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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

*Paris R. Baldacci**

This paper¹ focuses on the problems faced by *pro se* litigants in actually litigating, rather than settling their cases in New York City's Housing Court ("Housing Court"),² and the role of the court—particularly the role of judges—in assisting them in meeting these problems. It does not attempt a detailed theoretical analysis of the problems underlying the plight of *pro se* litigants in Housing Court, or of the solutions proposed here. Rather, its primary goal is to outline what has become generally recognized to be the underlying problem facing *pro se* litigants in most courts and particularly in New York City's Housing Court. I examine this issue in Part I. Part II then sketches a number of models and their theoretical bases by which that problem can be addressed. Ac-

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¹ This paper is based on an earlier version prepared for the working conference: *The Housing Court in the 21st Century: Can It Better Address the Problems Before It?*, October 29, 2004, New York County Lawyers Association, to serve as a basis for the discussions of the "Adjudicative Process and the Role of the Court" working group. The Report of that working group – as well as those of other working groups – is also included in this issue of the Journal. I am indebted to the insights generated by the working group and to its chair, Hon. Marcy Friedman, who is currently a Justice of the Supreme Court of the State of New York and was previously a Judge in the Housing Court of the Civil Court of the City of New York.

² The Housing Part of the Civil Court of the City of New York was established in 1972 by the passage of § 110 of the New York City Civil Court Act. See N.Y. CITY CIV. CT. ACT § 110 (1972). Subpart (a) provides:

A part of the court shall be devoted to actions and proceedings involving the enforcement of state and local laws for the establishment and maintenance of housing standards, including, but not limited to, the multiple dwelling law and the housing maintenance code, building code and health code of the administrative code of the city of New York

Id.

cordingly, this paper is not intended to be a destination, but rather a starting point.

However, I hope that this endeavor is more than just one more article in a series that have identified the underlying problem and proposed solutions, with little impact on the day-to-day experience of *pro se* litigants in New York City's Housing Court. Indeed, there is a depressing quality to reading the literature in this area. The plight of *pro se* litigants in New York City's Housing Court and the broad outlines of some solutions have been recognized for at least two decades.³ In addition, numerous law review articles, judicial studies and reports have for some time reached a remarkable level of consensus regarding the nature of the problems faced by *pro se* litigants in our adversarial system in state and federal courts in every part of the country.⁴

Nevertheless, conferences on meeting the challenge of the *pro se* litigant (such as the one that gave rise to this paper) are convened, but appear to be reinventing the wheel, unfamiliar with the previous research and analyses. They then issue reports which have little or no effect. I hope that this paper and the conference reports published here will not meet a similar fate. In addition, although the focus of this article is on proposed reforms in New York City's Housing Court, I

³ See THE CITY WIDE TASK FORCE ON HOUSING COURT, 5 MINUTE JUSTICE OR "AIN'T NOTHING GOING ON BUT THE RENT!" (1986); ACCESS TO JUSTICE PROJECT ADVISORY COMM., ACLU, JUSTICE EVICTED (1987) [hereinafter JUSTICE EVICTED]; THE COMMITTEE ON LEGAL ASSISTANCE, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, HOUSING, COURT PRO BONO PROJECT PART II: LAW REFORM (1988); THE COMM. ON LEGAL ASSISTANCE, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, PROPOSED LEGISLATION FOR NEW YORK CITY HOUSING COURT REFORM (1989); *Report on the Housing Court*, NEW YORK COUNTY COURT MONITORS (The Fund for Modern Courts, New York, N.Y.), Feb. 1994, at 51-57 [hereinafter New York County]; *Report on the Housing Court*, THE BRONX CITIZENS' COURT MONITORING PROJECT, INC. (The Fund for Modern Courts, New York, N.Y.), Dec. 1993, at 41-46 [hereinafter Bronx]; *Report on the Housing Court*, THE BROOKLYN CITIZEN COURT MONITORS (The Fund for Modern Courts, New York, N.Y.), Sept. 1993, at 43-48 [hereinafter Brooklyn]; Report by Scott Stringer, New York State Assemblyman, *The People Vs. DHCR & HPD: The Case for Reforming Housing Court* (May 1997) (on file with author); see generally Russell Engler, *And Justice for All - Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987 (1999) [hereinafter Engler]; PAULA GALOWITZ, *THE HOUSING COURT'S ROLE IN MAINTAINING AFFORDABLE HOUSING, HOUSING AND COMMUNITY ECONOMIC DEVELOPMENT IN NEW YORK CITY: FACING THE FUTURE* 180 (Michael H. Schill, ed., 1999).

⁴ See, e.g., AMERICAN JUDICATURE SOCIETY, *MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS* (1998) [hereinafter MEETING THE CHALLENGE].

would submit that the proposals outlined here may be applicable to other courts in which *pro se* litigants predominate.

I. THE PROBLEM

Although it is clear that most cases in Housing Court are settled, particularly those involving *pro se* litigants, the fact is that in many instances, especially in holdovers, out of possession cases, warranty of habitability hearings, or motions/hearings to compel compliance with orders to correct housing violations, a *pro se* litigant is thrust into the role of litigator within an adversarial system which she does not understand, either procedurally or substantively, and which effectively silences her.⁵

The preceding description and the analysis that follows are based on a few working hypotheses which will be elaborated below:

1. *Pro se* litigants usually have only a very generalized understanding regarding both the defenses and claims relevant to their cases and regarding how to present those defenses or claims to a trier of fact.⁶
2. The fundamental problem for *pro se* litigants in having their defenses or claims heard is not primarily their lack of information or understanding, but the structural dynamics in Housing Court which work to silence the *pro se* litigant even when she has some knowledge regarding defenses or claims.⁷

⁵ It is well-documented that *pro se* litigants in Housing Court are predominantly tenants. See, e.g., GALOWITZ, *supra* note 3, at 181-82 (noting that according to a 1993 study only 11.9% of tenants were represented). This figure has not changed significantly in the intervening years. Telephone Interview with Hon. Fern Fisher, Administrative Judge of the Civil Court of the City of New York (Mar. 3, 2005) (commenting that anecdotal evidence indicates that at most 15% of tenants are represented). However, there are also a not insignificant number of *pro se* landlords, particularly in the Housing Courts outside of Manhattan. *Id.* (noting that about 15% of landlords, primarily in the boroughs outside of New York County, may be unrepresented). Accordingly, the comments presented here are applicable with some modification to the challenges faced by *pro se* landlords.

⁶ See MEETING THE CHALLENGE, *supra* note 4; see also Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992) [hereinafter Bezdek]; Engler, *supra* note 3, at 1987-92; RICHARD ZORZA, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS 17-18 (2002) [hereinafter ZORZA]. See generally Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice*, 40 FAMILY CT. REV. 36 (2002) [hereinafter *Litigant's Struggle*].

⁷ Bezdek, *supra* note 6, at 561-62 (finding tenants in Baltimore Rent Court lost to landlord rent claims even when they had knowledge of or could prove defenses to those claims); *id.* at 591 (noting that poor tenants' relationship to law as one of subordination and not rights "renders dubious proposals that information-delivery responses could remedy dysfunctional condi-

3. The root cause of this systemic silencing may be, in part, a slavish adherence to what is perceived to be the strictures of the adversarial system, including the resulting notions of the appropriate role of judges in such a system.⁸

Whatever may be the root causes of this systemic silencing, evidence of it is pervasive. In a seminal study of Baltimore's Rent Court, Professor Barbara Bezdek found that even with an understanding of defenses and claims, including having received advice and, in some instances, papers prepared by attorneys to assist them, *pro se* litigants were systematically silenced in that court.⁹ Professor Bezdek identifies one element as key in understanding this dynamic: the judicial process in housing and other courts rejects both the form and substance of the

tions of the rent court's operation. . . . In other words, knowledge of rights would not confer power. Our experience in the courthouse suggests as much."); ZORZA, *supra* note 6, at 18 ("practitioners report that whatever resources are put into [providing *pro se* litigants with] information, in the end many [*pro se*] litigants cannot be prepared to handle the courtroom with information alone."). But see Helen B. Kim, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to Be Heard*, 96 YALE L.J. 1641, 1642 (1987). "Experience has shown that providing general legal information to *pro se* litigants can significantly increase their chances of success both in court and in settlement negotiations." *Id.*

⁸ See, e.g., *Litigant's Struggle*, *supra* note 6, at 41. Despite the modern trend toward a more active role for judges,

adversary theory requires the judge to remain *passive* until the conclusion of the advocates' presentations. He is not free to conduct an independent inquiry or otherwise accelerate the pace of the proceedings . . . [this passivity is] to ensure that the trier will remain neutral until he renders his decision . . . [and neutrality is to ensure] the integrity of adversarial deliberations (quoting STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND A DEFENSE* 34 (1984)) (emphasis added);

see also Engler, *supra* note 3, at 2022-23.

The traditional notions of who should be giving legal advice, and what it means to be impartial, were developed within the framework of the adversarial system. The adversarial system presumes that both sides will be represented by counsel The adversarial system purports to promote fairness and justice. Yet, the rules currently operate as barriers preventing unrepresented litigants from participating meaningfully in the legal system and thereby frustrate the goal of dispensing fairness and justice. . . . One important barrier is the narrow conception of impartiality that typically permeates the discussions of the various roles [of the players in the system, including judges.]

Id.

⁹ Bezdek, *supra* note 6. It should be noted that although Professor Bezdek's documentation and analysis focuses on Baltimore's Rent Court, the structural and systemic features she finds there that silence *pro se* litigants are present in most judicial settings and, thus, her conclusions, with some modification, are applicable to those settings as well. *Id.* at 533. See Engler, *supra* note 3, at 2047-69 (finding similar features in Family and Bankruptcy courts, and in Boston and New York City housing courts); see also Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123, 124-27 (1993) (showing the same is true in Family Court).

inevitable manner in which *pro se* litigants speak, i.e., narrative. Indeed, it is obvious that narrative is the way in which most people, except perhaps lawyers, speak.

In our observations, when invited [to say why they are in court], . . . many tenants offer the court an explanation for their nonpayment. The judge either waits through the story or interrupts it, but at either point, tells the tenant that her remarks are irrelevant, and orders judgment for the landlord. This is the clash between the conventions for talking about troubles in noninstitutional settings and the law's conventions for speech within legal institutions, which the judge learned through formal education in law school and observation of other legal professionals' courtroom behavior. . . .

. . . My point is that the judge is structuring the discourse by leading the tenant into expression and then dismissing that which the judge elicited. Doing so in this way is both misleading and destructive.

It is misleading, because the rule-oriented court talk expected and privileged by judges in low-level courts bears little or no relation to people's natural narratives. The rules of courtroom discourse are seldom explained to those witnesses expected to conform to them. . . . Rules of evidence disallow the ordinary discourse rules used when people talk as they ordinarily do. . . . Judges, however, expect parties to present their own case and abjure "acting as a party's advocate" by frankly eliciting storylines. . . . As structured, [the judge's approach] excludes virtually all tenants from meaningful participation in the conversation. This makes the legal process a charade. This is destructive of more than tenant's statutory rights. For most tenants, such a court offers a stern lesson that formal rights are for somebody else and not for them.¹⁰

¹⁰ Bezdek, *supra* note 6, at 586-89 (citing William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Narratives*, 19 LAW & SOC'Y. REV. 661 (1985) [hereinafter O'Barr]).

In studies of self-represented litigants in small claims courts, Conley and O'Barr discovered two contrasting modes of organizing and presenting accounts of the dispute to the judge: rule-oriented and relation-oriented accounts. . . . A rule-oriented account is directed to legal rules. A relational account is oriented with respect to social rules. The impact of the two story-presenting modes on small claims judges is significant. The courts typically treat relational accounts dismissively and regard their content as irrelevant and inappropriate. . . .

Bezdek, *supra* note 6 at 586-87. Professor Bezdek also argues that the court's rejection of the mode of discourse of the *pro se* tenant is exacerbated by (or perhaps even rooted in) the tenant's economic and often race- and gender-based position of subordination vis-à-vis the economically dominant, represented party and the court as an enforcer of that party's rights. *Id.* at 565-75,

But why is narrative rejected as an appropriate way of speaking in our judicial system, either in testimony or in oral argument? Primarily, as Professor Bezdek's analysis demonstrates, because narrative is viewed as being an uneconomic, rambling mode of communication, and as an inappropriate means for raising or demonstrating cognizable legal claims on which legal relief may be given. Thus, the *pro se* litigant is continuously interrupted during that narrative either by the attorney's objecting "She's testifying in a narrative," or by the court's insisting that much of the narrative is "irrelevant" and, thus, cannot be dealt with in the context of the present case, motion, or hearing.

Indeed, Professor Bezdek's observations and conclusions are confirmed in my own work with *pro se* litigants in New York's Housing Court. I have observed such litigants reduced to silence or at best incoherence in court, even after I had given them detailed advice and, in some instances, "*pro se* papers," with the advice or papers completely ignored and, thus, rendered ineffective. Indeed, I have observed judges and adversaries use the fact that the *pro se* litigant had received legal advice against her by raising the burden placed on her. I often hear judges and adversaries say, "Well, you clearly understand your rights!" but then deprive the litigant of the value of that imputed knowledge by not permitting her to articulate it in the only manner she knows, i.e., in narrative form.

This silencing occurs even in the face of the tremendous advances that have been made under Chief Judge Judith Kaye's Housing Court restructuring initiative,¹¹ especially as sensitively implemented by Judge Fern Fisher, the Administrative Judge of the Civil Court of the City of New York. It occurs even in the face of the laudable attempts of indi-

583-85; see also Lucie E. White, *Subordination, Rhetorical Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 4 (1990), demonstrating that mere access to formal adjudicatory rituals does not comport with due process if it does not provide a forum in which one can actually speak and be heard:

Familiar cultural images and long-established legal norms construct the subjectivity and speech of socially subordinated persons as inherently inferior to the speech and personhood of dominant groups. Social subordination itself can lead disfavored groups to deploy verbal strategies that mark their speech as deviant when measured against dominant stylistic norms. These conditions . . . undermine the capacity of many persons in our society to use the procedural rituals that are formally available to them. Furthermore, bureaucratic institutions disable *all* citizens—especially from subordinated social groups—from meaningful participation in their own political lives. (emphasis in original).

¹¹ Judith S. Kaye & Jonathan Lippman, *Breaking New Ground* (1997).

vidual Housing Court judges to "hear" the *pro se* narrative and to do "justice" in the few minutes given to each case. Indeed, success in eliciting *pro se* narratives, when it occurs, is particularly laudable given the fact that judges receive little or no training, guidelines, administrative support or peer assistance regarding how to assist *pro se* litigants by, among other things, eliciting narrative. The techniques for assisting *pro se* litigants in this way do not come naturally and may be counterintuitive, even to judges with a Legal Aid or Legal Services background.

In addition, the studies of The Fund for the Modern Court confirm that despite such *ad hoc* efforts by some judges, *pro se* litigants remain uncertain of both their claims and defenses, and how to articulate them in a way that the court will recognize or, indeed, permit. They fail to understand what is going on under the language and rubrics employed by legal professionals.¹²

This silencing occurs at each step of a *pro se* litigant's contact with the judicial process and each step reinforces the previous message:¹³

1. The papers the *pro se* litigant receives, in spite of "plain language" reforms, speak a language whose vocabulary and syntax are foreign to most people;
2. Answering in the Clerk's office, perhaps unavoidably, commences a rapid fire, assembly-line, verbal staccato modality: "next," "any defenses, conditions" (using a check-list answer), "why did you default?" "why do you need more time?" (again using a check-list order to show cause form) "next!"
3. In the Resolution Parts, court officers command: "find your calendar number; no, not the index number; go back outside and find the calendar number"; "you have to wait for the landlord's attorney"; "no talking in the courtroom!"
4. *Pro se* litigants find that their primary "conversation" is with the landlord's attorney in the hallway, not with the judge; even if they actually get to talk to a law assistant or the judge, there is a rush to settle, with limited opportunity to spin out the story: "that's not relevant"; "I can't deal with that here, now," etc.

¹² Brooklyn, *supra* note 3, at 28-31; Bronx, *supra* note 3, at 25-29; New York County, *supra* note 3, at 33-38.

¹³ "The forfeiture of rights flows from the barriers facing unrepresented litigants at each stage of the proceeding and each encounter with the various players in the system. . . . The difficulties at each stage are compounded, rather than corrected, as the case proceeds." Engler, *supra* note 3, at 1989.

Throughout this process, which is understandably and appropriately settlement-directed, the *pro se* litigant is both seduced and dissuaded regarding her day in court: "You don't have to settle. You can go to trial." However, materials prepared by bar associations and the court system caution the *pro se* litigant by stating, "If you go to trial, the court cannot give you any legal advice. It can only give you information.¹⁴ You will be held to the same evidentiary standards as an attorney."¹⁵ Finally, either in a motion before the Resolution Part judge or on trial in a Trial Part, the *pro se* litigant's narrative is continuously interrupted by

¹⁴ See Committee on Housing Court, *A Tenant's Guide to Housing Court*, ASS'N OF THE BAR OF THE CITY OF N.Y., (Mar. 2004), available at <http://www.abcny.org/Publications/tenant.htm> ("The Judge cannot give you legal advice about your case, but he or she can explain what is going on, and the procedures and rules that must be followed at a trial."). For a more general discussion of the term "legal advice," see John M. Greacen, "No Legal Advice from Court Personnel" *What Does that Mean?*, 34 JUDGES' J. 10 (1995) (arguing that the term "legal advice" has no inherent meaning and proposing principles by which to define appropriate information from clerks and judges, which nevertheless would still exclude advising litigants to take a particular course of action, taking sides in a proceeding, or providing information to one side that one would not provide to the other side); John M. Greacen, *Legal Information vs. Legal Advice – Developments During the Last Five Years*, 84 JUDICATURE 198 (2001) (summarizing critiques of his earlier proposals as being too limited and too general); see also Engler, *supra* note 3, at 2026.

In redefining the roles of court personnel and those staffing assistance programs, the prohibition against the giving of legal advice by some of the actors in the system must be abandoned. The distinction between help that constitutes legal advice and help that does not provides little guidance to those on the front lines. Moreover, most assistance needed by unrepresented litigants is likely to involve what would fall within an intellectually honest definition of legal advice. While guidelines should be developed for what help a particular office or program may provide in a given context, the limits should not turn on what constitutes legal advice.

Id.

¹⁵ See, e.g., *Roundtree v. Singh*, 533 N.Y.S.2d 609, 610 (N.Y. App. Div. 2d Dept. 1988) ("Although the plaintiff appeared [in this personal injury case] *pro se* at trial, she did so at her peril. 'A litigant appearing *pro se* acquires no greater right than any other litigant.'") (emphasis added, citation omitted); *Duffen v. New York*, 665 N.Y.S.2d 978, 979-80 (N.Y. App. Div. 3d Dept. 1997):

Furthermore, claimant's choice to proceed *pro se* had no effect on his burden to present legally competent evidence. Although courts will routinely afford *pro se* litigants some latitude, a *pro se* litigant 'acquires no greater right than any other litigant' and will be held to the same standards of proof as those who are represented by counsel.

Id. (internal citations omitted). *But see Mosso v. Mosso*, 776 N.Y.S.2d 599, 600 (N.Y. App. Div. 3d Dept. 2004) ("It is true that respondent, as a *pro se* litigant, represented herself at her own risk and acquired no greater rights than other litigants. Nevertheless, some latitude is appropriate, especially in a proceeding such as this where a *pro se* litigant wishes to present evidence in her defense, but is frustrated from doing so through her own 'inexperience and lack of legal training.'") (internal citations omitted).

various objections, such as, calls for a narrative, hearsay, irrelevant, best evidence, foundation, asked and answered, dead man's statute, etc.

Even those within the court system who observe this silencing and who recognize something is amiss often feel powerless to intervene because of: (1) perceived constraints of role (e.g., "As a judge, I cannot be perceived to be an advocate for one side."); (2) the crush of the numbers of cases and the resulting limitations of time, energy and resources; or (3) a sense that the problems underlying the *pro se* litigant's inability to articulate her claims or defenses are social, educational or economic and, thus, outside the court's ability to address.¹⁶

However, if Housing Court is to function as a court of law like any other,¹⁷ rather than as a largely one-sided eviction apparatus, the *pro se* litigant's constitutional right to be heard, i.e., to have access to justice, must be addressed. As early as 1971, in an early right-to-counsel case, the Appellate Term, First Department, quoted at length from the U.S. Supreme Court's decision in *Boddie v. State of Connecticut*,¹⁸ acknowledging the fundamental constitutional necessity of meeting the challenge of the *pro se* litigant in New York City's Housing Court:

Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance,

¹⁶ See, e.g., Engler, *supra* note 3, at 2011-21, 2063-69; see also MEETING THE CHALLENGE, *supra* note 4, at 52-62, and Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?* 82 JUDICATURE 13, 17-20 (1998) (summarizing results of surveys of judges regarding the difficulties involved in dealing with *pro se* litigants) [hereinafter *Handling Litigants*].

¹⁷ Chief Judge Judith S. Kaye of the New York State Court of Appeals has proposed that the Housing Court be reconstituted as a constitutional court, since the Court, in fact, functions in all respects save name and remuneration like a constitutional court. See Testimony Before Joint Legislative Session on Court Restructuring, Oct. 7, 1997, available at http://www.courts.state.ny.us/press/old_keep/cjtestim.shtml. "The Civil Court, as you know, includes the Housing Part, which disposes of hundreds of thousands of matters annually yet isn't even a constitutional court. Consolidation would bring the status of this court in line with its important role in today's society." *Id.* But see Harvey Gee, *Is a "Hearing Officer" Really a Judge? The Presumed Role of "Judges" in the Unconstitutional New York Housing Court*, 5 N.Y. CITY L. REV. 1 (2002) (arguing that the Housing Court was unconstitutionally created, violating both separation of powers and due process strictures, and that its present functioning deprives litigants of due process. Unfortunately, this intriguing analysis is marred by significant theoretical and factual errors, including the author's mistaken presumption, asserted without evidence or authority, that Housing Court judges currently have "the authority and the responsibility to investigate the facts and develop the record . . . [even] where claimants are represented by attorneys. . . . The housing judge performs an active investigatory role and shoulders an obligation to obtain evidence."). *Id.* at 30.

¹⁸ 401 U.S. 371 (1971).

persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that [w]herever one is assailed in his person or his property, there he may defend. . . .

The Appellate Term also quoted Justice Douglas' concurring opinion in which he observed:

Our decisions for more than a decade now have made clear that difference in access to the instruments needed to vindicate legal rights, when based on the financial situation of the defendant, are repugnant to the Constitution. . . . Here the invidious discrimination is based on one of the guidelines: *poverty*. . . .

The court went on to quote Justice Brennan's concurrence in which he stated:

Courts are the central dispute-settling institutions in our society. . . . Where money determines not merely the kind of trial a man [sic] gets, but whether he [sic] gets into court at all, the great principle of equal protection becomes a mockery.

The Appellate Term concluded:

If low, moderate or middle income individuals are not to be denied their constitutional right to the use of courts or legal assistance, society must face up to this problem and find an effective way to respond to it.¹⁹

¹⁹ *Hotel Martha Washington Co. v. Swinick*, 322 N.Y.S.2d 139, 141-43 (N.Y. App. Term 1st Dept. 1971) (quoting *Boddie*, 401 U.S. at 377, 383, 386, 388 (internal citations and quotation marks omitted) (remanding nonpayment case for appointment of counsel)). *But see In re Smiley*, 36 N.Y.2d 433, 439-41 (N.Y. 1975) (rejecting constitutional claim for use of public money to provide counsel, but not the constitutional "access to the courts" analysis in Supreme Court decisions relied on in *Hotel Martha Washington*, 322 N.Y.S.2d at 139); *see also NYCHA v. Johnson*, 565 N.Y.S.2d 362, 364 (N.Y. App. Term 1st Dept. 1990) (finding its prior determination in *Hotel Martha Washington* regarding appointment of counsel no longer controlling after *Smiley*, 36 N.Y.2d at 439-41). For an early discussion of the constitutional dimensions of access to justice in New York City's Housing Court, see JUSTICE EVICTED, *supra* note 3, at 1-7; *see also* MEETING THE CHALLENGE, *supra* note 4, at 19-24. For a comprehensive analysis of the problem of access to justice, particularly for persons without lawyers, see DEBORAH L. RHODE, ACCESS TO JUSTICE (2004).

In addition to such fundamental constitutional concerns regarding equal access to justice, decisions expanding the bases for vacating *pro se* stipulations beyond those articulated in C.P.L.R. § 5015 frequently point to the *pro se* litigant's not having had a fair opportunity to raise defenses.²⁰ Indeed, even judgments after trial have been reversed where

the trial court did not permit [the *pro se* litigants] an adequate opportunity to present relevant evidence pertaining to [their defenses]. . . . As a result, the defenses were not developed and tenants were deprived of a fair trial. In the interests of justice, tenants should be given an opportunity to present their evidence upon a new trial.²¹

However, these constitutional, statutory, and equitable admonishments will remain hollow indeed unless we develop methodologies by which *pro se* litigants are not merely thrown into the adversarial arena unassisted by the various players in our judicial system—most importantly by the judges presiding over their cases.

II. MODELS FOR ADDRESSING THE PROBLEM

As daunting as the problems faced by *pro se* litigants may be, they are not insoluble. While it may be that the underlying problems cannot be resolved absent the provision of counsel, models exist which can at least mitigate the most serious and constitutionally infirm consequences of appearing *pro se* in New York City's Housing Court. I do not propose any one of these models as ideal solutions. Each of them presents problems, both theoretical and practical. Nor do I suggest that the following is an exhaustive list of all possible models. However, those in-

²⁰ See, e.g., *Solack Estates v. Goodman*, 432 N.Y.S.2d 3, 4 (N.Y. App. Div. 1st Dept. 1980) ("the elderly tenant, in a state of extreme emotional distress, lacked a basic understanding of the situation confronting her and the significance of the settlement"); see also *Thelma Realty Co. v. Harvey*, 737 N.Y.S.2d 500 (N.Y. App. Term 2d Dept. 2001) (vacating *pro se* stipulation and final judgment in nonpayment proceeding where tenant was "unaware of the legal effect of the DHCR [rent reduction] order" and where tenant had "alerted the court to the existence of the DHCR order" prior to entry of a final judgment of possession and issuance of a warrant of eviction predicated on the unreduced rent); Engler, *supra* note 3, at 2018-21 (and cases discussed therein).

²¹ *Wenjon Associates v. Morales*, N.Y.L.J., Oct. 18, 1985, at 16:3 (App. Term 2d Dept.) (reversing final judgment in nonpayment proceeding); *Mosso v. Mosso*, 776 N.Y.S.2d 599, 599-600 (App. Div. 3d Dept. 2004) (reversing Family Court order incarcerating *pro se* parent for violating order because she "was not given an adequate opportunity to present evidence supporting her defense").

cluded here suggest strategies regarding how the problem of assisting *pro se* litigants might be addressed.

A. *More Active Judicial Role Within the Strictures of the Present System*

Studies of New York City's Housing Court have consistently shown that some judges are "better" than other judges in mitigating the problems faced by *pro se* litigants appearing before them.²² A more systematic survey of those strategies used by such judges, which has not been done to date, would provide invaluable ideas about addressing those issues.²³ At a minimum, such a study should look at what assistance, if any, judges and court personnel currently provide *pro se* litigants at motions and evidentiary hearings. It should evaluate whether such interventions are successful or ineffective.²⁴ In addition, this survey should make some evaluation regarding whether such interventions are appropriate to the role of judge as understood in our current adversarial system. If the answer to these questions is in the affirmative, recommendations for system-wide adoption should be made. If the answer is in the negative²⁵ and the intervention strategy is still deemed to be highly successful, then constitutional, statutory, or administrative reform should be proposed to allow such modalities of intervention.

²² Brooklyn, *supra* note 3, at 8-26; Bronx, *supra* note 3, at 8-23; New York County, *supra* note 3, at 8-30.

²³ Such surveys in other *fora* have proved to be invaluable in developing strategies for meeting the challenge of *pro se* litigants. See, e.g., MEETING THE CHALLENGE, *supra* note 4, at 52-56; see also *Handling Litigants*, *supra* note 16, at 17-20.

²⁴ Of course, the criteria for determining "successful" or "ineffective" would have to be carefully articulated. The primary criterion of "successful," however, must be the extent to which the intervention assists the *pro se* litigant in being able to articulate her claims and defenses, and to understand the nature and the significance of the proceeding in which she is involved. See Engler, *supra* note 3, at 2022-31; see also *Litigants Struggle*, *supra* note 6, at 36-37; Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 JUDGE'S J. 16 (2003) [hereinafter Albrecht]. "The law must produce a consistent outcome for all litigants, regardless of their legal representation, based on the law and facts of their case." *Id.* at 44. See also *infra* text accompanying notes 70-80 (discussing successful interventions).

²⁵ For a discussion of the limitations placed on the role of the judge in assisting *pro se* litigants under current law, see Albrecht, *supra* note 24, at 17-23, 42-43 (surveying applicable Canons of Judicial Ethics and case law). See also Engler, *supra* note 3, at 2012-13 (same); KERRY HILL, AMERICAN JUDICATURE SOCIETY, MEETING THE CHALLENGE OF THE PRO SE LITIGANT: AN UPDATE OF LEGAL AND ETHICAL ISSUES (2002), available at http://www.ajs.org/prose/pro_legal_ethical.asp (last visited Feb. 15, 2005); *Litigant's Struggle*, *supra* note 6, at 39-42 (locating origin of limitations on judicial role in assisting *pro se* litigants in the history of the common law adversarial system).

Prior to a comprehensive survey of actual practices in New York City's Housing Court, the reports and recommendations of other courts, organizations, and scholars suggest some strategies of assistance that should be implemented. For example, a protocol developed the *Pro se* Implementation Committee of the Minnesota Conference of Judges²⁶ and a similar draft protocol of the Idaho Committee to Increase Access to the Courts²⁷ urge that judges, among other things, explain:

1. The order and protocols of an evidentiary hearing in detail at the beginning of the hearing;
2. The elements of claims or defenses that each side will need to demonstrate in order to get the relief they are seeking;
3. The burden of proof the party bringing the proceeding has;
4. The consequences of not demonstrating a necessary element or bearing ones burden of proof; and
5. The kind of evidence that may or may not be presented and considered.

The committees also urge judges to question the *pro se* litigant to obtain general information about the litigant's claims or defenses.²⁸ What is particularly important about these protocols is that they provide specific examples of how a judge can provide her explanations and pose questions within the context of specific case types.²⁹

In its survey of judges, the American Judicature Society has identified a number of similar strategies that appear to be effective in assisting *pro se* litigants; for example:

1. Conducting on-the-record preliminary conferences "to discuss procedure, deadlines" and "how to do things at trial;"³⁰
2. Using detailed court forms for motions and providing clear notices regarding motions and hearings, which should particularize the issues to be presented, which party bears the burden, what the standard of proof will be at the argument/hearing,

²⁶ *Pro Se* Implementation Committee of the Minnesota Conference of Judges, Protocol to be Used by Judicial Officers During Hearings Involving *Pro Se* Litigants (2002) [hereinafter Protocol].

²⁷ Idaho Committee to Increase Access to the Courts, Proposed Protocol to be Used by Idaho Judges During Hearings Involving Self-Represented Litigants (2002) [hereinafter Proposed Protocol].

²⁸ Protocol, *supra* note 26; Proposed Protocol, *supra* note 27.

²⁹ Protocol, *supra* note 26; Proposed Protocol, *supra* note 27.

³⁰ MEETING THE CHALLENGE, *supra* note 4, at 56.

and the consequences of not appearing or meeting one's burden;³¹

3. Giving "detailed explanations of trial procedures, as time permits;" and
4. "[A]llowing narrative testimony" and "actively asking questions and making objections."³²

Regarding evidentiary matters, the Society notes that some judges explain to the *pro se* litigant:

1. How to identify evidence relevant to prevailing on or defeating claims;
2. Procedures for obtaining such evidence;
3. The form that evidence may take;
4. What facts must be demonstrated to make that evidence admissible (i.e., foundation);
5. The main objections to admissibility (hearsay, best evidence, etc.);
6. The consequences of not having such evidence;
7. Providing for a reasonable opportunity to obtain such evidence; and
8. Assisting the *pro se* litigant at trial in establishing the necessary foundational elements for admitting such evidence and in how to testify regarding the substance of such evidence.³³

It is this last form of active judicial intervention which causes the greatest concerns regarding conduct that is deemed inappropriate to the passive, impartial role of the judge in our present system, and which gives rise to fears that the judge will appear partisan or as an advocate for one side. Although these concerns would appear to be less significant in judge trials (as distinct from the concerns raised in a jury trial, or where both sides are unrepresented), it is obvious that an appearance of partisanship could arise even there. However, as demonstrated above,³⁴

³¹ *Id.* at 56-57. It has also been argued that "[a] rule mandating that [federal] judges inform *pro se* litigants of their obligations under Rule 56(e) is necessitated by a layman's inability to discern his obligations from reading the rule. Some courts . . . derive the mandate from the Federal Rules of Civil Procedure. This practice, however, has been rejected entirely by other courts." Joseph M. McLaughlin, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule*, 55 *FORDHAM L. REV.* 1109, 1114 (1987) (internal citations omitted).

³² *MEETING THE CHALLENGE*, *supra* note 4, at 57.

³³ *Id.* at 57-58; see also *Handling Litigants*, *supra* note 16, at 19-20; *ZORZA*, *supra* note 6, at 75-84.

³⁴ See *supra* text accompanying notes 18-21.

given the constitutional dimensions of the problem, it is necessary to find some form of intervention that can be implemented without the appearance of partiality. This implementation, of course, will require heightened awareness by the judge of the danger of such an appearance, and clear indications by them on the record regarding why such interventions are being made.³⁵

However, acknowledging such limiting factors, the American Judicature Society has nevertheless adopted as a policy recommendation that "judges should assure that self-represented litigants in the courtroom have the opportunity to meaningfully present their case."³⁶ The Society has also recommended that "[j]udges should have the authority to insure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented litigants."³⁷ The proposals described above could be implemented within the strictures of the current system and do not require statutory authorization. Thus, these proposals should be explored and particularized regarding the appropriate modali-

³⁵ A particularly interesting discussion of the competing interests of the need for a judge to develop the record and the judge's appropriate role in that process is found in *People v. Arnold*, 98 N.Y.2d 63 (N.Y. 2002). Although the Court reversed the trial judge under the facts of that case for calling a witness on its own in a criminal jury trial, it noted:

In our adversarial system of justice, the roles of the parties and the decision-maker are, in theory, separate and well defined. In actuality, however, our system has evolved into what commentators have called a "modified" or "regulated" adversarial system. As a practical matter, trial courts sometimes must take a more active role in the presentation of evidence in order to clarify a confusing issue or to avoid misleading the trier of fact. Typically, these cases arise in the context of jury trials.

While "neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-seeking process," the court's discretion is not unfettered. The overarching principle restraining the court's discretion is that it is the function of the judge to protect the record at trial, not to make it. Although the law will allow a certain degree of judicial intervention in the presentation of evidence, the line is crossed when the judge takes on either the function or appearance of an advocate at trial.

There is no absolute bar to a trial court asking a particular number of questions of a seated witness or recalling a witness to the stand; or even allowing the People in narrow circumstances to re-open their case after a defense motion for a trial order of dismissal, when doing so advances the goals of truth and clarity. A court may not, however, assume the advocacy role traditionally reserved for counsel, and in order to avoid this, the court's discretion to intervene must be exercised sparingly.

Id. at 67-68 (internal citations omitted).

³⁶ AMERICAN JUDICATURE SOCIETY, REVISED PRO SE POLICY RECOMMENDATIONS 4 (2002).

³⁷ *Id.* See also Albrecht, *supra* note 24, at 45-48 (discussing the general principles that should guide a judge in assisting the *pro se* litigant).

ties for incorporation into the current structure and procedures in Housing Court, taking into consideration concerns about the appearance of partiality.

Similarly, it may also be profitable to consider a more liberal application of C.P.L.R. § 3017(a), under which “the court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just.”³⁸ Accordingly, absent prejudice to the represented party and given the relatively limited subject matter jurisdiction of Housing Court, it may be appropriate for the court to assist the *pro se* litigant in articulating legal theories for relief supported by the facts adduced at trial, even if they were not raised in a pleading. Of course, prejudice to the adversary would have to be guarded against by, among other things, allowing the adversary sufficient opportunity to respond after the court gives clear notice of its intent to consider a claim and possibly grant relief on that claim.³⁹

However, the measures described above may not be sufficient in themselves to prevent unjust results in cases involving *pro se* litigants. Thus, some commentators have urged reforms that would significantly enhance the role of the judge well beyond the parameters suggested by the proposals noted above and which, in fact, could require administrative, statutory, or constitutional authorization.⁴⁰ For example, it has been proposed that

Judges should *freely ask questions* of unrepresented parties and their witnesses. When judges make clear to the parties at the beginning of the hearing that they will ask questions—and explain why (to make sure they have the information they need to make a decision)—chances are minimal that their apparent impartiality could be impaired.⁴¹

³⁸ N.Y. C.P.L.R. § 3017(a) (2005).

³⁹ Such notice is not dissimilar to the notice requirements where a court decides to treat a motion to dismiss as one for summary judgment pursuant to N.Y. C.P.L.R. § 3211(c) (2005) or to the court’s ability to search the record pursuant to N.Y. C.P.L.R. § 3212(b) (2005) and grant relief even to the non-moving party.

⁴⁰ See, e.g., Engler, *supra* note 3. But see *Litigant’s Struggle*, *supra* note 6, at 45 (arguing that such proposals “do not radically alter the adversarial system or the traditional role of the judge. Nor do they make the judge the feared gatherer of evidence who may unfairly side with the party whose theory of the case is consistent with his or her investigation . . .”).

⁴¹ Albrecht, *supra* note 24, at 46 (emphasis added); see also Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When the Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423 (2004) (arguing that a judge’s neutrality—in fact and in appearance—can be pre-

While such a proposal would not place an affirmative duty on the judge to develop the factual record,⁴² it would authorize the judge to develop the record more actively than under the present regime. For example, the judge would be encouraged to ask questions to assure that she would have the facts necessary to do justice in the matter submitted to her for adjudication.

In order to avoid either interrupting the *pro se* litigant's narrative or the apparent anomaly of the represented party's attorney objecting to the judge's own questions, that same proposal urges the judge to insist on conducting the hearing in a more informal manner, particularly regarding the application of the rules of evidence.⁴³ Indeed, it recommends that the judge "convince the attorney of the benefits of proceeding informally," by, among other things, overruling an evidentiary objection "on the grounds that it would be a waste of judicial resources to proceed in formal compliance with the rules of evidence."⁴⁴ It further recommends that the judge require the attorney to include in his objection sufficient understandable information so the *pro se* litigant can cure the defect and that the judge refuse to uphold objections merely on the grounds of the form of a question or testimony.⁴⁵ Similarly, Professor Goldschmidt proposes that:

The judicial role should be expanded by explicit rules authorizing judges to provide *a reasonable degree of assistance* to *pro se* litigants in presenting their claim or defense. . . . [T]he court should assist by making sure all evidence the *pro se* litigant wishes to introduce is properly offered and admitted (unless found to be inadmissible due to privilege, irrelevance, immateriality, or redundancy. . . .). It is common knowledge that judges often assist attorneys by suggesting the correct form of a question, a certain line of inquiry not being pursued, or the manner of properly offering a document or other item into evidence. This proposal would, therefore, authorize similar assistance to *pro se* litigants. It may seem to radically change the traditionally passive role of the adversarial judge, but it is really only a modest expansion of that role.⁴⁶

served if she explains on the record the reasons for and modalities of her assisting a *pro se* litigant) [hereinafter *Disconnect*].

⁴² See discussion *infra* Part II.C.

⁴³ Albrecht, *supra* note 24, at 47-48.

⁴⁴ *Id.* at 47 (emphasis added).

⁴⁵ *Id.* at 47-48; see also ZORZA, *supra* note 6, at 81-84.

⁴⁶ *Litigant's Struggle*, *supra* note 6, at 48 (emphasis added).

It is clear that the proposals described above would go a long way in meeting the challenge of the *pro se* litigant. Under those proposals, a judge would be expected, indeed required, to provide a reasonable degree of assistance to the *pro se* litigant in articulating her claims or defenses and in introducing the evidence required to support those claims or defenses. However, since these proposals "do not radically alter the adversarial system or the traditional role of the judge" in that system,⁴⁷ they do not address the root cause of the problem faced by the *pro se* litigant, i.e., her being thrust into an adversarial system that presumes representation by a zealous advocate skilled in the technicalities of evidentiary law and in the "impenetrable thicket" of New York's housing law.⁴⁸

Thus, we must consider more radical, comprehensive and systemic reforms, even if they significantly change (1) the nature of our adversary system, based on its presumption of legal representation; and (2) the role of the judge in that system, presumed to be one of passivity and impartiality narrowly defined.⁴⁹ The next two subsections will discuss such proposals.

B. *Incorporating the Simplified Evidentiary Procedures Applicable to Small Claims Actions*

There is general agreement that "[w]hat many describe as the 'technicalities' of the law of evidence present a major barrier to making court processes open to all. They not only intimidate the parties, but also create significant barriers to the presentation of evidence to the fact finder."⁵⁰ Indeed, many judges view the strict application of the rules of evidence in hearings involving *pro se* litigants as impeding a judge's ability to do justice in such cases.⁵¹ One court has succinctly summarized

⁴⁷ *Id.* at 45.

⁴⁸ *In re* 89 Christopher Inc. v. Joy, 318 N.E.2d 776, 780 (N.Y. 1984).

⁴⁹ *See, e.g.*, Engler, *supra* note 3, at 1990-92, 2011-26, 2028-31.

⁵⁰ ZORZA, *supra* note 6, at 81.

⁵¹ *See, e.g.*, *Handling Litigants*, *supra* note 16, at 18.

Surprisingly, some judges feel the rules of evidence become a hindrance in certain cases, as do the attorneys themselves. Several judges suggested a "need to relax the rules so that justice can be done." Sometimes, "the lawyer whines and complains that the other side doesn't follow the [evidentiary] rules. That is true to a point, but the [evidentiary] rule often gets in the way of the 'truth.'" One judge explained, "It's amazing how much evidence can be presented without attorneys. Much more effective. Lawyers try to hide evidence much of the time."

the practical impact of the strict application of evidentiary rules on the ability of *pro se* litigants to present their cases to a judge:

It is simply unrealistic to expect lay litigants to understand and abide by the formal rules of evidence. How is a lay plaintiff to be made to understand that the bill for services which he presents to show the repair costs for his damaged property must be authenticated as a business record? Or that the police report of an accident proves nothing in the eyes of the law? . . . In the case of inexperienced *pro se* litigants, it is better to err on the side of admitting an ore-heap of evidence in the belief that nuggets of truth may be found amidst the dross, rather than to confine the parties to presenting assayed and refined matter which qualifies as pure gold under the rules of evidence.⁵²

As demonstrated above in Part I, the primary reason why evidentiary rules frustrate and, indeed, silence *pro se* litigants in presenting their claims and defenses is our adversarial common law system's rejection of narrative as an appropriate modality for the introduction of evidence.⁵³ As we also saw above in Part I, the mere imparting of legal information to a *pro se* litigant, including regarding the rules of evidence, is generally insufficient to overcome the silencing effect of the imposition of the strictures of our formal adversarial system, including

Id. See also John Sheldon & Peter Murray, *Rethinking the Rules of Evidentiary Admissibility in Non-Jury Trials*, 86 JUDICATURE 227, 228 (2003) [hereinafter Sheldon] ("When [a *pro se*] litigant faces a party represented by counsel in a jury-waived proceeding, rules of admissibility become more than superfluous: They become weapons that the lawyer can use to gain an advantage that has nothing to do with the merits of the case."). Thus, in order to facilitate the admission of clearly relevant and important facts, judges sometimes relax strict evidentiary requirements, even when the party is represented by counsel. See, e.g., MEETING THE CHALLENGE, *supra* note 4, at 57-58; *Litigant's Struggle*, *supra* note 6, at 48 ("It is common knowledge that judges often assist attorneys by suggesting the correct form of a question, a certain line of inquiry not being pursued, or the manner of properly offering a document or other item into evidence.").

⁵² Houghtaling v. Superior Court, 21 Cal. Rptr. 2d 855, 859-60 (Cal. Ct. App. 4th 1993).

⁵³ See also O'Barr, *supra* note 10, at 666-67.

Our analysis of our earlier data repeatedly confirmed the intuition that lay witnesses come to formal courts with a repertoire of narrative customs and strategies that are often frustrated, directly or indirectly, by the operation of the law of evidence. . . . These restrictions and prohibitions are supported by the statutory or common law of evidence or by unwritten custom widely followed in formal courts. Yet reflection on how we ordinarily speak suggests that each [evidentiarily] forbidden practice is common, *if not essential, in everyday narration.*

Id. (emphasis added).

evidentiary rules, which presumes representation by a trained zealous advocate.⁵⁴

Thus, a number of commentators have recommended that evidentiary rules be relaxed, or indeed, be jettisoned completely in cases involving *pro se* litigants, using the model of Small Claims courts as a guide for such a reform.⁵⁵ Given that the imposition of evidentiary rules is a key element in the silencing of *pro se* litigants, I agree that consideration must be given to adopting the "informal and simplified procedures" used in Small Claims actions in proceedings involving *pro se* litigants in housing court, or at least to adapting some of those procedures to such proceedings. The New York City Civil Court Act, in establishing the procedures for Small Claims actions, provides: "The court shall conduct hearings upon small claims in such manner as to do substantial justice between the parties according to the rules of substantive law and *shall not be bound by statutory provisions of rules of practice, procedure, pleading or evidence. . .*"⁵⁶

Of course, one would have to ensure that the panoply of rights and protections guaranteed by the complex body of substantive real property and rent regulation law are not compromised under the guise of doing "substantial justice." The few reported New York cases interpreting the notion of "substantial justice" indicate that that concept can be "a fluid criterion, and sometimes substantial justice is found by turning the judicial face slightly away from the technical rule of substantive law."⁵⁷

⁵⁴ See *supra* note 7 and accompanying text; see also O'Barr, *supra* note 10, at 672.

Witnesses' reactions to [evidentiary] objection sequences suggest that they have little understanding of the nature of this conflict [between the epistemological assumptions of the law of evidence and those of ordinary narrative speech] and that *the explanations offered by the courts do little to enlighten them about why the law deems their narratives unacceptable.*

Id. (emphasis added).

⁵⁵ See Engler, *supra* note 3, at 2028; see also *Litigant's Struggle*, *supra* note 6, at 51-53; ZORZA, *supra* note 6, at 81-83.

⁵⁶ N.Y. CITY CIV. CT. ACT § 1804 (McKinney 2005) (emphasis added).

⁵⁷ N.Y. CITY CIV. CT. ACT § 1804 (McKinney 2005) (Practice Commentary); see also DAVID B. SIEGEL, NEW YORK PRACTICE § 582, pp. 967-68 (3d ed. 1999) [hereinafter SIEGEL] (citing for the contrary position Gerald Lebovits, *Small Claims Courts Offer Prompt Adjudication Based on Substantive Law*, 70 N. Y. ST. B.J. 6, 9 (1998) [hereinafter Lebovits] ("The dominant view, however, is that judges and arbitrators in small . . . claims courts must *strictly follow substantive law* when deciding the merits of the claim." (emphasis added) (and cases cited therein)); see also ARTHUR F. ENGORON, SMALL CLAIMS MANUAL: A GUIDE TO SMALL CLAIMS LITIGATION IN THE NEW YORK STATE COURTS 41-43 (Comprehensive Version, 5th ed., 2001) [hereinafter ENGORON]. In support of his own position, Professor Siegel particularly notes the Small Claims court's decision in *Bierman v. New York*, 302 N.Y.S.2d 696 (N.Y. Civ. Ct., N.Y.

Thus, it would have to be made clear that under this proposal a judge would be required to determine "substantial justice" strictly within the terms established by the substantive provisions of applicable housing law.⁵⁸

One might also consider a modified application of Small Claims procedures. For example, one could relax the rules of evidence only where the unrepresented party bears the burden of proof, or only where both sides are unrepresented, or where the represented party consents to the relaxation.⁵⁹ One might also consider whether evidentiary rules should be relaxed only for the *pro se* litigant or also for the represented party. However, such shifting rules would appear to place an unnecessary burden on a judge to determine which rules should apply in the matter before the court and could lead to confusing and inconsistent or indeed arbitrary application. Thus, I would propose that a uniform approach be adopted in all cases where at least one party is *pro se* in which the same evidentiary rules apply to both parties, whether they are represented or not.⁶⁰ However, within such a uniform system, one could

Co. 1969), in which the court *sua sponte* applied strict liability in order to do "substantial justice," rather than negligence as required by the cause of action at issue in that case and applicable appellate law. However, the Appellate Term reversed this decision in part, holding that:

It being the mandate of the statute (CCA, § 1804) that the rules of substantive law are applicable to the Small Claims Court, the court below erred in departing from the traditional rules of negligence and in adopting a rule of strict liability without fault. Stability and certainty in the law requires adherence to precedents by courts of original jurisdiction, and the decisions of the Court of Appeals must be followed by all lower courts. If a rule of strict liability is to be adopted, the pronouncement should come from the Legislature or the Court of Appeals, and not from a court of original jurisdiction.

Bierman v. Consol. Edison Co., 320 N.Y.S.2d 331, 332 (N.Y. App. Term 1st Dept. 1970) (internal citations omitted). Thus, I agree with Judge Lebovits that the small claims model demonstrates that the provisions of substantive law must and can be preserved even in a system that relaxes evidentiary and procedural requirements.

⁵⁸ This dual nature of the court—informal in procedure, but formal in applying substantive law—would have to be made clear to the *pro se* litigant. "If one party and the judge are procedurally informal and substantively legalistic while the other party proceeds informally in both respects, the latter is seriously disadvantaged, for only her opponent is addressing the normative issues that concern the court." Richard Lempert, *The Dynamics of Informal Procedure: The Case of a Public Housing Eviction Board*, 23 LAW AND SOC'Y. REV. 347, 393 (1989).

⁵⁹ Some commentators have suggested strategies by which a court might "convince the attorney of the benefits of proceeding informally." Albrecht, *supra* note 24, at 47 (emphasis added); see also ZORZA, *supra* note 6, at 81-83.

⁶⁰ See Albrecht, *supra* note 24, at 18 (recommending that the same protocols be applied whether the other party is represented or not).

jettison either in whole or in part all evidentiary rules or only those which might have a greater likelihood of excluding otherwise reliable evidence, e.g., hearsay or documentary foundations.⁶¹

Because Housing Court trials are predominantly judge trials, the judge's ability to disregard inadmissible facts ameliorates concerns about the judge's having before her facts that might be inadmissible in a formal evidentiary hearing.⁶² The primary focus of the system would be to allow the *pro se* litigant's narrative to unfold with minimal interruptions

⁶¹ See Sheldon, *supra* note 51, at 231; see also MCCORMICK ON EVIDENCE, 1, at § 327 (John William Strong ed., 4th ed. 1992) [hereinafter Strong]. Of course, in general, the issue of exclusion does not arise unless the represented party raises an evidentiary objection. See ZORZA, *supra* note 6, at 81 ("In theory then, in most jurisdictions, in the absence of objection, most evidence comes in and may be given what weight the fact finder finds appropriate.") (citing Strong, *supra*, at § 52 ("The general approach, accordingly, is that a failure to object to an offer of evidence at the time the offer is made, assigning the grounds, is a waiver upon appeal of any ground of complaint against its admission.")); see also MICHAEL M. MARTIN ET AL, NEW YORK EVIDENCE HANDBOOK § 1.3 (2003) (discussing same result under New York law).

⁶² Sheldon, *supra* note 51, at 228.

When judges sit without juries, however, there is no point either in trying to screen evidence or in issuing limiting instructions. Screening is impossible, because the person who does the screening is the very person from whom the evidence is supposed to be screened, and it makes no sense to ask judges to instruct themselves.

Id.; Strong, *supra* note 61, at § 60 ("[J]udges possess professional experience in valuing evidence greatly lessening the need for exclusionary rules."). But see Andrew J. Wistrich, Chris Guthrie, Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information?*, 153 U.P.L.R. 1251, 1251-52 (2005) (arguing that "judges are generally unable to avoid being influenced by relevant but inadmissible information of which they are aware."). Nevertheless under our current system,

[appellate] courts have said that in reviewing a case tried without a jury the admission of inadmissible evidence [even] over objection will not ordinarily be a ground of reversal if there was admissible evidence received sufficient to support the findings. The judge will be presumed to have disregarded the inadmissible and relied on the admissible evidence.

Strong, *supra* note 61, at § 60; see also RICHARD T. FARRELL, PRINCE, RICHARDSON ON EVIDENCE § 1-103 (1995). Of course, a finding of plain error, where the substantial rights of a party are affected by admitting inadmissible evidence, can result in reversal. Strong, *supra* note 61, at § 52; cf. N.Y. C.P.L.R. § 2002 (2005) ("An error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced."). For a summary of the arguments for abolishing the rules of evidence in all non-jury trials, whether or not they involve *pro se* litigants, see Sheldon, *supra* note 51, at 229 (noting that in other common law countries "the common law of admissibility of evidence . . . has little practical impact in civil trials before judges. In England, the admissibility of most forms of evidence in civil cases is left to the trial justice's sound discretion."); see also FRANKLIN STRIER, RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM 157-58 (1994) [hereinafter STRIER] (proposing the elimination of exclusionary rules, particularly the hearsay rule, even in jury trials); but see Jeremy A. Blumenthal, *Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective*, 13 PACE INT'L. L. REV. 93 (2001) (arguing that evidentiary rules are essential to our common law adversarial system).

or objections. Perhaps objections, to the extent that they are allowed, could be reserved or raised in short hand form or be agreed to prior to trial. Thus, the goals would be to avoid interrupting the narrative with objections and to find another way of preserving technical evidentiary objections on the record to the extent that they would be incorporated into this model.⁶³

In any event, the relaxing of the rules of evidence and procedure, which appear to be two significant determinants in silencing *pro se* litigants, will go a long way to address the problems identified above in Part I of this paper. However, adopting a Small Claims court model is not a guarantee that *pro se* litigants will be able to fully and adequately articulate their narrative before the court. As noted above, Professor Bezdek observed systemic silencing of *pro se* litigants in Baltimore's Rent Court, which is based on the Small Claims model with relaxed rules of evidence.⁶⁴ Thus, the mere relaxing of evidentiary rules will not in and of itself assure that the *pro se* litigant's narrative will be elicited and heard in any legally meaningful sense.⁶⁵ Rather, the court must also address three additional factors which contribute to the *pro se* litigant's

⁶³ See *supra* notes 43-44 and accompanying text; see also *Litigant's Struggle*, *supra* note 6, at 48.

⁶⁴ See *supra* notes 7-10 and accompanying text; see also Bezdek, *supra* note 6, at 588 ("In small claims courts, where many such evidentiary constraints are relatively relaxed, we might expect there to be more tolerance for ordinary speech," finding that such is not the case); O'Barr, *supra* note 10 (documenting the factors in Small Claims courts which limit the legal adequacy of *pro se* narratives); *Litigant's Struggle*, *supra* note 6, at 42 (and works cited there).

⁶⁵ See, e.g., Engler, *supra* note 3, at 2044 ("rule changes alone are unlikely to eliminate problems facing the unrepresented poor . . .") (citing Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 46 OHIO ST. L.J. 243, 245, 268 (1985)); see also John M. Conley & William M. O'Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. REV. 467, 506 (1988) [hereinafter Conley].

Informal justice is also a process created to protect individual rights. Small claims courts were conceived in part to enable consumers, tenants, and others with limited power to assert rights inexpensively and expeditiously. As our data demonstrate, however, there is no such thing as *the* process of informal justice. It is, rather, a broad range of different processes, with the differences deriving in significant part from the role perceptions of those [i.e., judges] who administer it. . . .

We can only reiterate our concern about the discrepancy between the ideal of a system of informal justice designed to help certain types of litigants and the reality of many systems, each of which meets some needs but may ignore others. We are troubled that this variation is effectively concealed from litigants and beyond their control.

silencing even without the strictures of formal evidentiary rules of exclusion.⁶⁶

First, a judge should not be seduced into believing that the mere relaxing of evidentiary rules, in and of itself, remedies the power imbalance between a *pro se* and a represented party. As noted above, the economic and often racial and gender status of the *pro se* tenant places her in a position of subordination within the legal system, and profoundly affects her ability to speak or to have her voice heard in any meaningful or persuasive way by the court.⁶⁷ This power imbalance is further exacerbated by the advantage resulting from the dominant party's usually being represented by a zealous advocate, skilled in both substantive and procedural law, and familiar with the culture and practices of the Housing Court in which he or she practices on a regular, indeed often on a daily basis.⁶⁸ Accordingly, the court must consistently and systematically "[r]emain alert to imbalances of power in the courtroom."⁶⁹

Techniques for addressing this imbalance have been suggested by commentators. For example, a judge needs to be sure to inquire about the *pro se* litigant's views on the issues before the court at each stage of the trial, hearing, or motion.⁷⁰ The court should also resist the temptation of allowing the attorney, who may be more facile in using the terminology and categories familiar to the court, to define the factual and legal issues before the court.⁷¹ This is particularly important where the

⁶⁶ The concerns and techniques set forth below are also applicable even where the rules of evidence are in full effect. See discussion *supra* Part I.A.

⁶⁷ See *supra* notes 9-10 and accompanying text.

⁶⁸ See Engler, *supra* note 3, at 2068-69.

⁶⁹ Albrecht, *supra* note 24, at 47; see also Beatrice A. Moulton, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STANFORD L. REV. 1657 (1969) (describing effects of power imbalance in spite of the Small Claims judge's statutory power to conduct an informal hearing, raise objections or defenses for a party, conduct independent investigation of facts, disregard technical rules of evidence, and exercise equitable powers).

⁷⁰ Albrecht, *supra* note 24, at 47; see also *Disconnect*, *supra* note 41, at 439 ("Judicial inquiry of the parties as to whether they understand what is expected of them, what the judge is doing, what has been decided, and the consequences of that decision . . . serve[] justice by making it possible to obtain more information when misunderstanding has led to lack of information, and serve[] the appearance of justice by showing the interest of the judge in justice.")

⁷¹ Bezdek, *supra* note 6, at 569-70 (describing how even unrepresented landlords are often allowed to establish the terms of the court's inquiry of the *pro se* litigant). It is my own experience in Housing Court that a judge will more frequently than not turn to the attorney and inquire, "So, what's going on here counselor?" Of course, where the landlord bears the burden to make out a *prima facie* case, it is customary for that party to present its case first. The issue

pro se litigant bears the burdens of proof or persuasion, such as in pressing an affirmative defense, or in moving for relief by order to show cause. Accordingly, by employing techniques which signal to the *pro se* litigant that her view of the facts or the law is not being discounted simply because of her economic, racial, gender, or *pro se* status, but indeed is welcome and valued, the court will in some measure mitigate the silencing effects of such status-based subordination.

Second, a judge must construct appropriate modalities of intervention to assist the *pro se* litigant in telling her story or narrative to the court. As described above, the strictures of evidentiary rules, particularly in disallowing narrative and other ordinary forms of speech, significantly limit the *pro se* litigant's ability to speak and to be heard. However, if the court merely invites the *pro se* litigant to "tell your story," or "explain why you are here today," or "tell me why your landlord should not get a judgment of possession against you," the resulting narrative, free from evidentiary constraints but unassisted by judicial intervention, will generally be factually incomplete and legally insufficient.⁷² Thus, judicial intervention is essential. O'Barr and Conley have catalogued some of the indicia in unassisted *pro se* narratives which signal the *pro se*'s quandary regarding the sufficiency of her story and her need for intervention.⁷³ For example, *pro se* litigants will frequently ask where to begin or end the narrative, or otherwise indicate that they do not know the "relevant" time periods. They will also continue the nar-

here is not essentially one of chronology. Rather, the primary issue is one of dominance by the represented party and the court's deference to or reliance on that party's presentation of the issues as the *sole* lens through which the evidentiary hearing or motion is seen.

Invariably, the judge starts the hearing with the landlord's claim . . . So the tenant starts her comments with [that claim]. Most often, only [the landlord's claim] has been spoken of when the judge dismisses the tenant's speech and rules for the landlord. As structured, it excludes virtually all tenants from meaningful participation in the conversation. This makes the legal process a charade.

Bezdek, *supra* note 6, at 589.

⁷² O'Barr, *supra* note 10, at 676-77 (describing how *pro se* litigants in Small Claims courts "invariably responded [to such invitations] not by answering the questions in a narrow sense but by commencing a chronological narrative of the dispute as they perceived it. The scope of these narratives often went far beyond the facts that the court was empowered to adjudicate."); *id.* at 662 ("unassisted lay witnesses seldom impart to their narratives the deductive, hypothesis-testing structure with which judges are most familiar and often fail to assess responsibility for events in question the way that the law requires.") (emphasis added); Bezdek, *supra* note 6, at 588 (describing how by asking the *pro se* litigant "Is there anything you want to tell me?" the judge "is structuring the discourse by leading the tenant into expression and then dismissing that which the judge elicited. Doing so in this way is both misleading and destructive").

⁷³ O'Barr, *supra* note 10, at 683-84.

rative, with segments linked with "ands" or pauses until they think they've told "enough." They frequently use "rising intonation" at the end of segments, which signals a request for "acknowledgment and understanding."⁷⁴

Without assistance from the judge, the *pro se* litigant will simply continue her narrative until she thinks what she has said is sufficient to defeat the landlord's claim or support her request for relief.⁷⁵ However, she will generally not have structured the narrative in a deductive manner, based on a theory of the case, which directly refutes the landlord's claim in a manner that is cognizable under the applicable law or which supports her defense, affirmative defense, or counterclaim.⁷⁶ Accordingly, unassisted, the *pro se* litigant's narrative will generally be seen to be legally inadequate,⁷⁷ in spite of the fact that they will often contain all of the elements which, if marshaled by a lawyer, would be legally adequate.⁷⁸

Thus, the judge must assist the *pro se* litigant in structuring and developing her narrative so that its legal adequacy can be articulated and evaluated. O'Barr and Conley have documented the efficacy of judicial interventions which guide the *pro se* litigant in: (1) identifying narrative beginning and end points;⁷⁹ (2) emphasizing facts which are more probative than others regarding the primary legal issues before the court; (3) specifying the harm suffered or the relief sought; (4) identifying corroborative facts; (5) constructing facts according to the legal elements re-

⁷⁴ *Id.*

⁷⁵ *Id.* at 685 ("When [the *pro se* litigant] concludes, he apparently believes that he has given the court an adequate basis for finding against [the other party].").

⁷⁶ *Id.* at 685-86 ("It may be significant that in his narrative, the [*pro se* litigant] proceeded as if the facts would speak for themselves. . . . He does not lay out a theory of the case for testing. Rather, he presents the facts he considers relevant and expects them to lead to a conclusion.").

⁷⁷ *Id.* at 684 ("The most significant problems faced by small claims litigants relates to the legal adequacy of their narratives. . . . Legally inadequate narratives are for our purposes narratives that differ substantially in form and content from the accounts judges are accustomed to dealing with by training and experience.").

⁷⁸ *Id.* at 678.

The narrator provides three types of evidence within his account. First, he produces *documents* that support his story. Second, he calls '*witnesses*' by performing their parts. Third, he introduces *physical evidence*. . . . In an everyday account, some of these might not have been included. Their inclusion in the [*pro se*'s] testimony hints at his conception of legal adequacy. . . . Analyzed in this manner, relatively unconstrained narratives offered as evidence to the court reveal lay models of the kinds of accounts that are appropriate and sufficient to prove a [claim or defense].

Id. (emphasis in original).

⁷⁹ O'Barr, *supra* note 10, at 683.

quired for relief; and (6) responding to the landlord's factual and legal claims or defenses.⁸⁰

Accordingly, even in a system freed from the strictures of evidentiary rules, the role of the judge must be expanded to include "facilitating the unrepresented litigant's presentation of his or her own case—as the litigant has conceived it. . . ."⁸¹ However, this expansion of the role of the judge is perhaps a judge's most daunting challenge in dealing with *pro se* litigants, since it may challenge the judge's deeply-held notion of the appropriate judicial role as being one of a passive trier of facts presented to her by others.⁸² It also requires a judge to acknowledge that her notion of her role significantly affects and, to some degree, determines the extent and nature of the interventions she is prepared to make to assist a *pro se* litigant. There is no question that most judges

⁸⁰ *Id.* at 693-94 (describing a *pro se* litigant who "had the benefit of a referee who was willing and able to develop a theory of [the case], frame the case in deductive terms, and then test the hypothesis developed against the evidence."); *see id.* at 696 (describing magistrates who "intervene sometimes to restructure testimony for the apparent benefit of the witness and sometimes to resolve an issue that the witness seems determined to avoid."). The techniques by which any interviewer, including, with some modification, a judge, can obtain information from a witness in a non-leading, "non-suggestive" manner are well-documented in the literature on client and witness interviewing. *See, e.g.,* Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 41-52 (1995) (describing (1) the "simple" techniques of "cognitive interviewing" which help the witness remember and narrate the full facts of her narrative, i.e., assisting the witness in reinstating the context in which the events took place; urging the witness to tell all of the facts, not those which she believes to be "relevant"; assisting the witness in remembering events in different orders and from different perspectives; and (2) the stages of such an interview, i.e., inviting an open-ended narration; probing for details by directing the witness's attention back to each significant topic, beginning with open-ended questions, followed-up with narrower questions for each topic; and reviewing with the witness all of what is judged to be relevant information culled during the prior stages); *see also Disconnect, supra* note 41, at 443-45 (describing techniques for assisting a *pro se* litigant during direct examination and in making out a *prima facie* case). Little or no judicial training is currently in place for Housing Court judges regarding these interventions and techniques. Accordingly, judicial training and continuing legal education must include exposure to and an opportunity to practice such modalities of assistance.

⁸¹ Albrecht, *supra* note 24, at 44 (noting that such assistance does not transform the judge into an advocate, but simply a facilitator); *Litigant's Struggle, supra* note 6, at 48-51 (describing the court's role in facilitating admission of evidence and "bringing out facts"); Lebovits, *supra* note 57, at 10 ("Judges and arbitrators [in small claims courts] have nearly unfettered discretion, subject to due process concerns, in 'taking active charge of the proceedings and examining witnesses.'") (citation omitted).

⁸² *See supra* notes 8, 15, 16, 25, 35; *see also* STRIER, *supra* note 62, at 84, ("[T]he Anglo-American judge's image and functions as those of a mere moderator of a contest . . . have left his seemingly powerful figure (and with him the parties) at the mercy of the professional combatants.") (quoting ALBERT EHRENZWEIG, *PSYCHOANALYTIC JURISPRUDENCE* 265 (1971)).

have some general notion of what they believe to be role-appropriate interventions based on their understanding of current legal and ethical norms,⁸³ as well as their own practices.⁸⁴ However, in an empirical study of more than eighty Small Claims cases in Colorado and North Carolina, Conley and O'Barr have documented five distinctive judicial role-types and their significant impact on each type's trial practices and decisions:⁸⁵

Judges applying the same substantive and procedural law—and sometimes sitting in adjacent courtrooms—dispense justice in radically different ways. . . . Our examination of what judges say in rendering on-the-spot judgments suggests that this behavioral variation derives from divergent conceptions of the judge's role and the nature of legal decision-making. Thus, the law interpreter (Judge A), who rarely deviates from the straightforward application of legal rules, speaks of a process in which she is at the mercy of unyielding principles, even when she is disturbed by the results they produce. The law maker (Judge B), who adapts or even invents rules of law in pursuit of justice as she sees it, expresses herself in terms which suggest that the law is there to serve her ends, and not vice versa. The mediator (Judge C), who treats the adjudicative process as simply an opportunity to work out a compromise, puts similar emphasis on her central and highly discretionary role in the system. The authoritarian (Judge D), who renders definitive legal judgments and often involves himself in the personal affairs of the litigants, speaks in extraordinarily personal terms in exercising his authority. Finally, the proceduralist (Judge E), defined by his close, sometimes obsessive attention to procedural details, paints a verbal picture of a legal decision maker who is armed with discretionary power, yet protected from direct interaction with the litigants by several layers of legal formality. In each instance, there is a clear parallel between the judge's attitude as revealed in his unrehearsed speech and the individual's behavior on the bench.⁸⁶

Accordingly, judges must reflect on whether their concept of judicial role-type, perhaps using the above typology as a guide, limits their ability to implement the interventions proposed in this section as neces-

⁸³ See *supra* note 25.

⁸⁴ See *supra* notes 30-33 and accompanying text.

⁸⁵ Conley, *supra* note 65, at 481-504 (describing conclusions of their study of more than eighty Small Claims proceedings, which included observation of each proceeding, review of transcripts, and conversations with the judges involved).

⁸⁶ *Id.* at 504.

sary to assure *pro se* litigants' equal access to justice.⁸⁷ As has been argued throughout this paper and by other commentators, a judge's individual concept of role must give way to assuring equal access to justice for the *pro se* litigant.⁸⁸ Absent such a refocusing and reformulating of the role of the judge, even in a system not bound by the stric-

⁸⁷ There are, of course, considerations other than that of "role" that may deter a judge from assisting a *pro se* litigant. Related to considerations of "role" is the court's concern about an appearance of partiality. See Engler, *supra* note 3, at 2011-21; see also *Litigant's Struggle*, *supra* note 6, at 48-49 (noting that "assistance [to *pro se* litigants] is only perceived as unfair by the represented litigant who already has an unfair advantage over the *pro se* litigant."); *Disconnect*, *supra* note 41, at 437.

If what happens [during trial] is analyzed only in moment to moment terms it may seem non-neutral, when, for example, a judge asks a question of one party. But if that question is established as part of a process in which all [witnesses] are asked questions when needed for the judge to understand what happened, then a process that is seen to be neutral *in an overall sense* has been created . . . even if it may help more those who need to be helped because they lack counsel or education or both.

Id. (emphasis added). In addition, judges have legitimate political concerns regarding their reappointment to the bench if their assistance to the unrepresented litigant is perceived to be contrary to the interests of the economically, and thus politically, dominant party in the proceeding. This concern was expressed a number of times during the discussions of the "Adjudicative Process and the Role of the Court" working group. See *supra* note 1.

Fostering the notion that the judge is 'above the fray,' exercising her authority solely in accord with her conscience and interpretation of the law, is more appealing to the judge if she must stand for election to retain her seat. Election creates a potential conflict of interest: Political considerations may influence a judge's actions. Passivity serves to buffer elective judges against public recriminations from unpopular decisions, particularly in non-jury cases.

STRIER, *supra* note 62, at 84.

Housing Court judges are subject to reappointment every five years at the discretion of the administrative judge. N.Y. CITY CIV. CT ACT § 110(f)-(i) (2005). Although Housing Court judges are not elected, they face the same "conflict of interest" concerns outlined by Professor Strier, *supra*, as part of the reappointment process. As part of the reappointment process, a Housing Court judge must be put forward by the Housing Court Advisory Committee, which contains representatives from the real estate industry. *Id.* § 110(g). The judge must then be interviewed by various bar associations, which also contain members from the landlords' bar and others sympathetic to their interests. Finally, the Housing Court judge is reappointed solely "at the discretion of" the Chief Administrative Judge of the Courts, who is usually elected or appointed by an elected official, and thus is also subject to the same political pressures noted above. Accordingly, the concerns expressed by Housing Court judges about the implications for their reappointment should they assist *pro se litigants* in the enhanced manner proposed here is not without merit. Thus, statutory or administrative enactments legitimizing these forms of judicial intervention would go a long way in shielding Housing Court judges from the political and reappointment pressures described above that may limit their assistance to *pro se* litigants.

⁸⁸ Engler, *supra* note 3, at 2022-23.

The adversarial system purports to promote fairness and justice. Yet, the rules currently operate as barriers preventing unrepresented litigants from participating meaningfully in the legal system and thereby frustrate the goal of dispensing fairness and

tures of formal evidentiary rules, "the effectiveness of changes such as these [jettisoning or, at least, significantly restricting the application of formal rules of evidence], will be limited, if not undercut. . . ." ⁸⁹

C. *Adopting an Administrative Procedure or Inquisitorial Model in Which the Judge Bears an Affirmative Duty to Develop the Factual Record and to Identify Controlling Law*

Both of the proposals described above involve an enhanced role for a judge in assisting the *pro se* litigant in articulating her theory of the case and in introducing evidence in support of that theory. It has been suggested that such an expansion of the judge's role is appropriate even within our present adversarial system.⁹⁰ However, my concern in this section is not with whether the reforms described above require statutory or administrative change, but whether those proposals are sufficient to assure the *pro se* litigant's equal access to justice. Unfortunately, I submit that the answer to that question must be in the negative. The studies and commentaries referred to above suggest that even with enhanced judicial assistance, the fundamental power imbalance between represented and unrepresented parties in Housing Court—both status-based and in terms of the *pro se* litigant's lack of familiarity and facility with legal categories—will not be redressed. Accordingly, some commentators have proposed that a judge should be given an affirmative duty to develop the factual record and to identify the controlling law, following the model of judges in administrative hearings or in jurisdictions using an inquisitorial model.⁹¹

justice. Given a choice between clinging to the rules at the expense of the goal, or modifying the rules to further the goal, *the rule must be modified.*

Id. (emphasis added); *Litigant's Struggle*, *supra* note 6, at 51 ("Both rules of court and judicial ethics must be modified accordingly to free judges to engage in these activities [i.e., asking questions, calling witnesses, and conducting limited independent investigations] and determine the 'truth' in every case.").

⁸⁹ Engler, *supra* note 3, at 2069.

⁹⁰ *Litigant's Struggle*, *supra* note 6, at 45 (arguing that such proposals "do not radically alter the adversarial system or the traditional role of the judge. Nor do they make the judge the feared gatherer of evidence who may unfairly side with the party whose theory of the case is consistent with his or her investigation . . ."). However, even Goldschmidt acknowledges that some of his proposals may require some statutory or administrative reforms. *See id.* at 51.

⁹¹ *See* Engler, *supra* note 3, at 2017-18, 2028-31; *Litigant's Struggle*, *supra* note 6, at 51; 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, 975-80 (2004); *see also* STRIER, *supra* note 62, at 283-84 (proposing incorporating aspects of the inquisitorial model even where both parties are represented and even in jury trials).

An administrative law judge in federal, state, and municipal administrative fora has an affirmative duty to assist a *pro se* claimant develop her case.⁹² This duty to assist requires that the judge "probe into . . . and explore for all the relevant facts."⁹³ Consideration should be given to the implications of imposing this same duty on Housing Court judges. Such an imposition would directly address *pro se* litigants' inability to develop factual records and present the facts in a way that demonstrates the legal sufficiency of their cases.⁹⁴

However, merely imposing this duty on a judge by a rule change is no guarantee that the *pro se* litigant will receive the assistance she is promised by such a rule change.⁹⁵ Administrative judges frequently fail to fulfill their obligation to develop the factual record.⁹⁶ Accordingly, the interventions described in the preceding section⁹⁷ would have to be imported here as a mandated component of the judge's duty to develop the factual record.

The mandated role of the judge in developing the factual record proposed here also bears some similarity to the role of the judge in the

⁹² See, e.g., *Shaw v. Chater*, 221 F.3d 126, 134 (2d Cir. 2000) ("[T]he rule in our circuit [is] that 'the ALJ, unlike a judge in a trial, must [her]self affirmatively develop the record' in light of 'the essentially non-adversarial nature of a benefits proceeding' [E]ven when, as here, claimant is represented by counsel.") (quoting *Pratts v. Chater*, 94 F.3d 34, 37 (2d Cir. 1996)) (quoting *Echeverria v. Sec'y of Health & Human Serv.*, 685 F.2d 751, 755 (2d Cir. 1982); *Diaz v. Wing*, N.Y. L.J., Feb. 6, 2003, at 18:1 (N.Y. App. Div. 1st Dept.) (illustrating that the same is true regarding New York state and municipal administrative judges).

⁹³ *Echeverria*, 685 F.2d at 755.

Where, as here, the claimant is unrepresented by counsel, the ALJ is under a heightened duty to scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts. A reviewing court must determine whether the ALJ adequately protect[ed] the rights of [a] *pro se* litigant by ensuring that all of the relevant facts [are] sufficiently developed and considered.

Id. (quoting *Hankerson v. Harriss*, 636 F.2d 893, 895 (2d Cir. 1980)) (quoting *Gold v. Sec'y of HEW*, 463 F.2d 38, 43 (2d Cir. 1972)) (internal quotations omitted).

⁹⁴ See *supra* notes 72-80 and accompanying text.

⁹⁵ See *supra* note 65.

⁹⁶ See, e.g., *supra* note 93 and cases cited therein; see also Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 704-09 (2002) (documenting reversal rates of more than 50% for Social Security administrative law judge disability determinations, but arguing that this reversal rate is in part explainable by courts engaging in a too close review of the factual record under a substantial evidence standard of review). But see Anthony Taibi, *Politics and Due Process: The Rhetoric of Social Security Disability Law*, 1990 DUKE L.J. 913 (1990) (arguing that judicial timidity restrains judges from identifying and rectifying underlying systemic flaws which result in wrong decisions and injury to personal dignity and autonomy).

⁹⁷ See *supra* notes 70-80 and accompanying text.

inquisitorial model followed in most jurisdictions outside of the United States.⁹⁸ Of course, adopting aspects of the inquisitorial model would have a significant impact on the adversarial nature of our existing judicial model and is, thus, unacceptable to some commentators.⁹⁹ Nevertheless, defenses of the adversarial system against incursions of inquisitorial-based reforms are rooted in the adversarial system's presumption that a zealous lawyer will represent each side in a case.¹⁰⁰ However, the primary landscape in Housing Court for the foreseeable future is one populated predominantly with *pro se* litigants. Thus, the incorporation of at least some aspects of the inquisitorial model, primarily by enhancing the role of the judge in developing the factual record, and in identifying and applying controlling law is essential in guaranteeing equal access to justice for *pro se* litigants.

⁹⁸ See, e.g., *Litigant's Struggle*, *supra* note 6, at 41.

In this system, the professionally trained judge takes an activist role and ensures a solution based on the merits of the case by calling witnesses, asking most of the questions, and conducting hearings Narrative testimony is invited and, with some exceptions, most evidence offered by the parties is admitted With greater judicial involvement in fact finding, "the threat of one-sided distortions of misinformation appears less immediate, and the need to subject means of proof to testing becomes less compelling."

Id. (citation omitted); STRIER, *supra* note 62, at 16 ("[T]he judge controls and conducts the court's investigation, calling witnesses and establishing the scope of the inquiry.").

⁹⁹ See, e.g., *Litigant's Struggle*, *supra* note 6, at 53 ("[W]e would be sacrificing some important elements of popular control over the legal system.") (quoting DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 103 (1988) [hereinafter LUBAN]); see also LUBAN, at 98 (noting that "despite its numerous attractions, the German [inquisitorial] procedure requires other changes in the legal system and the nexus of values enveloping it that would make the trade-off unacceptable").

¹⁰⁰ LUBAN, *supra* note 99, at 239-41 (arguing that access to the adversary system and the rules by which that system functions presume representation by an attorney). Professor Luban, although a staunch defender of the adversarial system against inquisitorial-based reforms, further notes that our adversarial system not only presumes representation by a lawyer, but is constructed to require such representation.

The design of a legal system that cannot be operated by laypeople is surely the result of state decisions, indeed, of the accretion of hundreds of millions of state decisions. Moreover, the inability of poor people to afford lawyers is also the result of choices made by the state, both formalistically as a matter of law and also as a matter of plain fact. . . .

[T]he selective exclusion of the poor from the legal system does not simply fail to confer an advantage on them—it actively injures them.

Id. at 246-47. Professor Luban's solution to this constitutional infirmity is limited to the deregulation of some routine legal services, mandating pro bono representation, and funding of legal services, all of which preserve the lawyer-centric and resulting judicial passivity models of our adversary system, and provide little relief for those who, in spite of these reforms, will appear in court, including Housing Court, without attorneys. *Id.*

In the French civil (and criminal) systems, the judge has the responsibility for fact gathering, including developing facts pre-trial and at trial by questioning witnesses.¹⁰¹ As in summary proceedings in Housing Court, discovery by the parties in the French system is extremely limited. Rather, the judge directs the development of the factual and legal issues in the case, and fixes time limits. Appeals are *de novo*.¹⁰²

Obviously, the whole cloth importation of such a civil code-based inquisitorial approach raises significant statutory and potentially constitutional issues.¹⁰³ In addition, such an importation could give rise to practical considerations, since the French system relies on fairly well-developed *dossiers* to educate the judge regarding the factual and legal issues that she is expected to develop and on which she must rule. There are also theoretical considerations of such an importation given, for example, the almost exclusive reliance in the French system on documentary evidence due to a fundamental devaluation of the trustworthiness of testimony.¹⁰⁴ Nevertheless, some familiarity with a judicial system in which the judge plays a significant fact development role, particularly during the phase of the trial called the *enquête*,¹⁰⁵ may counter

¹⁰¹ I am deeply indebted in this section to a paper by Professor Anne Moynihan, *The French Judiciary* (1996) [hereinafter Moynihan] (prepared for the Housing Court Committee, Association of the Bar of the City of New York) (describing that system's inquisitorial model and discussing its applicability to the U.S. civil system and New York City's Housing Court in particular). See also Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B.U. INT'L. L.J. 57 (1994); C.N. Ngwasiri, *The Role of the Judge in French Civil Proceedings*, CIV. JUST. Q. 169 (April 1990) [hereinafter Ngwasiri]; Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do The French Do It, How Can We Find Out, and Why Should We Care?* 78 CAL. L. REV. 539 (1990); James Beardsley, *Proof of Fact in French Civil Procedure*, 34 AM. J. COMP. L. 459 (1986) [hereinafter Beardsley]; Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131 (1983) [hereinafter Tomlinson].

¹⁰² Moynihan, *supra* note 101. For a summary of similar elements in the German system, see LUBAN, *supra* note 99, at 94-97; see also STRIER, *supra* note 62, at 213-18 (comparing the French and German systems).

¹⁰³ Moynihan, *supra* note 101, at 2; see also LUBAN, *supra* note 99.

¹⁰⁴ Beardsley, *supra* note 101, at 467, 469-70, 480 (claiming that the French system's almost exclusive reliance on documentary evidence results in "fact avoidance," i.e., the failure of the judge to use the full range of powers and methods available to her to develop the factual record). In fact, an over-reliance on documentary evidence might severely prejudice a *pro se* litigant in Housing Court. Thus, that aspect of the French system may be not only theoretically, but also practically unsuitable both to the American system in general, but also to the goal of assisting the *pro se* litigant in presenting her narrative evidence.

¹⁰⁵ *Id.* at 478-79:

In the *enquête* the witness is asked by the magistrate to state *discursively* what he knows about the case. He will be interrupted from time to time by the magistrate

a reflexive rejection of such a judicial role simply because American judges and advocates have little knowledge of or exposure to systems other than our own adversarial one.¹⁰⁶

These preliminary explorations suggest that a more comprehensive investigation of such systems beyond the brief summary provided here may identify additional means by which the role of the judge can be enhanced to meet the challenge of *pro se* litigants in Housing Court.¹⁰⁷ In any event, one should investigate and evaluate the importation of at least some aspects of such a role for a judge.¹⁰⁸ For example, Professor

either so that specific questions may be put or to enable the magistrate to dictate to his clerk (*greffier*) a summary of what the witness has said. . . . During this exercise the lawyers are seated in the back of the room, out of the line of sight of the witness, and are only asked at the end of the *enquête* if there are other questions which they would like to have the investigating magistrate [not the lawyer] put to the witness. The magistrate may decide not to restate the question; he may simply ask the witness to respond or to clarify his earlier statements. There is, however, none of the psychological pressure associated with cross-examination as practiced in common law procedure. Immediately upon the end of the interrogation, the magistrate's summary is handed to the witness for review and signature.

(emphasis added). See also Ngwasiri, *supra* note 101, at 176-85.

¹⁰⁶ Indeed, Professor Luban's rejection of inquisitorial-based reforms is premised primarily on what he calls "a pragmatic argument: if a social institution does a reasonable enough job of its sort that the costs of replacing it outweigh the benefits, and if we need that sort of job done, we should stay with what we have." LUBAN, *supra* note 99, at 92. However, as Professor Luban acknowledges, the system we have "cannot be operated by laypeople." *Id.* at 246. Thus, even on a pragmatic analysis, the present system does not do "a reasonable enough job" for *pro se* litigants and should be changed accordingly. As Professor Strier has noted, "What is prevalent is not necessarily what is functional or fair. We must be chary of a misplaced complacency that our trial procedures are optimal, and therefore inviolable. The adversary system is not sacrosanct. By eschewing labels, we can bring to our table the option to adopt the best features of foreign systems." STRIER, *supra* note 62, at 287. Indeed, Professor Ellen E. Sward, has concluded that "Adversarial ideology has failed. The adversary system is transforming itself into a more inquisitorial, less individualistic methodology even as apologists debate the various justifications for adversarial adjudication. The transformation seems to be bringing about a system that is more effective at fairly complex fact-finding, socially significant rule-making, and behavior-modifying litigation. The less individualistic, more communitarian ethic that is reflected in the transformation should be recognized and encouraged. That recognition may entail abandoning adversarial ideology, but a focus on our goals and values is more helpful in evaluating and modifying our adjudicatory system than any rigid ideology could be." *Values, Ideology and the Evolution of the Adversary System*, 64 IND. L.J. 301, 355 (1988/1989).

¹⁰⁷ "An understanding of the inquisitorial system trial is essential to a broader appreciation of the adversary system. Each system puts the other in context, setting a baseline for comparison and contrast of the representative features." STRIER, *supra* note 62, at 16.

¹⁰⁸ As Strier has explained:

I do not suggest wholesale adoption of the inquisitorial philosophy that a trial is a vehicle for the implementation of state policy. Instead, I prescribe a departure from our self-imposed enslavement to the principle that (except for the relatively rare jury

Strier has proposed a "middle ground" approach to expanding the inquisitorial role of the judge during trials involving attorneys in terms familiar to those versed in the adversarial model:

To gain the benefits of independent, judicial questioning during trial, we need not replace purely adversarial evidence gathering with the judge-dominated model of the inquisitorial system. An acceptable middle ground could be the same allocation of interrogating power employed during our *voir dire*. . . . [T]he judge might conduct the initial interrogation, after which the attorneys would be free to probe for additional details. But the judge could always ask supplemental questions which an incompetent or marginally competent attorney neglects to pose. The occasional need for this judicial "safety net" protection escapes few who are familiar with adversary system trials.¹⁰⁹

Adapting this more active role of the judge to hearings involving *pro se* litigants could significantly assist the *pro se* litigant in developing the factual record.

In addition, as noted above, *pro se* litigants also face a daunting challenge in articulating a legal framework or theory of the case in which the merits of their claim or defense can be evaluated.¹¹⁰ Thus, it could be productive to adapt the approach in German civil actions in which the "court's duty to discover the truth is matched by a *cognate responsibility to ascertain and apply the law without prompting from the parties*. In essence, the court seeks to ensure a decision based on the merits of the case."¹¹¹ Although this approach may seem at odds with the judge's role within the adversary system,¹¹² it is not unlike the role played by a judge in Small Claims court, who must not only apply substantive law to the facts presented by the *pro se* parties, but must also identify the substantive law to be applied to the facts since a Small

nullification) procedure is all-important in trial and outcome is irrelevant. We will not compromise the integrity of our trial system if we occasionally drop the blindfold of Justice to avert gross inequities. If we do not, if we continue to abide by a blind, quasi-religious faith in adversary procedure, then the means to justice will have swallowed the ends.

Id. at 283.

¹⁰⁹ *Id.* at 265.

¹¹⁰ See *supra* notes 72, 77, and 80.

¹¹¹ STRIER, *supra* note 62, at 217 (emphasis added).

¹¹² *Id.* (noting that "A contrary dynamic obtains in the adversary system. The general premise of adversary procedure is that the court has no independent knowledge of the law and must therefore be informed of it by argument.").

Claims judge generally does not have the benefit of lawyers to brief the law.¹¹³ Such an approach could be adapted to Housing Court proceedings. Of course, if such a responsibility is imposed on the Housing Court judge, she must be provided both training in the substantive law most regularly at issue in the proceedings before her,¹¹⁴ and a sufficient pool of court attorneys to assist in legal research and bench memos on the matters before her.

Professor Moynihan summarizes some of the considerations suggested by the French inquisitorial model that could guide evaluation of the advisability of incorporating other elements from such systems:

¹¹³ See Lebovits, *supra* note 57, at 9 (establishing that small claims judge is required to adhere strictly to the requirements of substantive law and may not merely speculate or compromise under the guise of doing substantial justice). Professor Siegel has inquired, in response to Judge Lebovits' argument,

With no lawyers representing the parties . . . , we must ask how the substantive law can be applied at all, much less 'strictly'. . . . [T]he requirement to apply the substantive law strictly when there are no attorneys present to argue the law would put on the small claims judge the same duties imposed on a Court of Appeals judge to whom talented and well paid attorneys argue the law in cases with high stakes, and for whom two law clerks offer ready assistance and counsel.

SIEGEL, *supra* note 57, § 582, at 968. The answer to Professor Siegel's inquiry, I would submit, is that the small claims judge must use whatever knowledge or assistance is at her disposal to identify the substantive law applicable to the facts put before her by the *pro se* litigant or that were developed by the judge. See Lebovits, *supra* note 57. Only by assuming that responsibility can the small claims judge "do substantial justice . . . according to the rules of substantive law." N.Y. CITY CIV. CT. ACT § 1804 (emphasis added). Indeed, The Small Claims Manual admonishes judges that this statutory requirement:

. . . serves as a clarion call to apply New York's hallowed statutory and common law, lest the Small Claims forum develop a reputation for second-class justice that it has heretofore resolutely avoided. . . . [I]f the 'technical rule of law' is unclear, Judges (even non-lawyer Town and Village Court justices) should do what they do when (or would do if) sitting in other court parts: *determine the rule of law as best they can, with whatever review, research, and reflection are necessary.*

ENGORON, *supra* note 57, at 41 (emphasis added).

¹¹⁴ A candidate for a Housing Court judgeship must "have been admitted to the bar of the state for at least five years, two years of which shall have been in active practice." N. Y. CITY CIV. CT. ACT § 110(i). In addition, the candidate must also be "qualified by training, interest, experience, judicial temperament and *knowledge of federal, state and local housing laws and programs.* . . ." *Id.* § 110(f) (emphasis added). These statutory requirements are intended, among other things, to assure that a Housing Court judge has a sufficient level of knowledge and possibly practice in substantive housing law. Accordingly, requiring such judges to identify and apply applicable substantive law for *pro se* litigants does not present the Herculean challenge feared by Professor Siegel. See *supra* note 113. However, these statutory qualifications for appointment, and indeed for reappointment to the Housing Court bench, will have to be rigorously applied to ensure that persons sitting in Housing Court will be able to meet their responsibility to assist *pro se* litigants in the manner proposed here.

[We] might want to consider the French experience when it considers the role that should be played by the housing court judge. The typical French trial and a housing court case share many similarities. Limited discovery is an obvious one. So is the summary or documentary nature of the proceeding. The questioning of those witnesses who need to [be] called in the French trial can apparently be done by judges without a loss of public confidence in judicial fairness.

The French system does assume a role for lawyers, but there are aspects of the French process that might be used to improve the lot of the *pro se* litigant. In fact, in many civil jurisdictions, the judge has a duty to assist the parties in clarifying their positions on factual and legal issues. In France, a judge may play such a role but it is not mandatory. It has been noted that, in practice, "this effectively rescues parties with poor counsel, reflecting the civil system's fundamental prejudice favoring the application of substantive law to obtain a just result rather than a reliance on technicalities and procedure that often leads to an unjust resolution." However, in a decision, the judge may include only those grounds and documents relied on or produced by the parties that have been available for inspection to both parties.

Major debate has occurred about importing many aspects of the French . . . procedure into common law traditions. . . . That debate would provide a rich background against which [we] might consider issues raised by suggestions that housing court judges roles be changed to more closely resemble the role of judges in France.¹¹⁵

It should be noted that contrary to the concerns expressed by some commentators,¹¹⁶ adopting a more active, inquisitorial role for judges need not compromise judicial impartiality and fairness. Judges in inquisitorial systems engage in a mandated active role without a loss of impartiality.¹¹⁷ Administrative law judges, who also develop the factual record and determine which law is applicable to the cases before them, do so without any loss of an appearance of fairness.¹¹⁸ Accordingly,

¹¹⁵ Moynihan, *supra* note 101, at 8-9 (citation omitted).

¹¹⁶ See Engler, *supra* note 3, at 2023-24 (summarizing concerns about appearance of partiality if a judge assists a *pro se* litigant); see also *Litigant's Struggle*, *supra* note 6, at 42-44; see also STRIER, *supra* note 62, at 37 (summarizing impartiality concerns arising from a judge's taking a more active role in fact finding).

¹¹⁷ *Id.* at 83-84, 266-67; but see LUBAN, *supra* note 99, at 99 (describing the dominance of prosecutors over the examining magistrate in the pre-trial phase in the French criminal system) (citing Tomlinson, *supra* note 101, at 150-64).

¹¹⁸ Engler, *supra* note 3, at 2018.

such concerns should not preempt importing aspects of the inquisitorial model.

III. CONCLUSION

The proposals set forth above challenge our adversarial system's received traditions of judicial passivity and impartiality, narrowly understood. These traditions dramatically limit the role played by most judges in New York City's Housing Court (and in most other courts) in assuring access to justice for *pro se* litigants. The consequences of this circumscription are devastating for a *pro se* litigant, particularly one who feels compelled to litigate her case rather than accept a settlement that she considers to be unfair or prejudicial. Warned by the court that she will be subject to the same mystifying rules of evidence, trial procedure, and motion practice as a trained attorney, she soon realizes that the option of "going to trial" may forebode even worse consequences than the settlement she is resisting. If she opts to press her defenses or claims at a hearing or by a motion, she finds that the assistance provided to her even by a judge sensitive to the challenges faced by a *pro se* litigant is extremely limited in the strange land of our attorney-centric rule-bound adversarial system. Although the judge may try to explain trial or motion procedures, and to some extent relax evidentiary rules, or even allow her to testify to a limited degree in narrative form, she is left to figure out on her own when she has said enough to meet a legal standard regarding which she is largely ignorant.

Accordingly, I have proposed, as have other commentators, a more active, inquisitorial-based role for Housing Court judges. I submit that most of the models of such judicial intervention outlined above can be

The precedents from small claims courts and administrative agencies serve as an important reminder that impartiality does not require judges to be passive. Like other judges, small claims judges must remain impartial. ALJs in Social Security, welfare, and unemployment benefits cases must also remain impartial. Judges may therefore be active in assisting unrepresented litigants without compromising their impartiality.

Id. (citations omitted).

Even within the United States, the trial judge's passivity is unique among those serving in formal dispute resolution roles. In administrative hearings . . . arbitrators play an active role without the loss of impartiality. In collective bargaining, federal mediators rescue legions of sessions from stalemate. And at the local and private sector levels, conciliators of all kind successfully function as neutral but active third-party facilitators in quasi-judicial roles. Clearly, impartiality and passivity are not necessarily corollaries.

STRIER, *supra* note 62, at 84.

incorporated to some extent into the present adversarial system. However, the constitutional infirmity of the present system, which denies equal access to justice to most *pro se* litigants in Housing Court, i.e., to the vast majority of tenants and to a not insignificant number of small landlords, requires that we consider more far-reaching departures from the received construction of judicial role. Thus, I submit that at least two additional reforms, which may require statutory, administrative, and ethical reforms, are required: (1) jettisoning, in whole or in part, evidentiary rules; and (2) placing an affirmative duty on the judge to develop the factual record and to determine and apply relevant substantive law.

To some judges, lawyers, and commentators, such a transformation challenges their very notion of what constitutes a legal system and the role of a judge within such a system. Some may perceive the forum that may result from these proposals as nothing more than a delegalized dispute resolution center overseen by a problem solver, not a court of law presided over by a judge. However, I agree with Professor Goldschmidt that:

[t]he delegalization proposed here consists of eliminating the secrecy regarding basic legal information, such as the elements of causes of action, and relaxing the rules of procedure and evidence. These do not effect changes in substantive law, only in the fairness of the proceedings for all litigants. Even if proceedings under these proposals turn out to be, in one commentator's words, "litigation lite" for *pro se* litigants and their adversaries, that is better than unfair litigation or no access to justice at all.¹¹⁹

Indeed, one might note that in spite of the efforts of dedicated and well-intentioned judges and administrators, and in spite of recent Housing Court reforms, the current system can hardly be called a law-based system. An adversarial system in which one of the contestants enters the arena without arms or even armor, or in which she is given at best second-rate weapons, but no training on how to use even such inferior tools, bespeaks a system in which the powerful survive, irrespective of the demands and protections of substantive law. If a judge passively presides over such unequal combat, acquiescing to and enforcing its results, she reduces herself to being no more than a spectator to the pro-

¹¹⁹ *Litigant's Struggle*, *supra* note 6, at 53-54 (internal citations omitted).

ceedings, rather than functioning as a neutral arbiter of facts and a dispenser of justice. The proposals developed in this paper attempt to find interventions by which a judge can assist the parties in presenting to her both the nature of the legal conflict and the facts she needs to adjudicate that conflict based on applicable substantive law. In that way, a judge can more truly be said to be a person who is presiding over a system ruled by law and not by the accidents of status or legal representation.

Implementation of these proposals will not be easy. At a minimum, judges must be trained in the methods described above which are permissible within the present system and encouraged (or perhaps even persuaded) to apply them in their courtrooms. In addition, it is essential that experimental *pro se* parts be established in which to test the proposals set forth here. Those judicial interventions proposed above that do not require statutory or other changes to be implemented would be used in all matters sent to those parts. Those interventions that do require such changes could be used where the parties consent to their usage. The workings of the parts should be observed, documented, and evaluated. The resulting experience-based conclusions would provide a rationale for replacing or refining the methodologies used, and for developing further interventions.

Whether or not the court system opts to adopt any of the proposals set forth in this paper, it must recognize the challenge thrust upon it by the large numbers of *pro se* litigants in the Housing Court, and identify and implement some forms of judicial intervention to meet that challenge. If it fails to do so, it will have failed in its fundamental constitutional and judicial task of assuring access to justice to *pro se* litigants in New York City's Housing Court.