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Self-Representation, Access to Justice, and the Quality of Counsel:
A Comment on Rabeea Assy's *Injustice in Person: The Right of Self-Representation*
(forthcoming, JERUSALEM REVIEW OF LEGAL STUDIES)

David Luban

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The role of commentator is at once simpler and more complicated when you find yourself largely in agreement with the author. Simpler, because all you really need to say is “well done!”; more complicated, if your assigned role is to raise points of doubt. Assy has largely persuaded me on most points he argues, and as I was reading I discovered that he has anticipated many of my concerns and objections. I will begin, therefore, with “well done!” Assy’s book advances a clear-cut argument against the legal right of self-representation, basing it on meticulous and broad-ranging scholarship that covers U.S., UK, and German law, as well as law in the international criminal tribunals and the European Court of Human Rights. And not only law: he includes an astute critical discussion of psychological studies of procedural justice and a philosophical discussion of autonomy. Furthermore, for those of us in common law jurisdictions who believed more or less uncritically that the right to self-representation is moral and procedural bedrock, Assy’s conclusion that no credible argument supports an unlimited right of self-representation comes as a surprise – so the book has a substantial thesis that upends conventional wisdom. The surprise is partly mitigated when we learn that many European legal systems already prohibit self-representation, and therefore mandatory legal representation of the sort Assy proposes isn’t simply a theorist’s hypothetical. But a common lawyer who takes the right of self-representation as axiomatic might think those European systems are wrongheaded. Assy’s arguments disabuse us of that idea.

I'm nevertheless left with questions and hesitations, mostly about the hard cases in which Assy's proposed rule of mandatory representation may work injustice. Assy supports a rule of mandatory representation in non-criminal cases, but he is undecided whether it should be absolute or only a strong presumption that would allow exceptions. My comments identify cases (or classes of cases) where exceptions seem in order. I will focus almost entirely on the U.S. legal system and U.S. examples, the only ones I really know.

I.

The heart of Assy's critique of self-representation is encapsulated in a phrase he uses many times: legal representation, be it self-representation or representation through counsel, is supposed to be "effective and efficient." That is a moral and practical requirement on any system of justice that purports to fulfill the rule of law.

The problem with self-representation is that it is usually *ineffective* for the self-represented litigant, and it is *inefficient* for the courts, which have to deal with litigants who don't know procedure, violate rules, and waste time with pointless and sometimes incoherent arguments. Furthermore, pro se litigants not only waste the court's time, they waste their adversaries' time and money, and impose opportunity costs on other litigants by clogging up the courts – so an unlimited right of self-representation may inflict collateral damage beyond wasting judges' time and trying their patience.

Assy's critique thus includes arguments of two kinds: first, that self-representation is bad for litigants themselves, sometimes verging on suicidal. Second, that self-representation damages the legal system and works injustice.

Let's assume what is almost certainly true: that the overwhelming majority of litigants, represented or unrepresented, want to win their case or at least gain some practical advantage. In other words, very few are litigating for sport, or to make a statement. Later, we will also have to consider the handful of exceptions, those who are involved in political cases.

For the vast majority who litigate to win, the first question is why they decide to represent themselves. Assy, who does not show much sympathy for pro se litigants, does not delve into their motivations and world-view in great detail; but it seems there are three answers, all of which he considers at various points in the argument:

(1) would-be litigants believe, rightly or (usually) wrongly, that they can do as good a job as a lawyer;

(2) they can't obtain a lawyer, for financial or other reasons; or

(3) their lawyer won't present the case the litigant wants to make.¹

Of course these can overlap.

II.

These three motivations can in turn be subdivided into a mix of good and bad reasons. For example, the belief that I can do as well as a lawyer may actually be true in some simple cases (Assy does not deny this), especially because I may be willing to put in dozens more hours preparing my case than a busy lawyer would do. In complicated cases, on the other hand, a layperson who thinks he can do as well as a lawyer is probably suffering from hubris or ignorance or both. Or the layperson may believe (probably

¹ For another list of reasons, some of which appear to be speculative and anecdotal but do make sense, see Swank, at 1572.

wrongly) that going it alone will elicit enough sympathy from judge or jury to make up for incompetence.

But the layperson may also have a realistic appraisal of how bad her lawyer is, and it may be too late or too difficult to switch counsel. Her lawyer seldom returns phone calls or emails, missed a deadline, forgot key facts when they spoke on the eve of trial, and never bothered to investigate evidentiary leads the client mentioned repeatedly. At trial, the client notices her lawyer dozing off, and she is completely frustrated when the lawyer's bumbling cross-examination leaves out key questions. So she fires the lawyer in mid-trial and prepares to go it alone, provided the judge will let her. This is desperation, not hubris, and it may be justified. While Assy is by no means oblivious to lawyer incompetence and neglect, it seems to me that he pays them insufficient heed. "Doing better than a lawyer" is a comparative judgment, and the comparison must include bad lawyers as well as good ones. Assy suggests that a client dissatisfied with her counsel can switch counsel,² but that is not always practical. It is seldom costless, and clients may not know how to find a better counsel the second time around. If a judge refuses to move back an impending trial date (perhaps fearing that the change in counsel is a delaying tactic), substitute counsel may have no time to prepare.

Assy discusses an important and well-known study of a Massachusetts district court that found that represented litigants facing eviction from their homes fared substantially better than pro se litigants who had received a training session on legal self-help.³ That finding buttresses Assy's case for the ineffectiveness of self-representation

² Assy, at 146 (ch. 7, TAN 22).

³ The study is D Greiner, C Pattanayak and J Hennessy, 'The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects of the Future' (2013) 126 Harvard Law Review 901, cited in note 4 of chapter 1 (p. 10).

compared with lawyer representation. But another study by the same authors shows that lackluster representation may be the norm in a specialized Massachusetts housing court, and lackluster representation made little or no difference in how often clients kept their homes. In that study, one group of housing-court litigants received only minimal “unbundled” legal help in hallway settlement negotiations and mediations; they went pro se in the hearings. But they fared just as well as clients receiving full-service representation, even though the full-service lawyers provided an average of 11 more hours of service than the “unbundled” lawyers.⁴ The authors suggest that the reason was simply that the full-service lawyers were not very zealous. They seldom filed motions or requested jury trials, indeed far fewer than the lawyers in the district court study, and it showed in the results.

III.

Next consider what is probably the most important of the three reasons clients choose to self-represent: the client simply can’t obtain a lawyer, for financial or other reasons. What might those other reasons be? Well, in some cases the lawyer might decline a case because it is frivolous; or proceeding with it might be unethical because the client insists on lying. Here, as Assy rightly argues, the lawyer who turns down the case or withdraws from it serves a legitimate gatekeeping purpose.⁵ The existence of such cases is not an argument for a right of self-representation – rather, it supports Assy’s skepticism of self-representation. A defender of self-representation might respond that there are other remedies for frivolous cases: U.S. courts have the power to impose

⁴ Cassandra Wolos Pattanayak, D. James Greiner, & Jonathan Hennessy, How Effective Are Limited Legal Services Programs? A Randomized Experiment in a Massachusetts Housing Court (2012), available at <http://www.law.uchicago.edu/files/files/Greiner%20Paper.pdf>. See pp. 23, 40, 44.

⁵ Assy, at 146-47.

financial sanctions on those who file frivolous papers. However, that may not deter a judgment-proof litigant.

But financial reasons are a more important reason that people can't find lawyers than lawyer gatekeeping. Inability to afford a lawyer is obvious in cases of indigent litigants, and Assy emphasizes that in the UK the rise of self-representation is fueled by deep cuts in Legal Aid. In the United States, the legal aid situation is worse, and is likely to become worse still: President Donald Trump's proposed budget completely eliminates the already-pathetically underfunded Legal Services Corporation; and there is no legal right to state-funded legal aid in civil cases, not even in an extreme case when the state is trying to terminate an unrepresented mother's parental rights.⁶

Assy also notes that sometimes the financial reasons people can't find lawyers come from the lawyer's side: lawyers simply don't want a case that pays too little. In the United States, this is a standard reason for plaintiff's lawyers to turn down contingency fee cases: unless they can get a healthy five figure outcome, they aren't interested. Legitimate cases that might matter significantly to the plaintiffs can be snuffed out for this reason. A related phenomenon occurs in civil rights cases, where discrimination victims may be looking for job reinstatement rather than money – in which case a contingency fee is impossible because there is no *res*. Federal law provides for attorney's fees for the prevailing party in civil rights cases, but a series of Supreme Court decisions have made it harder to collect attorney's fees, and in any case, the prospect of losing and

⁶ *Lassiter v. Dep't. of Social Services*, 452 U.S. 18 (1981).

collecting nothing may deter plaintiff's lawyers from taking on risky cases, even if they are meritorious.⁷

There is a third financial reason, which affects litigants who are not indigent: attorney's fees can turn valid claims into economic losers.

Here is a personal story. In my twenties, long before I knew any law, I moved out of an apartment. I had a hunch my landlord wouldn't return my security deposit. So, once my belongings were out, I asked a photographer friend to take detailed photos of the empty apartment, with witnesses present, so I could prove there was no damage. As predicted, the landlord refused to give back my deposit, and I sued him in small claims court. His response, or rather his lawyer's, was to counter-claim for damages at a high enough level to bump the case out of small claims court – and high enough to clean out my meager savings if I lost. It was a baseless, vexatious counter-claim, but it worked.

I took the landlord's scary-looking complaint to a lawyer along with my photos. He told me I had a very good case. But, he explained, his fee for going to court would be more than the security deposit I was trying to recover. He said the best he could do was settle the case, offering to drop my claim in return for the landlord dropping his. And that's how it worked out. I paid my lawyer, and the landlord kept my money.

Knowing then what I know today, I would have called the landlord's bluff and represented myself pro se: even in the hands of a legal ignoramus like me, my case was a stone cold winner. But I was nervous, because I couldn't afford to lose. And my lawyer was right: at his hourly rate, even a short victorious trial would have lost me money on

⁷ The Supreme Court cases are *Marek v. Chesny*, 473 U.S. 1 (1985), *Evans v. Jeff D.*, 475 U.S. 717 (1986), and *Bukhannon v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598 (2001).

top of the anxiety. A valid case that was economically rational to bring pro se became economically irrational once a lawyer entered the picture.

I fit into a category Assy describes: my choice to settle for injustice was not a case of “demonstrated inability to pay.”⁸ I could afford a lawyer. It’s just that once I factored in lawyer’s fees, the only choice that made economic sense was letting the landlord steal my money. Even though my choice did not “relate to objective ability to pay,” it was not based on “subjective cost-benefit calculation,”⁹ the two alternatives Assy mentions. There was nothing subjective about the calculation that winning my case would cost me more money than I stood to win.

What my lawyer should have done was pull out the housing code, photocopy the two pages I needed, and advise me to represent myself. He might have thrown in a little procedural primer: “Bring along the photos and witnesses. And by the way: get a haircut, wear a tie, and call the judge ‘Your Honor’.” He could have billed me for the half-hour it would take to tell me all the procedure I needed to know. Justice would have been served. In an Idaho study, nearly a third of pro se litigants explained that they litigated pro se because a lawyer advised them to – so perhaps I was simply unlucky in my choice of lawyer.¹⁰

Assy discusses cases like mine on the final page of his book, and he concedes that in such cases courts should perhaps permit self-representation; so his proposed rule of mandatory representation need not be exceptionless. Assy’s concession of this point is, I think, grudging: he also writes that “denial of access to court . . . might turn out to be a price worth paying for the benefits of mandatory representation if imposed as a general

⁸ Assy, at 21.

⁹ Assy, at 21 note 41.

¹⁰ Swank, at 1573.

rule.”¹¹ And even a rule that permits exceptions for cases like mine should, in his opinion, place the burden of proof on the litigant to justify self-representation. Assy suggests that to satisfy that burden the litigant might have to show “competence to conduct effective and efficient litigation” among other things – which might be impossible, for normally the court has no way of knowing in advance how competent the litigant is.¹²

The point of my story is simple: a rule that requires people to hire lawyers to play the game of civil justice will dissuade some people from pursuing meritorious claims because lawyers are expensive. And this can be true even for people who can afford lawyers.

How expensive are lawyers? In the United States, very expensive. One author Assy cites reports that “an uncontested divorce that does not go to court will cost around \$16,500, whereas a contested divorce that proceeds to trial could cost more than \$150,000. However, the average price for obtaining a divorce is around \$20,000.”¹³ That was fifteen years ago. Since then, divorce kits available on-line make uncontested divorce far, far cheaper; when I did a brief google search, I found that it costs as little as \$150 plus the filing fee. But that is an argument for, not against, the efficacy of self-representation. Why make the divorcing couple pay thousands when they can do it by themselves for hundreds?

I will assume that other forms of litigation may carry comparably exorbitant price-tags. Assy argues that “financial considerations are not always tantamount to

¹¹ Assy, 206.

¹² Id. at 207.

¹³ Amy C. Henderson, Meaningful Access to the Courts?: Assessing Self-Represented Litigants’ Ability to Obtain a Fair, Inexpensive Divorce in Missouri’s Court System, 72 UMKC L. Rev. 571, 574 (2003), at 573, quoted in Swank, at 1541.

financial necessity,”¹⁴ but financial necessity may not be the appropriate yardstick. A \$20,000 legal fee would take a large bite out of the retirement savings of the average U.S. household, which amounts to \$95,000. The family could afford the fee if it had to, so financial necessity is not the issue. But paying the lawyer’s bill might make for a leaner retirement down the road, the kind in which mom can’t afford dental work and dad has to forego hearing aids.

The underlying point seems to be this. Assy assumes throughout his argument that legal services will continue to be distributed by market mechanisms, as is certainly the case. But he barely discusses the palpable market failures. A mandatory representation rule such as he favors gives people two options: pay the market rate, or lump it by forfeiting your legal right to bring or defend an action. If the market rate is prodigious, that choice is entirely unappetizing.

IV.

To this, there is an obvious reply. The undeniable strength of Assy’s argument is that adding in the option of self-representation is no solution to the problem, because self-representation is overwhelmingly likely to be ineffective. From the hapless pro se litigant’s point of view, self-representation is akin to a kamikaze attack that misses the target and plunges into the ocean. From the point of view of the court, it’s a mess. If the judge aids the pro se litigant, there goes procedural fairness. If the judge doesn’t, there goes substantive justice. Either way, it’s a waste of time and therefore a waste of public resources. For the judge, it’s a lose-lose dilemma.

We can put this argument in different terms. Usually, the access-to-justice movement thinks it is awful that people with legal problems have to represent themselves

¹⁴ Id. at 20.

because they can't get an affordable lawyer. It would be irrational if they suddenly pivoted and argued on behalf of self-representation, as though it is a solution to the problem of inadequate legal services rather than a symptom of the problem.

Irrational or not, I think the reason that reaction is tempting is that Assy's advice to litigants seems callous about denial of justice: if you don't want to pay the market rate for a lawyer, that's your choice. Drop your claim or defense. Suck it up.¹⁵ At least rhetorically, Assy seems a little too uncritical of the legal services market as it is currently structured, and a little too indifferent to the plight of would-be clients who the legal services market excludes.

Matters are worse if the stakes for that would-be client are unacceptably high. Suppose the cause of action is obtaining a restraining order against an abusive husband. Must the wife forego the restraining order because she can't afford a lawyer (because her abusive husband keeps the family money)? Or consider an immigrant seeking political asylum, who faces an adversarial removal hearing to contest the asylum officer's negative finding. In the United States, there is no right to legal aid in removal proceedings. Must the asylum seeker surrender because she can't pay \$4000 up front for a lawyer? That is a lot of money even for a working immigrant who makes \$24,000 a year, twice the 2017 federal poverty line (and therefore not an indigent). Admittedly, chances are slim that the asylum seeker will prevail if she goes pro se against an experienced government lawyer in immigration court – but do we really want to deny her the opportunity? It's her only chance to avoid deportation to danger.

How about a tenant facing eviction? In my own experience observing Baltimore housing court, the multitudes of pro se litigants usually lose; but do we really want to

¹⁵ Assy, at 149-151.

deny them their chance to avoid homelessness? People who can't pay their rent probably can't hire counsel either. Equipped with a "know your rights" pamphlet, they may discover they have a defense if, as is often the case, the landlord hasn't maintained the premises properly. Armed with that knowledge, they occasionally win.

I've chosen these examples – the restraining order, the asylum claim, the eviction – because the stakes for the litigant if she doesn't litigate are non-monetary and punishingly high. They are cost-benefit calculations, but it would be misleading to call the stakes "subjective"¹⁶ merely because they are non-monetizable. Self-representation may be a desperate and usually fruitless route to take, but it's better than no hope at all.

So here are the possibilities: the mandatory-representation rule Assy favors, which gives the client the choice between retaining an expensive lawyer or being excluded from court; or the right of self-representation, which gives the client the third option of going pro se. For reasons Assy persuasively sets out, that third option is a losing proposition for most clients much of the time. My response – self-representation may be better than nothing – still leaves underserved client populations with an unattractive choice set. Both rules are bad. But it seems that in these cases a mandatory representation rule is the worse of two evils.

V.

Assy hints at a solution to this impasse in his interesting chapter on McKenzie Friends, the British system of permitting pro se litigants to bring along non-lawyer helpers. Some helpers offer little more than moral support or a cooler, wiser head. But some McKenzie Friends may be highly knowledgeable and skilled repeat-players in

¹⁶ Assy, at 21 note 41.

specialized corners of the law. They can perhaps be a genuine low-cost alternative to both unaided self-representation and mandatory lawyering-up.

In the United States, unlike the UK, no such institution exists. The bar fights relentlessly to preserve the lawyer monopoly against such interlopers, labeling what they do unauthorized practice of law (UPL) and prohibiting it.¹⁷ UPL restrictions are sheer protectionism by the bar. But permitting non-lawyer assistance, or better yet permitting lay representation, might be a way to make Assy's rule against pure self-representation more palatable.

The organized bar is on strong grounds when it insists that only fully trained lawyers are competent to handle complicated civil litigation. But many of the contexts of pro se litigation hover somewhere between simple and complicated civil litigation. They are administrative proceedings before specialized tribunals and boards. They deal with unemployment compensation, rent disputes, special education placements, disability hearings, probating uncontested wills, and the like. They may be too complicated for a novice, but a layperson or paralegal can be trained on how to litigate these hearings, without anything like a full-fledged legal education. Breaking the bar's monopoly on legal representation seems to me a necessary accompaniment to Assy's proposed mandatory representation rule.

VI.

Even in complex cases, we should remember that trials are rare events because of settlements and plea bargains. The overwhelming majority of U.S. cases terminate through negotiations, not trial. So one question we must ask about the effectiveness of

¹⁷ Only one U.S. state has agreed to permit licensed limited-services legal technicians: Washington State Bar Association, *Limited License Legal Technician Program*, available at <http://www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians>.

self-representation is whether a pro se litigant is incompetent to settle a case – or less competent than a lawyer. Assy does not explicitly discuss this question.

The contrast between layperson and lawyer negotiating a settlement is not as stark as the parallel question about conducting a trial. Most law students graduate without ever taking a negotiation class, and we have no reason to suppose lawyers are expert negotiators. Conversely, laypersons can be tough and shrewd negotiators. One might respond that because lawyers know the law, they know better than laypeople how to bargain in the shadow of the law. But so-called settlement mill law firms are based on a business model of never going to trial, and their lawyers do not bargain in the shadow of the law.¹⁸ Indeed, the pro se litigant's ignorance of the law might make her a tougher bargainer, so that the opposing lawyer or insurance adjuster decides that it's simpler to pay a bit more to this stubborn fool and avoid the expense of trial.

These speculations cry out for empirical investigation, and possibly formal modeling. The question, simply, is how effective pro se litigants are at settling various categories of cases, as compared with lawyers. Are the vast performance gaps at trial and trial preparation that Assy rightly emphasizes equally vast in the settlement process, or might they be narrower? Notoriously, lawyers often settle cases in ways that are more advantageous to the lawyer than the client. In a typical contingency fee tort case, the lawyer's investment of time rises rapidly as trial approaches, while the settlement value of the case rises more slowly; that gives lawyers incentives to settle prematurely, and then "cool out" their client to persuade the client that the settlement is the best the client

¹⁸ Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 *Georgetown J. Legal Ethics* 1485 (2009) shows that settlement mills do reasonably well for clients with small claims, but poorly for clients with serious injuries or specially meritorious claims. Engstrom found that their lawyers do not bargain in the shadow of trial. Rather, they settle cases quickly for standardized amounts.

can hope for.¹⁹ On the criminal side, defense counsel may well go along with the prosecutor and judge in plea bargaining to maintain smooth working relationships among courthouse regulars – a phenomenon described half a century ago in Abraham Blumberg’s classic article “The Practice of Law as a Confidence Game.”²⁰ Assy notices the possibility of agency problems in the client-lawyer relationship, but his only response is to suggest that (unspecified) rules should be adopted to alleviate them.²¹ Realistically, that is not going to happen. Thus, to reiterate, when we ask how much worse unrepresented parties fare, we must compare them with parties represented by bad or mediocre lawyers, not only with those whose lawyers are capable and conscientious.

VII.

To talk about settling cases changes the focus of inquiry from trials themselves – which seem to be at the center of Assy’s concern – to the pre-trial phase. That raises, indirectly, a question about the chronology of self-representation. At what point in the process from filing an initial complaint or response, to verdict, to appeal, does Assy’s presumptive mandatory representation rule kick in? Most of his objections to self-representation have to do with the mess pro se litigants create in the courtroom, where they don’t know the rules of procedure or evidence: wasting time, violating rules, and botching their own cases in a way that threatens to turn trials into travesties.

Does Assy think the same dangers exist in the pre-trial phase? They might not. Suppose, for example, that a pro se litigant files a complaint against a represented party. The party responds with a motion to dismiss. If the plaintiff has botched the complaint,

¹⁹ The classic is Douglas Rosenthal, *Lawyers and Clients: Who’s in Charge* (1974).

²⁰ Abraham Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession*, 1 *Law & Soc Rev.* 15 (1967).

²¹ Assy, at 147.

the motion to dismiss succeeds, and that is the end of the story. Undoubtedly, some of defendant's money will be wasted; likewise, some judicial time. But both of these are minimal.

Alternatively, suppose the action survives the motion to dismiss. That suggests the plaintiff has drafted a credible complaint. Offhand, therefore, I see no reason why individuals should be barred from filing pro se complaints (or, in the defense role, pro se answers to complaints). The cost to efficiency is slight; and unless the complaint gets dismissed with prejudice, nothing precludes the ineffective plaintiff from hiring a lawyer and trying again – so the cost to effectiveness is also slight. Thus, it would make sense for a mandatory representation rule to kick in later than at the initial filing of the complaint. But when?

As I indicated earlier, a parallel question arises if a represented litigant decides to fire her lawyer during the trial, perhaps because she thinks counsel is botching the case, or perhaps because she hates the legal theory her counsel has chosen. Assy, I take it, would remain skeptical on effectiveness and efficiency grounds, and it would be useful to know his approach to self-representation that begins in mid-trial, in either civil or criminal cases.

A defender of mandatory representation might respond that in criminal cases, a represented defendant whose lawyer botches the case has recourse: he can appeal on grounds of ineffective assistance of counsel. But such appeals are notoriously hard to win, because the Supreme Court won't grant relief unless the appellant can demonstrate a reasonable probability that the outcome would have been different if the lawyer had

performed better, i.e., that it is not harmless error.²² As commentators have long noticed, this harmless-error test sets the court of appeals up as a kind of super-jury, adjudicating guilt based on the written record, which does not reveal what defense counsel failed to say or do at or before trial. In recent years, the Supreme Court has gotten slightly better on ineffective assistance issues,²³ but the prospects of success remain dim. For that reason, a criminal defendant who watches his counsel butchering his case may reasonably conclude that he has nothing to lose by firing counsel and finishing the case pro se. The parallel recourse in civil cases might be a malpractice action against the feckless attorney; but those, too, are very hard to win – and they require hiring an expensive malpractice lawyer.

In short, one wants to know the scope of Assy's proposed mandatory representation rule: which phases of the litigation process does it govern? When does it kick in, and when does it terminate?

VIII.

I also wonder how bad the efficiency problems are that self-representation inflicts on judicial institutions. Assy suggests that hordes of pro se litigants are creating a major problem of judicial administration. However, one study Assy cites concedes that the evidence consists mostly of “negative anecdotal impressions”²⁴ by judges and court

²² Strickland v. Washington, 466 U.S. 668 (1984).

²³ The cases are a reminder of how bad lawyers can be: Wiggins v. Smith, 539 U.S. 510 (2003)(ineffective assistance when defense counsel failed to investigate mitigating circumstances in a death-penalty case); Rompilla v. Beard, 545 U.S. 374 (2005)(ineffective assistance when death penalty defense counsel failed to examine a prior conviction file they knew prosecution planned to use); Maples v. Thomas, 132 S. Ct. 912 (2012)(ineffective assistance when death penalty counsel missed a filing deadline because they changed jobs without notifying defendant or the judge that they were withdrawing from the case); Hinton v. Alabama, 134 S. Ct. 1081 (2014)(ineffective assistance when defense counsel in a capital case hired an incompetent expert because he mistakenly believed he was limited to \$1000 for expert testimony); Padilla v. Kentucky, 130 S. Ct. 1473 (2010)(ineffective assistance when defense attorney failed to advise client that pleading guilty made him subject to automatic deportation).

²⁴ Swank, at 1547 and 1547 n. 66.

personnel, who may well put undue weight on a few memorable incidents. It's also a bit hard to interpret data about the rise of pro se litigation. For example, the same study points out that in California, pro se divorce filings rose from 1% in 1971 to 75% in the early 2000s²⁵ – but it fails to point out the reason. In 1970, California instituted no-fault divorce, which made pro se divorce proceedings feasible. It seems likely that in 1971 the perception that to get a divorce you had to have a lawyer was still entrenched, because uncontested divorce was a novelty. Eventually the public learned that for a simple divorce you don't need a lawyer. And notice that pro se filings in uncontested divorce proceedings don't raise problems either of effectiveness or efficiency. True, one spouse may needlessly concede money or rights, and therefore divorcing couples would be prudent to consult a lawyer before going pro se. That is different from retaining a lawyer.

The same study also cites a sharp rise in pro se federal court appeals, without considering how many of these are pro se prisoner petitions, which naturally multiply in an age of mass incarceration. In 2016, 25.5% of all federal appellate filings were prisoner petitions,²⁶ and 88% of these were pro se.²⁷ They make up 38% of pro se federal appeals. At the district court level, prisoner petitions amount to 83% of all pro se filings.²⁸ No doubt processing pro se prisoner petitions is a nuisance, but law clerks handle most of them quickly and summarily, and it is hard to see the phenomenon as an important threat to the federal appeals courts. The real threat to justice would be prohibiting prisoners

²⁵ Id. at 1540.

²⁶ U.S. Courts Statistics & Reports, Table B-1: U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending, by Circuit and Nature of Proceeding During the 12-Month Period Ending March 31, 2016, http://www.uscourts.gov/sites/default/files/data_tables/fjcs_b1_0331.2016.pdf. These include 4082 criminal appeals and 9600 private prisoner petitions, out of a total of 53,649 federal appellate filings.

²⁷ U.S. Courts Statistics & Reports, U.S. Courts of Appeal – Judicial Business 2016, <http://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2016>.

²⁸ U.S. Courts Statistics & Reports, Table C-13: Civil Pro Se And Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2016, http://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2016.pdf.

from filing habeas petitions or allegations of prison abuse unless they have a lawyer. Such a rule would make the grotesque U.S. criminal justice system even more grotesque.

Admittedly, the federal appellate courts get a lot of pro se filings other than prisoner petitions: almost 30% of their non-prisoner case filings are pro se.²⁹ But it seems likely that these too are mostly disposed of summarily, just as in the state courts that report such data.³⁰ Matters may be different in the UK. But the U.S. data don't unequivocally demonstrate a pressing problem that cries out for a solution. A flood of pro se uncontested divorces, probated wills, and contested traffic tickets is not a crisis. And even the large numbers of pro se general civil filings are mostly a paperwork burden, not a trial burden.

Nor is it necessarily a crisis of inefficiency or unfairness when pro se litigants don't know the rules of procedure and evidence and require some judicial latitude or even coaching. Suppose, for example, I had taken my security deposit case to court. I could well imagine the following farce:

ME: Your Honor, take a look at these photos.

LANDLORD'S COUNSEL: Objection. He hasn't put them in evidence.

JUDGE: Sustained.

ME: Your Honor, I'd like to put them in evidence.

LANDLORD'S COUNSEL: Objection. No foundation.

JUDGE: Sustained.

ME: What does that mean?

²⁹ U.S. Courts Statistics & Reports, U.S. Courts of Appeal – Judicial Business 2016, <http://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2016>.

³⁰ Although the relevant federal data is unavailable, a 2010 report by the New Mexico Court of Appeals indicates that 95.5% of its pro se appeals are disposed of in a memorandum opinion. Cited in Michael Correll, Finding the Limits of Equitable Liberality, 35 Vt. L. Rev. 863, 869-70 (2010). This article contains a great deal of useful data on pro se filings – including that 14% of pro se appeals succeed in New Mexico.

JUDGE: It means you haven't given facts to authenticate the evidence.

ME: Got it, thanks. I have the photographer here to testify that he took them in my apartment and developed them himself. [The photographer is sworn in.]

ME: Did you take these pictures in my apartment on May 4?

LANDLORD'S COUNSEL: Objection, leading.

JUDGE: Sustained.

ME: What does that mean, Your Honor?

JUDGE: You can't ask a question that points him to the answer.

ME: How am I supposed to get him to authenticate the evidence, then?

JUDGE: Oh, for heaven's sake. Just ask him if he was ever in your apartment.

ME: Were you ever in my apartment?

PHOTOGRAPHER: Yes.

JUDGE: Now ask him if he was there May 4.

ME: Were you there May 4?

PHOTOGRAPHER: Yes.

JUDGE: Now ask him what he did there.

LANDLORD'S COUNSEL: Your Honor, I object to you feeding him questions!

JUDGE: Noted. Overruled. We haven't got all day. [To me:] Proceed.

ME: What did you do there? ...

True, this is annoying; and true, the judge has departed from the impartial adjudicator's role. But both the annoyance and the unfairness are trivial – and it is landlord's counsel who is the true time-waster, using the evidence rules in a childish dilatory game. It would be useful to know how much of the “chaos” pro se litigants cause in trials is as trivial as

this imaginary script, and furthermore how much of it is the result of the opposing lawyer playing lawyer games with the rules.

IX.

One of the strongest and most compelling chapters in Assy's book is his analysis of the standard defense of the right of self-representation: that it is required by the value we place on client autonomy. Such an argument is often made, but seldom analyzed, and Assy has done a thorough and convincing job of demolishing the argument.

Some of his critiques are nevertheless weaker than others. I was not persuaded by his argument that even when litigation is a person's "only rational choice" he cannot be said to be coerced into it, because he can always choose to forego his claim or defense.³¹ Assy uses this conclusion to argue that "by choosing to litigate, the litigant accepts the terms of litigation," including mandatory representation if that is the court's rule.³² This is an overly formalistic and philosophically dubious conception of coercion. A more realistic version would admit that if litigation is truly the only rational choice, the litigant's "choice" to accept a rule like mandatory representation is forced on him. If forcing it on him reflects an important social policy promoting effectiveness and efficiency, so be it – but let's not pretend the litigant chose it.

Similarly, the argument that a rule mandating representation on pain of exclusion from court cannot be defended by H.L.A. Hart's distinction between duty-creating and power-creating legal rules. Assy argues that hiring a lawyer is not a duty and the exclusion is not a sanction, merely a failure to confer on the person the power to

³¹ Assy, at 151.

³² Assy, at 151.

litigate.³³ Whatever the labels, the material situation remains the same: litigants must hire a lawyer or abandon their claims.

What *are* persuasive in Assy's treatment of the autonomy issue are two linked arguments: first, that those who defend the right of self-representation on autonomy grounds usually offer merely "an abstract idea of freedom of choice,"³⁴ without explaining *why* freedom to personally handle the procedural minutiae of a civil trial is a choice that matters. Second, that what *does* matter is having one's voice and viewpoint reflected in a trial. To this, Assy has the following powerful response:

While having a voice is one thing, litigating in person is another. A general right to self-representation entails much more than a right to speak up and therefore requires further justification. A right to speak in court could be satisfied in all sorts of limited ways that fall short of self-representation, such as through a litigant's testimony or a direct but limited speech to the court. ... Furthermore, while speaking up in court may be intrinsically justified, ..., the other activities of calling witnesses and experts, seeking disclosure, tendering evidence, and so on [cannot be justified by their intrinsic value].³⁵

Exactly right.

Now there is one exceptional situation in which handling the matter personally may have intrinsic value, and that is a political case where the self-representation is a protest against the legal process. Assy's book offers an illuminating discussion of self-representation in the ICTY, where we can see this dynamic writ large. Slobodan Milošević and Vojislav Šešelj staged notorious and wildly disruptive self-representations

³³ Assy, at 151-54.

³⁴ Assy, at 154.

³⁵ Assy, at 165.

to delegitimize the Tribunal in the eyes of their home constituencies, and to string out the proceedings. They were following the *défense de la rupture* strategy of the legendary “devil’s advocate” Jacques Vergès, and in both cases it was a singular success, meaning a disaster for the Tribunal. (In reality, neither of them was entirely self-represented – they were in constant communication with teams of lawyers.) One might think of this as a strong argument for mandatory representation, and Assy is right that the only reason the ICTY tolerated it was because of the political sensitivity of the situation. But even if their self-representation isn’t designed to turn the trial into a circus, clients might wish to forego legal representation as a political protest. Courts that have decided on a policy of mandatory representation may still decide to prohibit such protests – not because such cases are frequent, but because other litigants will claim (in bad faith) that their case is “political,” simply to gain the right of self-representation.

To me, however, the significant autonomy question arises when clients might have motivations to make arguments that their lawyers don’t want to make, or to prevent their lawyers from making arguments that the client objects to. Consider this letter written by Lenin to some imprisoned comrades facing an upcoming trial:

As to lawyers. Lawyers should be kept well in hand and made to toe the line, for there is no telling what dirty tricks this intellectualist scum will be up to. They should be warned in advance: Look here, you confounded rascal, if you ... speak of socialism as something immature or wrong-headed, or as an infatuation, or if you say that *the Social-Democrats reject the use of force*, ... then I, the defendant, will pull you up publicly, right then and there, call you a scoundrel, declare that I reject such a defense, etc. And these threats must be carried out. ... Even a smart

liberal lawyer is extremely prone to mention *or hint* at the peaceful nature of the Social-Democratic movement.... All such attempts should be nipped in the bud. The lawyers ... are the most reactionary of people. ... Be a lawyer only, ridicule the witnesses for the State and the Public Prosecutor; ... but leave the defendant's convictions alone....³⁶

Lenin feared that to win the case, defense counsel would undermine the cause.

A famous contemporary example of the same phenomenon occurred in the U.S. trial of Ted Kaczynski, the “Unabomber.” Kaczynski, a hermit mathematician, believed that technological society is destroying humanity. Over years, he mailed bombs to technologists, killing three and injuring 23. He offered to stop sending the bombs if the *New York Times* and *Washington Post* agreed to print his 35,000 word manifesto *Industrial Society and Its Future*, which they did. Kaczynski was eventually captured and put on trial, where he faced the death penalty. His lawyers determined to put on a mental defense, but Kaczynski refused – he was sure he could win by getting evidence suppressed (legal arrogance that his lawyers thought was another symptom of mental illness). Determined to save his life, his counsel manipulated him into undergoing psychiatric interviews, and then informed him that they were going to use the mental defense whether he liked it or not.

The judge would not permit Kaczynski to fire them and represent himself. In a letter to the judge, Kaczynski wrote: “[M]y personal ideology and that of the mental-health professions are mutually antagonistic ... [My lawyers] calculatedly deceived me ... I would rather die, or suffer prolonged physical torture, than have the [mental] defense

³⁶ V. I. Lenin, *A Letter to Y. D. Stasova and to the Other Comrades in Prison in Moscow*, Jan. 19, 1905, at <https://www.marxists.org/archive/lenin/works/1905/jan/19.htm>.

imposed on me in this way by my present attorneys.”³⁷ Kaczynski attempted suicide, and eventually accepted a no-death-penalty plea bargain, as the only way to avoid being portrayed as (in his words) a “grotesque and repellant lunatic”³⁸ – which would, after all, discredit the manifesto that was his life’s work and that he had killed to get into print.

Here, as perhaps in Lenin’s letter, we see examples of paternalistic lawyers who realize that the only way to win the case is to present arguments that their clients hate. On the other side, in *Jones v. Barnes*, we find a prisoner whose appellate counsel refused to include in his brief non-frivolous arguments that the prisoner wanted to include. The Supreme Court rejected his claim that this violated his constitutional right, reasoning that too many arguments may make a brief less effective, and this was a tactical decision left to the lawyer’s discretion; the dissenters responded that counsel’s decision violated Barnes’s autonomy.

What these cases have in common is that counsel is distorting or suppressing the client’s voice. This, it seems to me, violates a client right that Assy agrees is important: the right to voice. (Whether we call it an autonomy right doesn’t matter.) He writes that

the primary undertaking of a lawyer ... is to act as a partisan player, not merely by advocating her client’s interests as best as she can, but by carrying out as best she can her client’s instructions. Lawyers are duty-bound to employ their professional skills to facilitate the exercise of the client’s right to be heard, by transforming the client’s version of the events into a legal claim or defence.³⁹

³⁷ Quoted in *U.S. v. Kaczynski*, 239 F.3d 1108 (9th Cir. 2001)(Reinhardt J. dissenting). For more on the Unabomber case, see Michael Mello, *United States v. Kaczynski: Representing the Unabomber*, in *Legal Ethics: Law Stories* 139 (Deborah L. Rhode & David Luban eds., 2006); William Finnegan, *Defending the Unabomber*, *New Yorker*, Mar. 16, 1998, at 55-56.

³⁸ *Id.*

³⁹ Assy, at 145 (ch. 7, TAN 20).

This, however, is *not* the rule in U.S. jurisdictions. Lawyers must “abide by the client’s decisions concerning the objectives of representation,” but only “consult with the client as to the means by which they are to be pursued.”⁴⁰ Clients set the ends, but lawyers have sole authority over the means. Assy argues that “if a given system does not provide litigants with sufficient control . . . , then the rules regulating the client-lawyer relationship should be reconsidered.”⁴¹ Perhaps so, although a rule allowing clients to control every strategic and tactical decision their lawyer makes has obvious disadvantages. In any event, the U.S. allocation of authority is not about to change.

In such cases, exceptional though they are, it seems that the only way the client’s right to participate through her own voice can be honored is self-representation.

X.

To summarize, I have raised the following concerns about Assy’s argument:

1. He underemphasizes the tension between mandatory representation and inadequate availability of affordable legal services.
2. He focuses almost exclusively on trials, not settlements, even though settlements rather than trials are the norm in litigation. In settlements, the gap between self-representation and representation through counsel may be narrower than in trials, and the procedural confusion caused by pro se litigants more minimal.
3. He underemphasizes bad lawyering, which may narrow the gap between self-representation and representation through counsel.
4. He (possibly) overestimates how much havoc self-representation actually creates in the legal system.

⁴⁰ ABA Model Rules of Professional Conduct, 1.2(a).

⁴¹ Assy, at 145.

In addition, I have suggested that he needs to specify which portions of the litigation process his proposed rule of mandatory representation governs. And I have suggested several categories of non-simple cases where the rule should create exceptions: those where self-representation is the client's only chance; those where the need to hire counsel changes an economically rational case into a loser; those where the client is actually indigent; prisoner petitions; and cases where counsel, possibly for valid paternalistic reasons, won't provide clients with the voice to which they have a right.