

## *Law that is Pro Se (Not Poetry): Towards a System of Civil Justice that Works for Litigants Without Lawyers*

WILLIAM FOTHERBY\*

### I AN INTRODUCTION

The law applies equally to everyone — even to those without lawyers. But not only is law ubiquitous, it is also complex, and often the arbiter of matters in which the stakes are very high. Thus, in legal matters, the prudent action is to retain a lawyer. Relying on one's own auspices to navigate safely legal shoals is a foolish decision, indeed.<sup>1</sup>

Yet, both in New Zealand and in other jurisdictions, the number of those facing courts unrepresented is growing. What some have labelled the “*Pro Se* Phenomenon” has been, since the mid-1990s, the subject of much discussion from academics, judges, law commissions and bar associations.<sup>2</sup> In Australia, the question of how to cope with this influx has been labelled by one judge “the greatest single challenge for the civil justice system at the present time”.<sup>3</sup> In England and Wales, the problem has been the subject of in-depth study since as far back as the influential Woolf Report.<sup>4</sup> Canadian courts have been iterating their responsibilities in these circumstances for nearly two decades,<sup>5</sup> while in the United States, many lower-level courts have made wide-ranging reform to their court services to accommodate better those litigants who represent themselves.<sup>6</sup>

By comparison, New Zealand's response has been muted. This article therefore seeks to advance this discourse, at least in the context of unrepresented litigants within the civil jurisdiction. Nevertheless, much of the discussion is also relevant to unrepresented criminal defendants.

Part II examines the extent and nature of the *pro se* phenomenon. It will discuss those studies that have evaluated the growing class of *pro se*

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\* BA/LLB (Hons), Solicitor, Meredith Connell. The author would like to thank Judge Roderick Joyce QC (District Court, Auckland) for his support and guidance with this topic.

1 This sentiment is embodied in the well-known precept: “One who is his own lawyer has a fool for a client.”

2 The term *pro se* litigant derives from Latin, meaning on one's own behalf.

3 Justice Davies “The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System” (2003) 12 JJA 155 at 168 as cited in Justice Nicholson AO “Can Courts Cope with Self-Represented Litigants” (2005) 8 FJLR 139 at 142.

4 Lord Woolf *Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1995) ch 17 <[www.dca.gov.uk](http://www.dca.gov.uk)> [“*Interim Report*”].

5 See *R v Hardy* (1991) 120 AR 151 (AlbCA).

6 See Richard Zorza “Trends in Self-Represented Litigation Innovation” (2006) <[www.ncsconline.org](http://www.ncsconline.org)>. See generally Margaret Barry “Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?” (1998–1999) 67 *Fordham L Rev* 1879.

litigants and then question what reasons may motivate a person to self-represent. Part III highlights the complex interplay between the right to self-represent and the difficult aspects of self-representation. Here the article argues that, while there is patent need to help such litigants access and engage with the law, the customary answer — measures to increase lawyer availability — is problematic and ultimately insufficient.

Parts IV and V suggest reform in the shape of more efficient delivery of legal services. They advocate a “continuum”, where the type and cost of the legal service an individual can access is dependent on the nature and gravity of the legal problem faced. Most notably, this continuum includes better and freer dissemination of legal information, the increased use of lay legal advisers, and the provision of unbundled legal services, to target better and meet the legal needs of those who, otherwise, would be faced with the prospect of representing themselves.

## II THE *PRO SE* PHENOMENON

### A Worldwide Phenomenon

With few exceptions, judges, commentators and researchers around the world perceive that a great number of civil litigants are now proceeding *pro se*.<sup>7</sup> In many cases, the evidence for this is far more anecdotal than the result of in-depth investigation. Indeed, one of the greatest hindrances to this area of study is a lack of detailed statistical analysis — a lack that stems from the fact that assessing data on self-represented litigants is incredibly difficult. Few court data systems record whether a party is represented,<sup>8</sup> while many litigants are represented intermittently during the litigation process, making classification and quantification of the problem more than challenging.<sup>9</sup>

This most likely is one reason that before 2009, no formal study of the level of self-representation in New Zealand existed. This is not to say the problem had gone unacknowledged. In submissions to the Law Commission, both the Family Court and the Environment Court had

7 See Lois Bloom and Helen Hershkoff “Federal Courts, Magistrate Judges, and the Pro Se Plaintiff” (2002) 16 Notre Dame JL Ethics & Pub Pol’y 475; Hon John Stanoch “Working with Pro Se Litigants: The Minnesota Experience” (1998) 24 Wm Mitchell L Rev 297; Russell Engler “And Justice for All — Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks” (1997) 67 Fordham L Rev 1987 [“Justice for All”]; Tiffany Buxton “Foreign Solutions to the US Pro Se Phenomenon” (2002) 34 Case W Res J Int’l L 103; Drew Swank “The Pro Se Phenomenon” (2005) 19 BYU J Pub L 373; Family Court of Australia *Self-Represented Litigants – A Challenge: Project Report* (May 2003) <[www.familycourt.gov.au](http://www.familycourt.gov.au)>; Woolf *Interim Report*, above n 4.

8 Department of Constitutional Affairs *Litigants in Person: Unrepresented Litigants in First Instance Proceedings – DCA Research Series 2/05* (2005) at 2–3 <[www.law.cf.ac.uk](http://www.law.cf.ac.uk)>; Paula Hannaford-Agor and Nicole Mott “Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations” 24(2) The Justice System Journal (2003) 163 at 174.

9 Hannaford-Agor and Mott, above n 8, at 175.

previously noted a trend towards parties appearing without representation.<sup>10</sup> Further, in its 2005 paper, *Delivering Justice for All*, the Law Commission itself referred to “the contemporary reality of uneven representation and increased self-representation”,<sup>11</sup> reiterating a point that it had made one year previously, within the context of the Family Court, as a result of discussions both with court workers and litigants themselves.<sup>12</sup>

In July 2009, the Ministry of Justice released a report on self-represented litigants within the criminal and family jurisdictions (the 2009 report).<sup>13</sup> The authors were careful to emphasise the exploratory nature of their report.<sup>14</sup> Yet, their findings provided the first picture of self-representation in this country. The report found that within the family jurisdiction, over two-thirds of key informants believed the number of lay litigants had increased over the past five years, but without historical trend data, the authors could not assess whether this perception was true.<sup>15</sup> Litigants also appeared to represent a far wider range of backgrounds than in the past. As a percentage, the self-represented made up between 7 and 17 per cent of litigants in the Family Court.<sup>16</sup>

This is a significant percentage. Yet, the situation overseas is even more dire. In England, a report published in 2005 concluded that unrepresented parties in first instance proceedings were common.<sup>17</sup> Two-thirds (67 per cent) of County Court cases and one-third (34 per cent) of High Court cases involved one or more unrepresented party.<sup>18</sup> While this was not a longitudinal study,<sup>19</sup> and statistical evidence for an increase in the numbers of lay litigants was equivocal,<sup>20</sup> evidence the authors gleaned from interviews with judges and court staff suggested on balance an increase in unrepresented parties in recent years.<sup>21</sup>

The Family Court of Australia reported that in the year 2007–2008, 36 per cent of its cases involved at least one self-represented party at trial, while 27 per cent of cases involved parties that had received no legal assistance whatsoever.<sup>22</sup> Similarly, the Supreme Court of Queensland has noted that self-represented litigants are involved in just under one-third

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10 Law Commission *Seeking Solutions: Options for Change to the New Zealand Justice System – Have Your Say (Part II)* (NZLC PP52, 2002) at 77 [*Seeking Solutions*].

11 Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004) at 6.

12 Law Commission *Dispute Resolution in the Family Court* (NZLC R82, 2003) 185 [*“Dispute Resolution in the Family Court”*].

13 Melissa Smith, Esther Banbury and Su-Wuen Ong *Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions* (2009) <[www.courts.govt.nz](http://www.courts.govt.nz)>.

14 *Ibid.*, at 112.

15 *Ibid.*, at 32–33.

16 *Ibid.*, at 33.

17 Department of Constitutional Affairs, above n 8, at 245.

18 *Ibid.*, at 36–37.

19 *Ibid.*, at 251.

20 *Ibid.*, at 60.

21 *Ibid.*

22 Family Court of Australia *Annual Report 2007–2008* (2008) at 58 <[www.familycourt.gov.au](http://www.familycourt.gov.au)>.

of cases within its civil jurisdiction.<sup>23</sup> The High Court of Australia is a different matter entirely — and quite an astounding case. In its 2007–2008 report, the High Court noted the significance of the fact that the number of lay litigants appearing before it had risen to two-thirds of all cases.<sup>24</sup> Of particular note was that self-represented parties brought 93 per cent of applications involving immigration matters.<sup>25</sup>

A number of commentators in the United States have also noted growth in civil *pro se* litigation.<sup>26</sup> One common example comes from California, where, in 1971, only one per cent of litigants in divorce cases proceeded without an attorney.<sup>27</sup> By 1985, this rate had risen to 47 per cent,<sup>28</sup> a rate that had risen again to almost 75 per cent by the year 2000.<sup>29</sup> Yet the size and diversity of the country makes it impossible to take individual jurisdictions as in any way representative of the nation as a whole. It is sufficient to note prominent legal ethicist Russell Engler's 2008 analysis that "the flood of unrepresented litigants in civil cases over the past decade has caused a fundamental re-examination of the operation of many of [the United States'] courts".<sup>30</sup>

The experience overseas suggests that the level of self representation in New Zealand may be greater than what the 2009 report reflects. Indeed, the report itself cautions against drawing too much from the "brief snapshots of this study", stressing the need for further research before making conclusions.<sup>31</sup> In particular, the number of courts the authors studied was, by their own admission, very limited.<sup>32</sup> Moreover, in identifying the reasons for self-representation, discussed below, and concluding that these broadly mirror those found overseas, the study illustrates the great potential for numbers of self-represented litigants in this country to rise further.<sup>33</sup> At the very least, what must be accepted is that studies both home and abroad demand that the challenge these litigants pose not be ignored in the hope that it will simply disappear.

## The Reasons for Self-Representation

In designing a response to this phenomenon, we should carefully study

23 Supreme Court of Queensland *Annual Report 2007–2008* (2008) at 21–23 <[www.courts.qld.gov.au](http://www.courts.qld.gov.au)>.

24 High Court of Australia *Annual Report 2007–2008* (2008) at 18 <[www.hcourt.gov.au](http://www.hcourt.gov.au)>.

25 *Ibid.*, at 19.

26 Jona Goldschmidt *Judicial Assistance to Self-Represented Parties: Lessons from the Canadian Experience* (Loyola University Chicago, 2006) at 1 <[www.abanet.org](http://www.abanet.org)>; Russell Engler "Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role" (2008) 22 *Notre Dame JL Ethics & Pub Pol'y* 367 at 368 ["Ethics in Transition"].

27 Bonnie Hough "Description of California Court's Programs for Self-Represented Litigants" (Paper delivered to the International Legal Aid Group, Harvard University, June 2003) <[www.courtinfo.ca.gov](http://www.courtinfo.ca.gov)>.

28 Swank, above n 7, at 376.

29 *Ibid.*

30 Engler "Ethics in Transition", above n 26, at 367.

31 Smith, Banbury and Ong, above n 13, at 113.

32 *Ibid.*, at 28–30.

33 *Ibid.*, at 112–113.

the reasons for self-representation. In fact, even before doing this, it is important to make one thing very clear: a minority of lay litigants find themselves representing themselves by choice.<sup>34</sup> Rather, their unrepresented status is a product of economic reality. As former High Court judge John Hansen has noted, the cost of litigation is such that it excludes all but the exceptionally wealthy and those whose limited means qualifies them for legal aid.<sup>35</sup> For those who do not fall into these categories — the “sandwich class” — the cost of reasonable representation can lead to financial ruin.<sup>36</sup> It does not surprise, therefore, that the most commonly cited reason for proceeding unrepresented, across all jurisdictions, is that of cost.<sup>37</sup> And what is worrying is that the so-called sandwich class is growing. In New Zealand, both the expenditure on civil legal aid<sup>38</sup> and the number of civil legal aid grants<sup>39</sup> have significantly declined since 1996. Fewer litigants eligible for legal aid means that more will be forced to face the legal system unassisted, not least because those just outside the qualifying criteria are the most likely to be pushed to represent themselves.<sup>40</sup> Further, at present, not only is the qualifying income threshold very low — an individual must not earn more than \$19,741 before tax<sup>41</sup> — but also an applicant’s case must meet a merits test based on its prospect of success.<sup>42</sup> Even if eligible, a litigant may be forced to self-represent for some time while his or her application is approved.<sup>43</sup>

Another, sometimes related, reason is the belief that representation is not necessary or not desirable.<sup>44</sup> While occasionally the result of misplaced confidence,<sup>45</sup> litigants are commonly advised, by lawyers themselves, that the proceedings they intend are simple enough to make a lawyer’s help superfluous, or disproportionately expensive compared to the desired outcome.<sup>46</sup> Uncontested divorce proceedings are a common example where a ‘do-it-yourself’ approach is possible.<sup>47</sup> Yet, this attitude is not limited to

34 Department of Constitutional Affairs, above n 8, at 16.

35 John Hansen, retired High Court Justice, “Courts Administration, the Judiciary and the Efficient Delivery of Justice: A Personal View” (FW Guest Memorial Lecture, Otago University, 28 September 2006) at 3 <[www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz)>.

36 Ibid.

37 Smith, Banbury and Ong, above n 13, at 42. Department of Constitutional Affairs, above n 8, at 16; Hannaford-Agor and Mott, above n 11, at 172–173; Richard Foster, “Australian Experience with Self-Represented Litigants (SRLs) – A Family Court Perspective (paper presented to the 21st AIIA Conference, Freemantle, 19–21 September 2003) at 3 <[www.aija.org.au](http://www.aija.org.au)>.

38 Legal Services Agency *New Zealand Country Report: 2007 International Legal Aid Group Conference* (2007) at 20 <[www.lsa.govt.nz](http://www.lsa.govt.nz)> [*New Zealand Country Report*].

39 Ibid, at 5.

40 Department of Constitutional Affairs, above n 8, at 16.

41 Legal Services Agency *New Zealand Country Report*, above n 38, at 9–10. The financial thresholds vary depending on whether the applicant has a partner and/or financial dependents.

42 Ibid, at 9.

43 Hannaford-Agor and Mott, above n 8, at 172.

44 Department of Constitutional Affairs, above n 8, at 15.

45 John Dewar, Barry Smith and Cate Banks *Litigants in Person in the Family Court of Australia – Research Report 20* (2000) at 34 <[www.familycourt.gov.au](http://www.familycourt.gov.au)>.

46 Department of Constitutional Affairs, above n 8, at 17–19.

47 Dewar, Smith and Banks, above n 45, at 34.

family law. A recent study into unmet legal need in New Zealand suggested that roughly half of all people who suffered what they considered a serious legal problem did not seek any information or assistance, and, of these, one-third dealt with the problem themselves.<sup>48</sup> The report concluded that “many people want to tackle their problems with minimal assistance, and without the intervention of specialists”<sup>49</sup> — a natural inclination given the often very personal nature of legal disputes. This does not mean that all these people are attempting to conduct legal proceedings by themselves; should a matter come to trial, there is still a strong preference for professional representation.<sup>50</sup> Nevertheless, it demonstrates a widespread belief that many legal problems do not require professional legal solutions.

There is no guarantee either that those who desire and can afford a lawyer will be able to find one to take on their case. While there is a professional obligation to represent any client, regardless of how unpopular they are or how hopeless their case is,<sup>51</sup> in practice many lawyers, possibly encouraged by their insurers, may refuse to take on clients who are likely to complain, do not speak fluent English, or have, in the lawyer’s view, little chance of success.<sup>52</sup> These factors may also lead a litigant’s representative to withdraw while proceedings are still on foot, leaving the litigant to continue alone.<sup>53</sup> Of course, one cannot ignore the fact that some litigants represent themselves believing that they will thereby gain some advantage — for example, in a criminal trial, to obtain an adjournment or to harass the other party in a way they could not through the medium of a lawyer.<sup>54</sup> This is regrettable, and this subgroup is one key reason that many members of the legal profession are less than sympathetic to the wider class of self-represented litigants.<sup>55</sup> Yet, in any system there will be those who attempt to manipulate it for their own, undeserved advantage. This minority<sup>56</sup> should not stop us aiding the many for whom self-representation is undesired and involuntary. Rather, within the system, there must be cognisance of this and specific measures adopted to minimise such abuse.

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48 Legal Services Agency *New Zealand’s 2006 National Survey of Unmet Legal Needs and Access to Services: Implications for Information and Education* (2007) at 6 <[www.lsa.govt.nz](http://www.lsa.govt.nz)> [Unmet Legal Needs].

49 *Ibid.*

50 Department of Constitutional Affairs, above n 8, at 16.

51 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, ch 4.

52 Department of Constitutional Affairs, above n 8, at 19–20; Dewar, Smith and Banks, above n 45, at 34.

53 Foster, above n 37, at 3.

54 Dewar, Smith and Banks, above n 45, at 34.

55 Engler “Justice for All”, above n 7, at 2027.

56 See text accompanying below n 88.

### III THE RIGHT TO SELF-REPRESENTATION AND ITS DENIAL

#### The Right to Represent Yourself

Any citizen is entitled to bring or defend a claim in person in any court of law. Where this right comes from, however, is less clear. One source may be *The Trial of William Penn*<sup>57</sup> where Penn, after whom the American state of Pennsylvania is named, and another man, William Mead, found themselves tried for tumultuous assembly and disturbance of the peace. The trial and its progeny are famous for well-known reasons. Yet also, less momentarily, the following exchange occurred between Penn and the court.<sup>58</sup>

Penn. I am unacquainted with the formality of the Law, and therefore, before I shall answer directly, I request two things of the Court. First, that no advantage may be taken against me, nor I deprived of any benefit, which I might otherwise have received. Secondly, that you will promise me a fair hearing, and liberty of making my defence.

Court. No advantage shall be taken against you; you shall have liberty, you shall be heard.

Granted, at the time a criminal accused had no right to counsel, who were seen as an impediment to an efficient and successful prosecution. For serious crimes, at least, self-representation was the norm as the court expected a defendant simply to tell the truth.<sup>59</sup> In this regard, the ‘right’ to represent oneself would have meant very little. Nevertheless, for less serious crimes, such as that with which Penn was charged, a defendant could employ a lawyer to present his defence.<sup>60</sup> Penn’s involvement in the case meant that 12 years later, the right of all persons before the court to “freely appear in their own way ... and there personally plead their own cause themselves”<sup>61</sup> appeared in the Pennsylvania Frame of Government, an early Bill of Rights-like document that was greatly influential in the United States,<sup>62</sup> where the right was first enshrined in statute in the Judiciary Act of 1789.<sup>63</sup> In Commonwealth countries, the right remains protected primarily by the

57 *The Trial of William Penn* 6 How St Tr 951 (1670).

58 The Penn, Mead and Jury Commemoration Committee *The Trial of William Penn of and William Mead at the Old Bailey 1670* (Headley Brothers, London, reprint, 1908) at 15.

59 See James Tomkovicz *The Right to the Assistance of Counsel: A Reference Guide to the United States Constitution* (Greenwood, Santa Barbara, 2002) at 1–9. Further, only quarter of a century later, the Treason Act 1695 (7 & 8 Will. III c. 3) made the first statutory guarantee of counsel in English law.

60 See *ibid.*

61 William Penn Pennsylvania Frame of Government, Laws Agreed Upon in England etc (1682) at [VI].

62 *Faretta v California* 422 US 806 (1975), note 37.

63 Judiciary Act of 1789 1 Stat 73–93 (1789).

common law. In *Cachia v Hanes*, for example, the High Court of Australia stated that “the right of a litigant to appear in person is fundamental”,<sup>64</sup> while the New Zealand Court of Appeal has noted that a “natural person of sufficient age and capacity cannot be denied the right to present his case in person”.<sup>65</sup> Several New Zealand statutes also acknowledge the right to appear and act personally.<sup>66</sup>

Within the criminal context, the justification for the right to self-represent has been well-discussed by a number of courts.<sup>67</sup> It is premised on respect for the individual’s dignity and personal autonomy.<sup>68</sup> An accused is personally entitled to choose what defences he or she will raise. Of course, this rationale is equally applicable to those who find civil suits brought against them — if they wish, they should have full control over how they respond to this legal threat. Further, the importance of the right here lies in the way it ensures that justice can be afforded to all. It allows litigants who would otherwise be unable or unwilling to incur the expense of legal representation to vindicate their rights by appearing for themselves.<sup>69</sup>

### The Problems of Self-Representation

While law may guarantee this right, self-representation greatly challenges the way our legal system operates. For the most part, this stems from the fact that the rules of civil procedure assume that lawyers will assist litigants.<sup>70</sup> An adversarial system, such as ours, is built on the duties owed by members of the legal profession to the court when conducting litigation.<sup>71</sup> As a judge cannot investigate the matters necessary to determine litigation properly, he or she must rely on the legal practitioners who will argue the case. The duties of fidelity to the court<sup>72</sup> ensure that for the most part this reliance is not misplaced. A self-represented litigant, however, is not subject to these rules. Without the performance of these duties, others within the judicial system must shoulder the burden of ensuring a just determination.<sup>73</sup> More broadly, each actor in the litigation process is expected to possess expertise in their particular role; this allows them to interact smoothly with others within the system and ensure the efficient dispatch of justice.<sup>74</sup> With the

64 *Cachia v Hanes* (1994) 120 ALR 385 at 391 (HCA).

65 *Re G J Mannix Ltd* [1984] 1 NZLR 309 at 312 (CA).

66 See District Courts Act 1947, s 57; Crimes Act 1961, s 354.

67 See for example *R v Cumming* [2006] 2 NZLR 597; *R v Swain* (1991) 63 CCC (3d) 481; *Faretta v California*, above n 62.

68 *Faretta v California*, above n 62, at 834.

69 *Cachia v Hanes* (1991) 23 NSWLR 304 at 317 (NSWCA) per Handley JA.

70 See Duncan Webb “The Right Not to Have a Lawyer” (paper presented to the Confidence in the Courts Conference, Canberra, Australia, 9–11 February 2007) [“The Right Not to Have a Lawyer”].

71 Justice Nicholson AO, above n 3, at 142.

72 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, ch 13.

73 Bloom and Hershkoff, above n 7, at 483.

74 Australian Institute of Judicial Administration *Litigants in Person Management Plans: Issues for Courts and Tribunals* (2001) at 4 <[www.aija.org.au](http://www.aija.org.au)>.



appearance of someone without this skill, a vacuum appears in the system.<sup>75</sup> The result is that often self-represented litigants demand far more of the court's time and resources than their represented counterparts do. Indeed, the High Court of Australia has estimated that its registry staff expend over 50 per cent of their time assisting lay litigants.<sup>76</sup>

A further troublesome aspect is that very often those who self-represent cannot attain objectivity or emotional distance from their case.<sup>77</sup> Litigants in person are rarely in a good position to assess the merits of their claim, and legal sociologists have highlighted the role that practitioners play in encouraging clients to come to terms with the ostensible capriciousness with which justice is administered.<sup>78</sup> This is important because litigants will bring to the judicial process their own highly personalised definitions of 'justice' and their own optimistic expectations of what is due to them.<sup>79</sup> Those without representation can find it very difficult to match this with the evidential and procedural requirements that the law requires before a court makes its own determination where justice lies.<sup>80</sup> A refusal to comply with expected procedure may thus not just be the result of not understanding how the procedure works, but also the perception that these rules are a barrier to reaching the 'right' outcome in the case. This places great pressure on the judge whose job it is to oversee the trial.<sup>81</sup> The judge must ensure both that the self-represented litigant is guided through the trial and allowed to present his or her case, and that the proceedings as a whole are conducted in such a manner that a self-represented party can understand the final determination as a fair one.<sup>82</sup>

A lack of objectivity is linked to one of the most widely made complaints about self-represented litigants — vexatious and frivolous litigation. A commonly held belief is that many lay litigants commence strings of far-fetched or totally meritless claims, or are serial re-litigators of identical or substantially similar claims.<sup>83</sup> Further, in the process, they may exhibit hostility or a disregard for the effect these cases have both on the court and on their opponents.<sup>84</sup> And, as Engler has noted, many of the rules that have traditionally dealt with self-represented litigants have been developed in response to this perception.<sup>85</sup> However, in-depth study of this question shows that the number of vexatious litigants is very,

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75 Justice Nicholson AO, above n 3, at 142.

76 *Ibid.*, at 140.

77 Australian Institute of Judicial Administration, above n 74, at 4; Department of Constitutional Affairs, above n 8, at 157.

78 Department of Constitutional Affairs, above n 8, at 89.

79 Frederick Calhoun "Violence toward Judicial Officials" (2001) 576 *Annals AAPSS* 54 at 56.

80 *Ibid.*, at 58.

81 Department of Constitutional Affairs, above n 8, at 159.

82 Cynthia Gray *Reaching out or Overreaching: Judicial Ethics and Self-Represented Litigants* (American Judicature Society, Des Moines, 2005) at 5–7.

83 Department of Constitutional Affairs, above n 8, at 79–80. See also Australian Institute of Judicial Administration, above n 74, at 4.

84 Department of Constitutional Affairs, above n 8, at 79.

85 Engler "Justice for All", above n 7, at 2027.

very small. Engler has noted that most unrepresented litigants in eviction and debt collection cases are defendants, and, further, that unrepresented litigants in bankruptcy and family cases are unlikely, by choice at least, to be repeat players in the system.<sup>86</sup> In Agor and Mott's study, one of the few constants across the several United States jurisdictions that they investigated was that self-represented litigants were predominantly new to the justice system.<sup>87</sup> In England, the Department of Constitutional Affairs, who interviewed District Court judges on the frequency of vexatious lay litigants, recorded some of their responses as variously "de minimis" and "a fraction of a per cent".<sup>88</sup> Despite their small numbers, however, the report's authors concluded that these litigants were a substantial challenge to the administration of the courts — particularly for court staff.<sup>89</sup> The problem this minority poses certainly should not be ignored. However, the litigant who is the exception should not dictate the response to unrepresented litigants in general.<sup>90</sup>

The final and perhaps most obvious problem with self-representation is that generally such litigants do not advance their interests as well as those who have legal representatives.<sup>91</sup> Often such litigants struggle to conceptualise their cases in a manner amenable to legal determination, instead expressing them solely in social, non-legal terms.<sup>92</sup> And even where lay litigants conduct extensive legal research, many lack the ability to identify, extract and apply the salient point to his or her case.<sup>93</sup> The procedural complexity of the civil justice process is another significant barrier. Not only will lay litigants have little or no understanding of the complicated rules, but also administrative matters — for example, knowing the location of the registry, how to format documents and the extent (if any) of filing fees — will all make the process more difficult.<sup>94</sup> The obligation to disclose all relevant documents to the opposing party is palpably counter-intuitive, ostensibly a requirement to assist your opponent, and it is thus unlikely that without representation a litigant will be able to utilise this process effectively.<sup>95</sup> Further, without knowledge of what to expect when appearing in court, the experience can be intimidating and nerve-racking, especially when proceedings take an unexpected turn away from that for which the self-represented litigant has prepared.<sup>96</sup> The result is that their

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86 Ibid.

87 Hannaford-Agor and Mott, above n 8, at 172.

88 Department of Constitutional Affairs, above n 8, at 79–80.

89 Ibid, at 82.

90 Engler "Justice for All", above n 7, at 2027.

91 Alberta Law Reform Institute *Alberta Rules of Court Project: Self Represented Litigants — Consultation Memorandum No 12.18* (2005) at 14.

92 Ibid, at 154; John Baldwin "Raising the Small Claims Limit" in A S Zuckerman and R Cranston (eds) *Reform of Civil Procedure: Essays on Access to Justice* (Clarendon Press, Oxford, 1995) 185 at 188.

93 Department of Constitutional Affairs, above n 8, at 155.

94 Webb "The Right Not to Have a Lawyer", above n 70, at 9. The author notes the recent amendment to the District Court Rules, which happily have gone a long way to simplifying procedure in that court.

95 Ibid, at 9–10.

96 Department of Constitutional Affairs, above n 8, at 163–165.

advocacy in court, as with their representation in general, is often (but not always) significantly worse than that of the lawyer they may oppose.<sup>97</sup>

### Effacing the Right to Appear in Person

It would seem, therefore, that two elements of law are in direct opposition. On one side, there is a substantive right afforded to all individuals to appear for themselves in court. On the other is the collection of procedural rules that dictate the way in which this part of the legal system works. The exercise of the former causes great difficulty for the functioning of the latter.

Inevitably, the victor in this conflict is the set of rules that govern the operation of the courts. Underlying our rules of civil procedure is the normative assumption that litigants ought to be represented; the litigant who comes to court without a lawyer is deficient.<sup>98</sup> Indeed, rather than a right to self-represent, the reality is that in many cases there is a quasi-obligation of professional legal assistance.<sup>99</sup> Not only the rules of the court, but also the culture that pervades the curial process, presume that the proper users of the system are legal professionals, judges and bureaucrats, and it is these actors who, by virtue of their control of the system, have shaped the structure of civil justice to a form that is most convenient to themselves.<sup>100</sup> This institutional bias perhaps explains the fallacious assumption that a large proportion of self-represented litigants are vexatious, and the complaint that too much of the court's time is exhausted catering to these litigants' needs.<sup>101</sup> In short, the institution of the courts has not been designed to accommodate self-represented litigants; instead, it discourages them.<sup>102</sup>

This is also reflected in the frequent response to the often identified problem of substantial unmet legal need.<sup>103</sup> Rather than changing the system to fit the self-represented litigant, the solution is to make the litigant fit the system; many see the answer, either through increased spending on legal aid or encouraging greater pro bono service, as making more lawyers available to those who need them.<sup>104</sup> See, for example, the government's response to the suggestion (made by the Law Commission) that assistance should be improved for those who wish to self-represent:<sup>105</sup>

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97 *Ibid.*, at 162–163.

98 Webb “The Right Not to Have a Lawyer”, above n 70, at 5–6.

99 *Ibid.*

100 *Ibid.*, at 1; Engler “Justice for All”, above n 7, at 1988–1989.

101 Webb “The Right Not to Have a Lawyer”, above n 70, at 6–7.

102 *Ibid.*, at 7.

103 Legal Services Agency *Unmet Legal Needs*, above n 48, at 6; Deborah Rhode “Access to Justice” (2000–2001) 69 *Fordham L Rev* 1785 at 1785; Bloom and Hershkoff, above n 7, at 482; Engler “Justice for All”, above n 7, at 1987.

104 Webb “The Right Not to Have a Lawyer”, above n 70, at 17.

105 Ministry of Justice *Government Response to Law Commission Report on Delivering Justice For All* (Presented to the House of Representatives August 2004) at [56]–[57].

The Government considers that access to representation is fundamental to upholding the principles of natural justice and to contribute to its outcome of a fairer, more credible and more effective justice system ... . Lack of representation and self-representation ... leads to resource and time implications for the courts. Proceedings may be prolonged, requiring judicial and staff time as well as increased costs for parties.

...

The Government considers that the combination of proposed new initiatives ... will improve the availability and quality of representation.

This, typically, is the preferred approach of the legal profession;<sup>106</sup> an approach that, as some commentators have noted, shows an inherent self-interest as it is lawyers who will benefit from the increased funding for fees, and judges who will enjoy the benefits of trained advocacy.<sup>107</sup>

This strategy is problematic for several reasons. First, it is simply unrealistic to provide an experienced lawyer to every person who is not served by the market. While legal aid massively expanded the accessibility of the legal system, it is now increasingly limited by expense.<sup>108</sup> In nearly all countries, legal aid spending has become incrementally narrower, while the criteria for merit and financial means have become more restrictive.<sup>109</sup> The system in New Zealand is particularly unaffordable as, of the nearly 3000 listed providers, 99 per cent are in private practice.<sup>110</sup> Compensating private practitioners on a fee-for-service basis is far less efficient than spending this money on staff lawyers and social workers.<sup>111</sup> Thus, as Parker noted:<sup>112</sup>

As currently institutionalized, the legal aid approach to delivering access to justice is unaffordable because it aims to make formal legal justice available in wider and wider circumstances, thereby riding the tiger of costly professional fees and salaries.

If lawyers were to be fairly compensated for their work, the costs of drastically widening the scope of the legal aid scheme would be enormous.<sup>113</sup>

106 Alberta Law Reform Institute, above n 91, at 46; Webb "The Right Not to Have a Lawyer", above n 70, at 4.

107 See Robert Flannigan "Costs for Self-Represented Litigants: Principles, Interests and Agendas" 33 *The Advocates' Quarterly* (2007) 447 at 450.

108 Christine Parker *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, Oxford, 1999) at 33; Legal Services Agency *Unmet Legal Needs*, above n 48, at 5.

109 *Ibid.*

110 Legal Services Agency *New Zealand Country Report*, above n 38, at 5.

111 Parker, above n 108, at 34.

112 *Ibid.*

113 The Bellow-Sacks Access to Civil Legal Services Project *Civil Legal Services for All Americans* (2005) at 16 <[www.courtinfo.ca.gov](http://www.courtinfo.ca.gov)>.

Similar problems beset the suggestion of greater pro bono service from the bar. It is generally noted, at least by American commentators, that pro bono programmes have never addressed more than a “small and haphazardly selected portion of the legal needs of the poor”.<sup>114</sup> Indeed, it was the inadequacy of pro bono activities of individual attorneys that led to the establishment of centrally funded legal services.<sup>115</sup> Neither courts nor bar associations have been willing to mandate significant public service contributions, while the idea of compulsory pro bono work has been met with strong objections.<sup>116</sup> It is argued that not only is compulsory charity oxymoronic and would impinge upon the rights of lawyers to dispose freely of their labour, but also “having reluctant dilettantes dabble in poverty law is an expensive way of providing services of an unverifiable quality”.<sup>117</sup> In short, it would take a hitherto unseen herculean commitment to increased pro bono work from the private bar to make inroads into the burgeoning number of *pro se* litigants.

Finally, an underlying reason for the right to self-represent is to guarantee personal autonomy in conducting one’s legal affairs. However, there will always be individuals who will find procuring representation difficult: those who mistrust the legal profession, are chronically impersonal, have the most unpopular cases, or — for justifiable reasons — wish to represent themselves. The most liberal supply of free lawyers will not result in these people engaging lawyers.

### Why the System Must Be Changed

At present, therefore, our system of civil justice poorly serves the large number of self-represented litigants. Those who choose to proceed *pro se* find themselves mired by rules that presuppose the participation of trained advocates. These litigants are, as one commentator elegantly puts it, the court system’s “unwanted prodigal children”.<sup>118</sup> So far, the response has been to make the litigant fit the system. Yet, the shortcomings traversed above demonstrate that this is the wrong approach. Rather, we must make the system fit the litigant, a point made by Lord Woolf himself:<sup>119</sup>

Only too often the litigant in person is regarded as a problem for judges and for the court system rather than the person for whom the system of civil justice exists. The true problem is the court

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114 Special Project “The Legal Services Corporation: Past, Present, and Future?” (1983) 28 NYL Sch L Rev 593 at 638 cited in Helen Kim “Legal Education for the Pro Se Litigant: A Step towards a Meaningful Right to Be Heard” (1986–1987) 96 Yale L J 1641 at 1650. See also Deborah Rhode *Access to Justice* (Oxford University Press, New York, 2004) at 16–17 [*Access to Justice*].

115 Kim, above n 114, at 1650.

116 Rhode *Access to Justice*, above n 114, at 17–18.

117 *Ibid.*

118 Forrest Mosten “Unbundling of Legal Services and the Family Lawyer” (1994–1995) 28 Fam L Q 421 at 435 [“Unbundling of Legal Services”].

119 Woolf *Interim Report*, above n 4, at 119.

system and its procedures which are still too often inaccessible and incomprehensible to ordinary people.

It is a concern if a certain section of the community is denied the opportunity to enforce or defend its rights.<sup>120</sup> Fundamentally, a civilised system of government requires a means by which every citizen can peacefully resolve disputes. The means that our society has chosen is a system of courts where everyone may bring a claim, which, in turn, makes the right to sue and defend a right conservative of all other rights, and one that lies at the heart of an orderly government.<sup>121</sup> And while it is easy to congratulate ourselves on the way certain rights are afforded to every person, these rights are illusory unless they can be enforced by recourse to a court or tribunal.<sup>122</sup>

Moreover, in order to do justice, the court must accurately determine the facts of the case in issue before it. The purpose of the rules of procedure is to achieve this rectitude of decision.<sup>123</sup> A just procedure, therefore, must take sufficient steps to arrive at decisions that are correct in fact and in law.<sup>124</sup> On the other hand, a procedure that imposes a higher risk of error on a certain class of litigant would fail to treat these litigants with equal regard. All litigants *must* be equal before the law, in that the rules of procedure will not distort the correct application of the law to the true facts, in favour of one litigant, or class of litigant, over another.<sup>125</sup> Regardless of how fair substantive law may be, it “is impotent to provide the necessary safeguards unless the administration of justice, which alone gives effect and force to substantive law, is in the highest sense impartial”.<sup>126</sup>

When the consequence of procedural rules is that self-represented litigants cannot effectively navigate and use the legal system, the courts cannot deliver just results. Further, it is simply unfair to leave those without lawyers to flounder before and during the meaningful and impartial hearing to which they are entitled.<sup>127</sup> To do so is to deprive these litigants of a fair determination of their disputes, and, more worryingly, to create a class of people whose rights and interests are free to predation. In sum, our system of justice is deficient if it cannot accommodate those who have been wronged and who, either by necessity or for whatever reason of their own, seek to enforce their rights without a lawyer’s aid.<sup>128</sup>

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120 A Zuckerman “Justice in Crisis: Comparative Dimensions of Civil Procedure” in A Zuckerman (ed) *Civil Justice in Crisis: Comparative Perspectives of Civil Procedure* (Oxford University Press, Oxford, 1999) 9.

121 See *Chambers v Baltimore & Ohio Railroad Company* 207 US 142 (1907) at 148.

122 Duncan Webb “Why Should Poor People Get Free Lawyers?” 28 (1998) VUWLR 65 at 70 [“Free Lawyers”].

123 Zuckerman, above n 120, at 4.

124 *Ibid.*

125 *Ibid.*, at 4–5.

126 Reginald Smith as quoted in Bruce Boyer “Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of *Lassiter v Department of Social Services of Durham*” (2005–2006) 15 Temp Pol & Civ Rts L Rev 635 at 635.

127 Goldschmidt, above n 26, at 11. Note in this regard s 27 of the New Zealand Bill of Rights Act 1990 (“right to justice”).

128 Webb “The Right Not to Have a Lawyer”, above n 70, at 3.

#### IV MAKING LAW *PRO SE*

It is important first to establish some parameters. Crucially, it should not be taken from this article that people should be encouraged to represent themselves. The law is difficult, and, where possible, both citizens and the administration of law will best be served when they employ legal professionals. There will also always be legal matters where it will simply not be appropriate to proceed *pro se*. And it is probably impractical to attempt the design of a legal system that would render a lawyer's help redundant for the majority of ordinary people.<sup>129</sup> The best approach, therefore, is that *pro se* litigation should not be encouraged, but accepted.<sup>130</sup>

Herein lies the answer to the fear that greater accommodation could itself lead to greater self-representation. While the fundamental assumption must remain that professional representation is inimitable, in response to the challenge that the self-represented pose, we must shape our system of justice to enable litigants, if necessary, to bring a matter to court themselves effectively and acceptably. Of course, greater self-representation is not itself the concern; the prospect of wasted court time, substandard advocacy and vexatious claims is. In connection with the latter, this article has already noted that vexatious lay litigants make up a very small minority. Yet, one can also point out that strike out and summary judgment procedures offer opposing litigants the ability to dispatch frivolous claims expediently, and there is no reason to deny such applications where a lay litigant's claim is not merely deficient in form, but also patently devoid of substance. Further, having the Attorney-General declare a particular litigant vexatious under s 88B of the Judicature Act 1908 is another option. While the threshold for making such an order is incredibly high,<sup>131</sup> the trend in England has been towards a far more active approach to controlling vexatious litigants.<sup>132</sup> This may be the inevitable quid pro quo for the greater accommodation that vexatious lay litigants may seek to exploit. Moreover, while a more aided *pro se* litigant may still fare better if professionally represented, the alternative — leaving such a litigant unassisted — is clearly much worse, for both the litigant and the court.<sup>133</sup> In words borrowed from Mary McNeal, the choice is between being with only one oar, or without a boat entirely.<sup>134</sup> And it may well be that many one-oared litigants burden the court less than

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129 *Ibid*, at 17.

130 Stanoch, above n 7, at 298.

131 “[A]n unusual step, justifiable only in extraordinary circumstances ...”: Andrew Beck and others *McGechan on Procedure* (online ed) at J88B.04(1).

132 This trend began in *Bhamjee v Forsdick* (Practice Note) [2004] 1 WLR 88.

133 Kim, above n 114, at 1651. Note also the argument that developing programs to aid *pro se* litigants may foist self-representation on people — particularly the poor — who have more than enough demand on their time and energies. See Elizabeth McCulloch “Let Me Show You How: Pro Se Courses and Client Power” (1996) 48 Fla L Rev 481 at 491 as cited in Barry, above n 6, at 1881.

134 Mary McNeal “Having One Oar or Being Without A Boat: Reflections on Fordham Recommendations on Limited Legal Assistance” (1999) 67 Fordham L Rev 2618.

a smaller number of the boatless. In any event, surely it is no argument that offering assistance to lay litigants could increase their numbers, when not to do so is to deprive those who now self-represent from exercising a right (a right, recall, conservative of others) that they are guaranteed.

## V TARGETED LEGAL SERVICE DELIVERY

At the beginning of the 20th century, civil litigation was the preserve of men of property and the occasional corporation.<sup>135</sup> Today, because of social changes, legislative initiatives in social welfare and economic regulation, nearly every citizen is a potential litigant — yet our system of civil justice has remained largely unchanged.<sup>136</sup> Now it is unsuited to the increase in the number and type of litigants, primarily because it is too labour-intensive.<sup>137</sup> And because of this, the costs of going to trial are not only excessively high,<sup>138</sup> but also often grossly disproportionate to the amount in dispute.<sup>139</sup>

A key factor in this problem is the way in which our system delivers legal services. Premised on the expectation that an individual will contract out his or her legal problem in its entirety, it really is ‘one size fits all’. A better system recognises that legal problems of different intensity can be solved with legal services of different extensiveness — and, importantly, cost. As Rhode noted, reforms that minimised the need for expensive representation would allow many individuals to solve more effectively their law-related problems.<sup>140</sup>

The idea, summarised to a phrase, is to supply as much or as little assistance as is required to resolve a legal problem. This has been referred to variously overseas as a legal service triangle, a legal service pyramid or a mixed-model system.<sup>141</sup> Using the pyramid model, the most expensive services are at the apex, and reserved for the complex problems. At the base are the cheapest services, such as high-volume information, education and responses that are less, if at all, tailored to the needs of a client. Between the two extremes is a graduated scale of different legal services in an ascending order based on cost and comprehensiveness. A diagram, for the purposes of this article, is included below. Importantly, the model does not suggest that consumers must progress through the different service layers (starting at the base) before they can access the legal service most appropriate to

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135 Geoffrey Davies “Fairness in a Predominantly Adversarial System” in H Stacy and M Lavarch *Beyond the Adversarial System* (The Federation Press, Sydney, 1999) at 103.

136 *Ibid.*

137 *Ibid.*

138 Hansen, above n 35, at 3.

139 Davies, above n 135, at 103.

140 *Ibid.* See also Woolf *Interim Report*, above n 4, at [32].

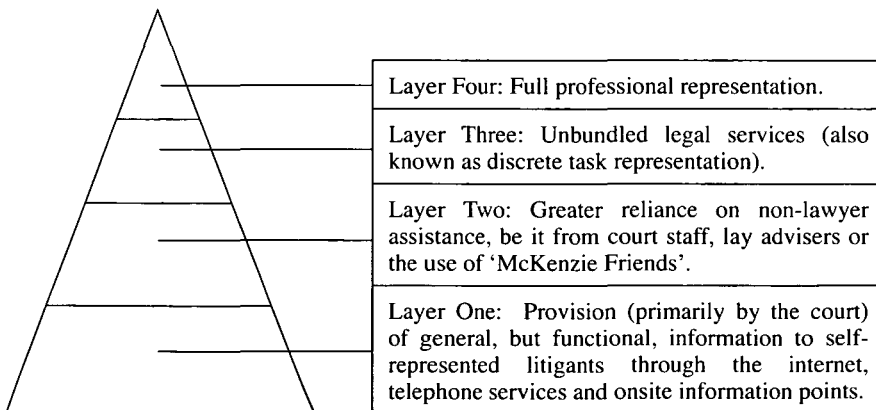
141 The Bellow-Sacks Access to Civil Legal Services Project, above n 113. note 38.



their needs. A consumer can immediately access each different level of service, regardless of the layer on which it sits.<sup>142</sup>

Two key features suggest that better targeting the delivery of legal services will help meet the challenges of *pro se* litigation. The first is cost. By disintegrating the delivery of legal services into smaller, discrete parts, litigants can choose what legal assistance they want, or, more pertinently, what they can afford. For those litigants who may be unable or unwilling to pay a lawyer to resolve their dispute holistically, it may be far more attractive to buy a precise and specific legal service. This article will develop this idea below. The other feature relates to the policy of protecting a person's individual autonomy to conduct his or her own legal affairs. The mixed-services model allows litigants to procure selectively what legal assistance they require to bring or defend their case. In this way, while the litigant will remain in complete control, their representation will be better assisted, better prepared and better enabled.

The pyramid this article proposes is four-storied. At the bottom is general information for self-represented litigants, which should come primarily from the court itself. The next layer envisages an expanded role for lay advisers and court staff in the provision of legal advice, and the use of McKenzie friends to support self-represented litigants in the courtroom. The top two layers concern professional legal advisers. While the top layer covers the traditional full-service lawyering role, the layer below this comprises what is known as 'unbundled' legal services, which allow a client the choice of which of the discrete services offered by a lawyer they wish to procure.



Our current model of legal service delivery includes elements of this targeted model. Legal information is available from a number of different sources: there are citizen organisations that provide a degree of legal advice,

<sup>142</sup> Ibid, at 41–42.

and, if pushed, some lawyers will agree to work only on a select part of a client's legal problem. What is absent is any measure of coordination. The approach is consistent with the presumption of representation discussed above — if a person does not want to instruct a lawyer, the current model forces him or her to expend a considerable amount of energy co-opting a more appropriate form of legal service. To improve access to justice, these different options must be clearly identified, easily accessed and simply used. Alternatives to full representation must be viewed as a legitimate and facilitated response to the individual demands of a particular legal problem.

### **Information for the Self-Represented Litigant**

#### *1 Why Supply Information, Who Should Supply it, and What to Supply*

A *pro se* litigant needs direct access to pertinent general information in order to pursue effectively his or her desired legal end.<sup>143</sup> Supplying this information, furthermore, eases some of the pressure he or she would otherwise place on the court, a fact recognised by none other than Chief Justice Elias:<sup>144</sup>

There are two main opportunities. The first is in informing the public effectively about the services provided by the Court and assisting those who need to have such access to get into the door ... . At a time when the unrepresented litigant is a fact of life, the dissemination of such information ... in simple language is essential if the Courts are not to be overburdened by the special needs of litigants in person ... .

The better a self-represented litigant is prepared, the more efficiently the court system operates. Recently, particularly in the United States and Australia, there has been a proliferation of 'do-it-yourself' legal materials from private sources.<sup>145</sup> In New Zealand, too (but to a lesser extent), there are a number of internet-based sources of information designed to help laypeople with legal problems.<sup>146</sup> But the responsibility for ensuring that litigants are supplied adequately with information must invariably rest with the court. This obligation stems from the court's role as a determiner of citizens' dues, and the requirement that its procedure allows it to conduct this role as efficiently, and with as much rectitude, as reasonably possible. Moreover, as a practical matter, it is the court that simultaneously needs to

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<sup>143</sup> Smith, Banbury and Ong, above n 13, at 83.

<sup>144</sup> Sian Elias "Address to the Australasian Family Courts Conference, Auckland, 15 October 1999" (2000) 3 BFLJ 107 at 109.

<sup>145</sup> See Rhode *Access to Justice*, above n 114, at 80.

<sup>146</sup> The Coalition of Community Law Centres' site <[www.communitylaw.org.nz](http://www.communitylaw.org.nz)>, particularly, offers a wide and varied selection of legal information, sometimes to quite a thorough level of detail.

know where and what information is available, and is best placed to assess what information a litigant or class of litigant will need. Finally, providing appropriate, accessible information and advice — particularly at the point of entry into a court — may, in fact, discourage a person litigating without representation.<sup>147</sup> In short, as it is the court that will most benefit, so too must it shoulder the greatest burden.

The information needs of lay litigants are well-documented.<sup>148</sup> They extend not only to material on their substantive rights, but also to the procedure that must be followed to enforce these in court. Information on how to make a claim, for example, and how to respond to a claim as a defendant, as well as material on the purpose of cross-examination, court etiquette and the rules relating to service of court documents, are all essential to most people who intend to represent themselves.<sup>149</sup> Similarly, information on alternatives to litigation, such as mediation or dispute tribunals, especially if provided at an early stage, may act as a screening mechanism that reduces the numbers of litigants in person.<sup>150</sup> In this regard, mention should be made of an information sheet produced by our Family Court.<sup>151</sup> These guidelines, given to litigants as soon as court staff deem it is appropriate, set down the obligations that attach to representing oneself in court. These include the need to give an address for service, the format requirements for affidavits and court documents, the need to put all evidence to be relied on in affidavit form and to serve it on the other party, and the prohibition on publishing details of what has occurred inside the court.<sup>152</sup> All the guidelines are one page in length, and written in an easy, clear style — for example:<sup>153</sup>

7. At the beginning of your case you will be given an opportunity to outline your case, on the basis of the evidence. At the end of the hearing you will be given a further opportunity to summarise your case and make legal submissions. It is important for you to remember that anything you say when outlining or summarising your case **must** be in the evidence which the Court has to consider.

The form and content of this information is ideally suited to the needs of self-represented litigants and should be adopted by all other New Zealand courts.

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147 Australian Institute of Judicial Administration, above n 74, at 14.

148 Ibid; Barry, above n 6, at 1880; Kim, above n 114, at 1651; Family Court of Australia, above n 7, at 2.

149 Australian Institute of Judicial Administration, above n 74, at 14–15.

150 Ibid, at 15. See also Woolf *Interim Report*, above n 4, at [11]–[13].

151 Family Court of New Zealand *Litigants in Person: Guidelines for Procedures in the Family Court* available at <[www.justice.govt.nz](http://www.justice.govt.nz)>.

152 Ibid.

153 Ibid.

## 2 Information Delivery

The courts may provide this information in a number of ways. The most obvious is through internet services, and, in this way, the approach of the Australian courts is exemplary. The state courts of Victoria, New South Wales and Queensland have devoted pages of their websites to those who wish to represent themselves.<sup>154</sup> The Family Court of Australia's site, in a section entitled "Do it yourself kits", includes downloadable interactive forms that cover financial statements, service documents and applications for consent orders.<sup>155</sup> While our Family Court does provide some similar information via its website, the presentation of this information can be confusing. For example, it states:<sup>156</sup>

The Family Courts Rules 2002, specify what documents you must file, where you must file the documents, who must be served and when you can make an application without giving notice to the other party and the court procedures and processes that need to be followed.

Clicking on the underlined link will take a user through to the Family Court Rules in their entirety. While the relevant rules are later specified, this leaves someone without legal training with the task of transposing these to the demands of his or her case. Those questioned for the 2009 report commented that this website was difficult to access, and that legislation and case law were difficult to source by general internet searches.<sup>157</sup>

To be effective, web-based information must be delivered in a way that is alive to the needs of lay litigants: to not only what legal information they most require, but also how incomprehensible this information can appear. Visible, useful and comprehensible web-based information must be a priority in any strategy that targets unrepresented users of the legal system.<sup>158</sup>

In saying this, it is all too easy to assume the ubiquity of the internet. One finding of the Legal Services Agency's study of unmet legal need was that over one-third of respondents indicated a preference for seeking help over the telephone, a figure that was even higher for a number of key demographics.<sup>159</sup> Of those surveyed, only seven per cent indicated that a website would be their preferred means to access legal information.<sup>160</sup> These preferences indicate that the utility of non-internet

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154 See <[www.supremecourt.vic.gov.au](http://www.supremecourt.vic.gov.au)>; <[www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au)>; <[www.courts.qld.gov.au](http://www.courts.qld.gov.au)>.

155 See <[www.familylawcourts.gov.au](http://www.familylawcourts.gov.au)>.

156 See <[www.justice.govt.nz](http://www.justice.govt.nz)>.

157 Smith, Banbury and Ong, above n 13, at 81.

158 See generally Richard Russkind *The End of Lawyers: Rethinking the Nature of Legal Services* (Oxford University Press, Oxford, 2008) at 59–93.

159 Legal Services Agency *Unmet Legal Needs*, above n 48, at 7. Key demographics were Pacific Island women over 44, and Māori women under 45.

160 *Ibid*, at 15.

services should not be overlooked in determining how legal information is best to be disseminated. Many legal information organisations in Canada and Australia, for example, have toll-free legal information lines that offer person-to-person assistance, or libraries of pre-recorded plain language information that are available at any time.<sup>161</sup>

*Pro se* ‘clinics’ have been implemented in a number of overseas jurisdictions with high levels of self-represented litigants. These are generally seminar-like classes that court staff, lawyers or even law students deliver periodically, with the purpose of offering *pro se* litigants, with common cases, information on court procedures.<sup>162</sup> The United States’ District of Columbia, for example, has developed a clinic for litigants who intend to proceed *pro se* in obtaining a divorce, and expect this divorce to be uncontested.<sup>163</sup> This clinic, which involves two two-hour sessions, aims to provide a level of confidence and comprehension to participants when confronted with court processes — indeed, a mock trial is held at the end of the second session.<sup>164</sup> A similar response has been to implement self-help kiosks within courts.<sup>165</sup> Utah and Arizona courts use these to enable court users to gain access to forms and instructions for legal proceedings in which litigants commonly represent themselves.<sup>166</sup> Another method is to employ specific *pro se* clerks with offices inside court buildings to help litigants fill in forms, and answer general questions relating to certain procedures.<sup>167</sup> While these court staff must adhere to restrictions on supplying legal advice, some courts go further by providing a practising lawyer to assist litigants.<sup>168</sup> In the latter case, in order to be assisted, litigants must first give a written understanding that the lawyer is not acting in a representative capacity.<sup>169</sup>

These programmes are not mutually exclusive. Any information strategy that will allow the court to discharge its obligation to give lay litigants good information will comprise a combination of the above programmes and others. The important point is that lay litigants — indeed, all people — deserve the best possible information about the legal system. At present, there seems to be an assumption that a little knowledge is a dangerous thing, and this fear, perhaps, can be understood. The obvious solution, therefore, is to provide not a little information, but a lot, and to design this information so that as many people as possible can understand it.

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161 Law Commission *Seeking Solutions*, above n 10, at 60.

162 Buxton, above n 7, at 122.

163 Barry, above n 6, at 1914.

164 *Ibid.*

165 Law Commission *Seeking Solutions*, above n 10, at 61.

166 Engler “Justice for All”, above n 7, at 2000.

167 Buxton, above n 7, at 121.

168 Engler “Justice for All”, above n 7, at 2000–2001.

169 Buxton, above n 7, at 121.

## Non-Lawyer Assistance

If a lawyer in New Zealand learns that a person is providing unauthorised legal services, that lawyer must immediately report the matter to the Law Society.<sup>170</sup> The penalty for such ultra-crepidation is a fine of up to \$50,000 for a natural person and up to \$150,000 for a corporation;<sup>171</sup> a failure to report it could result in a (certificated) practitioner being disbarred.<sup>172</sup>

Providing general legal *information* to third parties will not infringe these rules: thus, there is no objection to the community law centres or citizens' advice bureaux that give individuals information on their legal rights and obligations.<sup>173</sup> Providing personalised legal advice to litigants is a different matter entirely.<sup>174</sup> The organised bar has fiercely guarded the monopoly that it enjoys in this area, often in the name of protecting the wider public from the legal assistance of individuals that are incompetent or unethical.<sup>175</sup> In this fervour to protect lawyers' privileged position, some commentators are quick to note an underlying desire to protect the profession from unrestricted competition.<sup>176</sup>

To give justice to litigants without lawyers, these restrictions on unauthorised practice of law should be eased — a position advocated by numerous studies that have examined this issue.<sup>177</sup> Further, most research suggests that lay specialists can effectively provide routine services in legal matters where needs are greatest.<sup>178</sup> Allowing a specified class of non-lawyers — court staff, lay specialists, law clerks, legal executives, even law students — to advise litigants involved in certain types of cases would provide a cost-effective supply of personal assistance.<sup>179</sup> This is not to say that *any* person should be allowed to represent another; rather, those people acknowledged to have the special skills that would allow them to provide effective representation should be allowed to do so. This is not a radical suggestion. At common law, a judge may allow a layperson to appear and speak for an unrepresented litigant if that judge thinks this is appropriate.<sup>180</sup> In *Re G J Mannix Ltd*, Cooke J (as he then was) in the Court of Appeal set down general principles governing how this power, born out of a tribunal's inherent right to regulate its own procedure, should be used:<sup>181</sup>

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170 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 2.11.

171 Lawyers and Conveyancers Act 2006, s 46.

172 *Ibid*, ss 241 and 242.

173 Webb "The Right Not to Have a Lawyer", above n 70, at 10.

174 *Ibid*.

175 Rhode *Access to Justice*, above n 114, at 74.

176 *Ibid*, at 83.

177 Rhode "Access to Justice", above n 103, at 1806.

178 *Ibid*, at 1814.

179 Mary Noone "Paralegals – In the Community's Interest?" (Paper presented to the conference Improving Access to Justice: The Future of Paralegal Professionals, Adelaide, Australia, 19–20 February 1990) available at <[www.aic.gov.au](http://www.aic.gov.au)>.

180 See *Collier v Hicks* (1831) 2 B & Ad 663; 109 ER 1290 (KB) and *Mihaka v Police* [1981] 1 NZLR 54 (HC).

181 *Re G J Mannix Ltd* [1984] 1 NZLR 309 (CA) at 314.

[A]s a reserve or occasional expedient, for use primarily in emergency situations when counsel is not available or in straightforward matters where the assistance of counsel is not needed by the Court or where it would be unduly technical or burdensome to insist on counsel. Especially in minor matters, cost-saving could also be a relevant factor.

His Honour went on to state that a court should not issue any “tacit continuing or general licence to an unqualified agent to appear in winding up or any other class of proceedings”.<sup>182</sup> Yet surely these remarks have some application to those litigants who find themselves without legal representation. As often cases where parties are commonly unrepresented will be relatively straightforward — at least for someone with a degree of specialised, although not necessarily legal, knowledge — it is strongly arguable that lay litigants may find themselves in situations that meet this criterion, especially when viewed together with the issue of cost. The alternative criterion may also apply: it is beyond doubt that many would characterise their situation as one of emergency where counsel is not available.<sup>183</sup>

What *is* accepted is the use of a ‘McKenzie friend’ — a person who, with the leave of the court, may accompany a litigant and offer them support in the form of taking notes, quietly making suggestions and giving advice.<sup>184</sup> This procedure, while infrequently used by litigants themselves,<sup>185</sup> could be (and, overseas, has been) expanded to give litigants in person lay support in the courtroom. For example, the Subordinate Courts of Singapore implemented a pilot programme in 2006 that provided unrepresented litigants with a person to assist in this capacity, taken mostly from a pool of undergraduate volunteers from the National University of Singapore.<sup>186</sup> The scope of this assistance extended to explaining the legal process and help filling in forms, but did not include giving legal advice or addressing the court. The service was only available to unrepresented litigants who came up against represented parties and asserted that they could not afford their own lawyer.<sup>187</sup>

Both the Law Commission and the New Zealand Government’s reception of such propositions have been lukewarm at best.<sup>188</sup> The concern is the lack of accountability and assurance of quality that underpins current

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<sup>182</sup> *Ibid.*

<sup>183</sup> Note, however, *Body Corporate 183059 v Sokol Ltd* HC Auckland CIV 2010-404-000140, 20 May 2010 at [14]. Here Justice Ellis noted that while the position as outlined in the *Mannix* decision had been preserved by s 27 of the Lawyers and Conveyancers Act 2006, it was “quite another matter, however, to invite other, unrelated and unqualified, persons into the Court to appear on behalf of the company”.

<sup>184</sup> *McKenzie v McKenzie* [1970] 3 All ER 1034 (CA).

<sup>185</sup> Department of Constitutional Affairs, above n 8, at 122.

<sup>186</sup> The Subordinate Courts of Singapore *Implementation of Lay Assistant Scheme (Pilot Phase)* (18 Sep 2006) <app.subcourts.gov.sg>.

<sup>187</sup> *Ibid.*

<sup>188</sup> See Law Commission *Delivering Justice for All*, above n 11, at 32; Ministry of Justice, above n 105, at [77].

prohibitions on the non-lawyer practice of law. The problem with this position is that even if the spectre of unethical, incompetent legal services requires them, unauthorised practice restrictions are unsuited to prevent this behaviour because they focus only on the giving of unauthorised assistance — not on the quality of this help, or on the unmet legal need that it fulfils.<sup>189</sup> A far more preferable regime is one that imposes minimum qualifications or a requirement for registration on non-lawyers who seek to represent litigants in cases where the consequences of bad advice or shoddy representation would be significant.<sup>190</sup> If this were the case, there would be no reason either why such persons could not be bound to a code of ethics or carry insurance for claims made against them for negligent practice.<sup>191</sup> With law students, court staff and non-lawyers who work in the wider legal profession, supplying suitable supervision and education should also help allay any concern. Lessening lawyers' monopoly on aiding litigants and providing less costly layperson alternatives must be considered as a viable option to provide legal services to those who currently go without.

### Unbundled Legal Services

While the general model of lawyer service contemplates that all the tasks incidental to a client's legal problem will be performed by the practitioner, unbundled legal services envisage a client choosing which of the numerous discrete tasks that make up this service the lawyer will perform. What remains will be the client's responsibility, and the contractual relationship will reflect as much.<sup>192</sup> Thus, a client may want representation at trial, but will handle by himself or herself the discovery process, the filing of documents and the negotiations with the other lawyer. Alternatively, clients may wish to have a lawyer's help in preparing for a mediation that they plan to conduct themselves.<sup>193</sup> It is akin to ordering legal services à la carte.<sup>194</sup>

This should not be considered a new way to deliver legal services because many, if not most, lawyers unbundle their practices already.<sup>195</sup> A lawyer may review an agreement reached without his or her assistance.<sup>196</sup> He or she may also provide a client with an initial consultation and then never see that client again, or simply draft a letter on a client's behalf but do no more.<sup>197</sup> Lawyers rarely offer this as an alternative to full representation,

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189 Rhode *Access to Justice*, above n 114, at 90.

190 *Ibid.*

191 *Ibid.*, at 90–91.

192 Mosten "Unbundling of Legal Services", above n 118, at 423.

193 *Ibid.*

194 Fern Fisher-Brandvein and Rochelle Klempner "Unbundled Legal Services: Untying the Bundle in New York State" (2001–2002) 29 *Fordham Urban L.J.* 1107 at 1108.

195 Forrest Mosten, "Unbundle Your Practice" (2001) 18(7) *GP Solo Magazine* <[www.abanet.org](http://www.abanet.org)> ["Unbundle Your Practice"].

196 Fisher-Brandvein and Klempner, above n 194, at 1108.

197 Mosten "Unbundle Your Practice", above n 195.



for reasons that will be discussed below. Yet, it has the potential to better the lot of not only the litigants who at present are going unrepresented, but also the lawyers themselves. A lawyer's assistance with a legal problem may be far more attractive to many if individuals know that they can reduce cost and maintain control by only contracting for certain tasks.<sup>198</sup> Forrest Mosten, the attorney credited with coining the term, also argues that providing unbundled services empowers a client by allowing him or her to participate intensively in solving a legal problem, all the while knowing that the lawyer's help can be invoked if required. The result is that such clients will be better able to solve other future problems with the knowledge that they have gained.<sup>199</sup> From the point of view of the lawyer, not only could offering services in this way increase the number of clients for his or her practice, but he or she can also charge in a way that better reflects the work or skill expended for a specific task.<sup>200</sup> Bills calculated in this way are more predictable, better understood, and, in theory, more likely to be paid.<sup>201</sup> Nevertheless, many lawyers remain reluctant to offer limited services on financial grounds.<sup>202</sup>

A number of legal practices in the United States, Canada and Australia, have actively employed the unbundled model.<sup>203</sup> Inevitably, however, there are two main barriers to wholesale implementation. The first is practitioner liability. Many lawyers fear, not without reason, that the court may make them the scapegoat for the ill-advised decision of a client, within the realm of those tasks the client did not ask the lawyer to perform.<sup>204</sup> Unsatisfied customers of unbundled services have, indeed, brought and won malpractice cases.<sup>205</sup> Practitioners can obviate this risk, however, through a carefully drafted letter of engagement that outlines exactly what the client has hired them to do, what services they will perform and what issues they will address.<sup>206</sup> Regardless of whether legal services are unbundled, the current Conduct and Client Care Rules require a lawyer to do this.<sup>207</sup> Further to this information, a lawyer should indicate how difficult the tasks that the client has elected to do himself or herself will be.<sup>208</sup> A letter of engagement may go so far as to protect a lawyer from any claim or certain claims in negligence, on the basis that procuring unbundled services is a deliberate consumer choice on the part of a client who is aware of the potential for risk.<sup>209</sup> And recognising that unbundled

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198 Ibid.

199 Mosten "Unbundling of Legal Services", above n 118, at 430.

200 Mosten "Unbundle Your Practice", above n 195.

201 Ibid.

202 Rhode *Access to Justice*, above n 114, at 100.

203 Law Commission *Dispute Resolution in the Family Court*, above n 12, at 188–193.

204 Fisher-Brandveen and Klempner, above n 194, at 1114–1115.

205 See for example *Nichols v Keller* (1993) 19 Cal Rptr 2d 601 (CalCA).

206 Fisher-Brandveen and Klempner, above n 194, at 1116.

207 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3.4.

208 Fisher-Brandveen and Klempner, above n 194, at 1116.

209 Mosten "Unbundle Your Practice", above n 195.

services may not be suitable for everyone provides the greatest protection for practitioners — they can simply refuse to act on this basis if they feel that a client would not be able to handle certain tasks singlehandedly.<sup>210</sup> The second barrier is the challenge such a delivery model poses to the notion of traditional lawyering and the ethical obligations that attach to this role. A common fear is that if a practitioner appears in court on behalf of a client, but for a limited purpose, the court may be reluctant for that lawyer then to withdraw from further representation.<sup>211</sup> An equal concern lies with ‘ghost-written’ legal documents: documents that a lawyer prepares for a self-represented litigant but that do not acknowledge that lawyer’s involvement.<sup>212</sup> As judges will afford pleadings filed by a self-represented litigant a leniency because of that litigant’s lack of legal skill, to give this leniency to a ghost-written document would allow the party that filed it an unfair advantage.<sup>213</sup> Moreover, there are duties on a lawyer drafting pleadings to ensure that the facts he or she knows support the claim, and that it is reasonably arguable at law.<sup>214</sup> This protection against frivolous or inherently misrepresentative claims disappears where the lawyer does not disclose his or her involvement.<sup>215</sup>

These problems can be overcome with small modifications to our current practitioner ethics regime and the way we conceptualise legal service. Counsel that ghost-write for *pro se* clients could be made to disclose their involvement, but not their identity, in the preparation of legal documents; thus alerting the court to the professional work that has gone into these pleadings, but sparing that lawyer from complete responsibility for a client’s representation.<sup>216</sup> As further protection, regulatory bodies could demand that a client reveal the identity of a lawyer who had prepared dishonest or frivolous claims,<sup>217</sup> a demand that would be persuasive if the alternative were to hold the litigant singularly liable. Accepting unbundling as a legitimate way in which lawyers can help more people access justice must also lead to a relaxation of the ethical standards that currently make such representation difficult. In particular, while the current rules governing when and how a solicitor may withdraw his or her representation of a client in a proceeding do not rule out limited representation absolutely,<sup>218</sup> they could be modified to allow a simpler, more streamlined procedure.

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210 Gordon Renouf, Jill Anderson and Jenny Lovric “Pro Bono Opportunity in Discrete Task Assistance” (July 2003) LJSJ 55 at 55 <[www.nationalprobono.org.au](http://www.nationalprobono.org.au)>.

211 Rhode *Access to Justice*, above n 114, at 100.

212 Fisher-Brandvein and Klempner, above n 194, at 1116.

213 Rhode *Access to Justice*, above n 114, at 101.

214 See *Harley v McDonald* [1999] 3 NZLR 545 (CA).

215 Rhode *Access to Justice*, above n 114, at 101.

216 *Ibid.*

217 *Ibid.*

218 High Court Rules, r 5.41.

## The Role of Lawyers

Employing a lawyer in the usual, complete role makes up the top layer of the pyramid. Here, the simple point is that if lawyers were to reduce the fees that they customarily charge, then great strides would be made in allowing equal access to the law. How this could be effected is, regrettably, beyond the scope of this article. Pro bono work, too, must be encouraged. However, it does not need to be limited to offering the complete lawyer service for free. Endeavouring to participate in online discussions or providing resources such as standard documents to open source internet databases (as illustrative examples only) may well be a far more efficient way to expend free legal services.<sup>219</sup>

The pyramid model tries to grant easy, cheap and swift legal remedies by reducing dependence on trained legal officers. Simultaneously, it supplies more legal expertise to people who, at present, are forced to go without. As noted above, nearly all of the elements of such a system already exist in one form or another. What is required is a change of perception: a lawyer's full representation must be seen as the best weapon, though not the only possible tool, when enforcing legal rights. The availability of legal services must be targeted in such a way that reflects this belief. Such a change of perception, after all, is free. And the pay-off would be a system of civil justice that realistically caters to the demands of not only those litigants who at present proceed *pro se*, but also the large and growing number of people for whom hiring a lawyer comes at a great financial and personal cost.

## VI CONCLUSION

This article has advocated reform to the delivery of legal services to remedy a system that currently marginalises self-represented litigants. The model suggested aims to supply legal expertise at a level and cost that is proportionate to the legal problem faced. To do this, the legal profession must accept that the provision of legal information by the court, greater roles for lay advisers and unbundled legal services, are all legitimate supplements to the lawyer's role as the best provider of full legal expertise. To effect these reforms, the law may have to sacrifice some of the pomp and ceremony that historically have been seen to elevate it and the legal profession above the rough and tumble of ordinary social interaction. Granted, it may also rob the law of some its extant pomp, ceremony and magic. While this is lamentable, this is also necessary. Just as the price of lyricism is a weak institution, so, too, is the reward for speaking in prose a continued relevance and respect.