precedential questions of law are absent. And yet, due to the rise of an unrepresented majority, adversary norms are now failing in the very context where they are expected to conform to traditional notions. Rather than grapple with this seismic shift in the viability of American procedure, however, courts and ethics boards have buried it from public view. Their approach to addressing the colliding forces of pro se litigation and passive judging are taken up in the next part.

#### IV. COURTS, ETHICS, AND THE PASSIVE NORM

In contrast to complex litigation, where a plethora of manuals and rules now detail best practices for active judging, the various bodies that regulate judicial conduct have not articulated a need for adversary evolution in the two-party civil justice system. Very few courts have taken up any discussion of the judicial role in two-party cases involving the unrepresented, and those that have often dispense contradictory guidance, or simply reiterate the maxim that judges must remain passive, regardless of whether such conduct leads to an unfair outcome.<sup>124</sup> New ethical guidelines<sup>125</sup> purport to address the dilemma by allowing judges to extend basic *accommodations* to the unrepresented, but as this Part will show, the contemplated accommodations focus on explanation, referrals, and judicial demeanor, none of which solve the core issue: that pro se parties cannot effectively develop or present legal theories or facts. In effect, existing doctrine perpetuates the fiction that, with only superficial modifications, adversary procedure remains a largely operational framework for adjudicating pro se cases.

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[and] may consist of a hodgepodge of documents and information that expresses the litigant's dissatisfaction . . . but is only loosely woven together").

124. See *infra* Section IV.A.

125. See *infra* note 148 and accompanying text.

*A. Sparse, Unhelpful and Contradictory Court Decisions*

Despite the frequency with which trial judges must contend with unrepresented parties, appellate courts have paid very little attention to the proper role of the judge in such proceedings. In fact, only a few dozen opinions address the intersection of pro se litigation and adversary norms.<sup>126</sup> Moreover, the courts' guidance is often unhelpful or contradictory. Many decisions cleave to the passive norm and reject the premise that pro se status might be a reason to re-think the judicial role. Other courts appear more attuned to the failures of adversary process, but provide conflicting directives on whether judges should pursue fairness or proper procedure.

The case of *Fitzgerald v. Fitzgerald* provides an example of the courts' emphasis on the norm of party control.<sup>127</sup> In that case, an unrepresented wife claimed a non-marital interest in the couple's real property, but neglected to provide testimony to support the \$10,000 amount she claimed in her pleading to have contributed toward the property.<sup>128</sup> The Minnesota Court of Appeals dismissed her plea to supplement the factual record, holding that pro se parties are ". . . held to the same standards as attorneys and must comply with court rules . . ." in putting on their cases.<sup>129</sup> In a second example, *Wauwasha County v. Graf*, a tax foreclosure case, the Wisconsin Supreme Court was critical of the lower court for *sua sponte* raising a dispositive legal issue that the pro se party herself had failed to put forward.<sup>130</sup> The court emphasized that a trial judge has no duty to ". . . walk *pro se* litigants through the procedural requirements or to point them to the proper substantive law."<sup>131</sup> Numerous other courts have followed suit, upholding basic adversarial principles while ignoring the ramifications

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126. See Cynthia Gray, *Reaching Out Or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 NAT'L ASS'N ADMIN. L. JUDICIARY 97 (2007) [hereinafter Gray, *Reaching Out*] for comprehensive treatment of appellate cases touching on the role of the judge in handling matters involving unrepresented parties. It may well be that very little case law touches on the pro se issue because so few lawyers are available to appeal such cases.

127. *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119–20 (Minn. Ct. App. 2001).

128. *Id.*

129. *Id.*

130. *Wauwasha Cty. v. Graf*, 480 N.W.2d 16, 19–20 (Wis. 1992).

131. *Id.* at 20.

of obvious deficiencies in pro se case presentation.<sup>132</sup> Courts that hew to orthodox notions of adversary procedure effectively advise judges that *Lombardi* represents the proper approach for resolving millions of divorce, eviction, and consumer disputes: the party that can navigate procedure wins the contest, and no recalibration of the judicial role should be undertaken to protect litigants who cannot prevail on those terms.

Some jurisdictions cling so stubbornly to the passive norm that judges have been discouraged from providing even the most basic information to an unrepresented party, lest they be seen as an advocate for one side. In one prominent example, a debate played out in several circuits over the propriety of having judges advise unrepresented parties of the duty to submit counter-affidavits in opposition to a motion for summary judgment.<sup>133</sup> To be clear, the controversy did not contemplate judicial assistance in *crafting* the counter-affidavits; it simply centered around whether a judge should inform pro se parties that a publicly available rule of civil procedure requires submission of a particular form of evidence—written affidavits—in order to survive a motion for summary judgment.<sup>134</sup> At least three circuits concluded that judges were well within their proper role to refuse instruction on this procedural requirement.<sup>135</sup> In taking this stance, the Ninth Circuit

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132. See *Bowman v. Pat's Auto Parts*, 504 So. 2d 736, 737 (Ala. Civ. App. 1987) (holding that “the rules of procedure . . . are no more forgiving to a pro se litigant than to one represented by counsel.”); *Manka v. Martin*, 614 P.2d 875, 880 (Colo. 1980) (“A litigant is permitted to present his own case, but, in doing, should be restricted to the same rules of . . . procedure as is required of those qualified to practice law before our courts . . . .” (quoting *Knapp v. Fleming*, 258 P.2d 489, 489–490 (Colo. 1953)); *Solimine v. Davidian*, 661 N.E.2d 934, 934 (Mass. 1996) (“The fact that Solimine is acting pro se is also of no significance because he is held to the same standards to which litigants with counsel are held.”); *Bullard v. Morris*, 547 So. 2d 789, 790 (Miss. 1989); *Newsome v. Farer*, 708 P.2d 327, 331 (N.M. 1985) (“[A] pro se litigant must comply with the rules and orders of the court, enjoying no greater rights than those who employ counsel.”); *Sunpower, Inc. v. Hawley*, 296 N.W.2d 532, 533 (S.D. 1980) (“Defendant contends that this Court should set aside the default judgment because he was unfamiliar with the rules of pleading and trial practice. We do not agree.”).

133. See *Jessica Case*, *Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law an Excuse?*, 90 Ky. L.J. 701, 703–04, 704 n.24 (2002).

134. See *id.*

135. See *Beck v. Skon*, 253 F.3d 330, 333 (8th Cir. 2001); *Martin v. Harrison Cty. Jail*, 975 F.2d 192, 193 (5th Cir. 1992); *Brock v. Hendershott*, 840 F.2d 339, 343 (6th Cir. 1988); see also Jona Goldschmidt, *Autonomy and “Gray-Area” Pro Se Defendants: Ensuring Competence to Guarantee Freedom*, 6 Nw. J.L. & SOC. POL’Y 130, 144 n.97 (2011).

expressed concerns that a judge who offered information about a procedural issue would improperly inject himself into the case, “becoming a player in the adversary process rather than remaining its referee.”<sup>136</sup> The potential for the judge to influence the outcome was viewed as a wholesale negative by the court rather than as a positive feature that could enhance the validity of the court’s role in fair adjudication.<sup>137</sup>

Even the courts willing to recognize that the twin norms of party control and passive judging do not co-exist comfortably in cases involving the unrepresented typically offer judges no comprehensible instruction on how they might wrestle with the pro se dilemma. In the case of *Austin v. Ellis*, for example, the New Hampshire Supreme Court highlighted the “direct conflict” that results in a pro se case when a judge’s “essential function to serve as an impartial referee” comes up against “the concomitant necessity that the pro se litigant’s case be fully and competently presented.”<sup>138</sup> Rather than provide judges with a roadmap for resolving the conflict, the *Austin* court hedged and held that the judge’s duty to unrepresented parties “cannot be fully described by specific formula. Therefore, we prescribe none.”<sup>139</sup> Ultimately, this sort of doctrine is unhelpful and difficult to implement. While judicial discretion is commonly relied upon to carry out broad principles, the *Austin* court provided no principled guidance whatsoever. It is difficult to imagine how an individual judge might formulate an action plan that both maintains fidelity to the passive norm and also cultivates a fully developed record if the appellate court itself could not do so.

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136. *Jacobsen v. Filler*, 790 F.2d 1362, 1366 (9th Cir. 1986). The Ninth Circuit was also afraid any judicial assistance in advising pro se litigants of the rule’s requirements would open the floodgates toward other types of procedural leniency. The majority noted that “imposing an obligation to give notice of . . . evidentiary standards would . . . invite an undesirable, open-ended participation by the court in the summary judgment process.” *Id.* at 1365. *But see* *Rand v. Rowland*, 154 F.3d 952, 960 (9th Cir. 1998) (en banc) (modifying the holding in *Jacobsen* to require courts to notify pro se *prisoners*—but not other litigants—of the Rule 56 summary judgment obligations).

137. For a rare example of a court applauding judicial assistance to a pro se party, see *Oko v. Rogers*, 466 N.E.2d 658, 660–61 (Ill. App. Ct. 1984). The Court in *Oko* did not articulate forward-looking principles regarding judicial assistance for the unrepresented, but it did hold that the specific assistance provided by the judge did not prejudice the opponent. *Id.*

138. 408 A.2d 784, 785 (N.H. 1979).

139. *Id.* at 785 (internal quotations omitted) (citations omitted).



The case of *Nelson v. Jacobsen* provides a second illustration of the courts' equivocation.<sup>140</sup> The Utah Supreme Court first indicated that judges should strike an active stance in hearings involving unrepresented litigants, stating that, "because of his lack of technical knowledge of law and procedure [the pro se party] should be accorded every consideration that may reasonably be indulged."<sup>141</sup> But, when it came to defining the contours of the judge's specific duties in this context, the court backpedaled and withdrew its endorsement of a more active role.<sup>142</sup> Specifically, the court cautioned that a judge is not required to "translate legal terms, explain legal rules, or otherwise attempt to redress the ongoing consequences of the party's" pro se status.<sup>143</sup> While the *Nelson* decision ostensibly authorizes judges to take action to assist unrepresented litigants, the call for leniency cannot truly be fulfilled. After all, if the judge ascribes to the limits suggested by *Nelson*—and does not pause to define a legal term—what type of "consideration" for pro se parties remains?

A number of courts have mimicked the approach taken in *Nelson*: an articulation of support for the notion that courts should provide pro se parties with a meaningful opportunity to present their cases, followed by a directive stressing the importance of passive judging—thus preventing the judge from paying more than lip service to the needs of the unrepresented.<sup>144</sup> *Nelson* and its cohort result in a confused and contradictory doctrine. The courts acknowledge that unrepresented litigants cannot fulfill the norm of party control—and seem to suggest relaxation of adversary procedure—but then strip that rhetoric of meaning by circumscribing the judge's ability to take remedial measures.

Russell Engler posits that some of the courts' inflexible and contradictory jurisprudence in pro se cases may arise because courts

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140. 669 P.2d 1207 (Utah 1983).

141. *Id.* at 1213 (brackets in source omitted) (quoting *Heathman v. Hatch*, 372 P.2d 990, 991 (Utah 1962)).

142. *Id.*

143. *Id.*

144. *See, e.g.*, *Beaudett v. City of Hampton*, 775 F.2d 1274, 1277–78 (4th Cir. 1985); *Allen v. Friel*, 194 P.3d 903, 908–09 (Utah 2008); *see also Gamet v. Blanchard*, 91 Cal. App. 4th 1276, 1284–85 (2001) (determining that, despite pro se litigants not being entitled to any special treatment, "there is no reason that a judge cannot take affirmative steps . . . Judges are charged with ascertaining the truth, not just playing the referee.").

tend to recycle stock language from previous decisions without regard to context.<sup>145</sup> Specifically, some courts have taken a firm stance on judicial passivity in cases involving vexatious litigants or litigants who self-represent by choice, in order to rein in the conduct of those perceived as using pro se status to manipulate the system.<sup>146</sup> Other courts then apply those holdings to far more sympathetic pro se parties—those who are one-shot players and simply too poor to afford counsel—without analysis as to whether the same principles should continue to govern.<sup>147</sup> While this may be a contributing factor, it also seems clear that the courts have been flat-out stubborn in refusing to take seriously the breakdown of adversary procedure in run-of-the mill matters and the need to craft a responsive doctrine.

### *B. The “Accommodation” Doctrine*

New ethical guidance in the Model Code of Judicial Conduct takes a somewhat more evolved approach to addressing the judicial role in cases involving unrepresented parties, but, ultimately, with little impact. In 2007, comment four to the “impartiality” canon was updated to permit judges to “make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.”<sup>148</sup> The Model Code does not define “accommodation,” but a number of jurisdictions have set forth particular examples of acceptable judicial actions.<sup>149</sup> The actions specified include explaining procedure, making referrals to Legal Aid lawyers, avoiding the use of jargon, re-ordering the taking of evidence, and explaining the basis for a ruling.<sup>150</sup> The accommodation doctrine also appears in appellate rulings in the state of Alaska and, more recently, California. A number of advisory boards charged with developing suggested protocols for

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145. Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 367, 370–71 (2008).

146. *Id.* at 370–71, 386, 396.

147. *Id.* at 371–72.

148. MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.2 cmt. 4 (AM. BAR ASS’N 2007).

149. *See, e.g.*, COLO. CODE OF JUD. CONDUCT Canon 2, r. 2.6 cmt. 2 (COLO. JUD. BRANCH 2010); IOWA CODE OF JUD. CONDUCT Canon 2, r. 51:2.2 cmt. 4 (JUD. QUALIFICATIONS COMM’N 2010); OHIO CODE OF JUD. CONDUCT Canon 2, r. 2.2 cmt. 4, r. 2.6 cmt. 1A (OHIO SUP. CT. 2015). In one more permissive locality, the judge may ask “neutral” questions of the parties. D.C. CODE OF JUD. CONDUCT Canon 2, r. 2.6 cmt. 1A (D.C. CTS. 2016).

150. *See, e.g., id.*

judges in pro se matters have thrown their support behind the accommodation approach as well.<sup>151</sup>

At least twenty jurisdictions have adopted the exact language of comment 4 or substantially similar language.<sup>152</sup> In a typical example, the Ohio Code of Judicial Conduct now allows judges to provide “brief information about the proceeding and evidentiary and foundational requirements.”<sup>153</sup> The Colorado Code of Judicial Conduct also endorses judicial efforts to ensure that unrepresented parties understand the court process, but concludes with the admonishment that “[s]elf-represented litigants are still required to comply with the same substantive law and procedural requirements as represented litigants.”<sup>154</sup> Only the District of Columbia recommends that judges “should” make the foregoing accommodations and also suggests that judges ask “neutral” questions of the parties.<sup>155</sup> All other states make the granting of a pro se accommodation entirely discretionary.<sup>156</sup>

Advisory protocols for judges handling pro se cases also embrace the accommodation approach. In keeping with the amended ethical guidance, these protocols authorize only limited accommodations. Idaho has produced a judicial protocol that allows for basic explanation of how the proceeding will unfold, explanation of the elements, explanation of the burden of proof, and explanation of the rules of evidence.<sup>157</sup> Judges are admonished not to ask questions unless

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151. *See infra* note 157.

152. Most jurisdictions that have adopted revised Judicial Codes since 2007 have incorporated a version of comment 4. This includes Arizona, Arkansas, Colorado, Connecticut, the District of Columbia, Hawaii, Indiana, Iowa, Maryland, Minnesota, Missouri, Montana, Nebraska, New Mexico, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, Tennessee, Utah, Washington, and Wyoming. A few states, however, such as Kansas and Delaware, have chosen to exclude the language from comment 4 in amending their Judicial Codes.

153. OHIO CODE OF JUD. CONDUCT Canon 2, r. 2.6 cmt. 1A (OHIO SUP. CT. 2015); *see also id.* at Canon 2, r. 2.2 cmt. 4.

154. COLO. CODE OF JUD. CONDUCT Canon 2, r. 2.6 cmt. 2 (COLO. JUD. BRANCH 2010).

155. D.C. CODE OF JUD. CONDUCT Canon 2, r. 2.6 cmt. 1A (D.C. CTS. 2016).

156. *See, e.g.*, OHIO CODE OF JUD. CONDUCT Canon 2, r. 2.2 cmt. 4 (OHIO SUP. CT. 2015) (providing that a judge “*may* make reasonable accommodations to a self-represented litigant.” (emphasis added)).

157. JOEL HORTON, COMM. TO INCREASE ACCESS TO THE CTS., PROPOSED PROTOCOL TO BE USED BY IDAHO JUDGES DURING HEARINGS INVOLVING SELF-REPRESENTED

they are general in nature.<sup>158</sup> Massachusetts has also promulgated guidelines allowing judges to inform pro se litigants that their trials will be conducted according to the rules of evidence and procedure, to explain briefly what those are, and to permit judges to ask clarifying or general questions.<sup>159</sup> The protocol adopted by the Delaware Supreme Court is the most expansive, encouraging a judge to ask general questions, communicate judicial expectations, and modify procedures—although there is no specificity regarding which procedures would be appropriate to modify.<sup>160</sup>

Courts in Alaska and California have taken the most liberal stance on judicial accommodations, and yet these jurisdictions go only so far as to suggest that judges must, rather than may, provide basic procedural explanations to unrepresented parties in certain limited circumstances. In opinions that pre-date the amendments to the Model Code of Judicial Conduct, the Alaska Supreme Court has advanced the rule that a judge must explain to a pro se litigant the proper procedure for an action she is “obviously attempting to accomplish.”<sup>161</sup> On the flip side, Alaskan courts have clarified that there is no duty to provide explanation to an unrepresented individual who has failed to make at least a defective attempt to comply with procedure.<sup>162</sup> Thus, an unrepresented litigant who writes a letter to the judge seeking to intervene in a case is entitled to instruction on proper methods for achieving her objective,<sup>163</sup> but an unrepresented litigant who simply fails to obtain his medical records in a medical malpractice case is not entitled to instruction on the existence of discovery rules or the necessity of complying with them.<sup>164</sup>

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LITIGANTS (2002), [https://gis.latah.id.us/courtassistanceoffice/archive/eviction/Proposed\\_Protocol\\_for\\_Idaho\\_Judges\\_During\\_Hearings\\_Involving.pdf](https://gis.latah.id.us/courtassistanceoffice/archive/eviction/Proposed_Protocol_for_Idaho_Judges_During_Hearings_Involving.pdf).

158. *Id.*

159. *Guidelines for Pre-Hearing Interaction*, MASS CT. SYS. JUD. INS. § 2.1 (2006), <http://www.mass.gov/courts/court-info/trial-court/exec-office/ocm/jud-institute/pre-hearing-interaction-with-commentary-gen.html>.

160. DELAWARE COURTS, DELAWARE’S JUDICIAL GUIDELINES FOR CIVIL HEARINGS INVOLVING SELF-REPRESENTED LITIGANTS 2–4 (2011), <http://courts.delaware.gov/supreme/admdir/ad178guidelines.pdf>.

161. *Breck v. Ulmer*, 745 P.2d 66, 75 (Alaska 1987).

162. *Bauman v. State Div. of Family & Youth Servs.*, 768 P.2d 1097, 1098–99 (Alaska 1989).

163. *Keating v. Traynor*, 833 P.2d 695, 696 (Alaska 1992).

164. *Kaiser v. Sakata*, 40 P.3d 800, 802, 804 (Alaska 2002).

The California case of *Ross v. Figueroa* has been cited as an example of growing permissiveness around judicial accommodations and a significant modification, even expansion, of the judicial role.<sup>165</sup> Yet, in that case, the appellate court merely opined, in dicta, that a judge must explain to an unrepresented litigant barred from entering written testimony into the record that he has the right to testify to the same facts orally.<sup>166</sup> While *Ross* is unique in that it suggests action by a judge may be *required*, rather than simply authorized, to avoid a clear miscarriage of justice, the opinion is distressingly narrow. The *Ross* decision does no more than urge a judge to explain just one basic procedural right—the right to provide oral testimony—to a pro se litigant facing a permanent restraining order who otherwise would sacrifice his only opportunity to rebut an ex-girlfriend’s allegations of violence.<sup>167</sup> The *Ross* court did not endorse or discuss other duties to assist the unrepresented with case development.

The accommodation doctrine is touted as an attempt to “level[] the playing field”<sup>168</sup> for growing numbers of pro se litigants in the civil justice system, and to enhance “the role of the courts in promoting access to justice. . . .”<sup>169</sup> Commentators strongly support efforts to improve upon judicial explanation, instruction, referrals, and demeanor, and it is undoubtedly a step in the right direction to provide judges with examples of permissible conduct that is specific, practical, and easy to implement in the pro se context.<sup>170</sup> However, the

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165. See CTR. FOR FAM., CHILD., JUD. COUNCIL OF CA. ADMIN. OFF. OF THE CTS., & THE CTS., HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS: A BENCHGUIDE FOR JUDICIAL OFFICERS 2-1 (2007), [http://www.courts.ca.gov/documents/benchguide\\_self\\_rep\\_litigants.pdf](http://www.courts.ca.gov/documents/benchguide_self_rep_litigants.pdf).

166. *Ross v. Figueroa*, 139 Cal. App. 4th 856, 866–68 (2006).

167. *Id.* at 859–61, 866–68.

168. ABA MODEL CODE OF JUD. CONDUCT: REPORTER’S EXPLANATION OF CHANGES Canon 2 r. 2.2 cmt. 4 (AM. BAR ASS’N 2007), [http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/mcjc\\_2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/judiciaethics/mcjc_2007.authcheckdam.pdf).

169. OHIO CODE OF JUD. CONDUCT Canon 2, r. 2.6 cmt. 1A (OHIO SUP. CT. 2015).

170. See generally Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Representing Litigants*, 42 JUDGES J., Winter 2003, at 16, 45–48 (analyzing the current guidance to judges regarding pro se litigants and possible reforms to improve access and support for pro se litigants); Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City’s Housing Court*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 659, 670–96 (2006) (discussing possible solutions to problems faced by pro se litigants in New York housing courts); Jona Goldschmidt, *Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience*, 17 MICH. ST. U. COLL. J. INT’L L. 601, 607–

updated guidance commits a crime of omission in ignoring pro se deficits in factual and legal case development and skimming over the hurdles an unrepresented party might face in effectively carrying out procedural direction. The position taken by the accommodation doctrine—that basic technical assistance on the part of the judge will enable party participation and promote a fair result—reflects an underappreciation of the extent of the problem and obscures the depth of adversary breakdown in two-party civil cases.

To offer a window into the insufficiency of the accommodation doctrine, I return to Anita's case.<sup>171</sup> The judge handling Anita's habitability matter took advantage of most allowable accommodations. He offered Anita a referral to a Legal Aid lawyer. He explained an important rule of evidentiary admissibility and gave basic instruction on how to comply with it. He defined the term "authenticate," thereby eliminating the use of unnecessary jargon. He allowed Anita to testify in narrative form rather than in the typical question-and-answer format of a direct examination. He gave her more than one opportunity to add anything to the record that she deemed important. Finally, he advised Anita that the adverse ruling was compelled by her failure to produce reliable evidence to support the alleged housing code violations or the damages she sustained.

Still, Anita's judge jettisoned the search for truth and failed to reach an accurate, merits-based decision. Anita performed her case duties inadequately on every front. Her narrative omitted facts in support of the legal element of notice. She was unsuccessful in admitting into the record the building inspector's report, which was the key piece of documentary evidence in her case. And she asked for improper relief. Even though the judge employed the full range of pro se accommodations, he both failed to learn the true facts of what had transpired, and inadvertently denied Anita meaningful participation in her matter. Some procedural justice scholars insist that narrative

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09 (2008–2009) (examining the ABA Model Code of Judicial Conduct's addition of comment 4 to Rule 2.2 allowing reasonable accommodations for pro se litigants); Gray, *Reaching Out*, *supra* note 126 (recommending various techniques for judges in cases with pro se parties); Wilson & Hutchins, *supra* note 123, at 125; Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 438–45 (2004) (discussing the importance of assisting pro se parties in preserving neutrality in the court room).

171. *See supra* Part III.

testimony is critical for the unrepresented, in that it promotes both litigant autonomy and dignity.<sup>172</sup> However, Anita's case makes clear that offering leeway to present an unstructured narrative, without any guideposts to indicate the course it should take, may actually deprive a party of a meaningful opportunity to be heard. Anita spoke at length—and may have experienced relief at telling her story—but she had facts and evidence at her disposal that entitled her to relief, and yet she lost because mechanisms that might have aided her participation in the case were absent.<sup>173</sup>

As Anita's case highlights, courts and ethics bodies have given rushed and inadequate treatment to the intersection of adversary norms and pro se civil justice. An unrepresented party who receives a judicial accommodation will continue to have enormous additional case needs—investigation of the matter, identification of helpful facts, synthesis of controlling law, admission of evidence, oral case presentation in open court, and articulation of a request for available relief. Given the extensive challenges faced by the unrepresented in communicating relevant facts and legal theories, as well as securing appropriate remedies, even well-meaning efforts by a judge to offer procedural explanations are likely to have very little impact in helping pro se litigants fulfill the norm of party control.<sup>174</sup>

If the doctrinal approach to adversary procedure and the unrepresented were merely ineffective, it might be regarded as harmless. But the recent proliferation of rules and policies related to judicial accommodations has an unintended effect: it perpetuates the mirage of a functional adversary system in the civil courts. The judge in Anita's case might have reached a more accurate outcome by asking

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172. Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L. J. 2107, 2111, 2146 (1991).

173. See Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 DENV. L. REV. 469 (2016) (offering another interesting perspective on whether “telling one’s story” produces a fair result, or even a meaningful opportunity to be heard. In their empirical study of nearly 1,800 unemployment insurance cases, they present evidence that claimants who *withheld* testimony were more likely to prevail).

174. One might even question whether the trend toward judicial accommodations qualifies as a new doctrine at all. As Cynthia Gray has noted, procedural accommodations are not a tool available only to the unrepresented. Gray, *Reaching Out*, *supra* note 126, at 100. For instance, any lawyer appearing in a new jurisdiction for the first time would feel free to ask a judge for explanation on a local rule, and the judge who responds to the request would hardly be considered partial as a result.

Anita whether she notified her landlord of the poor conditions, asking foundational questions to independently ascertain the authenticity of the inspection report and ensure its admission into the record, proposing to Anita that she seek damages, and eliciting facts related to injuries or lost compensation experienced by her family. Yet none of these actions are considered ethically permissible as judicial accommodations, and the evolving guidelines for judges evidence no recognition that such assistance might be necessary.

The modern-day theory and doctrine of civil judging in small, two-party state court matters might be fairly summarized as this: a strong traditional norm of passivity, barely relaxed by the discretion to make explanatory accommodations when one or more parties are unrepresented. However, Anita's example demonstrates that neither the passive norm nor the accommodation approach is likely to result in fair or accurate decision-making in a majority pro se court. As explored in Part V, inadequate doctrine has left trial judges to their own devices in determining how to adjudicate pro se cases, which has resulted in regular, sizable, and inconsistent departures from adversary principles.

#### V. AD HOC JUDGING AND THE UNINTENDED COSTS OF PERPETUATING THE ADVERSARY MIRAGE

This Part elaborates on the unintended costs of holding judges to an adversary "ideal" in matters involving the unrepresented. Existing doctrine props up the illusion that, with a couple of tweaks, it is reasonable to rely on the norm of party control even in the face of systemic lack of counsel. And yet the degree of adversary breakdown in the average two-party case far exceeds any correction a procedural accommodation is capable of making.

In this Part, I identify three consequences of imposing outdated adversary procedure on pro se cases. First, judges often ignore it: in a quest for merits-based decisions, they depart from the passive norm—and often do so in substantial ways. Second, judges must rely on instinct, discretion, and knee-jerk reaction in crafting their procedural methods, which can result in "active" practices that fail to achieve an accurate outcome. Last, judges are beset by a deepening role confusion concerning the bounds of their authority in pro se matters, which exacerbates the unreliable and shifting procedure emerging in small case civil justice. The purpose of this Part is not to excoriate civil judges, but to illuminate the scope of the difficulties they face and to



make visible the imperfect procedures that materialize when judges are forced to operate in the shadow of unworkable standards of conduct.

*A. Regular, Sizable, and Inconsistent Adversary Departures*

Because adversary doctrine works at odds with the fundamental goal of basing decisions on the relevant law and facts, many judges simply disregard it—and do so completely under the radar. The dockets in most civil courts would grind to a halt if judges did not find ways to assist the unrepresented parties who appear before them. As such, it has become routine for judges to employ a range of unsanctioned adversary departures. In today's civil justice system, many judges engage in precisely the type of substantive case development prohibited by adversary doctrine: they frame legal theories, elicit facts, suggest remedies, and invent new procedures. However, their approach is ad hoc, variable, and inconsistent.

Very little research documents the particulars of this phenomenon, but one must spend only a few hours in the civil courts to observe frequent and sizable departures from the passive norm. Noted adversary scholar Stephan Landsman confirms that, “throughout the country,” judges operate with “virtually unfettered discretion” in pro se cases, which “yield[s] strikingly inconsistent treatment of such parties.”<sup>175</sup> Paris Baldacci observes that, in New York City's Housing Courts, some judges elicit legally relevant narratives from the parties before them, but do so in the absence of “training, guidelines, administrative support or peer assistance.”<sup>176</sup> In one regularly cited survey, judges reported that their policies for adjudicating pro se cases are “individually formulated,” with some judges willing to actively question the unrepresented, and others far less liberal in their treatment of pro se parties.<sup>177</sup>

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175. Landsman, *Growing Challenge*, *supra* note 13, at 450–51.

176. Baldacci, *supra* note 170, at 665.

177. Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 55–57 (2002); *see also* Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 978 (2004) (noting that as a practical matter, some judges are already providing substantial assistance to pro se litigants).

The journalist Kat Aaron describes two cases in Detroit's 36<sup>th</sup> District Court that illustrate judicial departures from adversary procedure, but also highlight the inconsistency with which departures are deployed.<sup>178</sup> In one case, a "soft-spoken" tenant defended herself in an eviction suit for nonpayment of rent.<sup>179</sup> She believed her rent subsidy had been sent to the wrong landlord, but had "difficulty advancing an argument on her own behalf."<sup>180</sup> The judge could have remained passive and swiftly processed the eviction in favor of the landlord, but refused to do so. Instead, she "coaxed facts out of both sides," tried to "get a handle on who owed what to whom," and made efforts to determine "what, besides eviction, was possible."<sup>181</sup> Rather than issue a judgment without a full airing of the facts, the judge cast aside adversary doctrine and attempted to resuscitate the tenant's claim.

In a second case, however, a judge in the same court took the inverse approach. An elderly maintenance worker filed a claim to contest the garnishment of his wages, but at the hearing told the judge he did not owe the underlying debt, and in fact, "had no idea what the debt was."<sup>182</sup> Aaron recounts the judge's response:

The judge told him that in order to make that argument, he would have had to contest the underlying debt, not the garnishment itself. The judge didn't tell him how to do that, though. She didn't make any effort to get to the truth of the matter, moving forward with the case despite the possibility that the collections agency had the wrong man. While the judge was talking, the defendant kept muttering under his breath. I was in the second row, close enough to hear him, and he was saying, "I'm so lost. I'm so lost."<sup>183</sup>

Across various jurisdictions, judicial appetite for adversary departures varies considerably. In New York, a trial judge explains that, in housing cases, most judges allow "pro se litigants to testify in

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178. Kat Aaron, *The People's Court?*, THE AM. PROSPECT (Nov. 21, 2013), <http://prospect.org/article/peoples-court>.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

narrative form and then ask them questions to navigate their story.”<sup>184</sup> He also asserts that housing court judges often prevent lawyers from engaging in a “barrage of interruptions or objections,” and raise valid objections on behalf of unrepresented parties when their opponents attempt to enter inadmissible evidence into the record.<sup>185</sup> However, Bruce Bohlman, a judge in North Dakota maintains that, in his courthouse, the opposite approach prevails.<sup>186</sup> Despite an “empowering mandate” set forth by the North Dakota Supreme Court in 1916 permitting judges to “elicit the evidence upon material and relevant points,” Judge Bohlman believes that most trial judges are so culturally accustomed to the adversary system, they are “hesitant to comply.”<sup>187</sup>

These examples underscore the risks associated with imposing an unrealistic procedural system on the courts. By upholding the passive norm, existing doctrine spurs rogue judging and inadvertently fragments procedure into a collection of changing rules.

#### *B. Ad Hoc Judging and the Out-of-Reach “Fair” Outcome*

A second cost of outdated adversary doctrine is that it forces judicial improvisation in departing from adversary norms, which can result in active practices that do not necessarily further a fair outcome. Relying on recent firsthand observations of judges in an ordinary domestic violence court, I offer two up-close examples of typical adversary departures and examine why procedural practices guided by instinct and gut reaction may fall short in advancing accurate results.

First, consider an exchange between a judge and an unrepresented petitioner seeking a protection order, which exemplifies a representative form of judicial fact development in a pro se court:

*Judge:* You said he did stuff in May and June. What?

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184. Gerald Lebovits & Julia Marter, *Evidentiary Issues in the New York Housing Court*, 38 N.Y. REAL PROP. L.J. 21, 27–28 (2010).

185. *Id.*

186. Bruce E. Bohlman & Erick J. Bohlman, *Wandering in the Wilderness of Dispute Resolution: When Do We Arrive at the Promised Land of Justice?*, 70 N.D. L. REV. 235, 241 (1994).

187. *Id.*; see also PUB. JUSTICE CTR., *supra* note 110, at 22 (noting that judges in Baltimore’s housing court also tend to remain passive).

*Petitioner:* Threatening stuff.

*Judge:* What?

*Petitioner:* That he'll take me to court.

*Judge:* Not what I mean. Did he threaten to harm you?

*Petitioner:* He said he was going to kill me.

*Judge:* When?

*Petitioner:* So many times.

*Judge:* When? I need testimony.

*Petitioner:* In June was one time.

*Judge:* What did he say?

*Petitioner:* 'I'm going to kill you.'

*Judge:* By phone? In person?

*Petitioner:* By phone.

*Judge:* How did it make you feel?

*Petitioner:* Scared for my life.

In this excerpt, the petitioner had difficulty with two aspects of case development: first, she was unable to identify a legally relevant form of threatening conduct; second, once she spoke to a cognizable threat, she was unable to provide details specific enough to meet her burden of proof. Adversary doctrine would have punished the petitioner with a prompt dismissal once she indicated that her ex-boyfriend threatened litigation rather than violence. Furthermore, adversary doctrine offers no provision for the judge to drill down on precise and detailed facts. Thus, the petitioner's claim likely would have failed even if she had raised the violent nature of the threat since, initially, she provided no details on when the threat occurred, how it was delivered, precisely what was said, and how it made her feel.

In lieu of dismissing the case—as the *Lombardi* playbook would dictate<sup>188</sup>—the judge prompted the petitioner by asking a series of questions that toggled between open-ended and leading. Specifically, the judge led with broad questions that began with “what” or

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188. *See infra* Part III.

“when,” but when those questions failed to yield legally relevant or sufficient answers, she followed up with narrower, more specific questions that hinted at the “correct” answer. In other words, the judge not only signaled to the petitioner that the type of threat she described would not suffice, but was explicit about a particular form of conduct that would satisfy the legal standard. She also took pains to boost the sufficiency of the record by eliciting both dates and verbatim statements related to the respondent’s alleged misconduct.

It would be reasonable to conclude that the judge in this case effectively drew out the petitioner’s best facts. But the exchange also highlights the risks of an ad hoc approach. In making an on-the-spot decision about how to circumvent adversary doctrine, the judge impatiently pushed for responsive answers without pausing to allow the petitioner’s story to take shape naturally. As a result, it is difficult to know whether the judge elicited truthful facts, or merely steered the narrative into a conventional frame.

A second exchange in the same domestic violence court similarly exposes the hazards of unregulated active judging. In that case, an unrepresented female petitioner requested a protection order against her former boyfriend, with whom she shared children. The petitioner primarily sought a stay-away provision as part of the order; she wanted to ensure that her abuser would be prohibited from visiting her or contacting her. But toward the conclusion of her testimony, the petitioner appeared to enlarge her set of concerns. She said to the judge, “What about my kids? They have seen [the respondent] threaten me.” The judge, without further questioning, added mandatory parenting classes to the order entered against the respondent.

The petitioner did not attach any specific request to the statements she made about her children, and it is not clear whether her concerns related to custody, the children’s physical or psychological well-being, or a sense that the respondent’s parenting skills were deficient in some way. Perhaps she was simply unburdening herself of an additional detail in a deeply traumatic experience. Under adversary doctrine, the petitioner would be required to formulate her own legal theories and articulate a proper request for relief.<sup>189</sup> The judge, however, did not allow the factual details to lay dormant; instead, she seized on the

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189. Frost, *supra* note 8, at 455-59.

petitioner's concern for her children and connected it to an available form of relief. In granting a remedy not requested by the petitioner, the judge departed from the passive norm.

The judge's adversary departure can be viewed as justifiable—even essential—but also poorly executed. First, she did not seek the petitioner's input on the remedy prior to imposing it. Most likely, the judge ordered the parenting classes in an effort to be responsive to the petitioner's concerns. And yet the effort may have been misplaced, as the petitioner herself was not properly consulted before the relief was issued. Second, the judge did not gather additional facts to determine whether the remedy she ordered was appropriately tailored to the circumstances of the case. Presumably, if asked, the petitioner could have shared specifics about the ages of her children, the nature of their relationship with their father, and what they witnessed. Upon gathering this information, the judge might still have deemed mandatory parenting classes the best available remedy, but just as likely, she could have decided that drug counseling or an award of temporary custody was in order.

As these examples demonstrate, judges who are dissatisfied with the quality of justice dispensed on their pro se dockets must invent their own methods for adjudicating claims. However, improvised procedure is fraught with complications of its own, especially on a busy docket when judges may be hurried and harried. Even assuming judges in the preceding examples were pure of heart, their procedural choices did not necessarily advance the goal of fair process. It is a second unintended cost of adversary doctrine that, as a substitute for carrying out its dictates, judges are instead stitching together a patchwork of flawed ad hoc procedures that may not function as well as they anticipate.

### *C. Deepening Judicial Role Confusion*

A final consequence of existing adversary doctrine is that it creates deep-seated judicial role confusion in the average two-party case. A recent employment case in the Eastern District of New York depicts the confused state of the judiciary when it comes to cases involving the unrepresented.<sup>190</sup> Aikam Floyd sued the sandwich shop Cosi for

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190. See *Floyd v. Cosi, Inc.*, 78 F.Supp.3d 558 (E.D.N.Y. 2015).

retaliation and discrimination.<sup>191</sup> However, at a hearing in the case, Mr. Floyd evidenced almost no ability to digest the proceedings or articulate his facts.<sup>192</sup> Judge Jack Weinstein presided over the case and, like other judges faced with similar circumstances, he felt forced to break with adversary doctrine in order to reach a merits-based result. Judge Weinstein assisted Mr. Floyd both in developing a legal theory and establishing that his claim was not time-barred.<sup>193</sup> Immediately after these exchanges took place, however, Judge Weinstein took the extraordinary step of recusing himself from the case.<sup>194</sup> In his recusal decision, he expressed distress over the role he had played in developing Mr. Floyd's legal theories, as well as the active judicial involvement that he predicted would be necessary—and yet prohibited—as the case progressed.<sup>195</sup>

Mr. Floyd had difficulties with case development from the outset. He told the judge that his supervisor had forged his signature on disciplinary notices, but then provided a circuitous, difficult-to-follow story that had no apparent connection to a legal cause of action.<sup>196</sup> At the conclusion of his factual testimony, however, Mr. Floyd provided a relevant detail, telling the judge he had been called “lizard man” at work.<sup>197</sup> Judge Weinstein pitched in to assist Mr. Floyd in articulating a legal theory supported by his facts:

*The Court:* And now you are claiming on what?

*Mr. Floyd:* The Title VII, the first one, act [sic] of 1964.

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191. *Id.*

192. *Id.*

193. Transcript of Record at 5–6, *Floyd*, 78 F.Supp.3d 558 (No. 14-CV-03772).

194. Memorandum & Order at 2, 5, *Floyd*, 78 F.Supp.3d 558.

195. *Id.*; *Floyd*, 78 F.Supp.3d.

196. A snippet of Mr. Floyd's testimony is as follows: “I told [my supervisor, Mike] I was not coming in and he told me to leave a message, I mean, write a note pretty much, so I wrote the note and I put it under the door. At the time we didn't have a board. Now we have a board at this time, but we didn't have a board then so we can stick it on. Now we have a board. But at the time I put the note under his door, so he said—I told him and I did what he asked, I wrote the note, I acknowledged what he said, and I gave notification to the court—not the court, to Mike to let him know I wasn't coming in. I had called the store, because the employee told me I was fired, so I called the store, got on the phone. Mike he said, [‘]I'm tired of you. I'm tired of your bs[.]. You're fired.[‘]” Transcript of Record at 5–6, *Floyd*, 78 F.Supp.3d 558.

197. *Id.* at 7.

*The Court:* Based on what?

*Mr. Floyd:* Harassment.

*The Court:* No. On your ethnicity, is that it?

*Mr. Floyd:* Yes.

*The Court:* You claim you are being discriminated against because you are African-American?

*Mr. Floyd:* Yes, sir. I have been at this job for seven years.<sup>198</sup>

In a separate segment, Mr. Floyd struggled to identify his final date of employment and the most recent instance of alleged discrimination.<sup>199</sup> In order to establish that Mr. Floyd had initiated his case within the applicable statute of limitations, Judge Weinstein elicited the following facts:

*The Court:* What was the last date you were discriminated against?

*Mr. Floyd:* The last date I was discriminated against is—I don't remember the last day I worked, sorry, sir.

*The Court:* Well, approximately?

*Mr. Floyd:* Within a couple of months. . . . Probably like the 27<sup>th</sup> of March, I believe was my last date.

. . . .

*The Court* [to opposing counsel]: When is the last date he stopped working? Do you have that?

*Ms. Jonak:* On information and belief, your Honor, it's a date in August 2013.

*The Court:* August 2013. He filed in September 2013, which would be timely, if we have a continuing violation, correct?

*Mr. Floyd:* Yes, sir.<sup>200</sup>

Without Judge Weinstein's assistance, it is unlikely Mr. Floyd would have asserted a valid legal claim or been able to establish that

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198. *Id.* at 8–9.

199. *Id.* at 10–11.

200. *Id.*



his case should survive a statute of limitations challenge by Cosi. The judge directed Mr. Floyd toward the proper legal theory—discrimination—and away from one that was not supported by his facts. Furthermore, in order to establish that the claim could proceed, the judge inquired as to Mr. Floyd’s final day on the job—even overriding Mr. Floyd’s own testimony on the matter—and made an inferential leap to conclude that Mr. Floyd had experienced a “continuing violation,” one that persisted until his last day of work.<sup>201</sup>

At the conclusion of this hearing, Judge Weinstein recused himself from the case *sua sponte*.<sup>202</sup> In his recusal order, the judge reflected on his discomfort with violating the passive norm, and yet his belief that doing so was necessary.<sup>203</sup> He asserted that “pro se justice is an oxymoron,” and that the case “required intervention by the court.”<sup>204</sup> However, he also acknowledged that in assuming an active role, and posing “leading questions,” his impartiality in the matter might be compromised.<sup>205</sup> The judge was conflicted about the propriety of the assistance he had extended to Mr. Floyd, but was equally uncomfortable allowing Mr. Floyd to flounder.<sup>206</sup> In the end, role confusion so paralyzed Judge Weinstein that he was unable to perform his job as a judge at all.

Like Judge Weinstein, a number of state court judges who handle typical two-party matters have been candid that they are confused as to their proper role in a pro se case and unsure of the boundaries of their own authority. The Honorable Gerard Hardcastle, a trial judge in Nevada, laments that “no one has told judges what is to be done,” and muses that “[a]ppellate courts probably believe the family trial courts are following the rules of evidence and procedure attached to the adversarial process.”<sup>207</sup> The Honorable Rebecca Albrecht, a former

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201. *Id.*

202. Memorandum & Order at 2, 5, *Floyd*, 78 F.Supp.3d 558.

203. *Id.*

204. *Id.*; *Floyd*, 78 F.Supp.3d at 560–61.

205. Memorandum & Order at 2, 4, *Floyd*, 78 F.Supp.3d 558; *Floyd*, 78 F.Supp.3d at 560–61.

206. See Memorandum & Order at 4, *Floyd*, 78 F.Supp.3d 558; *Floyd*, 78 F.Supp.3d at 561 (In the recusal order, the judge said that, if he were to continue presiding over the case, he would be “forced,” by Mr. Floyd’s pro se status, to continue to intervene on his behalf.).

207. Gerald W. Hardcastle, *Adversarialism and the Family Court: A Family Court Judge’s Perspective*, 9 U.C. DAVIS J. JUV. L. & POL’Y 57, 120 (2005).

trial judge in Arizona, asserts that, in cases involving the unrepresented, “[t]rial judges have no common understanding of the applicable ethical standards, case law, or practical techniques to use to ensure that justice is done in their courtrooms.”<sup>208</sup> And the Honorable Ron Spears, a trial judge in Illinois, notes that judges are “uncomfortable” assisting the unrepresented and often feel they are walking a “dangerous tightrope” where allowable guidance and impermissible advocacy are not clearly distinguished.<sup>209</sup> Most striking about the judges’ remarks is that they express uncertainty about aspects of their work that arise with great frequency. In demanding exclusive reliance on the parties’ case presentation skills, adversary theory and doctrine have created a judiciary uncertain of its core function.

## VI. AN AFFIRMATIVE DUTY

In this Part, I propose a framework for what I call “affirmative judging” in ordinary, two-party matters. As the preceding Parts demonstrate, adversary theory and doctrine are wildly out of touch with the degree of procedural breakdown and judicial role confusion now present in millions of two-party cases. As a result, judges have taken to underground, ad hoc practices to adjudicate basic cases. In complex litigation, the judicial role has been greatly enhanced to manage pre-trial procedures and post-trial remedies. This Part argues for adversary evolution in small-case civil justice as well, and suggests a parallel framework for an enlarged judicial role that takes into account the distinct needs of civil courts swamped by the unrepresented.

Based primarily on the model of administrative litigation within the Social Security Administration (SSA), the “affirmative judge” would have the duty to develop the factual and legal record in all cases involving an unrepresented party. Affirmative judging may demolish conventional adversary procedure, but it would help resurrect many of the underlying procedural values of fair process: impartiality, party participation, and transparency. Furthermore, imposing an affirmative duty on judges to develop the legally relevant facts would trigger a basis for appeal in those instances where the record was insufficiently built up. The affirmative judging framework is not intended as a rigid

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208. Albrecht, *supra* note 170, at 16.

209. Ron Spears, *An Adversary System Without Advocates*, 101 ILL. B. J. 592, 593 (2013).

prescription, but rather as a flexible doctrine that would be brought to life through the exercise of judicial discretion and regularly reviewed and honed by the appellate courts. This proposal builds on the important work of Russell Pearce and Russell Engler, both of whom suggest that an active judge is a critical component of equalizing access to justice.<sup>210</sup>

Although an affirmative judging framework could work to address inequities in many dimensions of the civil court system, this Article limits the proposal to cases involving unrepresented parties who appear in courts dominated by pro se litigants. At a minimum, this includes courts handling housing, family law, consumer, and domestic violence claims in almost every jurisdiction in the country. I limit the proposal in this way because the problem is most acute in majority pro se courts and demands immediate mobilization and action in that setting. In addition, majority pro se courts are the venues where judges will be most open to this change. Other than the litigants themselves, there is nobody more destabilized by the rise of an unrepresented majority than the judges who preside over hundreds of pro se cases each day. Out of sheer necessity, these judges are most likely to embrace clear rules that encourage an expansion of their role.

Finally, majority pro se courts may very well be the setting where lack of representation leads to the greatest unfairness. In most pro se courts, the low rate of representation bears no relationship to the merit of a claim, as there is typically no structural incentive that might motivate attorneys to take on meritorious cases. For example, one can make no judgments about the legitimacy of a domestic violence claim based on the absence of counsel, as there is no right to attorney's fees on a successful claim, and no pot of damages to divide with an attorney who prevails. In a tort case or a civil rights case, by contrast, one might assume that the relationship between attorney representation and case merit has at least a slightly stronger positive correlation, as meritorious matters will lead to financial compensation for the attorney even where

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210. See Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987 (1999) [hereinafter Engler, *And Justice for All*]; Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 *FORDHAM L. REV.* 969 (2004). Some comparative law scholars have also encouraged a more active judicial role in the United States. See Robert W. Emerson, *Judges as Guardian Angels: The German Practice of Hints and Feedback*, 48 *VAND. J. TRANSNAT'L L.* 707 (2015).

the litigants themselves are unable to afford counsel. It is for these reasons that an enhanced role for the judge assumes paramount significance in majority pro se courts.

#### *A. Characteristics of the Affirmative Judge*

Affirmative judging contemplates a duty on the judge to engage in three aspects of case development: cultivating legal theories, eliciting relevant facts, and granting appropriate remedies. Many judges already employ these strategies, albeit in the absence of training or authorizing guidelines. With approximately three-quarters of two-party civil cases involving a pro se party, it is no longer feasible to deny judges the ability to participate in developing the factual record.<sup>211</sup> The affirmative judging model proposed here draws from the Administrative Law Judge (ALJ) example in SSA cases and extends it to private law civil matters in the trial courts. ALJs in the Social Security disability context have a long history of carrying out an affirmative duty to develop the record, making plain that the model is workable, produces a clear but flexible standard of conduct, protects important aspects of due process, and raises the visibility and legitimacy of the adjudicatory process in a majority pro se environment.

##### *1. Comprehensive and consistent judicial case development*

Affirmative judging offers a comprehensive and consistent approach to case development. To build the legal framework, the judge would set forth common legal theories, present the statutory or common law elements, and suggest factual scenarios that satisfy the standard. In a domestic violence case, for example, the judge might begin by advising the petitioner on a stalking theory in this manner:

To make out a valid claim for a protection order, you must prove that you are the victim of abuse at the hands of a family member or intimate partner. One type of “abuse” is “stalking”—you must show that the respondent repeatedly followed you or harassed you, that the respondent threatened you, and that the respondent wanted to scare you. For example, if the respondent showed up at your office ten times last week, threatened to hurt you if you didn’t come

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211. *See supra* note 10.

outside to talk to him, and meant to scare you when he did so—that is stalking.

The judge would fulfill the factual development prong by eliciting relevant facts on each proposed legal theory. Interviewing theory provides a fitting structure for doing so. A judge might initiate open-ended questions, follow up with directed questions that closely track the legal elements, reflect back to the client the information she has shared, and conclude with a catch-all question designed to capture any non-conforming information.<sup>212</sup> To probe the stalking theory, the judge might proceed as follows:

Do you believe the respondent stalked you? On what do you base that belief? How did he contact you or attempt to contact you? Can you describe the first instance? What was said? How did it make you feel? So far, you've told me that he came to your office twice, uninvited, and each time told you he would kidnap your children from school if you refused to speak with him. Is there anything else you would like to add?

Last, the judge executes on the duty to grant proper remedies by informing the parties of available relief and inquiring as to eligibility for, and interest in, each potential remedy. A judge might wrap up a domestic violence case in the following manner:

In a protection order, I can require the respondent to stay away from you for twelve months. I can also order him to participate in parenting classes or drug counseling, and I can issue temporary custody and visitation orders—if you meet the eligibility criteria. Which of these remedies might you be interested in pursuing?

An affirmative judge would apply the foregoing techniques consistently across all parties and all case types. In matters where only one party is pro se, affirmative judging can serve to draw out information from the represented opponent, as the pro se party is unlikely to have taken advantage of discovery or be skilled in the art of cross-examination.<sup>213</sup>

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212. R. Hal Ritter, Jr. & Patricia A. Wilson, *Developing the Fine Art of Listening*, 81 MICH. B. J. 37, 38 (2002).

213. In fact, the affirmative duty is especially important in cases where only one side is pro se, as judges may be unlikely to extend assistance to the unrepresented over opposing counsel's objections if doing so is not required.

While an affirmative judge takes the reins in a pro se case, there is still ample opportunity for parties to add to case development at the conclusion of the judge's questioning. All parties, or their lawyers, can be granted the opportunity to present rehabilitative testimony or supplement the record in any way they deem fit.

## 2. *Close alignment with the Social Security model*

The affirmative judging model is closely aligned with well-developed adjudicatory procedure in SSA disability cases, lending credence to its viability in other civil cases involving unrepresented parties.<sup>214</sup> In SSA matters, the administrative law judge (ALJ) must “fully and fairly develop” the record so that a “just determination of disability” can be made prior to the disbursement of government benefits.<sup>215</sup> Some circuits have further enlarged the judicial role in SSA cases involving unrepresented parties, holding that, when counsel is absent, the judge's duty is “especially strong,”<sup>216</sup> and may require her to “scrupulously and conscientiously probe . . . for . . . relevant facts.”<sup>217</sup>

In SSA cases, the claimant retains the burden of proof,<sup>218</sup> but the ALJ takes steps to help her meet it, demonstrating that these concepts are not incompatible. The judge questions the claimant to elicit testimony,<sup>219</sup> resolves ambiguity and conflicting answers,<sup>220</sup> and examines witnesses that may have knowledge of key issues.<sup>221</sup> Of his role in developing the claimant's record in SSA cases, one ALJ said, “we . . . drag [testimony] out of [the claimant] by questioning”, we then “search the law. . . . We

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214. Eighty-one percent of all federal ALJs are assigned to SSA cases, meaning that thousands of judges have capably carried out an affirmative duty to develop the record. Jeffrey S. Wolfe & Lisa B. Proszek, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer*, 33 TULSA L.J. 293, 294 (1997).

215. See *Clark v. Shalala*, 28 F.3d 828, 830–31 (8th Cir. 1994) (quoting *McCoy v. Schweiker*, 683 F.2d 1138, 1147 (8th Cir. 1982); 20 C.F.R. § 404.944 (1988)).

216. *Carter v. Chater*, 73 F.3d 1019, 1021 (10th Cir. 1996).

217. *Brown v. Shalala*, 44 F.3d 931, 934–35 (11th Cir. 1995) (quoting *Smith v. Schweiker*, 677 F.2d 826, 829 (11th Cir. 1982)).

218. Frank S. Bloch, Jeffrey S. Lubbers & Paul R. Verkuil, *Developing A Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1, 19 (2003).

219. See *Rausch v. Gardner*, 267 F. Supp. 4, 6 (E.D. Wis. 1967).

220. See *Brown*, 44 F.3d at 935.

221. *Id.* at 936; see generally Frank S. Bloch, *Representation and Advocacy at Non-Adversary Hearings: The Need for Non-Adversary Representatives at Social Security Disability Hearings*, 59 WASH. U.L.Q. 349, 382 n.149 (1981).

search our minds, and we search whatever other records are available, we search the evidence . . . .”<sup>222</sup>

It makes eminent sense to draw from the administrative model in crafting standards of judicial conduct for today’s civil courts.<sup>223</sup> It is sometimes assumed that procedural safeguards in the judicial system are stronger than in the administrative system.<sup>224</sup> For instance, in an SSA case, the Third Circuit once remarked that due process in the administrative setting has to work harder to make up for “the absence of procedural safeguards normally available in judicial proceedings.”<sup>225</sup> However, the procedural safeguards available in traditional courts—among them discovery, subpoena power, the rules of evidence, and jury trials—are of little use to unrepresented parties who cannot effectively avail themselves of their protections.<sup>226</sup> Ironically, administrative adjudication, where procedures are less formal and the judge assumes a greater role, may now be more protective of individual rights than judicial adjudication across a large slice of the litigant population.

An agency like the SSA may be particularly appropriate to emulate as the architects of its adjudicatory system understood that it was important to design a process “understandable to the layman claimant.”<sup>227</sup> Whereas the procedural protections available in the civil courts only benefit the few parties fortunate enough to retain skilled counsel, the SSA system developed its system of rights-protection to respond specifically to the needs and capabilities of an unrepresented litigant population. Now that the population of the civil courts primarily consists of unrepresented

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222. See *Rausch*, 267 F. Supp. at 6.

223. Scholars have argued that there are rational reasons for ALJs to assume a more proactive role than traditional judges, as the ALJ must advance the agency’s mission while the civil judge has no such duty. See James E. Moliterno, *The Administrative Judiciary’s Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1192, 1211 (2006). However, while civil judges have no independent duty to discover the truth, they have other important duties, such as the duty to provide all parties with a meaningful opportunity to be heard. This duty is equally well served by the affirmative approach.

224. See Vivek S. Sankaran, *Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children*, 25 YALE L. & POL’Y REV. 63, 84–85 (2006); Philip G. Peters, Jr., *Health Courts?*, 88 B.U. L. REV. 227, 262–63 (2008).

225. *Ventura v. Shalala*, 55 F.3d 900, 902 (3d Cir. 1995) (referencing *Hummel v. Heckler*, 736 F.2d 91, 93 (3d Cir. 1984)).

226. See Steinberg, *supra* note 95 at 754–56 (examples of the various procedural protections that unrepresented litigants have difficulty exercising).

227. *Richardson v. Perales*, 402 U.S. 389, 400 (1971).

individuals, it is logical to import the methods and ethos of public benefits adjudication into the private law cases of the judicial system.<sup>228</sup>

The Supreme Court recently acknowledged the wisdom of importing administrative-like procedures into the civil courts. In *Turner v. Rogers*, a pro se civil contemnor owing \$5,000 in child support debt botched fact development in his case and landed himself in jail for twelve months despite the possibility that he could have asserted a valid defense.<sup>229</sup> In its opinion, the Court held that the Due Process Clause requires the courts to provide assistance to unrepresented civil contemnors in developing their legal claims and facts.<sup>230</sup> The *Turner* decision never mentions the judge as the purveyor of such assistance, but it does mandate that the alleged contemnor be provided an opportunity to “respond to statements and questions” about a common affirmative defense,<sup>231</sup> and the judge is the most likely court actor to assume that role. Even if the Court intended that court clerks and case managers, rather than the judge, provide the additional assistance, it is significant that, at least in one context, trial courts are now constitutionally obligated to act more like administrative tribunals in proactively serving the unrepresented.<sup>232</sup>

Importantly, functional uniformity can be achieved on the affirmative judging model without imposing a rigid set of rules on judges. In SSA proceedings, judges retain substantial discretion in determining the robustness with which they pursue case development. For one, the affirmative duty on ALJs does not require exploration of every possible avenue; individual judges can place appropriate limits on factual

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228. *Id.* (proclaiming that administrative procedure should emphasize the informal over the formal and should not be comfortable only for trained attorneys). Ironically, there is now a much higher rate of representation in SSA cases than there is in the civil courts. See SOC. SEC. ADVISORY BD., ASPECTS OF DISABILITY DECISION MAKING: DATA AND MATERIALS 60 (2012), <http://www.lb7.uscourts.gov/documents/1-11-CV-00224.pdf> (reporting that the attorney representation rate in SSA cases tends to hover between seventy and eighty percent, which is double the rate of representation that existed in these proceedings in the 1970s, when *Richardson v. Perales* was decided and the ALJ’s fact gathering role was cemented).

229. *Turner v. Rogers*, 564 U.S. 431, 437–38 (2011).

230. *See id.* at 455.

231. *Id.* at 434 (showing the *Turner* Court did not consider or answer any of the difficult questions posed by the prospect of an enhanced judicial role, nor did it explicitly address the potential break with adversary norms and ethical rules posed by active judging).

232. *See* Steinberg, *supra* note 95, at 789 (arguing that *Turner* implicitly authorizes a more proactive role for judges).



inquiry.<sup>233</sup> In addition, ALJs are encouraged to take into account litigant ability and demeanor in crafting their judging style in individual matters.<sup>234</sup> The affirmative judging framework offers an appropriate set of standards within which the judge can operate without resorting to a purely ad hoc approach.

While an affirmative judging model might be criticized for demanding a substantial outlay of additional resources by cash-strapped trial courts, the degree of additional expense is somewhat unclear. As Part IV suggests, courts are already deploying active judging techniques in many courtrooms. It is possible that courts may find it *more* efficient to extend regularized judicial assistance to the unrepresented than to allow them to flounder, commit mistakes, and deplete the clerks' time with repeated questions—only to return to court over and over again to prosecute the same claim.<sup>235</sup> This is not to dismiss concerns over limited resources out-of-hand, but rather to place the issue in the context of inefficiencies already present in the civil courts, some of which may be offset by an affirmative judging model.<sup>236</sup>

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233. See, e.g., *Kendrick v. Shalala*, 998 F.2d 455, 458 (7th Cir. 1993); see also *Hess v. Sec'y of Health, Ed. & Welfare*, 497 F.2d 837, 840 (3d Cir. 1974).

234. *Hennig v. Gardner*, 276 F. Supp. 622, 625 (N.D. Tex. 1967) (noting that one's nerves or education level may affect the credibility of facts, and holding that judge has a stronger duty when litigant skill level is low).

235. In one hearing, I observed firsthand in a local domestic violence court, a petitioner had returned to court eighteen times without successfully completing service of process. The judge continued to hear her case in open court, but would not direct her on the procedure for pursuing an alternative form of service. A judge's refusal to assist is, therefore, not cost-neutral, as the same parties may return to court again and again in pursuit of the same relief.

236. The matter of resources within the trial courts deserves greater attention. In 2012, approximately 1300 judges handled 816,575 individual SSA cases—averaging out to 628 hearings per judge. See *Workload of SSA's Administrative Law Judges (ALJs), fiscal years 2009–2012*, SOC. SEC. OFFICE RET. & DISABILITY POL'Y, <http://www.ssa.gov/policy/docs/statcomps/supplement/2013/2f8-2f11.html> (last visited Sep. 21, 2016). The high-intensity SSA caseload has led to delays of an average of sixteen months in case processing, forcing claimants to go without much-needed government benefits for the duration of the delay. The civil courts are stretched even thinner. See Kelli Kennedy, *Some Struggle To Live While Waiting More Than 2 Years For Social Security Disability Hearings*, U.S. NEWS (Nov. 28, 2015) <http://www.usnews.com/news/us/articles/2015/11/28/long-wait-times-plague-social-security-disability-process>. In 2014, in Massachusetts, forty-six family court and probate judges handled 156,531 matters, averaging out to 3403 cases per judge. See *Probate & Family Court Justices*, MASS. CT. SYS., <http://www.mass.gov/courts/court-info/trial-court/pfc/pfc-justices-gen.html> (last visited Sep. 21, 2016); see also *Probate & Family Court All Cases Filed By Division Fiscal Year 2014*, MASS. CT. SYS. (2014), <http://www.mass.gov/courts/docs/courts-and-judges/courts/probate-and-family-court/summarystats2014.pdf>. Not every family law or

### 3. *Building on adversary evolution in complex litigation*

Transformation of the judicial role in majority pro se courts will necessarily look different than it does in the arena of complex litigation, but it is aimed at a similar purpose. In big federal cases, judges are authorized intervene at the moments of greatest complexity, namely during pre- and post-trial phases of litigation when the parties are sorting through procedural issues, narrowing claims, determining areas of agreement, combing through mountains of discovery, and subsequently, implementing injunctive relief that may require dramatic changes within large institutions.<sup>237</sup>

In majority pro se courts, the moment of complexity occurs at a different point in time: in open court, when the parties are asked to develop the factual record. Many low-level civil cases implicate the fundamentally important issues of safety, shelter, stability, and parenthood.<sup>238</sup> That the cases are routine, involve only two parties, and are not legally complex does not diminish the significance and impact of the outcomes on the individuals involved. Without attorneys, fact development in these matters becomes a complex endeavor for parties to pursue on their own—one that may be exacerbated by lack of education, poor record-keeping, limited access to technology, unreliable witnesses, and language barriers. The need for a more active judge in big, federal cases is no greater than it is in small cases. In fact, the devastating consequences of bankruptcy, homelessness, or family violence can have far-reaching social effects that impact communities in ways as significant as do the disputes of corporate entities and the unconstitutional conduct of government actors. An affirmative judging model is an appropriate judging framework for addressing the type of complexity that emerges in the typical two-party case, and would serve as a parallel model to the type of active judging that is routine in large federal cases.

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probate case requires substantial judicial intervention; many settle early or involve a party who defaults. See, e.g., Peter Robinson, *An Empirical Study of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise and Fear*, 17 HARV. NEGOT. L. REV. 97, 105–06 (2012) (noting that most family law cases settle at settlement conferences). Nonetheless, enormous caseloads present a challenge to the affirmative judging model and potentially call for a renewed assessment of the allocation of resources within courts. At a minimum, courts might consider collecting data on how often judges interact with parties in open court to determine the frequency with which an affirmative duty would be triggered and the level of resources this could require.

237. See *supra* Section II.B.

238. Steinberg, *supra* note 95, at 749.

### *B. Affirmative Judging and Procedural Values*

In promoting fact development, the affirmative judging model bolsters three important procedural values that adversary process fails to advance in many two-party civil cases: impartial decision making, party participation, and transparency. Many of the presumed benefits of adversary procedure—many of the values it ostensibly advances—have come apart at the seams in confronting the unrepresented majority. Affirmative judging is not a perfect procedural model and does not address all of the barriers to effective pro se litigation; however, it offers a reasonable and feasible framework for protecting commonly invoked elements of fair process.

#### *1. Impartial decision-making*

There is perhaps no bigger indicator of a fair hearing than an impartial judge.<sup>239</sup> The parties must view the decision-maker as neutral and independent in order to experience the outcome as just. As one judge stressed, an “independent and unbiased adjudicator is such an essential element of accurate decision making that without it there may never be due process.”<sup>240</sup>

The passive norm is often defended as protective of impartial decision-making,<sup>241</sup> and indeed, through the lens of an individual case, a judge who refuses assistance to both parties may appear to maintain neutrality. Certainly, in withholding assistance universally, the judge guards against the instinct to develop only those legal and factual issues that comport with pre-existing beliefs about the merit of the parties’ claims. In addition, passive judging may boost the perception of neutrality because both parties are treated alike, or because the judge’s restraint itself communicates an air of detachment.

Judicial conduct that appears impartial at the individual case level, however, looks very different on an entire docket of pro se matters. When

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239. Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 457 (1986); see also Harold J. Krent & Lindsay DuVall, *Accommodating ALJ Decision Making Independence with Institutional Interests of the Administrative Judiciary*, 25 J. NAT’L ASSN. ADMIN. L. JUDGES 1, 1 (2005).

240. Judith K. Meierhenry, *The Due Process Right to an Unbiased Adjudicator in Administrative Proceedings*, 36 S.D. L. REV. 551, 554 (1991).

241. Landsman, *Brief Survey*, *supra* note 26, at 714–15.

most cases involve an unrepresented party, passive judging is much harder to justify as a means of impartial decision-making. Rather than reinforce neutrality, passive judging results in systemic partiality toward represented, or more skilled, parties who can capitalize on their opponents' confusion to gain control over the facts and issues to be considered in each case.<sup>242</sup> This may help explain why housing proceedings are sometimes singled out as particularly unfair to unrepresented parties. In case after case on a housing court docket, the judge is quite likely to render a decision on the basis of evidence submitted by the landlord without any real consideration of the tenant's under-articulated rebuttal.<sup>243</sup> While the judge might technically be considered "neutral," since neither the landlord nor the tenant benefits from assistance, the systemic result of the judge's passivity is to enable landlords to dominate the court proceedings.

Researchers in Baltimore City's rent court offer concrete evidence that systemic partiality can overtake civil proceedings in which one party is unrepresented. In a wide-ranging study of housing court practices, the researchers found that, in eviction pleadings, more than sixty-five percent of landlords reported incomplete or invalid licensing and registration information to the court, and over eighty percent reported outdated or inaccurate information about compliance with lead inspection requirements.<sup>244</sup> Although such deficiencies in the pleadings could have formed the basis of a tenant defense, the judges did not typically interrogate the veracity of the landlords' claims, and facially improper cases were thus allowed to proceed.<sup>245</sup>

The passive norm also undermines the perception of impartial decision-making among pro se parties, and this too is especially significant

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242. Two state court judges from Maryland note that "judicial passivity itself can create a lopsided process from which a non-neutral outcome can [result] . . ." Wilson & Hutchins, *supra* note 123, at 54. In pro se proceedings, the judges note that passivity from the bench might result in the judge not hearing relevant evidence or facts, the litigant feeling too intimidated to share his story, and the litigant not bringing forward important issues due to legal confusion. *Id.* at 54–55.

243. Bezdek, *supra* note 90, at 540; Michele Cotton, *A Case Study on Access to Justice and How to Improve It*, 16 J. L. SOC'Y 61, 81 (2014).

244. PUB. JUSTICE CTR., *supra* note 110, at 25–26 (2015), [http://www.publicjustice.org/uploads/file/pdf/JUSTICE\\_DIVERTED\\_PJC\\_DEC15.pdf](http://www.publicjustice.org/uploads/file/pdf/JUSTICE_DIVERTED_PJC_DEC15.pdf).

245. *Id.* at 25–26, 37.

when there is an asymmetry of representation or power.<sup>246</sup> In one study, welfare “[a]ppellants perceived ‘quiet’ or ‘passive’ ALJs as biased” in favor of the agency—not because the ALJ was employed by the agency, but because the ALJ allowed the agency’s representative to manage the hearing.<sup>247</sup> Even though pro se parties are typically offered an opportunity to present evidence, they may feel ill-equipped to take advantage of the moment, thus leaving intact the impression that the judge is ceding the floor to the skilled opponent.

Because the passive norm strongly favors represented parties who have access to knowledge and resources, affirmative judging for the unrepresented would merely tilt the balance back toward neutral. The model fortifies impartiality by creating a clear pathway for the unrepresented to present their facts, thereby increasing the likelihood that judicial fact-finding, rather than structural bias, will drive decision-making.

At the same time, affirmative judging would not unduly jeopardize the judge’s ability to remain neutral in individual cases. A number of scholars have made the point that judicial engagement does not automatically eradicate judicial neutrality—and of course, the experience of civil law systems and our SSA system demonstrates that this is so.<sup>248</sup> Richard Zorza has argued that judicial accommodations for the unrepresented, such as those embraced by the Model Code, and discussed in Part III, are justified in that they lead to a fuller airing of both sides to a dispute, thereby privileging actual neutrality over the appearance of neutrality.<sup>249</sup> As Zorza puts it, “passivity tends to appear neutral when it is not and . . . engagement is more likely to appear non-neutral when it is

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246. N.Y. CTY. LAWYERS’ ASS’N., REPORT: THE NEW YORK CITY HOUSING COURT IN THE 21ST CENTURY: CAN IT BETTER ADDRESS THE PROBLEMS BEFORE IT? 12 (2005), [http://www.citylimits.org/images\\_pdfs/pdfs/HousingCourtReport.pdf](http://www.citylimits.org/images_pdfs/pdfs/HousingCourtReport.pdf).

247. Vicki Lens, *Revisiting the Promise of Kelly v. Goldberg in the Era of Welfare Reform*, 21 GEO. J. ON POVERTY L. & POL’Y 43, 76 (2013).

248. In 2007, the Model Code of Judicial Conduct was amended to apply to Administrative Law Judges, meaning that the affirmative duty required of ALJs within the SSA system has been deemed compatible with the canon of impartiality. MODEL CODE OF JUD. CONDUCT app. I(B) (AM. BAR ASS’N 2011). So, there is already recognition that impartiality and active judging are not mutually exclusive.

249. Zorza, *supra* note 170, at 434.

in fact neutral.”<sup>250</sup> The affirmative judging model is premised on the notion that engagement with the unrepresented merely neutralizes the playing field, rather than providing an advantage to one side.<sup>251</sup>

There is always a risk that judges might focus on eliciting information that confirms pre-conceived notions about a case. However, requiring judges to explore a number of common claims or defenses in each matter can minimize this risk. At first blush, such a suggestion appears onerous, but in many pro se cases, only a few possible claims or defenses exist. For instance, in most eviction cases involving nonpayment of rent, the tenant can only defend against the action by raising one of a handful of possible defenses: that she did pay the rent, that the landlord waived his right to the rent, or that the landlord breached his duties under the implied warranty of habitability.<sup>252</sup> If impartiality, at a systemic level, is at least partly defined as decision-making that weighs equally the evidence available to both parties, then a judge who asks a series of well-crafted questions in each case is more likely to advance that goal than a judge who adopts the uncontested allegations of a single party as fact. Affirmative judging would enable unrepresented parties to submit at least some of their relevant facts into the record, and could play a role in negating the perception that judges are subject to capture by agency personnel or by powerful private parties.<sup>253</sup>

## 2. Party participation

Party participation in the courts, and in government more broadly, is not only an important procedural value, but a fundamental American value. We see it as critical that those affected by decisions have the opportunity to participate in, voice concerns about, and shape the outcome of those decisions. Procedural justice scholars have offered

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250. *Id.*; see also Sward, *Values*, *supra* note 22, at 355 n.96 (pointing out that “[t]here is some tendency in the literature to confuse impartiality with passivity. The two concepts must be distinguished. A judge can be impartial but very active in developing the case, as judges are in the continental inquisitorial systems. Impartiality is a requirement for fair adjudication, but judicial passivity is not.”).

251. See Engler, *And Justice for All*, *supra* note 210, at 2023; Gray, *Reaching Out*, *supra* note 126, at 105.

252. See, e.g., N.Y. CTS. ACCESS TO JUSTICE PROGRAM, TENANT QUESTIONS AND ANSWERS: NONPAYMENT EVICTION CASES IN NEW YORK STATE: DISTRICT, CITY, TOWN & VILLAGE COURTS OUTSIDE NEW YORK CITY 3–4 (2011), [https://www.nycourts.gov/courthelp/pdfs/TenantsGuide\\_nonpayment.pdf](https://www.nycourts.gov/courthelp/pdfs/TenantsGuide_nonpayment.pdf).

253. Lens, *supra* note 247, at 84–85.

theoretical grounding for the value of party participation by positing that it leads to voluntary compliance with governmental decisions.<sup>254</sup> This can be particularly important in the court setting, as parties are often directed to fulfill the terms of a judicial order in the absence of substantial court oversight.

Adversary procedure purports to promote party voice, and consequently, dignity and autonomy as well.<sup>255</sup> Through the norm of party control, parties dictate how their stories are framed and conveyed, decide whether particular issues or facts are raised, and present witnesses and evidence without substantial judicial intervention. In theory, then, the adversary system grants parties freedom and flexibility to shape their narratives in an intentional manner to advance their personal goals. Indeed, the primary justification for adversary procedure in modern times relates to its emphasis on party participation.<sup>256</sup>

When attorneys can provide the necessary professional expertise to help develop the parties' narratives, adversary procedure does indeed promote the value of party participation. In the pro se setting, however, the norm of party control suppresses voice, autonomy, and dignity, rather than advancing these important dimensions of fair process. Only represented parties benefit from maximum freedom in developing the content of their cases; the unrepresented are further disassociated from the court process when they are burdened with too much responsibility for developing the record.

Judicial accommodations—even those that relax certain procedural rules—are not sufficient to revive the relationship between adversary process and party participation. Several jurisdictions now permit judges to allow narrative testimony from pro se parties, and yet, as discussed in Part III with regards to Anita's hypothetical case, even this substantial procedural modification may not enable meaningful case participation.<sup>257</sup>

Research conducted by William O'Barr and John Conley confirms that narrative testimony can be problematic for unrepresented parties. In their linguistic and ethnographic study of fifty-five small claims hearings

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254. See Nourit Zimmerman & Tom. R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 *FORDHAM URB. L.J.* 473, 482–83 (2010).

255. Kessler, *supra* note 35, at 1212–13, 1258; Sward, *Values, supra* note 22, at 317–18; *see also* Landsman, *Brief Survey, supra* note 26, at 738.

256. See Sward, *Values, supra* note 22, at 317–18.

257. See *supra* Part III.

in two jurisdictions, O'Barr and Conley found that pro se parties who testify in narrative form tend to leave out legally relevant facts.<sup>258</sup> As illustration, they highlight the case of a man whose suit was damaged at the dry cleaner.<sup>259</sup> Although the plaintiff presented substantial evidence of the damaged suit, he did not address the legally significant issues of blame, agency, and responsibility, and the judge did not probe for these facts.<sup>260</sup> As a result, the man did not collect damages.<sup>261</sup> In a second example, O'Barr and Conley describe a woman who offered undisputed testimony regarding a faulty car engine she bought from a garage, but failed to advance facts related to her contractual relationship with the garage, and therefore did not recover her losses.<sup>262</sup>

The parties in O'Barr and Conley's examples cannot be said to have meaningfully participated in their cases. Although both were given wide berth to present their stories in narrative form, they left out critical facts that may well have existed and these omissions robbed their narratives of legal sufficiency.

Bryan Camp concurs that unrepresented parties experience "serious barriers to voice."<sup>263</sup> Relying on an in-depth analysis of the Internal Revenue Service's collection process, he argues that the unrepresented lack the substantive expertise to prosecute their cases, and therefore, cannot ensure that the decision-maker considers the right facts.<sup>264</sup> Even parties who interact with the judge directly, and appear to voice their concerns, do not participate meaningfully if they are not encouraged to share relevant facts that will have a substantial bearing on the decision.

Counterintuitive to conventional thinking, affirmative judging has the capacity to augment the voice of an unrepresented party. Through the affirmative model, the judge would cultivate active party participation in the case by drawing out testimony and evidence that the litigant might not recognize as significant. Even if an active judicial role diminishes certain traditional measures of party voice, such as the freedom to order

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258. See William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives*, 19 LAW & SOC'Y REV. 661, 661-62 (1985).

259. *Id.* at 685.

260. *Id.*

261. *Id.*

262. *Id.* at 686-88.

263. Bryan T. Camp, *The Failure of Adversarial Process in the Administrative State*, 84 IND. L. J. 57, 124 (2009).

264. *Id.* at 124-25.



evidence in a manner of one's choosing, it would serve more important measures, such as the party's ability to communicate all facts to the judge in a way that the judge can digest and follow.<sup>265</sup> The adversary system does not truly contemplate direct party-to-judge communication as a way of fostering party participation. The assumption has always been that an attorney develops the case, and serves as a proxy for the party in presenting it to the court.<sup>266</sup> While attorney representation may still present the best model for promoting party voice, it is no longer a reliable way to advance the value of participation in most two-party civil cases. The judge is by no means a perfect substitute for an attorney, but in devising non-leading questions that are reasonably likely to elicit relevant information, the judge can enable the party to become a more full-fledged participant in the hearing than the party is likely to achieve on her own.

O'Barr and Conley conclude from their study on small claims narratives that many of the participation barriers lay litigants face could be resolved by judges with the "time, inclination, and ability to intervene" with follow-up questions.<sup>267</sup> They hone in on one judge who formulated a legal theory and dutifully tested it by questioning the parties—with the result that the unrepresented plaintiff achieved the outcome she sought. The authors believe that, in taking an active approach, the judge aided the party's participation, and was therefore able to render a more exacting decision.<sup>268</sup>

Barbara Bezdek draws similar conclusions from extensive research in a Baltimore housing court.<sup>269</sup> Bezdek argues that unstructured narrative can diminish party voice, as the tenant will often offer a "relational" account of the story by focusing on social interactions, status, and the history of relationships between the parties, rather than ordering their accounts by legal theories or rules, leading judges to dismiss their narratives.<sup>270</sup> She suggests that judges should elicit appropriate discourse

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265. See O'Barr & Conley, *supra* note 258, at 696 (making the point that unrepresented litigants can benefit from the assistance of a magistrate who helps them organize their testimony and address all legally significant issues).

266. Engler, *supra* note 210, at 1988.

267. O'Barr & Conley, *supra* note 258, at 696.

268. *Id.* at 690–96.

269. Bezdek, *supra* note 90, at 533–35.

270. *Id.* at 587–88.

from pro se parties in order to promote litigant voice.<sup>271</sup> Such research supports the notion that active judging might aid the important value of party participation in pro se cases.

### 3. *Transparency*

Transparency is another crucial feature of fair process. A transparent court is defined as one that reveals “all relevant aspects of its operation.”<sup>272</sup> Procedural transparency is particularly important, as parties must be advised of how the court will adjudicate their cases so that they may prepare and adjust their expectations. A lack of transparency can undermine the trustworthiness of the judiciary and alienate the public’s faith in a fair process.<sup>273</sup> Furthermore, it can be difficult to evaluate or refine procedure when courts do not disclose their methods or engage in conduct that comports with written norms.<sup>274</sup>

Our criminal courts are transparent; the courts purport to abide by adversary norms, and do indeed proceed accordingly. In the civil courts, however, public doctrine commands adherence to adversary procedure, and yet many judges invent alternatives.<sup>275</sup> The rise of the unrepresented majority has forced many judges to confront the unsuitability of employing adversary procedure on their dockets, resulting in significant variation in procedural habits. Moreover, an odd silence surrounds judges’ on-the-ground practices, with virtually no public acknowledgement of the departures from adversary procedure now common in two-party cases. The two-party civil system is now likely the setting where the least transparency exists regarding adjudicatory practices. In housing, family law, and consumer courts, there is virtually no recognition that judges regularly depart from the passive norm or that litigants might be subject to widely differing procedural methods in court.

The affirmative judging framework would elevate transparency and accountability in majority pro se courts by creating a visible standard of practice that litigants can rely on in ordering their affairs. It is unrealistic to expect judges to remain passive in pro se matters if they seek to reach

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271. *Id.*

272. Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 483 (2009).

273. Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1324 (2010) (noting that when a court lacks transparency, it “deters the development of standards, prevents the monitoring of impact, and undermines the trustworthiness of the judiciary”).

274. *See id.*

275. *See supra* Part IV.

merits-based decisions. A better approach is to develop norms of conduct that judges can abide by, and then make those norms public so that parties understand how their proceedings will unfold.

Transparent procedures are particularly important if the affirmative judging model is to work in cases involving asymmetrical representation, where one party is represented and the other is not. Judicial intervention, if not authorized or required by clear guidelines, can raise the specter of prejudice against a represented party, who might be blindsided by atypical procedures. Indeed, this was the case in *Inquiry Concerning Broadman*,<sup>276</sup> where the judge relaxed traditional procedures for the unrepresented party, but was subsequently censured when the opponent's attorney complained that he received no advance notice that the "trial would proceed in an alternative order."<sup>277</sup> If, however, attorneys can predict what judges will ask and how they will ask it, they will feel better equipped to prepare clients to testify, and will be able to shift their focus to supplementing the record rather than presenting a case in chief.

No procedural system that vests discretion in the judge will be entirely transparent. In complex litigation, for example, managerial judging has often been criticized for its lack of transparency, owing to off-the-record settlement conferences that are regularly held in closed chambers.<sup>278</sup> In that setting, however, attorneys are typically present for both parties and a range of manuals and best practices are available to guide judicial conduct.<sup>279</sup> While challenging a judge's aggressive settlement tactics may still present difficulties, transparency exists in the sense that official court rules acknowledge the practice and discuss a range of acceptable judicial actions.<sup>280</sup> The predictability of any system will never be precise, but unrepresented parties compound the problem immeasurably. The affirmative judging model does not aim for absolute transparency, as judges will need to retain discretion in the way they carry out fact development, but it proposes a basic procedural framework that is reliable, delineated, and capable of serving the needs of most cases.

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276. See *Inquiry Concerning Broadman*, 48 CAL.4TH CJP SUPP. 67 (Feb. 26, 1999) (No. 145), [http://cjp.ca.gov/res/docs/s\\_c\\_cites/Broadman\\_48\\_Cal.4th\\_CJP\\_Supp.\\_67.pdf](http://cjp.ca.gov/res/docs/s_c_cites/Broadman_48_Cal.4th_CJP_Supp._67.pdf).

277. *Id.* at 70–71.

278. Todd D. Peterson, *Restoring Structural Checks in Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 73–78 (1995).

279. See MANUAL, *supra* note 86, at 167–82.

280. FED. R. CIV. P. 16; see MANUAL, *supra* note 86, at 167–82.

*C. Why Not a Discretionary Standard?*

This Section takes on the argument that simply broadening judicial discretion to develop the case record, rather than requiring it, would be sufficient to address the breakdown in adversary procedure in cases involving the unrepresented. To be sure, expanding upon a judge's discretionary powers might be a plausible alternative to an affirmative duty, as it would simply legitimize the range of adjudicative methods already employed in pro se courts. This Section argues, however, that an affirmative duty, and not a discretionary standard, is essential if we aim to further fair process.

While some amount of judicial discretion in the execution of procedure is desirable, not to mention inevitable, the decision whether to develop the factual record is too fundamental to the outcome of the case to be left to an individual judge's preferences. Indeed, it is unclear whether optional fact development on the part of the judge can even properly be characterized as an exercise of discretion. In the words of Ronald Dworkin, judicial discretion should be viewed as "the hole in a doughnut," hemmed in by "a surrounding belt of restriction."<sup>281</sup> Pauline Kim concurs that formal standards must be erected for discretion to be capably exercised.<sup>282</sup> Granting judges permission to either sit in stony silence or to elicit a legally relevant narrative from a party is better described as unfettered procedural choice, rather than discretion. Essential judicial functions, such as fact-finding, should not have an opt-out provision.

A discretionary standard is further problematic in that it invites implicit bias to infect judges' procedural choices. The findings of fourteen state task forces confirm that judges are vulnerable to implicit bias against women,<sup>283</sup> and some research also demonstrates that judges may harbor

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281. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31 (1977).

282. Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 408–09 (2007) ("[Discretion] suggests that a decision should be made not randomly or arbitrarily, but by exercising judgment in light of some applicable set of standards, guidelines, or values. Those standards or norms may rule out certain options while still permitting the decisionmaker [sic] to exercise some choice.").

283. Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 55–62 (1996) (analyzing some of the findings of fourteen state task forces from the 1990s, which documented serious bias against women in the courts—evidenced through poorer substantive outcomes, hostile treatment by judges, judicial bias against domestic violence survivors, judicial bias against spousal support, judicial bias regarding women's role and fault in divorce, judicial bias in custody decisions). For

implicit biases against racial minorities.<sup>284</sup> Moreover, because state court judges are voted in and do not have lifetime tenure, they are inherently susceptible to political forces that may cause them to favor litigants who share their racial, ethnic, gender, and socio-economic characteristics.<sup>285</sup> In other words, state trial courts are already primed for partiality toward represented or more powerful litigants, and granting judges discretion to decide whether, and to whom, to provide assistance may exacerbate those biases.<sup>286</sup>

One final drawback to a discretionary standard is that it would fail to create a sufficiently robust standard of review. Judicial review enhances the visibility of the trial court's actions and creates an above-board standard of conduct that can be honed by the appellate courts. Published decisions help develop and define best practices so that judges have standards to rely on, rather than simply a license to improvise. Under a discretionary regime, pro se parties would have very little opportunity to challenge a judge's refusal to grant assistance. The accommodation doctrine described in Part IV is discretionary in most jurisdictions and provides a window into the difficulty of seeking appellate review, even in the face of utterly inconsistent judicial conduct.<sup>287</sup> Indeed, an advisory benchbook promulgated by California's Judicial Council takes pains to assure judges that any "accommodation" they make, or choose to not make, is virtually immune to challenge.<sup>288</sup> Specifically, California advises its family law judges that, under the current state of the law, any

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more on gender and racial bias task forces, see GENDER AND RACIAL FAIRNESS RESOURCE GUIDE, NAT'L CTR. FOR STATE CTS., [www.ncsc.org/topics/access-and-fairness/gender-and-racial-fairness/resource-guide.aspx](http://www.ncsc.org/topics/access-and-fairness/gender-and-racial-fairness/resource-guide.aspx) (last visited Sept. 24, 2016).

284. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1195 (2009).

285. See Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 129, 131, 139 (1997) (discussing the political forces affecting judicial elections and making the point that gender and racial diversity on the bench may affect judicial attitudes toward minority issues and perspectives).

286. It is also possible that judges, in an attempt to assist historically disadvantaged groups, will go in the opposite direction, and like Judge Weinstein in *Floyd v. Cosi, Inc.*, 78 F.Supp.3d 558 (E.D. N.Y. 2015), will ask leading, rather than neutral, questions in an effort to help the pro se party—leading to a claim of bias from the opponent.

287. See *supra* note 148.

288. See JUD. COUNCIL OF CA., HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS: A BENCHGUIDE FOR JUDICIAL OFFICERS 3–7 (2007), [http://www.courts.ca.gov/documents/benchguide\\_self\\_rep\\_litigants.pdf](http://www.courts.ca.gov/documents/benchguide_self_rep_litigants.pdf).

accommodation they make will always be affirmed if the adjustments do not prejudice the other side.<sup>289</sup> Additionally, any refusal by judges to make an adjustment will always be affirmed unless the refusal is manifestly unreasonable or unfair.<sup>290</sup> Indeed, the benchbook accurately captures the difficulty of challenging judicial action under an abuse of discretion standard. In order to carve out a legitimate pathway to appeal, judicial development of the factual record must be required. It is only because an affirmative duty on judges is present in the SSA context that the district courts' reversal rate of ALJ decisions exceeds fifty percent.<sup>291</sup>

The sufficiency of the record in millions of pro se cases is, or should be, an issue of critical importance to the justice system, and one that demands far greater participation by appellate courts in setting and perfecting standards. An affirmative duty would create a proper standard of review, requiring remand of a case for further development of the record where the judge does not fulfill her duty, unless the error is harmless. In SSA matters, cases are routinely remanded for additional fact development, resulting in a doctrine far more sophisticated and fine-tuned in delineating judicial obligations than exists for trial judges in the civil courts.<sup>292</sup> In *Brown v. Shalala*, for example, the court found "evidentiary gaps" in the record evidenced by the judge's failure to review relevant medical documents and to question the claimant's husband following his testimony regarding the claimant's mental state.<sup>293</sup> The case was remanded for further fact gathering and the judge was deemed in violation of his duty to develop the record.<sup>294</sup>

The specter of judicial review, and the promulgation of more exacting standards, has a significant effect: ALJs award disability benefits in sixty percent of SSA cases.<sup>295</sup> To provide additional meaning to that statistic,

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289. *Id.*

290. *Id.*

291. Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 704–05 (2002).

292. *See, e.g.*, *Fred-Perez v. Barnhart*, 450 F. Supp. 2d 461, 466 (D. Del. 2006) ("The Court has reviewed the A.L.J.'s decision and concludes that this matter should be remanded for further development of the record. In social security cases, the A.L.J. is charged with the duty to develop a full and fair record.").

293. 44 F.3d 931, 935–36 (11th Cir. 1995).

294. *Id.* at 936.

295. Damian Paletta, *Disability-Claim Judge Has Trouble Saying 'No'*, WALL ST. J. (May 19, 2011), <http://www.wsj.com/articles/SB10001424052748704681904576319163605>

the affirmative duty on ALJs in the SSA context results in the award of benefits to more than 400,000 individuals annually who previously had been denied benefits by frontline bureaucrats in a two-phase review of the paper record.<sup>296</sup> Compare that to a study conducted in Baltimore where only eight percent of renters were successful in raising a habitability defense, even though researchers found that seventy-eight percent of those brought to court “were living amidst serious housing defects.”<sup>297</sup> A mandatory system of fact development, coupled with meaningful access to judicial review, is necessary if outcomes in the civil courts are to mirror those obtained in administrative tribunals such as the SSA.

## VII. CONCLUSION

The role of judge as a neutral and impartial arbiter is ingrained in the American conception of justice. Judges expect the parties to develop the factual and legal substance of a case, and to do so within the bounds of accepted procedural and evidentiary rules. A judge’s job is not to assist with this endeavor in any manner, but rather to respond to the parties’ actions with rulings appropriate to the circumstances. And yet, there is precedent for departing from traditional norms when they prove outdated. In the arena of complex litigation, a huge transformation in the judicial role has taken place, with judges now playing a much more prominent role in managing large-scale cases than ever before.

Just as the expansion of civil rights and the advent of the class action lawsuit altered the legal landscape in the 1960s and 1970s by requiring new modes of judicial adjudication in complex litigation, so too does the recent rise of an unrepresented majority create the conditions necessary

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918524; SOC. SEC. ADVISORY BD., ASPECTS OF DISABILITY DECISION MAKING: DATA AND MATERIALS 58 (2014), <http://www.lb7.uscourts.gov/documents/1-11-CV-00224.pdf>.

296. David Fahrenhold, *The Biggest Backlog in the Federal Government*, WASH. POST (Oct. 18, 2014), <http://www.washingtonpost.com/sf/national/2014/10/18/the-biggest-backlog-in-the-federal-government/> (noting that in fiscal year 2014, the SSA had an incoming caseload of 810,715 matters. Because ALJs grant benefits in approximately sixty-percent of cases, they award benefits to more than 400,000 claimants who were previously rejected by agency personnel). Note that some scholars have been critical of the ALJs in the SSA system because of their extraordinarily high grant rate. See Richard Pierce, *What Should We Do About Social Security Disability Appeals?*, REG., Fall 2011, at 34–37, <http://object.cato.org/sites/cato.org/files/serials/files/regulation/2011/9/regv34n3-3.pdf>.

297. PUB. JUSTICE CTR., *supra* note 110, at v.

for modification of the judicial role in two-party cases. A judge who presides over regular, everyday disputes in state courts may interact with as many as one hundred pro se parties daily, very few of whom can effectively discharge their duties under the norm of party control.<sup>298</sup> Indeed, a judge who spends all day, every day with the unrepresented, and yet refuses to descend from the passive perch, might find it difficult to *ever* discharge her duties to weigh facts, resolve disputes, and enforce the substantive law. Judges are aware of this dynamic, and many are engaging in unsanctioned adversary departures in an effort to determine the merits of a case. A better approach would involve imposing an affirmative duty on judges to develop the record in pro se cases. Such a duty would cohere theory, doctrine, and practice, and promote many of the procedural values that have been casualties of the clash between adversary procedure and the unrepresented.

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298. Leslie Eaton & Leslie Kaufman, *In Problem-Solving Court, Judges Turn Therapist*, N.Y. TIMES (Apr. 26, 2005), <http://nyti.ms/1SYOm2N>.



