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## 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

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## 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

### Cover Page Footnote

Professor of Law, Fordham University School of Law; Co-Director, Louis Stein Center for Law and Ethics. I greatly benefited from the comments of my colleagues at a Fordham Law School faculty brown bag discussion of this Essay. Special thanks Russell Engler, Bill Simon, and Brad Wendell for their helpful comments.

# 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

*Russell G. Pearce\**

“To no one will we sell, to no one will we refuse or delay, right or justice.”<sup>1</sup>

“Equal justice is an implausible ideal; adequate access to justice is less poetic but more imaginable.”<sup>2</sup>

The organized bar is in denial. It refuses to acknowledge that our legal system promises equal justice under law, but allows justice to be bought and sold.<sup>3</sup> Instead, the bar limits its attention to a small corner of this problem—the glaring fact that most low-income people cannot obtain any lawyer for their civil problems and cannot obtain adequate representation for their criminal defense.<sup>4</sup> As Deborah Rhode

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\* Professor of Law, Fordham University School of Law; Co-Director, Louis Stein Center for Law and Ethics. I greatly benefited from the comments of my colleagues at a Fordham Law School faculty brown bag discussion of this Essay. Special thanks Russell Engler, Bill Simon, and Brad Wendell for their helpful comments.

1. Deborah L. Rhode, *Access to Justice* 47 (2004) (quoting the Magna Carta).

2. Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 Wash. U. J.L. & Pol’y 47, 61 (2003).

3. See, e.g., Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. Rev. 1084, 1089-92, 1112 (1983). For further elaboration of this point, see *infra* Part I.

4. Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 Geo. J. Legal Ethics 423, 423 (2004). For example, the Fordham Law School Library’s quick and non-scientific survey of the American Bar Association President’s column in the ABA Journal from 1992 through 2001 identified at least twenty-five columns highlighting pro bono or legal services to the poor in contrast to only one suggesting changes in the courts to make them more accessible to parties without lawyers. See *infra* app. for these citations. While focusing on pro bono and legal services, the bar has rejected efforts to open the market for legal services. See, e.g., Rhode, *supra* note 1, at 87-96; Deborah J. Cantrell, *The Obligation of Legal Aid Lawyers to Champion Practice by Nonlawyers*, 73 Fordham L. Rev. 883 (2004); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229, 1267-76 (1995). It has also shown little interest in efforts to modify client advocacy to include a responsibility for the public good. For examples of these proposals, see David Luban, *Lawyers and Justice* (1988);

observes, “bar discussions of access to justice . . . assume that more access is better, and the trick is how to best achieve it.”<sup>5</sup> In the context of civil legal needs, bar leadership has focused, without much success, on providing more lawyers to low-income people through increased funding and more pro bono hours.<sup>6</sup>

Given that our society primarily distributes legal services through the market and employs an adversary system of justice, the bar’s proposals—if accepted—would have a very limited impact in advancing equal justice. The proposals address only a small portion of the inequality within the legal system and do not recognize that our society cannot provide the vast resources necessary to equalize the access to justice for low-income people. That does not mean that the bar should abandon its efforts. Rather, it should admit that these proposals have more of an effect of easing the suffering of those few low-income people lucky enough to obtain legal representation and not of realizing equal justice under law.

Inspired by Deborah Rhode’s comprehensive and well-argued book, *Access to Justice*,<sup>7</sup> and her suggestion that courts should provide legal information and simple forms to unrepresented parties, this Essay goes a step further. It proposes replacing—in every case—the paradigm of judge as passive umpire with the paradigm of judge as active umpire. Judges, who already take a more active role in particular courts and particular types of cases, would have an obligation to ensure that the parties’ procedural errors do not deprive the court of access to relevant evidence and legal arguments. While this proposal would certainly not eliminate unequal justice, it would at least be a major step toward reasonably equal justice under law.

## I. THE MARKET FOR JUSTICE

The aspiration of equal justice under law implies an absolute measure of justice and of equality. As a rhetorical flourish, it remains dominant today. Most lawyers and judges, as well as the general public, would find appalling the notion that justice can be bought and sold.<sup>8</sup> Nonetheless, the reality is that our legal system largely distributes legal services through the market and justice through an adversary system where the quality of legal services has a major influence. As a result, to a significant degree, justice is bought and sold and the inevitable result is unequal justice under the law.

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William H. Simon, *The Practice of Justice: A Theory of Lawyers’ Ethics* (1998); and Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 *Stan. L. Rev.* 589 (1985).

5. Rhode, *supra* note 2, at 49.

6. Rhode, *supra* note 1, at 103-04, 145-46; *see also infra* app.

7. Rhode, *supra* note 1.

8. Hazard et al., *supra* note 3, at 1112-13; *see* Rhode, *supra* note 1, at 3 (highlighting the centrality of commitment to equal justice under law).

A comparison between the ideal paradigms of the adversary and inquisitorial systems highlights the centrality of legal representation to the determination of justice in an adversary system.<sup>9</sup> An inquisitorial system employs expert judges to manage and guide a process where the parties assist them in their search for justice. Inquisitorial judges conduct investigations, initiate cases, determine the issues, and control the presentation of evidence.<sup>10</sup> In contrast, the adversary system paradigm places the parties at the center of the search for justice.<sup>11</sup> The adversary system assumes that the parties' competitive, individual pursuit of self-interest results in the most just outcome, for the parties and for society as a whole.<sup>12</sup> Accordingly, the parties, not the court, conduct investigations, initiate cases, determine the issues, and control the presentation of evidence.<sup>13</sup> The court, whether acting through a judge or a jury, is a neutral umpire. It resolves disputes regarding the legal issues the parties identify, the admissibility of evidence the parties have determined is relevant, and decides factual contests the

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9. What follows is a description of the inquisitorial and adversarial paradigms. In practice, a variety of factors can make the two systems more or less similar. *See, e.g.*, Mirjan R. Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* 3-6 (1986).

10. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 826 (1985); *see also* Matthew T. King, *Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems*, 12 Int'l Legal Persp. 185, 187-88 (2001-02); Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374, 380 n.24, 380-88 (1982).

11. John H. Langbein, *The Origins of Adversary Criminal Trial* 1-2, 8-9 (A.W. Brian Simpson ed., 2003); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1283 (1976); Resnik, *supra* note 10, at 380 n.3, 380-81.

12. Richard Posner has observed that the adversary system "resembles the market in its impersonality, its subordination of distributive considerations. The invisible hand of the market has its counterpart in the aloof disinterest of the judge." Richard A. Posner, *Economic Analysis of Law* 322 (1972). Other commentators have similarly compared the principles of the market to those of the adversary system. *See, e.g.*, Rob Atkinson, *Connecting Business Ethics and Legal Ethics for the Common Good: Come, Let Us Reason Together*, 29 J. Corp. L. 469, 484, 488 (2004); Robert F. Cochran, Jr., *Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternative Sources of Virtue*, 14 Notre Dame J.L. Ethics & Pub. Pol'y 305, 312 (2000); David Luban, *The Social Responsibility of Lawyers: A Green Perspective*, 63 Geo. Wash. L. Rev. 955, 974 (1995); W. Bradley Wendel, *Professional Roles and Moral Agency*, 89 Geo. L.J. 667, 698-99 (2001) (reviewing Arthur Isak Applbaum, *Ethics for Adveraries: The Morality of Roles in Public and Professional Life* (1999)). Many commentators have questioned whether the adversary system does indeed produce the most just result. *See, e.g.*, Langbein, *supra* note 11, at 1-2; Richard A. Posner, *Overcoming Law* 503 (1995) (describing justification of adversary system as "mystical faith"); David Luban, *Twenty Theses on Adversarial Ethics, in Beyond the Adversarial System* 134, 143-44 (Helen Stacy & Michael Lavarch eds., 1999). Some commentators have offered "nonconsequentialist justifications of the adversary system" which do not rely on the justness of the outcome. Luban, *supra* note 4, at 81-103; Monroe Freedman & Abbe Smith, *Understanding Lawyer's Ethics* 19-23 (2002).

13. Langbein, *supra* note 11, at 1; Chayes, *supra* note 11, at 1283; Resnik, *supra* note 10, at 380 n.23, 380-88.

parties have placed before it.<sup>14</sup> For purposes of this Essay, I will refer to the work of the party or the party's representative in preparing and presenting a case as "lawyering," whether performed by the party's lawyer or by the self-represented party.

Where the parties have such great control of the process, the quality of their lawyering efforts undoubtedly has a major influence on the outcome.<sup>15</sup> Precise measurement of this advantage is difficult. Other factors, such as the weight of relevant authority and available evidence, are likely to be significant influences as well. Accordingly, where the relative merits are comparable, the quality of lawyering will make a greater difference than where the relative merits vary greatly. Although a strong lawyer will win easily with a strong case, even a weak lawyer will have a good chance. But even the evaluation of what is a weak or strong case may vary; an excellent lawyer may be able to discover that what looks like a weak case is actually a strong one. While precise quantification of the effect of lawyering awaits further development, the strong influence of lawyering appears beyond dispute.<sup>16</sup>

Given this strong influence, the use of the market as the primary mechanism<sup>17</sup> for distributing legal services guarantees significantly unequal justice under law.<sup>18</sup> The more resources a party has, the better quality lawyering they can buy.<sup>19</sup> Parties with better lawyering are better able to achieve their goals in the legal system. In effect, wealthier parties have the capacity to buy more justice.<sup>20</sup> Rather than being the exception, inequality under law is more frequently the rule.

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14. See *supra* note 11 and accompanying text.

15. See, e.g., Atkinson, *supra* note 12, at 488; Marc Galanter, *Why the "Haves" Come Out Ahead?: Speculation on the Limits of Legal Change*, 9 *Law & Soc'y Rev.* 95 (1974); Hazard et al., *supra* note 3, at 1112 (noting that where "lawyers differ in skill, knowledge, and the time they can devote to a case, . . . justice—actual outcomes in the legal system—is related to the quality of lawyering that a client can afford"); Marvin E. Frankel, *An Immodest Proposal*, *N.Y. Times*, Dec. 4, 1977, (Magazine), at 92.

16. See *supra* note 15 and accompanying text.

17. Some exceptions exist. The government and, to a lesser degree, the bar provide services to the poor.

18. I do not mean to imply that the market for legal services is efficient. Indeed, the bar has created significant barriers to competition, such as restrictions on who can deliver legal services and who can have an ownership interest in firms delivering legal services. As a result, the price of legal services is significantly higher and the quality lower than what would result from an efficient market. See, e.g., Cantrell, *supra* note 4; Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *Fordham L. Rev.* 2581, 2599 (1999); Pearce, *supra* note 4, at 1272-73.

19. See *infra* note 15.

20. Langbein describes this as the "wealth effect." Langbein, *supra* note 11, at 1-2, 102-03.

## II. HOW MUCH INEQUALITY EXISTS IN THE MARKET FOR JUSTICE?

Current measures of the extent of unequal justice under law are quite gross and anecdotal. Absent an agreement on how to measure either justice or equality,<sup>21</sup> commentators tend instead to focus on “equal access to the justice system” as a surrogate.<sup>22</sup> But that measure also suffers from a lack of clarity. Determining equality requires a definition of legal need and lawyering quality to permit a comparison between similarly situated persons. Not only are these measures absent, but market analysis suggests that those needs are themselves dynamic and not easily susceptible to quantification.<sup>23</sup>

Nonetheless the gross, if somewhat indeterminate, inequality of our legal system in civil litigation is overwhelming.<sup>24</sup> Rhode finds that “[m]illions of Americans lack any access to justice, let alone equal access.”<sup>25</sup> In civil proceedings, most low- and middle-income people lack any affordable access to legal services, while in the criminal justice system, the government funded access for those who cannot afford their own is demonstrably inadequate. “According to most estimates,” notes Rhode, “about four-fifths of the civil legal needs of the poor, and two- to three-fifths of the needs of middle-income individuals, remain unmet.”<sup>26</sup> She observes that “[o]nly one lawyer is available to serve approximately 9,000 low-income persons, compared with one for every 240 middle- and upper-income Americans.”<sup>27</sup> With regard to middle-income Americans, Rhode estimates that “[m]illions” of them are “priced out of the legal process.”<sup>28</sup> As Richard Zorza adds, “[i]n many courts, well over [fifty] percent of litigants appear without lawyers.”<sup>29</sup>

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21. Rhode, *supra* note 1, at 5.

22. *Id.*

23. *Id.*; Hazard et al., *supra* note 3, at 1091-92.

24. By focusing on civil litigation, I do not mean to imply that equality abounds in criminal litigation. Even though indigent defendants have a legal right to court-appointed counsel in criminal cases, Rhode points to studies consistently observing that they do not receive adequate representation. The appointed lawyers often lack “experience or expertise in criminal defense,” fail to perform competently, do not receive enough compensation to fund required research and preparation, and do not have the resources to conduct the necessary investigations. Rhode, *supra* note 1, at 122, 123-29. Rhode concludes that “[g]overnment legal aid and criminal defense budgets are capped at ludicrous levels, which make effective assistance of counsel a statistical impossibility for most low income litigants.” *Id.* at 3.

25. *Id.*

26. *Id.*

27. Rhode, *supra* note 2, at 47-48.

28. Rhode, *supra* note 1, at 103.

29. Zorza, *supra* note 4, at 423 n.1.

### III. THE BAR'S PREFERRED SOLUTION: PROVIDING LAWYERS FOR THE POOR

Bar leaders have sought to address the problem of unequal justice under law through efforts to increase dramatically both funding and lawyer pro bono contributions.<sup>30</sup> They recommend major increases in government funding for civil legal services as well as increased contributions from lawyers.<sup>31</sup> They also urge strategies to persuade lawyers to provide many more pro bono hours than the existing average of "less than half an hour a week and . . . half a dollar a day" and to redirect efforts to helping the poor from the current emphasis on "assist[ing] family, friends, and charitable causes that largely benefit middle and upper income groups."<sup>32</sup> These strategies range from mandatory pro bono requirements to mandatory disclosure of pro bono hours, or voluntary commitment to provide a minimum pro bono contribution.<sup>33</sup>

### IV. WHY ACCESS TO LAWYERS WILL NEVER SOLVE THE PROBLEM OF UNEQUAL JUSTICE

Access to lawyers will make only a limited difference in the equality of justice. Undoubtedly, the difference it makes will be important to some individuals. One study, for example, found that the vast majority of tenants evicted in housing courts did not have a lawyer and that none of the tenants in an experimental bar pro bono program had been evicted.<sup>34</sup> Providing low-income people with lawyers will mitigate the harms they might face in the legal system. Nonetheless, given the market distribution of legal services, proposals for providing lawyers to the poor will never eradicate inequality. A market perspective reveals at least three very real limits on these efforts.

First, even if all low-income people received legal representation, substantial inequality would remain.<sup>35</sup> While those low-income people would be better off, market distribution of legal services would remain the rule. Parties with greater resources would be able to purchase a higher quality of legal services and better absorb the costs of litigation.<sup>36</sup> This factor alone would guarantee significant inequality among those parties who have retained lawyers, as well as between those with lawyers and those without.

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30. Rhode, *supra* note 1, at 187-90; *see also infra* app.

31. Rhode, *supra* note 1, at 103-04, 145-46; *see infra* app.

32. Rhode, *supra* note 1, at 17.

33. *Id.* at 16-18.

34. Comm. to Improve the Availability of Legal Servs., Final Report to the Chief Judge of the State of N.Y. 17 (1990).

35. Gary Bellow & Jeanne Kettleison, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. Rev. 337, 382-83 (1978).

36. *Id.*



Second, even the effort to provide low-income people with lawyers faces the impossible challenge of providing resources for an elastic need.<sup>37</sup> More than twenty-five years ago, Gary Bellow and Jeanne Kettelson observed that legal needs “have a tendency to expand as potential beneficiaries see lawyers as capable of responding to their problems.”<sup>38</sup> Accordingly, when free legal services are made available to the poor, “demand for services will increase to the limits of the available supply.”<sup>39</sup>

Third, Bellow and Kettelson recognized that society could never provide the resources necessary to provide quality legal services to low-income people. They noted that “even if demand for legal services remained constant . . . it would not be possible or desirable to expand the bar to meet the need.”<sup>40</sup> They explained that “to equalize the number of lawyers available to the very poor and the rest of the population” would require “[a] tenfold increase in the existing public interest bar” and that “to begin to provide the whole population with the same legal services that the affluent presently enjoy . . . would require something on the order of a tenfold increase in the size of the entire bar.”<sup>41</sup>

Given these limits, any effort to make significant progress toward equal justice would at least require other changes in the legal system.<sup>42</sup> One obvious place to look is the courts.

#### V. MAKING JUDGES RESPONSIBLE FOR REDRESSING FAILURES IN THE MARKET FOR JUSTICE

The potential for the courts to equalize justice has received far less attention from bar leaders than proposals for providing more lawyers for the poor in civil cases and more resources for the criminal defense of indigents.<sup>43</sup> State courts, together with commentators such as Jonah Goldschmidt, Russell Engler, Deborah Rhode, and Richard Zorza, have focused their efforts on assisting parties without lawyers in the courts.<sup>44</sup> In the context of providing justice to these parties, courts and

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37. *Id.* at 380; *see also* Hazard et. al, *supra* note 3, at 1091-92; Rhode, *supra* note 2, at 49.

38. Bellow & Kettelson, *supra* note 35, at 380; *see* Rhode, *supra* note 2, at 49.

39. Bellow & Kettelson, *supra* note 35, at 380.

40. *Id.*

41. *Id.* (italics omitted).

42. Bellow and Kettelson take a different tack than that explored in this Essay. Like other commentators, they urge a change in lawyer norms “to protect weak parties from being exploited by more powerful opponents.” *Id.* at 387. For more developed perspectives of this kind, see Luban, *supra* note 4; Rhode, *supra* note 4; and Simon, *supra* note 4.

43. Zorza, *supra* note 4, at 423; *see infra* app.

44. Rhode, *supra* note 1, at 81-86; Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *Fordham L. Rev.* 1987 (1999); Jona Goldschmidt, *The Pro Se Litigant's Struggle for*

commentators have considered or implemented proposals to place self-represented parties who cannot afford a lawyer on more equal footing by providing them with basic information on the law and procedures, as well as with forms and sometimes assistance in drafting pleadings and other court papers. Commentators have also suggested expanding the use of small claims courts and alternative dispute resolution where the proceedings are less formal and legal expertise is less important.<sup>45</sup>

Within these proposals, disagreement exists as to how far the court may go in assisting the self-represented party. The range of views includes limiting the assistance to the self-represented to providing forms without elaboration, providing information but not advice, allowing court clerks but not judges to provide assistance, and having both clerks and judges provide generous assistance.<sup>46</sup>

Russell Engler and Richard Zorza, in particular, argue that judges should shift from serving as passive umpires to active umpires with responsibility for keeping the process fair where one or more parties is self-represented.<sup>47</sup> Engler argues that “[t]he judge bears the ‘heavy responsibility’ for presiding over a ‘fair’ proceeding, which includes not only what occurs at trial itself, but outcomes produced by the more common result of settlement.”<sup>48</sup> This entails making the judge responsible for “develop[ing] a full and fair record,”<sup>49</sup> including providing “assist[ance to] the unrepresented litigant on procedure to be followed, presentation of evidence, and questions of law,” as well as “call[ing] witnesses and conduct[ing] direct or cross-examinations” on the court’s initiative.<sup>50</sup> Zorza’s approach does not go quite as far, but does make the judge responsible for ensuring that the self-represented party has “the greatest possible opportunity to be heard,”<sup>51</sup> including explaining the proceedings at every step and making sure that the parties understand the explanation, describing what the parties need to prove, explaining relevant evidentiary issues and establishing whether foundations exist, preventing a lawyer from taking advantage of a self-represented party, and referring a self-represented party for advice to a self help center or other expert

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*Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 *Fam. Ct. Rev.* 36 (2002); Zorza, *supra* note 4, at 423.

45. *See supra* note 44.

46. Engler, *supra* note 44, at 1992-2021; Zorza, *supra* note 4, at 435.

47. Engler, *supra* note 44; Zorza, *supra* note 4. Commentators have made similar arguments in the context of mediation. *See, e.g.*, Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 *Wash. U. L.Q.* 47 (1996).

48. Engler, *supra* note 44, at 2028.

49. *Id.* (quoting *Lashley v. Sec’y of Health and Human Servs.*, 708 F.2d 1048, 1051 (6th Cir. 1983) (quoting *McConnell v. Schweiker*, 655 F.2d 604, 606 (5th Cir. 1981))).

50. *Id.* Engler draws on precedents developed in small claims courts and administrative social security proceedings. *See id.* at 2016-18, 2028-31.

51. Zorza, *supra* note 4, at 442.

where appropriate.<sup>52</sup> Both Engler and Zorza emphasize that they intend these proposals to maintain and improve the adversary system by correcting process errors resulting from the ignorance of unrepresented parties.<sup>53</sup>

Proposals like Zorza's are part of a larger trend toward increasing the managerial role of judges in the adversary system. In his classic 1976 article, *The Role of the Judge in Public Law Litigation*,<sup>54</sup> Abram Chayes described the rise of a "public law litigation model" where the judge "is active, with responsibility . . . for organizing and shaping the litigation to ensure a just and viable outcome."<sup>55</sup> This approach spread self-consciously to mass tort cases, as well as to federal litigation generally where, as Judith Resnik described in her famous article, *Managerial Judges*, judges controlled pre-trial proceedings and encouraged settlements.<sup>56</sup> Recently, state courts have begun experiments with specialized courts in areas like drug treatment and domestic violence where judges manage the proceedings as leaders of a "problem-solving team" that includes the parties and social services providers<sup>57</sup> and serve as monitors of court sanctions.<sup>58</sup>

These trends, together with the developments in providing assistance to self-represented parties, point toward an effective means of reducing inequality under law. Rather than limit these approaches to particular courts, particular cases, or particular parties, we can extend their underlying principle to all cases and all courts. Rather than serving as a passive umpire, judges should be active umpires responsible for remedying process errors that would deprive the court of relevant evidence and arguments and that would ensure informed consent to settlements.<sup>59</sup> For example, if a party, whether represented or not, was unable to master the evidence rules necessary to enter relevant evidence, the judge should ask questions to determine

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52. *Id.* at 442-45.

53. Engler, *supra* note 44, at 2022-27; Zorza, *supra* note 4, at 429 n.15. Zorza distinguishes his proposals, which are aimed at improving the adversary system from a similar approach grounded in the values of the inquisitorial system. *Id.* (contrasting his view with that of Jonah Goldschmidt).

54. Chayes, *supra* note 11.

55. *Id.* at 1302.

56. Resnik, *supra* note 10, at 379-80. Where Chayes expressed enthusiasm about these developments, Resnik urged caution. See Chayes, *supra* note 11; Resnik, *supra* note 10, at 380, 414-45.

57. Judith S. Kaye, *Changing Courts in Changing Times: The Need for a Fresh Look at How Courts Are Run*, 48 *Hastings L.J.* 851, 862 (1997); see also Greg Berman & John Feinblatt, *Judges and Problem-Solving Courts* (2002).

58. Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 *Yale L. & Pol'y Rev.* 125 (2004); see Berman & Feinblatt, *supra* note 57. See generally Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 *Am. Crim. L. Rev.* 1501 (2003); Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 *Vand. L. Rev.* 831 (2000).

59. See *supra* note 53.

whether the evidence is admissible and, if so, accept it. Similarly, the court should raise relevant legal issues the parties have missed.<sup>60</sup> Although some judges do some of these things some of the time on an ad hoc basis,<sup>61</sup> making the judge an active umpire would change what is now ad hoc and unofficial into a standard and officially sanctioned procedure.

A number of challenges to this approach will arise. First, supporters of the pure adversary system model will oppose deviations from the passive umpire role.<sup>62</sup> As described above, in addition to the arguments from the needs of equal justice and the evolution of the judge's role, as a practical matter some judges do precisely what this Essay proposes. While making little change for those judges, this Essay's proposal would make this conduct systemic and transparent. Second, supporters of the adversary system model may argue that the active umpire model represents a change to the inquisitorial system. True, the active umpire does take more control from the parties than a passive umpire. But the process remains party-controlled unless process failures require judicial correction. This system is different than the inquisitorial system, in which the expert judge has control of all aspects of litigation.<sup>63</sup> Third, supporters of the adversary system model may assert that the active umpire model increases the danger that judicial bias or incompetence will influence the outcome. Judicial bias and incompetence are problems whether the judge is passive or active. While the more active role of the judge will arguably increase the effect of these problems on the outcome, it will also make the problems more visible and therefore more susceptible of melioration.

#### CONCLUSION

This Essay does not purport to offer the last word on the market for justice and unequal justice under law. It does draw on Deborah Rhode's excellent work to suggest that the bar should openly and honestly acknowledge that justice today is largely bought and sold through the market for legal services. The Essay recommends that the market distribution of legal services circumscribes strategies designed to provide some poor people with a lawyer. At best, they are properly described as efforts to mitigate harms and not as significant steps toward equal justice under law. More likely, to

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60. This proposal tracks the suggestions Engler and Zorza make for cases with self-represented parties. *See supra* notes 47-53 and accompanying text.

61. I would like to thank my colleague Jim Cohen for making sure I included this point.

62. *See, e.g.*, Robert M. Daniszewski, *Coping with the Pro Se Litigant*, N.H. B. J., Mar. 1995, at 46, 48; Resnik, *supra* note 10, at 380, 414-45; Bruce D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 St. Louis U. L.J. 553, 558 (1992).

63. *See supra* notes 51-52.

provide such a significant step would be making judges active umpires responsible for correcting process failures. But stating the problem and acknowledging the key role of judges are only first steps. Exactly how to make judges active umpires is a task requiring much further consideration.<sup>64</sup>

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64. This elaboration would include consideration of the role of court employees, *see, e.g.*, Engler, *supra* note 44, at 2031, as well as delineation of the circumstances requiring, and the appropriate forms of, judicial intervention.

## APPENDIX

A quick, unscientific survey of the columns of the ABA Presidents in the ABA Journal for the years 1992 to 2001 identified the following 25 columns on pro bono or legal services, in chronological order. Talbot "Sandy" D'Alemberte, *Seeking Fairness in Justice Reform: A Challenge to the Vice President*, A.B.A. J., Jan. 1992, at 10; Talbot "Sandy" D'Alemberte, *Florida's New Pro Bono Program: A Bold Step Toward Access to Justice*, A.B.A. J., Apr. 1992, at 8; J. Michael McWilliams, *Making Time for Pro Bono: Volunteer Service Must Be More Accessible to Lawyers, as Well as Clients*, A.B.A. J., Apr. 1993, at 8; J. Michael McWilliams, *Keeping the Dream Alive: Law Day Message: Justice for All—All for Justice*, A.B.A. J., May 1993, at 8; J. Michael McWilliams, *Meeting to Advance a Common Goal: Renowned Speakers, Marshall Tribute to Emphasize "Justice for All,"* A.B.A. J., June 1993, at 8; J. Michael McWilliams, *Dwindling Judicial Resources: Chronic Underfunding Leading to Delays, Reduced Services, Shutdowns*, A.B.A. J., July 1993, at 8; R. William Ide, III, *Rebuilding the Public's Trust: Working Toward an Improved Justice System and Renewed Respect for Lawyers*, A.B.A. J., Sept. 1993, at 8; Llewelyn Pritchard, *Coming to America: Lawyers Can Shape Tomorrow by Opening Legal Doors for Newcomers*, A.B.A. J., Nov. 1994, at 8; George E. Bushnell, Jr., *Time to Shift Focus: Bar Needs to Emphasize Public Service, Worry Less About "Image Problem,"* A.B.A. J., Jan. 1995, at 6; Roberta Cooper Ramo, *Defending American Democracy: Lawyers Play a Key Role in Ensuring that the Constitution Remains Vibrant*, A.B.A. J., Sept. 1995, at 8; Roberta Cooper Ramo, *Letter from the Front: Support for Constitutional Awareness and Lawyers Involvement Is Ongoing*, A.B.A. J., Nov. 1995, at 8; N. Lee Cooper, *Don't Forget the Main Street Lawyer: These Heroes of the Profession Go About Their Work Quietly, One Client at a Time*, A.B.A. J., Jan. 1997, at 8; Jerome J. Shestack, *Defining Our Calling, Focus on Professionalism Benefits Individual Lawyers and Justice as a Whole*, A.B.A. J., Sept. 1997, at 8; Jerome J. Shestack, *Respecting Our Profession: In this Difficult Profession, Let Us Try to Earn Our Self-Respect*, A.B.A. J., Dec. 1997, at 8; Jerome J. Shestack, *The Pro Bono Principle: Lawyers Owe It to the Profession-and Humanity-to Lend a Hand to the Needy*, A.B.A. J., Feb. 1998, at 8; Jerome J. Shestack, *Advancing Professionalism Needs Judicial Help*, A.B.A. J., Apr. 1998, at 8; Jerome J. Shestack, *Our Continuing Professional Odyssey*, A.B.A. J., Aug. 1998, at 8; Philip S. Anderson, *In Defense of Detainees*, A.B.A. J., Mar. 1999, at 6; William G. Paul, *ABA—A Home for All Lawyers*, A.B.A. J., Apr. 2000, at 8; Martha W. Barnett, *Angels of Justice*, A.B.A. J., Dec. 2000, at 10; Martha W. Barnett, *Dark Discoveries, New Hope: The ABA Aids Immigrant Detainees Facing Uncertain Futures*, A.B.A. J., Feb. 2001, at 8; Martha

W. Barnett, *Reflections*, A.B.A. J., Aug. 2001, at 8; Robert E. Hirshon, *On Law and Lobstering*, A.B.A. J., Sept. 2001, at 10; Robert E. Hirshon, *Graduating Under Pressure*, A.B.A. J., Nov. 2001, at 6; Robert E. Hirshon, *To the Heroes Among Us*, A.B.A. J., Dec. 2001, at 10. Only one column discussed changing the courts to make it easier for unrepresented parties. Talbot "Sandy" D'Alemberte, *Florida's New Pro Bono Program: A Bold Step Toward Access to Justice*, A.B.A. J., Apr. 1992, at 8. Other columns discussing the judiciary focused on defending judicial independence, see Jerome J. Shestack, *Defining Our Calling: Focus on Professionalism Benefits Individual Lawyers and Justice As a Whole*, A.B.A. J., Sept. 1997, at 8, or promoting alternative dispute resolution as a way of promoting reconciliation or reducing caseloads. See, e.g., J. Michael McWilliams, *Dwindling Judicial Resources: Chronic Underfunding Leading to Delays, Reduced Services, Shutdowns*, A.B.A. J., July 1993, at 8; Roberta Cooper Ramo, *Lawyers as Peacemakers: Our Navajo Peers Could Teach Us a Thing or Two About Conflict Resolution*, A.B.A. J., Dec. 1995, at 6.

*Notes & Observations*