Distributive Precedent and the Pro Se Crisis

Susannah Camic Tahk[*]

ABSTRACT: A crisis in pro se litigation is currently facing the U.S. legal system. This crisis appears in areas of law ranging from family law to consumer protection law to employment law to the rights of people currently experiencing incarceration. In these and other areas, litigants without lawyers almost invariably lose due to enormous legal and sociolegal impediments. Most scholars and other legal observers view this situation as virtually hopeless, but this Article turns in a novel direction by conducting an empirical study of those rare cases where pro se litigants succeed. The study involved assembling two original hand-coded datasets of these cases in nine states during a period in 2020. The first dataset consists of all 568 cases where pro se litigants succeeded, and the second consists of the 619 precedents that pro se litigants cited favorably in these cases. Analysis of these datasets shows that the substantial majority of pro se successes relied on a body of "distributive precedents," established by cases in which both original parties had lawyers. This Article identifies several of the key legal and social features of the distributive precedents, including their areas of law, geographical origins, and procedural and substantive characteristics. Based on these research findings, the Article outlines policy interventions into the pro se crisis, identifying several mechanisms for expanding the supply of distributive precedents and for increasing access to them.

---

[*] Professor of Law, University of Wisconsin Law School (she/her). For extremely helpful comments and conversation, thanks to Jennifer Bird-Pollan, Leslie Book, Tonya Brito, Chas Camic, Michelle Lyon Drumbl, Cecelia Klingele, Kate Finley, Keith Fogg, Anna Ganz, Andrew Hammond, Alexandra Huneeus, Ariel Jurow Kleiman, Michelle Layser, Gwendolyn Leachman, Ion Meyn, Yaron Nili, Renagh O'Leary, David Schwartz, Kathryn Sabbeth, Carey Seal, Miriam Seifter, Dan Tokaji, Nina Varsava, Clint Wallace, Bill Whitford, Eleanor Wilking, Bree Wilde, Rob Yablon, and the commenters at a Cornell faculty talk on a related paper. Special thanks to Alex Tahk both for discussion and for the enormous amount of pandemic childcare he did so I could write this paper, especially of our pandemic baby. For extraordinary research assistance, thanks to Sequoia Butler, Alex Gelhar, Matthew Kulju, Kass Longie, Daniel Lurker, Kathryn Price, Katherine Scott, Chelsea Thibodeau, Jordan Vassel, and Seynabou Youm. All errors are my own.

INTRODUCTION

Everyday, people in courthouses across the United States undertake the difficult task of appearing in front of the court without a lawyer. Pro se litigation, or litigation in which one party does not have a lawyer, is a major issue for the court system and for the litigants themselves. In some state courts, "seventy to ninety-eight percent of cases involve at least one unrepresented litigant."[1] In federal court, "[b]etween 1999 and 2018, over 1,517,000 federal district court cases, or 28 percent of all cases filed, involved at least one pro se party."[2] In some areas of the law, the pro se rate is much higher. In civil rights

1. Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 743 (2015) [hereinafter Steinberg, *Poor People's Courts*].

2. Mark D. Gough & Emily S. Taylor Poppe, (*Un)Changing Rates of Pro Se Litigation in Federal Court*, 45 LAW & SOC. INQUIRY 567, 574 (2020) [hereinafter Gough & Poppe, *Pro Se Litigation*]. While these authors do not find an increase in recent years, they observe that this high rate of pro se federal litigation persists despite numerous recent efforts to reduce the pro se docket. *See*

cases where the plaintiff is currently incarcerated, 95.6 percent of litigants proceed pro se, and 84.1 percent of petitioners in habeas corpus action are pro se.[3] Approximately 33 percent of civil rights cases and 20 percent of employment cases in federal court also involve pro se litigants.[4] Civil justice scholar Jessica Steinberg summarizes the situation by writing that, "it is not improbable to estimate that two-thirds of all cases in American civil trial courts involve at least one unrepresented individual. In short, the magnitude of the pro se crisis is immense."[5]

The "pro se crisis"[6] becomes most severe in its impact on the country's most marginalized and disadvantaged people. In 2010, poverty law scholar Gene Nichol wrote that "[s]tudy after demoralizing study demonstrates, with daunting and repetitive consistency, that over eighty percent of the legal need of the poor and the near poor—a cohort including at least ninety million Americans—is unmet."[7] Nichol quotes President Jimmy Carter: "Ninety percent of our lawyers serve ten percent of our people. We are overlawyered and underrepresented."[8]

The pro se crisis has enormous consequences. As the result of this crisis, "huge numbers of our fellows 'lose their families, their housing, their livelihood, and like fundamental interests.'"[9] Issues "frequently involving the most vital questions of life—divorce, child custody, domestic violence, health care, shelter, subsistence, life-sustaining benefits—are either rejected, ignored, or determined under terms of extraordinary imbalance, as a result of the absence of counsel."[10]

At a system level, the pro se crisis also undermines the idea that U.S. courts offer equal access to justice. The pro se crisis creates a "literal chasm

---

also Just the Facts: Trends in Pro Se Civil Litigation from 2000 to 2019, U.S. CTS. (Feb. 11, 2021), https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019 [https://perma.cc/ZKL6-HBZ7] (describing essentially the same statistics as Gough & Poppe).

3. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1609 (2003) [hereinafter Schlanger, *Inmate Litigation*]. *See generally* Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015) [hereinafter Schlanger, *Adulthood*] (updating and largely confirming these results).

4. Gough & Poppe, *Pro Se Litigation*, *supra* note 2, at 578. This civil rights number references civil rights cases outside of the prison and employment contexts, which are included in the other statistics cited here. *Id.*

5. Steinberg, *Poor People's Courts*, *supra* note 1, at 751.

6. *Id.*

7. Gene R. Nichol, Jr., *Judicial Abdication and Equal Access to the Civil Justice System*, 60 CASE W. RSRV. L. REV. 325, 327 (2010).

8. *Id.* at 328 n.14 (quoting Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 371 (2004)).

9. *Id.* at 329 (quoting HOWARD H. DANA, JR., AM. BAR ASS'N TASK FORCE ON ACCESS TO CIV. JUST., REPORT TO THE HOUSE OF DELEGATES 112A, at 9 (2006), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2006/2006_am_112a.pdf [https://perma.cc/Y6QH-2QJJ]).

10. *Id.* at 327–28.

that exists between our aspiration of 'equal justice under law' and the actual exclusionary operation of our civil justice system."[11]

Empirical evidence demonstrates that equal justice concerns are not hypothetical. Pro se litigants do face major disadvantages. Empirical legal scholars Mark Gough and Emily Taylor Poppe find that pro se cases "are associated with higher rates of termination by pretrial adjudication, higher rates of dismissals, and lower rates of settlement."[12] In addition, pro se litigants are much more likely to lose even if their cases make it to court. Steinberg writes that "[i]t is well-documented that unrepresented litigants secure far fewer victories in court than their represented counterparts."[13] Win rates for cases with lawyered plaintiffs "are approximately 300 percent greater than those for cases involving pro se plaintiffs."[14]

The disparity reaches across all areas of the law. "[I]n every case category [that Gough and Poppe studied], win rates [were] lower among cases involving pro se plaintiffs relative to . . . where all parties are represented by counsel."[15] Legal scholar Ayelet Sela similarly reports "that well over half of the [pro se] cases [she studied were] dismissed sua sponte on the court's motion or upon a motion to dismiss filed by the opposing party, most commonly due to failure to state a claim."[16]

A substantial body of legal scholarship has examined some of the many disadvantages pro se litigants face and the reasons they so often lose. This scholarship includes Marc Galanter's path-breaking article, *Why the "Haves" Come Out Ahead*,[17] which spotlights the significance of legal precedent. According to Galanter, the "haves" of litigation, that is, parties with resources and lawyers, litigate as a "long game."[18] Rather than concentrate solely on one-shot victories, "haves" attempt to establish favorable precedents that then allow them to win repeatedly.[19] Subsequent scholarship has applied Galanter's insight about precedent across forums and substantive areas of the law.[20]

---

11. *Id.* at 328.

12. Gough & Poppe, *Pro Se Litigation*, *supra* note 2, at 582.

13. Steinberg, *Poor People's Courts*, *supra* note 1, at 744.

14. Gough & Poppe, *Pro Se Litigation*, *supra* note 2, at 582.

15. *Id.*

16. Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORNELL J. L. & PUB. POL'Y 331, 337 (2016) [hereinafter Sela, *Streamlining Justice*].

17. *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (discussing the disadvantage pro se litigants face and why these often cause them to lose).

18. *Id.* at 97–104.

19. *See id.*

20. *See, e.g.*, Shauhin Talesh, *How the "Haves" Come Out Ahead in the Twenty-First Century*, 62 DEPAUL L. REV. 519, 527–30 (2013) (documenting, among other things, how the "haves" use private ordering systems to preserve their advantages); Shauhin A. Talesh, *How Dispute Resolution System Design Matters: An Organizational Analysis of Dispute Resolution Structures and Consumer Lemon*

In addition, extensive scholarship on low-resourced litigants has examined the pro se experience empirically, documenting the many disadvantages that face parties appearing in court without lawyers.[21] As this Article will document, those reasons derive both from formal law and from socio-legal factors.

Laws, 46 LAW & SOC'Y REV. 463, 489–90 (2012) (examining how the "haves" come out ahead in private dispute resolution systems); Shauhin A. Talesh, *The Privatization of Public Legal Rights: How Manufacturers Construct the Meaning of Consumer Law*, 43 LAW & SOC'Y REV. 527, 553–54 (2009) (looking at how the "haves" shape legal meaning in private dispute resolution procedures); Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869, 893–99 (1999) (finding the Galanter pattern in the context of employment litigation); Karyl A. Kinsey & Loretta J. Stalans, *Which "Haves" Come Out Ahead and Why? Cultural Capital and Legal Mobilization in Frontline Law Enforcement*, 33 LAW & SOC'Y REV. 993, 993, 1004–21 (1999) (identifying the importance of occupational prestige and experience as the reason the "haves" come out ahead); Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 21–26, 60–61 (1999) (looking at patterns of influence in alternative dispute resolution systems and proposed reforms); Donald R. Songer, Reginald S. Sheehan & Susan Brodie Haire, *Do the "Haves" Come Out Ahead over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925–1988*, 33 LAW & SOC'Y REV. 811, 827–31 (1999) (demonstrating that repeat-player litigants have a substantial advantage in U.S. Courts of Appeals); Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals*, 36 AM. J. POL. SCI. 235, 254–47 (1992) (finding that litigation resources are correlated with success in U.S. Courts of Appeals). *See generally* MARC GALANTER, WHY THE HAVES COME OUT AHEAD: THE CLASSIC ESSAY AND NEW OBSERVATIONS (2014) (reprinting the article and summarizing the literature since); IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? (Herbert M. Kritzer & Susan S. Silbey eds., 2003) (reviewing extensive empirical work on Galanter's piece).

21. *See* Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise Through Lawyers' Impact*, 80 AM. SOCIO. REV. 909, 910–24 (2015) [hereinafter Sandefur, *Elements of Professional Expertise*]; D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessy, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 906–09, 919–51 (2013); Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 SEATTLE J. FOR SOC. JUST. 51, 65–71 (2010) [hereinafter Sandefur, *The Impact of Counsel*] (reporting the results of a meta-analysis of twelve different studies on the effects of representation); Andrew I. Schoenholtz & Jonathan Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739, 739–45, app. at 765–72 (2002); Spencer G. Park, Note, *Providing Equal Access to Equal Justice: A Statistical Study of Non-prisoner Pro Se Litigation in the United States District Court for the Northern District of California in San Francisco*, 48 HASTINGS L.J. 821, 821–24 (1997); Nicole Summers, *Civil Probation*, 75 STAN. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3897493 [https://perma.cc/3VEJ-VKEQ] (arguing that eviction court, where most tenants appear unrepresented, is a form of "civil probation" and looking at it empirically). *See generally, e.g.*, Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509 (2022) (probing the role judges play in pro se cases); Kathryn A. Sabbeth & Jessica K. Steinberg, *The Gender of Gideon*, 69 UCLA L. REV. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3807349 [https://perma.cc/PNP7-9JTP] (revealing a gender disparity in representation rates); Lauren Sudeall & Daniel Pasciuti, *Praxis and Paradox: Inside the Black Box of Eviction Court*, 74 VAND. L. REV. 1365 (2021) (showing how the process of eviction court works is highly place-dependent); Tonya L. Brito, *Producing Justice in Poor People's Courts: Four Models of State Legal Actors*, 24 LEWIS & CLARK L. REV. 145 (2020) (examining the experiences of low-income litigants, sometimes pro se, in family court); Nicole Summers, *The Limits of Good Law: A Study of Housing Court Outcomes*, 87 U. CHI. L. REV. 145 (2020) (finding that

Against the backdrop of overwhelming disadvantages faced by pro se litigants, it is perhaps surprising that they experience any success at all in court. Yet, they do. This Article is the first empirical study of pro se success. It examines why pro se litigants sometimes beat the odds and what courts and policy makers can do to help them succeed more often.

The study is based on a novel dataset of all 568 cases from January to August 2020, in both state and federal court, in which a pro se litigant experienced some kind of legal success.[22] For each of these successful 568 pro se cases, my research assistants and I hand-coded a number of variables, including the primary issue at stake in the case and the specific precedents the case cited.[23]

Using this data, I drilled down further into the precedents used by successful pro se litigants. I tried to answer questions that are underdeveloped in current scholarship such as: What are the characteristics of the precedents that enable pro se litigants to achieve successful outcomes? Do pro se litigants rely on different precedents in different areas of law? Does the body of precedent used by pro se litigants consist of few or many cases? Do these precedents concern substantive or procedural issues? Perhaps most fundamentally, where and how do the precedents used by pro se litigants originate?

What these datasets reveal seems unsurprising at first glance: Pro se litigants succeed when they have relevant law, or precedent, on their side. To succeed in court, pro se litigants need case law that pertains to the issue they hope to win: They need precedent.[24] However, Galanter's theory predicts that litigation's "have-nots," including pro se parties, should struggle to find useful precedent.[25]

Consistent with that prediction, I found that pro se litigants do not rely on precedent set by other pro se litigants. Instead, they rely on precedent that *represented* parties established. Approximately 68.9 percent of the 619 precedents beneficial to pro se parties were cases in which both previous

---

mostly unrepresented tenants are unable to take advantage of favorable landlord-tenant law); D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118 (2012) (studying the results "of randomized evaluations of legal assistance programs" measuring the effects of both the "offer of and the actual use of representation"); Carroll Seron, Gregg Van Ryzin & Martin Frankel, *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419 (2001) (examining the results of a "randomized experimental evaluation of a legal assistance program for low-income tenants in New York City's Housing Court").

22. *See infra* Sections II.A–.B.

23. *Id.*

24. Following civil procedure scholar Maggie Gardner, I here use the term "precedent" broadly to include all prior judicial opinions, whether or not they are binding on the citing court and whether or not they are published in a formal reporter. *See* Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. REV. 1619, 1626–29 (2020).

25. Galanter, *supra* note 17, at 97–108.

parties had lawyers, often elite ones.[26] Inasmuch as the "have nots" have success in court, they are able to rely on precedent that the "haves" set. In this way, the resources of the "haves" benefit the unrepresented "have nots."

As this process happens, precedent distributes resources from the hands of those who can afford to pay lawyers into the hands of pro se parties who cannot afford representation. This dynamic is the core argument of this Article: Precedent distributes from the lawyered to the unlawyered. Further, distributive precedent, which I define as *lawyered precedent on which at least one pro se litigant has relied for a favorable proposition of law*, typically shares its benefits serendipitously. A represented party probably has no inkling when a decision made in her favor can and does benefit a pro se party, or perhaps many pro se parties. In addition, distributive precedent disperses its benefits by enlarging the pie of legal resources rather than by re-allocating them. Advantaged parties still get the full value of their legal victories even when that value also accrues to less advantaged parties.

This Article analyzes empirically how precedent distributes its benefits. In what areas of law and under what conditions does distributive precedent arise? What kind of distributive precedents are most valuable to pro se litigants? What makes for a what I will call a distributive "general precedent"? Then, this Article uses answers to these factual questions to address policy. What can distributive precedents tell us about how to create more precedents beneficial to pro se parties? How can courts and lawyers help pro se parties gain access to valuable precedents?

On the policy front, understanding precedent as a valuable good to be shared between represented parties and unrepresented parties opens up important new pathways for legal reform. These policy pathways share a theme. Law should not be a secret. As this Article will discuss, courts, lawyers, and policymakers often treat potentially valuable case law as a treasure hoarded by legal insiders. Yet, precedent is the law. The law is supposed to be public information. Fueling the secretive practices of legal authorities seems to be the belief that if more people had access to precedential case law, then (a) those people might use precedential law to bring more lawsuits, and (b) they might not hire lawyers to help them navigate the legal system. Courts want to manage their dockets, and lawyers want to their work to benefit their own clients.[27] Justifiable as these concerns may seem, however, they do not outweigh legitimacy problems with a system of justice that expects people to abide by laws that they cannot even find. Many of this Article's suggested reforms focus on bringing precedent out of its metaphorical vault and making it more widely accessible.

My research is the first to examine the potential distributive effects of precedent. Studying the distributive potential of precedent contributes to two

26. *See infra* Sections II.A–.B.

27. *See generally, e.g.*, Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 NW. U. L. REV. 1137 (2022) (discussing judicial reform to improve efficient and promote better case management).

major and often disconnected bodies of legal scholarship. The first concerns pro se and low-resourced litigants in general. Neither the theoretical literature on this subject, which follows Galanter's lead, nor its empirical counterpart has investigated the question of when, despite the odds, a pro se litigant succeeds.[28] Doing so is the purpose of the database created for this Article. Understanding pro se successes is particularly important given the scope of the current pro se crisis in this country. Peering into the tiny window of opportunities available to pro se litigants may help scholars and advocates to widen that window.

The second literature to which this Article contributes is the well-established one on the role of precedent more generally.[29] While civil procedure scholars, among others, have long studied the workings of precedent,[30] they have yet to investigate in a comprehensive way precedent's distributive function. For this reason, scholars have never considered the potential that precedent has to distribute the legal system's resources to litigants who lack legal representation. This Article adds to the literature on precedent by treating precedent as a valuable good whose benefits can, in certain circumstances, flow to the legal system's most under-resourced participants.

To examine and suggest ways to build upon the distributive potential of precedent, this Article will proceed in three parts. Part I will discuss the current state of legal knowledge about pro se litigants.[31] Section I.A will describe the pro se crisis and its breadth, and Section I.B will describe the long odds any pro se party faces in litigation.[32] Section I.C. will consider what is known about why a litigant's lack of a lawyer so often entails failure in court. Section I.C.1 will analyze the ways that the law itself has created the pro se crisis, and Section I.C.2 will discuss the role of socio-legal factors in producing the crisis.[33] Part II will then turn to the distributive potential of precedent.[34] Section II.A will describe the research design of my study, and Section II.B will present the findings of the study.[35] It will identify six basic patterns according to which pro se litigants derive particularly significant value from distributive precedents.[36] Part III will build on these research findings to propose policy reforms aimed at expanding the distributive potential of

28. *See* Shauhin A. Talesh, *Foreword* to GALANTER, *supra* note 20, at iii–ix.

29. *See* William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. L. & ECON. 249, 252 (1976).

30. *See generally* Nina Varsava, *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J. L. & HUMANS. 62 (2018) (providing an excellent critical look and study of the literature on civil procedure precedent).

31. *See infra* Part I.

32. *See infra* Sections I.A–.B.

33. *See infra* Section I.C.

34. *See infra* Part II.

35. *See infra* Sections II.A–.B.

36. *See infra* Sections II.A–.B.

precedent, in particular by reducing practices of secrecy found in the American legal system.[37] Section III.A will suggest ways to increase the supply of distributive precedent, and Section III.B will consider how to improve access to it.[38]

I. THE PRO SE CRISIS

A. *SCOPE OF PRO SE CRISIS*

Pro se litigation currently poses an enormous problem for litigants and for courts. Mark Gough and Emily Taylor Poppe found that "between 1999 and 2018, over 1,517,000 federal district court cases, or 28 percent of all [federal district] cases filed, involved at least one pro se party."[39] The rate of pro se plaintiffs in cases filed from prison is particularly high. For prison civil rights cases, it is 95.6 percent and 84.1 percent for prison habeas corpus cases.[40] "In 2018, prisoners filed over 50,000 lawsuits in the federal district courts to vacate their sentences, challenge the conditions of their confinement, or protest civil rights violations . . . . [T]hese lawsuits comprised about 20 percent of the civil docket in the federal district courts in 2018."[41]

In other areas of the law, access to justice scholar Jessica Steinberg reports that "[i]n landlord-tenant matters, for instance, it is typical for ninety percent of tenants to appear pro se."[42] She also finds that "[t]he problem is similarly severe in the family law arena."[43] Her data shows that in California, for example, in "eighty percent of family law cases," at least one party proceeds pro se[44]; in Maryland, seventy-six percent of litigants seeking domestic violence protective orders are pro se[45]; and "[i]n Philadelphia, eighty-nine percent of child custody litigants" are pro se.[46]

Lack of legal representation is a particularly acute problem for the most socially disadvantaged members of U.S. society. Sociologist Rebecca Sandefur

37. *See infra* Part III.

38. *See infra* Sections III.A–.B.

39. Gough & Poppe, *Pro Se Litigation*, *supra* note 2, at 574.

40. *Id.* at 572. The increase in pro se litigation by incarcerated plaintiffs is associated with mass incarceration. *See id.* at 572–84; Anna Gunderson, *Ideology, Disadvantage, and Federal District Court Inmate Civil Rights Filings: The Troubling Effects of Pro Se Status*, 18 J. EMPIRICAL L. STUD. 603, 604 (2021) [hereinafter Gunderson, *Troubling Effects*] ("In the last four decades, the prison population has rapidly accelerated, with the incarceration rate growing from just over 100 per 100,000 population in the United States in 1980 to 440 per 100,000 population by 2017 . . . ." (citation omitted)).

41. Gunderson, *Troubling Effects*, *supra* note 40, at 604.

42. Steinberg, *Poor People's Courts*, *supra* note 1, at 750.

43. *Id.*

44. *Id.* at 751.

45. *Id.*

46. *Id.*

cites evidence that at least "80% of the legal needs of the poor go unmet."[47] Steinberg adds that, "[t]enants with mental disabilities, victims of domestic violence, overwhelmed single mothers, non-English speakers, and the mentally ill flood the courts and exacerbate the inadequacy of self-representation."[48] Steinberg and poverty law scholar Kathryn Sabbeth also find in an exhaustive study of the topic that "gender is extremely significant with respect to who benefits from the right to counsel,"[49] a situation that "relegates women to a secondary legal status and impinges on the functioning of American democracy."[50]

The pro se crisis is a serious racial justice problem.[51] Recent research has demonstrated "that race matters in representation rates."[52] In both criminal and civil proceedings, the parties unable to afford counsel are disproportionately people of color.[53] In their 2016 study, sociolegal researchers Amy Myrick, Robert Nelson, and Laura Beth Nielsen showed "that racial and ethnic minorities, in particular African Americans, are much less likely to have lawyers than white plaintiffs."[54] Specifically, "[c]ompared to white plaintiffs (the reference group), African Americans are 2.5 times as likely to file pro se."[55] Additionally, cases alleging racial discrimination were "about 1.8 times more likely to be filed without the benefit of counsel" (even controlling for the race of the litigant).[56]

---

47. Rebecca L. Sandefur, *What We Know and Need to Know About the Legal Needs of the Public*, 67 S.C. L. REV, 443, 451 (2016) (citing Ethan Bronner, *Right to Lawyer Can Be Empty Promise for Poor*, N.Y. TIMES (Mar. 15, 2013), https://www.nytimes.com/2013/03/16/us/16gideon.html [https://perma.cc/TVP9-NLSR] ("The Legal Services Corporation, the Congressionally financed organization that provides lawyers to the poor in civil matters, says there are more than 60 million Americans — 35 percent more than in 2005 — who qualify for its services. But it calculates that 80 percent of the legal needs of the poor go unmet.")).

48. Steinberg, *Poor People's Courts*, *supra* note 1, at 758–59.

49. Sabbeth & Steinberg, *supra* note 21, at 4.

50. *Id.* at 5.

51. *See also* Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1252–57 (2022) (focusing on the role of race in the civil justice system); Tonya L. Brito, David J. Pate, Jr. & Jia-Hui Stefanie Wong, *"I Do for My Kids": Negotiating Race and Racial Inequality in Family Court*, 83 FORDHAM L. REV. 3027, 3027–36 (2015) (looking at how attorney representation affects civil court proceedings for low-income litigants using critical race empiricism). *See generally* Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263 (2016) (explaining why Black people with civil justice problems are less likely than their white counterparts to seek formal legal assistance with civil justice problems).

52. Amy Myrick, Robert L. Nelson & Laura Beth Nielsen, *Racial Disparities in Legal Representation for Employment Discrimination Plaintiffs*, *in* BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 107, 107–16 (Samuel Estreicher & Joy Radice eds., 2016).

53. Kathryn A. Sabbeth, *The Prioritization of Criminal Over Civil Counsel and the Discounted Danger of Private Power*, 42 FLA. ST. U. L. REV. 889, 931–34, 931–32 n.289 (2015).

54. Myrick et al., *supra* note 52, at 109.

55. *Id.* at 111.

56. *Id.* at 112.

These findings are consistent with Sandefur's research about the importance of "[r]ace, class, and gender differences in turning to law, in getting the attention of legal institution staff, such as lawyers, clerks who control the dockets of the lower courts, or Supreme Court justices, and in the results of attempts to mobilize law . . . ."[57] The Myrick, Nelson, and Nielsen data also support the analysis that legal scholar and sociologist Sara Greene provides in her recent access to justice study, which found that "[B]lack respondents . . . were less likely than white respondents to have sought, or considered seeking, legal help for their civil legal problems," a difference that was "primarily explained by racial differences in trust in institutions."[58] While Greene, Sandefur, and the Myrick team call for more research on race and access to justice, so far all of their findings suggest that lack of legal representation is a problem more likely to affect Black Americans than white Americans.[59]

The pro se crisis is particularly severe in the context of cases brought by people currently experiencing incarceration. Prison litigation accounts for "over two-thirds . . . of cases involving a pro se litigant."[60] As mentioned above, cases brought by people currently experiencing incarceration "are overwhelmingly pro se."[61] Political scientist Anna Gunderson finds that in 2018, people currently experiencing incarceration "filed over 50,000 lawsuits in the federal district courts to vacate their sentences, challenge the conditions of their confinement, or protest civil rights violations []with the latter two categories comprising approximately 29,000 cases."[62] "[T]hese lawsuits comprise[] about 20 percent of the civil docket in the federal district courts."[63]

Pro se litigants who are currently incarcerated almost never succeed.[64] Often, their petitions are instantly dismissed, sometimes with essentially no judicial review.[65] Gunderson tells the following shocking story:

> In 2007, the chief of central staff for a Louisiana state appellate court died by suicide and revealed an explosive truth about court proceedings in his suicide note: "For probably the past 10 years, not one criminal writ application filed by an inmate pro se has been reviewed by a Judge on the Court. I prepared the ruling on each of those writ applications, and they were signed by a Judge, without so

57. Rebecca L. Sandefur, *Access to Civil Justice and Race, Class, and Gender Inequality*, 34 ANN. REV. SOCIO. 339, 352 (2008).

58. Greene, *supra* note 51, at 1268; *see* Myrick et al., *supra* note 52, at 107–16.

59. *See id.* at 1268–70; Myrick et al., *supra* note 52, at 120–22; Sandefur, *supra* note 47, at 447–59.

60. Gough & Poppe, *Pro Se Litigation*, *supra* note 2, at 576.

61. Schlanger, *Adulthood*, *supra* note 3, at 166.

62. Gunderson, *Troubling* Effects, *supra* note 40, at 604.

63. *Id.*

64. *See id.* at 603–05, 618–24.

65. *See id.*

> much as a glance at the application" . . . . Though this allegation came to light over a decade ago, none of the affected prisoners received any legal relief and in 2019, the U.S. Supreme Court refused to intercede in the legal fate of one affected prisoner housed in that state . . . .[66]

For Gunderson, this story "is emblematic of larger and more troubling trends in inmate litigation in state and federal courts."[67] Civil rights scholar Margo Schlanger demonstrates that in 2012 judges terminated 84.9 percent of prison civil rights cases before trial.[68] In 90.9 percent of the remaining cases, the pro se litigant lost at trial.[69] Controlling for many other case characteristics, Gunderson finds that, in the context of prison litigation, "filing without the aid of an attorney is associated with a lower likelihood of a favorable or likely favorable judgment for the plaintiff and a higher likelihood that a case will be dismissed."[70] She finds this effect across the judicial political divide.[71] In other words, "all judges, regardless of party, tend to rule against the most disadvantaged subset of an already disadvantaged group, prisoners."[72]

The fact that so many currently incarcerated people proceed pro se and then lose their cases, or may not even be able to move forward with their cases, is particularly striking in regard to this country's racialized mass incarceration catastrophe. As legal scholar Dorothy Roberts writes in her now-famous "Foreword" to the *Harvard Law Review* issue on prison abolition: "The United States stands out from all nations on Earth for its reliance on caging human beings."[73] She documents that "[i]n the last forty years, the U.S. incarcerated population exploded from about 500,000 to more than two million."[74] What is more, she finds that "[m]ost people sentenced to prison in the United States today are from politically marginalized groups—poor, [B]lack, and [B]rown."[75] In fact, "[n]ot only are [B]lack people five times as likely to be incarcerated as white people, but also the lifetime probability of incarceration for black boys born in 2001 is estimated to be thirty-two percent compared to six percent for white boys," and "[B]lack women are twice as likely as white women to be behind bars."[76] When poor, Black, and Brown people experiencing incarceration sue to enforce their civil rights, they likely do so pro se, and as a result, face extremely long odds.

---

66. *Id.* at 603 (emphasis removed and citations omitted).
67. *Id.*
68. Schlanger, *Adulthood*, *supra* note 3, at 164–65 tbls.3 & 4.
69. *Id.*
70. Gunderson, *Troubling Effects*, *supra* note 40, at 605.
71. *Id.* at 603–05, 618–24.
72. *Id.* at 605.
73. Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 12 (2019).
74. *Id.*
75. *Id.* at 13.
76. *Id.* (footnote omitted).

B. PRO SE LITIGANT LOSSES

The number of litigants appearing without lawyers becomes a crisis in large part because of the enormous disadvantage pro se status brings with it. As legal scholars Victor Quintanilla, Rachel Allen, and Edward Hirt put it, "[w]hen claimants press their claims without counsel, they fail at virtually every stage of civil litigation and overwhelmingly fail to obtain meaningful access to justice."[77]

"In September 2017, Judge Richard Posner abruptly resigned from the Seventh Circuit" because of the overwhelming difficulties pro se litigants faced there.[78] Posner wrote that a party appearing without a lawyer

> rarely engages the sympathy of [his] judicial colleagues, or of their law clerks or of the staff attorneys. Sometimes the pro se prevails on appeal, yet often to prevail is merely to delay defeat until the case is remanded to the district court or until a subsequent appeal by the pro [se party] from defeat on remand.[79]

As Posner suggests, pro se parties are particularly likely to lose. In her meta-level analysis of existing scholarship on the pro se experience, Sandefur finds that "on average, lawyer-represented people are more likely to win than are unrepresented people in every study."[80] Her "meta-analysis of twelve studies revealed that securing legal representation increased the likelihood of receiving a favorable outcome anywhere between 1.19 times to *13.79* times compared to the likelihood of receiving a favorable outcome when *pro se*."[81]

In a similar review of the evidence, legal scholars Emily Taylor Poppe and Jeffrey Rachlinski "conclude that the evidence strongly supports the conclusion that representation benefits clients."[82] "The vast majority of the studies provide evidence that represented parties obtain more favorable outcomes than

---

77. Victor D. Quintanilla, Rachel A. Allen & Edward R. Hirt, *The Signaling Effect of Pro Se Status*, 42 LAW & SOC. INQUIRY 1091, 1091 (2017).

78. Mitchell Levy, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. CHI. L. REV. 1819, 1820–22 (2018) (citing David Lat, *The Backstory Behind Judge Richard Posner's Retirement*, ABOVE THE L. (Sept. 7, 2017, 1:44 PM), https://abovethelaw.com/2017/09/the-backstory-behind-judge-richard-posners-retirement [https://perma.cc/A7PB-4PFQ]) (finding that "a wide range of reforms undertaken by federal district courts have not significantly impacted case outcomes for pro se litigants")).

79. RICHARD A. POSNER, REFORMING THE FEDERAL JUDICIARY: MY FORMER COURT NEEDS TO OVERHAUL ITS STAFF ATTORNEY PROGRAM AND BEGIN TELEVISING ITS ORAL ARGUMENTS 135 (2017).

80. Sandefur, *The Impact of Counsel*, *supra* note 21, at 69.

81. Quintanilla et al., *supra* note 77, at 1092 (citing Sandefur, *The Impact of Counsel*, *supra* note 21, at 70) (emphasis added); *see also* Seron et al., *supra* note 21, at 423–29 (explaining the findings of a randomized controlled trial in which litigants in New York's housing court were randomly assigned lawyers); Schoenholtz & Jacobs, *supra* note 21, at 739–45, 765–66 (examining disparities in outcomes between represented and unrepresented litigants in immigration court).

82. Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881, 885 (2016).

unrepresented parties . . . ."[83] These two researchers find the effect to be particularly notable in certain areas of the law, including housing,[84] employment,[85] family,[86] small claims,[87] tax,[88] bankruptcy,[89] and torts.[90] Stephan Landsman similarly reports that in "[p]erhaps the best snapshot of district court pro se litigation, . . . which analyzed 1993 San Francisco filings in the Northern District of California. . . . Pro se litigants won only 3.5 percent of their cases . . . ."[91] To take yet another example, a team of researchers examining unemployment appeals found that "[c]laimants for whom a representative appears win a significantly greater amount of the time when no representative appears for the other party, 90.5%, as compared to when representation appearance is balanced, 71.5%."[92]

Many pro se cases never even make it to the point at which a court would rule on the merits of their claims. Sela reports that, "[s]tudies show that well over half of the cases involving [a self-represented litigant] are dismissed sua sponte on the court's motion or upon a motion to dismiss filed by the opposing party, most commonly due to failure to state a claim."[93] Like the scholars cited above, Sela also finds that "[self-represented litigants] who manage to advance further in the process tend to fare worse than represented parties."[94]

Experimental evidence further supports the conclusion of these mostly quantitative and observational studies. In one experiment, a team of researchers randomly assigned counsel to unrepresented tenants who were awaiting hearings in landlord-tenant cases in New York.[95] The study found that represented claimants were substantially more likely than pro se tenants to retain possession of their apartments.[96] Other experimental researchers

83. *Id.*

84. *Id.* at 909–10.

85. *Id.* at 919–22.

86. *Id.* at 922–26.

87. *Id.* at 926–28.

88. *Id.* at 928–30.

89. *Id.* at 930–32.

90. *Id.* at 932–33.

91. Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 442 (2009) (citing Park, *supra* note 21, at 821–35).

92. Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *Lawyers, Power, and Strategic Expertise*, 93 DENV. L. REV. 469, 488 (2016).

93. Sela, *Streamlining Justice*, *supra* note 16, at 337.

94. *Id.*

95. Seron et al., *supra* note 21, at 420–26.

96. *Id.* at 424–29 (finding that represented parties were evicted in 24.1 percent of cases and pro se parties were evicted in 43.5 percent of cases).

investigating landlord-tenant court[97] likewise found large differences between the outcomes for unrepresented and represented litigants.[98]

One of the most recent studies of pro se success rates focuses specifically on the many pro se cases in which the plaintiff is currently incarcerated. Pro se parties filing from prison "[were] significantly less likely to receive a favorable or likely favorable judgment and are significantly more likely to have their cases dismissed than those who file with the aid of an attorney."[99] "This effect," Anna Gunderson found, "is independent of ideology, that pro se plaintiffs are disadvantaged regardless of which judge is hearing the case."[100] For Gunderson, her evidence "is suggestive . . . of the incredible challenges the disadvantaged face in our legal system and fits with recent psychological research that judges, attorneys, and the public alike are skeptical of pro se claimants regardless of the quality of their legal claims."[101]

C. Reasons Pro Se Litigants Fare Worse

Why do pro se litigants face such long odds in court? Part of the problem is legal rules themselves. Others lie at the intersection of legal and social factors and derive from the particularly inhospitable environment that these factors conspire to create. This Part will first discuss the formal legal obstacles pro se parties face, then turn to sociolegal hurdles.

1. Legal Reasons

The law itself places significant barriers in the way of pro se litigants. Procedural legal rules often stymie pro se efforts to present their cases, and doctrine restricts the circumstances in which courts appoint lawyers to assist unrepresented parties.[102] In addition, federal legislation concerning lawsuits filed from prison imposes a particularly harsh legal regime on a category which, as described above, includes many pro se parties.[103]

The rules governing federal court jurisdiction keep pro se litigants out of court. Recent procedural legal developments "may disproportionately affect [aspiring] pro se litigants,"[104] many of whom are "diverted into a 'private legal order' comprising internal grievance procedures and alternative dispute resolution forums."[105] Should would-be pro se litigants actually manage to get

97. *See* Greiner et al., *supra* note 21, at 904–09.

98. *Id.* at 908–09.

99. Gunderson, *Troubling Effects*, *supra* note 40, at 618.

100. *Id.*

101. *Id.* at 605 (citations omitted).

102. Gough & Poppe, *Pro Se Litigation*, *supra* note 2, at 568–82; Gunderson, *Troubling Effects*, *supra* note 40, at 605–23.

103. Gough & Poppe, *Pro Se Litigation*, *supra* note 2, at 568–82; Gunderson, *Troubling Effects*, *supra* note 40, at 605–23.

104. Gough & Poppe, *Pro Se Litigation*, *supra* note 2, at 570 (citations omitted).

105. *Id.* (citations omitted).

to court, they encounter there an increasing number of "procedural obstacles that make it more difficult for them to pursue their claims, including increased pleading requirements, limitations on the scope of discovery, increased willingness to grant motions for summary judgment, and narrowed grounds for establishing personal jurisdiction."[106] For instance, landmark civil procedure cases *Bell Atlantic Corp. v. Twombly*[107] and *Ashcroft v. Iqbal*[108] raised the standard for pleading a case.[109] Legal economist William Hubbard has found that those cases had a significant effect on case outcomes for pro se plaintiffs.[110] Similarly, civil procedure scholar A. Benjamin Spencer has written about how amount-in-controversy rules restrict access by poorer litigants to federal court.[111]

Even non-jurisdictional procedural rules can be problematic for pro se litigants. In a recent comprehensive study of the procedural rules that apply to pro se litigants in courts across the country, poverty law and civil procedure scholar Andrew Hammond documents the various "taxes" that apply to pro se litigants.[112] Even when courts attempt to lift burdens for the unrepresented, unfortunate unintended consequences may follow.[113]

---

106. *Id.* (citations omitted).

107. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556–59 (2007).

108. Ashcroft v. Iqbal, 556 U.S. 662, 679–80 (2009).

109. Under *Iqbal*, in federal civil actions, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570). This standard replaced a more plaintiff-friendly rule where dismissal was only appropriate if "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45–46 (1957). For an access to justice critique of the *Twombly* and *Iqbal* pleading regime, see Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 331–47 (2013).

110. William H. J. Hubbard, *The Effects of* Twombly *and* Iqbal, 14 J. EMPIRICAL LEGAL STUD. 474, 494–509 (2017).

111. A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 358–66 (2010). These rules require that cases brought under the federal courts' diversity jurisdiction concern a certain amount of money. 28 U.S.C. § 1332(a) (2018) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . .").

112. Andrew Hammond, *The Federal Rules of Pro Se Procedure*, 90 FORDHAM L. REV. 2689, 2706 (2022). Hammond also identifies a number of "subsidies" that courts offer for pro se litigants. *Id.* at 2706–09. However, as he notes, even many of the pro-se-specific policies designed as subsidies in fact impose burdens on pro se litigants or introduce particular uncertainty or vagueness. *Id.* For example, he discusses the well-known requirement that courts construe pro se filings liberally. *Id.* at 2710–12. However, local rules have discretion to incorporate this rule as they wish, sometimes in ways not favorable to the pro se party. *Id.* at 2705–21. Hammond discusses how "[t]he District of Nebraska gives the individual judge discretion to consider a pro se litigant's amended pleading as supplemental to . . . the original pleading, unless stated otherwise." *Id.* at 2711. In one case, a pro se litigant attempted to substitute an amended complaint for an earlier complaint, but the rule allowed the court to treat the amended complaint as supplemental and continue relying on the original complaint, against the wishes of the pro se party. *Id.*

113. *Id.* at 2708–10.

For instance, Hammond documents that "[t]he most common rules related to pro se litigants are ones that exempt them from various filing requirements."[114] His research revealed that many districts currently proceed on the view that pro se parties may not have access to the federal court's electronic filing system.[115] Therefore, they "impose a variety of rules premised on this lack of access."[116] For example, "[m]any districts explicitly require pro se parties to file paper documents with the Clerk of the Court."[117] Some courts will exempt pro se parties from the paper-document rule and allow them to e-file, as represented parties usually do.[118] However, some courts refuse to allow that.[119] In one case Hammond describes, the Eastern District of North Carolina denied a pro se plaintiff's request to access electronic filing because he had already demonstrated an ability to file using paper and "did not adequately explain how electronic access would accommodate his mental impairment."[120] Further, most districts require pro se parties to file their paper documents using specific court-supplied forms, and specific penalties attach to pro se parties who fail to comply.[121] For example, in the Western District of Kentucky, if a pro se party fails to use the correct form in a timely manner, the court can dismiss the case.[122]

In addition, judges do not have a duty to help puzzled pro se litigants who appear in their courts. The Supreme Court has written:

> District judges have no obligation to act as counsel or paralegal to *pro se* litigants. . . . Explaining the details of federal habeas procedure and calculating statutes of limitations are tasks normally and properly performed by trained counsel as a matter of course. Requiring district courts to advise a *pro se* litigant in such a manner would undermine district judges' role as impartial decisionmakers.[123]

Moreover, the Supreme Court has held that the legislation authorizing courts to request counsel for unrepresented parties does not allow courts to require lawyers to actually take cases pro bono.[124] As a result, as this Article

114. *Id.* at 2708.
115. *Id.* at 2704–21.
116. *Id.* at 2708.
117. *Id.*
118. *Id.* at 2708–09.
119. *Id.*
120. *Id.* at 2709.
121. *Id.* at 2709–10.
122. *Id.*
123. Pliler v. Ford, 542 U.S. 225, 231 (2004); *see also* Jona Goldschmidt, *Required, Permissible, and Impermissible Forms of Federal Judicial Assistance to Self-Represented Litigants: Toward Establishment of a Judicial Duty of Reasonable Assistance*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 217, 226 (2019) (discussing *Pliler* and the "federal courts' refusal to assist or provide procedural information to pro se litigants").
124. Mallard v. U.S. Dist. Ct. for S. Dist. of Iowa, 490 U.S. 296, 310 (1989).

will discuss in Part III, judges rarely work to find and appoint lawyers for pro se litigants.[125]

Incarcerated plaintiffs, a significant part of the pro se docket, face additional obstacles to get into court under federal law. For one, in 1995, Congress passed the Prison Litigation Reform Act of 1995 ("PLRA"),[126] which constrains civil rights cases brought by people currently incarcerated.[127] "[T]he PLRA sets a number of limits on institutional-reform lawsuits targeting prisons."[128] The PLRA forces inmates challenging prison conditions to exhaust all relevant administrative procedures before filing in court.[129] The legislation also requires courts to screen upfront all complaints that people currently incarcerated have filed and then to dismiss these cases without allowing any of the standard litigation proceedings if "the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief."[130] The PLRA also forbids people who are currently incarcerated from suing "for mental or emotional injury suffered while in custody without a prior showing of physical injury or . . . a sexual act."[131] As legal scholar Margo Schlanger puts it, "as was evident nearly immediately, the PLRA undermined prisoners' ability to bring, settle, and win lawsuits."[132]

In addition, for litigants to proceed *in forma pauperis* (that is, as indigent and, therefore, as subject to looser filing-fee rules), as many pro se litigants do, the PLRA requires them to submit copies of their prison bank accounts for the past six months and then has the court withdraw fees directly from the accounts.[133] This rule imposes substantial costs on people currently incarcerated who rely on these bank accounts, which are often supplied by impoverished family and friends, to cover basic necessities. The PLRA also imposes a limit on the number of times (three) a litigant may file *in forma*

125. *See* Sarah B. Schnorrenberg, *Mandating Justice:* Naranjo v. Thompson *as a Solution for Unequal Access to Representation*, 50 COLUM. HUM. RTS. L. REV. 260, 273 n.78 (2019) (describing how, in most circuits, courts take the position that they have no authority of any kind to compel representation and how judges may otherwise lack resources to help unrepresented parties); *see also* POSNER, *supra* note 79, at 70–75 (lamenting how rarely judges on the Seventh Circuit attempt to recruit counsel in pro bono cases).

126. 42 U.S.C. § 1997e. For background on the sociopolitical context and legislative history of the PLRA see Schlanger, *Inmate Litigation*, *supra* note 3, at 1565–633.

127. *See* Catherine T. Struve, *The Federal Rules of Inmate Appeals*, 50 ARIZ. ST. L.J. 247, 293–94 (2018) (providing an excellent overview of all the procedural rules relevant to cases filed by people who are currently incarcerated).

128. *Id.* at 294.

129. 42 U.S.C. § 1997e(a).

130. *Id.* § 1997e(c)(1).

131. *Id.* § 1997e(e).

132. Schlanger, *Adulthood*, *supra* note 3, at 153.

133. Struve, *supra* note 127, at 296–99.

pauperis.[134] Further, for all of the litigation it covers, the PLRA substantially limits the availability of attorneys' fees[135] and damages.[136] The enacting legislation also prevents federally funded legal aid organizations from taking on cases from prison.[137]

Unsurprisingly, in her study of the topic, Schlanger found that the PLRA has in fact had a substantial adverse impact on cases and outcomes for people who are currently incarcerated, the vast majority of whom do not have lawyers.[138] She writes that "[o]ne might expect that the drastic pruning of the prisoner civil rights docket that occurred beginning in 1996 would tilt the docket toward higher quality cases—so that prisoner success rates would go up."[139] Instead, "the PLRA not only made . . . civil rights cases harder [for people currently incarcerated, normally proceeding pro se] to bring . . . but also made them harder to win."[140]

Cases are harder to win, Schlanger argues, because, after the passage of the PLRA, cases brought by people who are currently incarcerated often "are thrown out of court for failure to properly complete often-complicated grievance procedures."[141] Further, in prison cases, "the government defendants are winning more cases pretrial, settling fewer matters, and going to trial less often."[142] Notably, "[t]hose settlements that do occur are harder fought[]"[143] and "they are finalized later in the litigation process."[144] Overall, following the

134. 28 U.S.C. § 1915(g) ("In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.").

135. 42 U.S.C. § 1997e(d)(3); *see also* Schlanger, *Inmate Litigation*, *supra* note 3, at 1631 (discussing the limitations on attorney fees). *See also generally*, Eleanor Umphres, *150% Wrong: The Prison Litigation Reform Act and Attorney's Fees*, 56 AM. CRIM. L. REV. 261 (2019) (arguing that the legislation as currently interpreted deters lawyers from taking cases from prison and arguing for a different understanding of the relevant provision).

136. 42 U.S.C. § 1997e(d)(2).

137. *See* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104–134, § 504(a)(15), 110 Stat. 1321, 1321–55. Schlanger describes the effect of this provision: "Even though legal services offices used to handle vastly more inmate litigation than in more recent years, the new restriction was by no means merely symbolic. In 1995, recipient offices recorded more than 10,000 inmate matters—around a tenth of which involved representation that ended with a settlement or an agency or court decision." Schlanger, *Inmate Litigation*, *supra* note 3, at 1632.

138. *See* Schlanger, *Inmate Litigation*, *supra* note 3, at 1633–90.

139. Schlanger, *Adulthood*, *supra* note 3, at 162.

140. *Id.* (internal citation marks omitted).

141. *Id.*

142. *Id.* at 163.

143. *Id.*

144. *Id.*

passage of the PLRA, pro se litigants who are currently incarcerated "are . . . winning and settling less often, and losing outright more often."[145]

A corresponding federal bill, the Antiterrorism and Effective Death Penalty Act ("AEDPA"), applies to the major category of prison litigation that the PLRA does not cover: habeas petitions.[146] Among other things, "AEDPA sets a statute of limitations for state-prisoner habeas petitions and for federal-prisoner proceedings"[147] and "requires screening by the courts of appeals for 'second or successive' habeas or § 2255 proceedings, under a newly-heightened standard."[148] AEDPA also restricts federal habeas relief for claims arising from prisons that have been "adjudicated on the merits in State court proceedings"[149] and bans relief altogether for people currently incarcerated in state prisons who claim ineffective assistance of counsel.[150] In addition, under AEDPA people currently incarcerated in state prisons may only have evidentiary hearings in limited circumstances.[151]

2. Sociolegal Reasons

In addition to the many legal obstacles that may depress the number of pro se successes, there are sociolegal impediments also at work.

For one, pro se litigants lack the substantive expertise that lawyers do.[152] Legal scholars Colleen Shanahan, Anna Carpenter, and Alyx Mark have observed that "[s]ubstantive legal knowledge [includes] legal theories, common law rules, statutes, doctrine, case law, and other content-based knowledge. . . . [L]awyers draw on this knowledge to determine what law is relevant to a given client's case."[153] Without this knowledge, the unrepresented often have difficulty stating their claims in legal terms and addressing adverse legal arguments.[154]

In addition, pro se litigants do not have the procedural expertise that lawyers possess. Sandefur describes the importance of this type of expertise: "Once constructed as legal, problems can be acted on through formal legal processes, which involve forms, motions, pleadings, and hearings that must be completed accurately."[155] Often, pro se litigants are not familiar with these

145. *Id.*
146. Struve, *supra* note 127, at 292–96.
147. *Id.* at 293 (citations omitted).
148. Struve, *supra* note 127, at 296–99 (quoting 28 U.S.C. § 2254(b)); *see* 28 U.S.C. § 2254(b) (2012).
149. *Id.* § 2254(d).
150. *Id.* § 2254(i).
151. *Id.* § 2254(e)(2).
152. Sandefur, *Elements of Professional Expertise*, *supra* note 21, at 911.
153. Shanahan et al., *supra* note 92, at 490 (footnotes omitted).
154. Sandefur, *Elements of Professional Expertise*, *supra* note 21, at 924–25.
155. *Id.* at 911.

procedures.[156] These research findings dovetail with Sandefur's finding that lawyers have especially large effects on case outcomes in areas of law that are "procedurally complex."[157]

Then, pro se parties do not have the strategic expertise that lawyers do.[158] Strategic expertise consists of knowledge of the argumentative techniques that may appeal to legal decisionmakers as well as of what access-to-justice scholars call "relational expertise," [159] or the fact that lawyers often have built positive relationships with judges, with lawyers on the opposing side, and with other court players.[160] In contrast, pro se litigants often appear in courtrooms without knowing the relevant actors or their preferences.[161]

Further, pro se parties may have cases that judges, correctly or incorrectly, perceive as less legitimate.[162] Judges may view a lawyer's involvement as a positive signal about the case,[163] believing that lawyers select cases that are particularly likely to have merit.[164] Additionally, as Sandefur's work (described above) suggested, a lawyer's presence may make a judge more likely to deem a litigant more credible, even putting aside the quality of the legal arguments.[165]

While a full examination of this topic is beyond the scope of this article, the sociolegal barriers to pro se success are often complicated and compounded by class and race barriers to justice. As noted above, pro se litigants are more likely to be members of marginalized groups.[166] Members of disadvantaged groups face their own unique barriers to accessing the legal system.[167] Existing

156. *Id.* at 910–11.

157. Sandefur, *The Impact of Counsel*, *supra* note 21, at 73 ("The figure reveals a striking finding: [T]he observed difference is much greater for cases in those fields of law that lawyers rate as involving greater procedural complexity. This is true even when such cases are heard in simplified forums such as tribunals and small claims courts.").

158. *See* Shanahan et al., *supra* note 92, at 510.

159. Sandefur, *Elements of Professional Expertise*, *supra* note 21, at 909–11 ("In some instances, lawyers appear to affect outcomes because their presence on a case acts as an endorsement of its merits, and their presence in a courtroom encourages the court to follow its own rules. In these instances, lawyers' relevant expertise is less substantive (their knowledge of the law) than relational (their relationship to the court).").

160. *See* Sandefur, *The Impact of Counsel*, *supra* note 21, at 76–78 (describing what happens when a potential litigant has a case that is sympathetic on the facts but lacks legal merit).

161. *Id.*

162. *See* Sandefur, *Elements of Professional Expertise*, *supra* note 21, at 924–25.

163. *Id.* at 925.

164. *Id.* at 924–25.

165. *See* Sandefur, *The Impact of Counsel*, *supra* note 21, at 61 (discussing how merely having attorney-representation makes an impact on litigation regardless of the claim's legal merits).

166. *See supra* notes 39–76 and accompanying text.

167. *See generally* Greene, *supra* note 51 (examining how race and class affect interactions with the civil justice system); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012) (discussing how implicit bias can impact the outcome of cases); Avital Mentovich, J.J. Prescott & Orna Rabinovich-Einy, *Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality*, 71 ALA. L. REV. 893 (2020) (summarizing disparities in outcomes across age, gender, and race lines).

inequalities across race, gender, and class lines probably exacerbate the challenges faced by a pro se litigant.

II. DISTRIBUTIVE PRECEDENT

Alexander Hamilton wrote in Federalist 78 that "[i]t is indispensable" for courts to be "bound down by . . . precedent[]."[168] Judicial precedents are one of the main sources of U.S. law. A judicial precedent is "a decided case that furnishes a basis for determining later cases involving similar facts or issues."[169] It "speaks . . . with authority; it is not merely evidence of the law but a source of it; and the courts are bound to follow the law that is so established."[170]

As a practical matter, lawyers are the people who generally provide access to precedent. Knowledge of precedent is a major piece of their professional expertise. Much of law school is spent teaching would-be lawyers about important precedents.[171] Precedents become a major part of lawyers' professional knowledge base.[172] No lawyer I know of has committed to memory the thousands of potentially relevant precedents to their cases, so lawyers also regularly rely on expensive subscription-only legal databases to find precedents.[173] These searchable databases, like LexisNexis and Westlaw, have become the primary way of identifying and reading precedents.[174] If a non-lawyer wants to use the databases, the options are to go physically to a law library or to pay the hefty price of a legal search engine.[175] However, even the search engines cannot help inexperienced users know which cases might be relevant and why. As a result, lawyers often serve as precedent's gatekeepers.

Lawyers also litigate with an eye toward creating precedent.[176] While lawyer involvement often benefits the "haves," the well-known strategy of "impact litigation" involves public interest lawyers, sometimes working with clinics at law schools, taking on cases likely to generate favorable precedent

168. THE FEDERALIST NO. 78 (Alexander Hamilton).

169. *Precedent*, BLACK'S LAW DICTIONARY (10th ed. 2014).

170. JOHN SALMOND, JURISPRUDENCE 176 (Glanville L. Williams ed., 10th ed. 1947).

171. *See* Shanahan et al., *supra* note 92, at 489–93.

172. *See id.*

173. *See* Merritt E. McAlister, *Missing Decisions*, 169 U. PA. L. REV. 1101, 1103–08 (2021) (discussing how lawyers have come to rely to searchable databases).

174. *See id.*

175. *See Lexis Packages for Online Legal Research*, LEXISNEXIS, https://store.lexisnexis.com/buyonline/purchase [https://perma.cc/MH59-VYDL] (showing the cheapest "small firm" option for all potentially precedential case law for Lexis costs $190/month); *Westlaw Classic Plans and Pricing*, WESTLAW, https://sales.legalsolutions.thomsonreuters.com/en-us/products/westlaw-classic/plans-pricing [https://perma.cc/K8HR-EQPZ] (showing the cheapest Westlaw option costs $194.35/ month.).

175. For a description of this history, see Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 444–69 (2001) (summarizing some of the extensive literature criticizing impact litigation as a tool for social justice).

176. *See* Galanter, *supra* note 17, at 97–107.

for future litigants.[177] For decades, lawyers oriented toward social justice focused on taking on cases likely to reverberate widely as precedents for the have-nots, and in this way, level Galanter's playing field a bit.[178] In this way, lawyers have become essential to both creating and accessing precedent.

Nonetheless, as the law, precedent affects not just lawyers, but anyone obligated to follow the law. In particular, scholars of precedent acknowledge that precedential decisions, often binding, have benefits for members of a society that go beyond any particular case.[179] This is true for a number of reasons. First, precedent provides predictability and consistency.[180] Predictability and consistency help an individual party, but they also help people who will never litigate. In a treatise on precedent, legal scholar Bryan A. Garner asks the reader to "[t]hink of a child's established expectation . . . after years of habituation, that the family will eat dinner at 7:30 p.m. sharp. . . . Reliance on past actions to inform present ones pervades many aspects of our everyday lives."[181]

A second frequently identified benefit of precedent is equality.[182] Legal scholar Nina Varsava cites Benjamin Cardozo on this point: "If a group of cases involves the same point, the parties expect the same decision. . . . If a case was decided against me yesterday when I was a defendant, I shall look for the same judgment today if I am plaintiff."[183] Varsava adds that "[t]he equality justification is often described in terms of comparative or formal justice: [R]egardless of whether people are otherwise treated badly (substantively unjustly), if they are treated equally, then justice in the formal sense is served."[184]

A third benefit of precedent is constraint on judicial power.[185] Precedent prevents judges from deciding cases in any way they want and on any basis. As Garner puts it, "[i]n a democracy, citizens and litigants must have confidence in the judiciary and in the rule of law, which requires that a judge's decisions must not be—and must not seem to be—arbitrary, based on personal preference, or unbounded."[186] A fourth benefit is really not for the litigants but for the courts themselves: legitimacy.[187] As Maggie Gardner humorously

177. *See* Cummings & Eagly, *supra* note 175, at 444–69.

178. *Id.*

179. *See., e.g.*, Gardner, *supra* note 24, at 1633–37.

180. A.L. Goodhart, *Precedent in English and Continental Law*, 50 L.Q. REV. 40, 44–60 (1934).

181. BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 22 (2016).

182. Varsava, *supra* note 30, at 72.

183. *Id.* (citing BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33–34 (2010) (quoting WILLIAM G. MILLER, THE DATA OF JURISPRUDENCE 355 (1903))).

184. *Id.*

185. *Id.* at 75–77.

186. GARNER ET AL., *supra* note 181, at 21.

187. *See id.* at 76–79; Varsava, *supra* note 30, at 78–79.

noted, "this is the 'I am not making this up' use of precedent."[188] Gardner argues that judges often rely even on nonbinding precedent to confer legitimacy.[189]

Given all of the benefits that precedent confers, legal scholar Catherine Albiston has described it "as a public good, socially owned, and with profound social meaning."[190] Similarly, legal scholars William Landes and Richard Posner also treat precedent as a public good.[191] In an effort to model the benefits that precedent produces, Landes and Posner "treat the body of legal precedents created by judicial decisions in prior periods as a capital stock that yields a flow of information services which depreciates over time as new conditions arise that were not foreseen by the framers of the existing precedents."[192] As a result, for Landes and Posner, treating precedents as a productive good suggests that some of it can be particularly valuable. For instance, "in areas of the law that affect more people, legal capital should be relatively more valuable . . . ."[193]

Thinking of precedent as a source of resources raises the question: What about the legal system's least-resourced players? To what extent can they derive any value from precedent? Or is precedent in the same category as e-filing and substantive legal knowledge and procedural expertise: yet another legal advantage that litigation's "haves" are able to hoard?

No, in fact. Precedent is one rare good that the legal system does distribute. As Albiston points out, precedent, unlike almost every other legal resource, is a public good that is socially owned.[194] As a result, some of precedent's value accrues to pro se litigants. As economist and legal scholar Eleanor Wilking points out, as a public good, precedent is non-excludable.[195] For that reason, its initial creators cannot restrict access to it.[196] Instead, its benefits can spread widely and be distributed even to parties without lawyers. How this resource distribution occurs, and the circumstances that facilitate this distribution, are the questions this Article's study addresses.

As a tax and poverty law scholar, I previously carried out an empirical study of Tax Court cases in which pro se litigants won.[197] Anticipating the

188. Gardner, *supra* note 24, at 1634 (quoting Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1950 (2008) (quoting DAVE BARRY, DAVE BARRY IS NOT MAKING THIS UP (1994))).

189. *Id.* at 1634–35; *see also* Schauer, *supra* note 188, at 1948–60.

190. Albiston, *supra* note 20, at 905.

191. *See* Landes & Posner, *supra* note 29, at 264–67.

192. *Id.* at 250–51.

193. *Id.* at 266.

194. Albiston, *supra* note 20, at 905 (citing Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1089 (1984)).

195. Email from Eleanor Wilking to Susannah Tahk (Feb. 23, 2021) (on file with author).

196. Daniel Liberto, *Rival Good*, INVESTOPEDIA (June 1, 2021), https://www.investopedia.com/terms/r/rival_good.asp [https://perma.cc/2BMV-N9W4].

197. Susannah Camic Tahk, *Spillover Tax Precedent*, 2021 WIS. L. REV. 657, 661–67.

results of the current Article,[198] I found that in the majority of the Tax Court cases I analyzed, the precedents that undergirded pro se victories often came from cases in which a previous taxpayer had retained an attorney.[199]

The Tax Court study also found that "procedural issues were the most common" site of these distributive spillovers.[200] This was because low-income taxpayers were particularly likely to be situated in circumstances "procedurally analogous to those of their higher-income counterparts."[201] In other words, the tax situation of a high-income taxpayer would typically diverge in its factual content from situations that pro se taxpayers would ever encounter (for instance, defending a tax shelter worth millions of dollars,).[202] However, the high-income taxpayer's tax problems often matched a low-income person's tax problems in some single procedural way (for instance, reliance on advice from a tax adviser).[203] The high-income taxpayer would retain high-end counsel, who would litigate the question intensively, resulting in favorable precedent on the issue.[204] That precedent would in turn become valuable to low-income pro se litigants.[205]

The Tax Court study naturally prompted the question: To what extent were its findings limited to tax law?[206] In non-tax areas, high-resourced and low-resourced litigants seemed less likely to have procedural problems analogous to one another.[207] The vast majority of U.S. citizens file a tax return and comply with an Internal Revenue Code that applies to them all.[208] The Internal Revenue Code's wide applicability would seem to create singular opportunity for precedent to serve a distributive function.[209] But could precedent play a similar role outside of the tax context?[210] On the basis of the evidence that I will report from the present study, the answer to this question turns out to be yes.

Understanding how precedent is a benefit for pro se litigants is important precisely because they have so few other such benefits. As the literature described in Part II documented exhaustively, very few resources of any kind are available to pro se litigants. The legal system does not have many non-

198. *See id.* at 673–77.

199. *Id.* at 679.

200. *Id.* at 662.

201. *Id.*

202. *Id.* at 659–62, 712–17.

203. *Id.* at 660, 690.

204. *Id.* at 659–62.

205. *Id.* at 660–67.

206. *Id.* at 715.

207. *Id.* at 716.

208. *See Returns Filed, Taxes Collected & Refunds Issued*, IRS (May 26, 2022), https://www.irs.gov/statistics/returns-filed-taxes-collected-and-refunds-issued [https://perma.cc/K96V-B8F6] (showing the number of tax returns filed in 2021).

209. Tahk, *supra* note 197, at 715.

210. *Id.* at 717.

excludable goods that might give pro se litigants a ledge on which to stand. Precedent is one.

A. RESEARCH DESIGN

To examine these questions, I conducted a two-phase study during which I constructed two original datasets. In the first phase, I created a dataset ("Successes Dataset") of all cases from January to August[211] of 2020,[212] in state and federal court, in which a pro se litigant experienced some form of success: making it past a judge-administered screening process, defeating a motion to dismiss or a move for summary judgement, winning a case on any issue, or outright. The states included—California, Georgia, Illinois, Massachusetts, Kansas, Pennsylvania, Texas, Washington, and Wisconsin—were selected because they vary in geography, population, and demographics. I wanted variety by circuits, as well as to have a few of the sample states share the same circuit, to reveal variation both within and across circuits. For each of these 568 pro se success decisions, my research assistants and I hand-coded the following variables: the state, the main issue in the case, the number of citations, and all of the precedents the case cited favorably. As far as I know, this is the first dataset of pro se successes.

In the second phase of the project, I unpacked and systematically analyzed the list of precedents identified in the first phase of the research. For this purpose, I created a second dataset ("Precedents Dataset"). I then reviewed each one of these 619 precedents individually. Within this second dataset, I hand-coded a number of variables for each precedent. These variables included: the parties involved in the case (individual experiencing incarceration vs. individual not experiencing incarceration vs. business vs. nonprofit vs. governmental entity); presence of counsel; type of counsel, if known (paid vs. pro bono vs. government-employed vs. public interest vs. clinic); state in which case occurred; year; type of law; number of citations to the precedent overall; number of citations from the pro se cases in the Successes Dataset; the issue(s) for which the case was cited by the pro se successes (here coding these issues as binary variable for whether it was

211. The data collection stopped in August, because a team of summer research assistants collected it, and there is no reason to think that the cases from the final four months of the year would differ in any way from their earlier counterparts in ways that matter for this study. As a check, I was able to have two research assistants work through fall 2020 and spring 2021 and gather data from their states (Illinois and Georgia) that went back through approximately 2016. I reviewed all of the 2019 cases to see if they revealed any patterns different from the ones observed in 2020, and they did not (data on file with author).

212. I chose 2020 to have the most recent data available. The one way in which 2020 differed from years before it was of course the COVID-19 pandemic. However, these decisions are almost entirely from motions filed, or cases litigated, before the pandemic erupted. Aside from potentially reducing the overall volume of issued decisions as judges and their staffs faced health and family challenges, the pandemic would not have any reason to affect the sources of variation in the data that I am studying here.

substantive versus procedural); and, finally, a written description of the issue. The Precedents Database is the first effort not only to identify but also to gather data on the precedents that pro se litigants use.

B. RESEARCH FINDINGS

In this subpart, I will discuss the patterns in the data and describe some illustrative cases. Taken together, the data document the Article's core argument: Precedent distributes resources from parties who have lawyers to parties who do not.

Of the 619 precedents on which the pro se litigants relied, 68.9 percent, or 427 cases, were "distributive precedents," as I have defined them, as *lawyered precedents on which at least one pro se litigant has relied for a favorable proposition of law.*[213] That is, pro se litigants more often succeed based on earlier cases in which both sides had lawyers. In this way, precedent distributes to pro se parties resources they otherwise would not have had, such as substantive and procedural expertise, ability and practice in argument, and legal reputation.

Several factors may explain this key finding that pro se parties need lawyered precedent to win. For one, as documented above, pro se parties do not have very much success, so the universe of pro se decisions that can help future unrepresented parties is small. For another, lawyers often brief issues and in this way provide judges with a guide to helpful case law that in turn makes opinions longer, full of useful citations, and thereby of greater assistance to judges writing opinions in pro se cases. After all, in pro se cases, the party without a lawyer likely did not write an extended brief packed with relevant case law. As a result, judges and their clerks have to base any potentially favorable opinions on external precedent rather than on party submissions. Relatedly, in cases where both parties do have lawyers, opinion writers generally have to consider arguments from both sides and reflect on how to counter the arguments from the side that is going to lose. When both sides have lawyers, decisionmakers will not simply reject the case out of hand because one side was pro se. This sort of weighing of the precedent may lead clerks and judges to write more thoughtful, well-reasoned opinions, perhaps even with more of the pithy turns of phrase that are so easy to cite later. These well-considered opinions then may make for more useful precedent for later deciders.

Consider the scenario of clerk or judge drafting an opinion in a pro se case makes concrete some of the resources that precedent distributes. The opinion-writer first scans her own base of legal knowledge, perhaps with the assistance of legal search engines, to identify any cases in which a litigant won on the precise issue the pro se litigant raised. As discussed above, lawyers add value for their clients in part because their presence on a case makes the

213. *See supra* Section II.A.

parties they represent more likely to win.[214] When a decisionmaker later rules for a pro se litigant because of that win, the pro se litigant shares the value that comes from the mere fact of representation.

The opinion-writer then further probes her store of expertise, again with the aid of the search engines, to look for favorable precedential language that might support the pro se litigant's cause. Any such words the opinion-writer finds may even have wound their way into precedent from original lawyer submissions. Even if no lawyer wrote the pro-se-favorable precedential phrases themselves, the lawyer on the precedential case likely did legal research and may have orally argued in support of the pro-se-favorable position. If the lawyer was paid, those hours of research and advocacy may have cost hundreds or even thousands of dollars. The research and advocacy may have influenced the earlier decisionmaker to write something that helped her client. Then, when the clerk or judge uses that language in the later pro se case, the value of that research and advocacy also accrue to the pro se litigant.

My datasets revealed several patterns that characterize distributive precedents. Here, my analysis here is purely descriptive. It does not undertake the statistical testing that would explain why the patterns exhibited in pro se successes and the workings of distributive precedents take the forms they do. Nevertheless, these observed patterns provide an important first look on how pro se litigants realize the distributed value of precedent.

1. The Areas of Law of Distributive Precedent

First, the distributive precedents came from many different areas of law. The most common area was law dealing with people who are currently incarcerated (153 distributive precedents), but many distributive precedents also concerned civil procedure issues (ninety-six). Other areas that gave rise to multiple distributive precedents were public benefits law (twenty-eight), Fourth Amendment law (twenty-six), employment law (eighteen), substantive criminal law (sixteen), criminal procedure (fifteen), family law (eleven), disability rights law (eight), miscellaneous constitutional law (eight), torts (six), contracts (five), immigration law (five), business organizations law (four), open records law (four), consumer protection law (four), bankruptcy law (three), Employee Retirement Income Security Act ("ERISA") law (three), and housing law (two).

214. *See* Part I. Recall that the literature cited above discusses some of the components of that lawyerly value. The value of a lawyer to a case includes her very presence, both as a signaling device and as a means to avoid pro-se-specific legal obstacles, which in turn derives from the value of her law degree. The value also includes the base of substantive, relational, and procedural expertise she has acquired.

i. Prisoner's Rights

A representative distributive precedent dealing with a person who was then incarcerated is *Gomez v. Randle*.[215] Raul Gomez, who was then incarcerated in Illinois state prison, alleged the following facts[216]: He was waiting to enter his cell at Stateville Correctional Center when two nearby people, who were also then incarcerated in the facility, started to fight.[217] An officer fired shots at the fighters, but the officer hit Gomez instead,[218] wounding Gomez's arm.[219] Gomez asked several times for medical help or supplies for his bleeding wound, but prison officials refused, and Gomez filed a grievance.[220] Several weeks later, a prison investigator stopped by Gomez's cell and told Gomez that if he failed to drop the grievance, prison officials would transfer him to a facility called Menard Correctional, where he had "known enemies."[221] Gomez eventually agreed to drop the grievance, but a different officer told him it was "too late."[222] So Gomez was transferred to Menard with no other reason given.[223] Gomez then sued prison officials for, among other things, retaliating against him with the transfer in violation of his First Amendment rights.[224] The district court ruled against Gomez on all counts and did not even address the First Amendment issue.[225] Gomez appealed, and at this point he somehow acquired representation from one of Chicago's large firms, McDermott, Will & Emery.[226] His lead lawyer, a white collar defense lawyer named Kirk Watkins, argued the case before the Seventh Circuit,[227] where a three-judge panel ruled that "Gomez easily satisfie[d] all three prongs" of the legal standard for a First Amendment retaliation claim.[228]

Relying on *Gomez v. Randle*, an Illinois district court subsequently allowed Travis Weston, a pro se litigant also incarcerated at Menard, to proceed in

215. Gomez v. Randle, 680 F.3d 859, 861–64 (7th Cir. 2012).

216. *Id.* at 861.

217. *Id.* at 861–62.

218. *Id.* at 862.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *See id.* at 862–63.

224. *Id.* at 863.

225. *Id.* at 863–64.

226. Appellant's Amended Docketing Statement at 1, Gomez v. Randle, 680 F.3d 859 (7th Cir. 2012) (No. 11-02962); *see also McDermott Dominates Vault 2022 Rankings with Top Spots Across Categories*, MCDERMOTT, WILL & EMERY (July 29, 2021), https://www.mwe.com/media/mcdermott-dominates-vault-2022-rankings-with-top-spots-across-categories [https://perma.cc/77MP-7K79] (describing some of the programs and their rankings at McDermott, Will, & Emery).

227. Oral Argument at 0:04, Gomez v. Randle, 680 F.3d 859 (7th Cir. 2012) (No. 11-2962), http://media.ca7.uscourts.gov/sound/2012/migrated.orig.11-2962_04_03_2012.mp3 [https://perma.cc/78WM-TN4U].

228. *Gomez*, 680 F.3d at 866.

2020 in a retaliation claim against prison officials.[229] According to Weston, he had filed a complaint against prison employees for violating his religious freedom and then lost his prison job for the stated reason that he had sued a prison official.[230] Also allowed to proceed in 2020 was Reginald Jones, also appearing pro se, who, at a different Illinois prison, filed a grievance alleging substandard medical care.[231] Afterwards, a prison official told Jones that, in part due to the grievance, guards hired a gang member to kill Jones's family—and that the murder had actually happened.[232] It had not.[233] Under *Gomez*, Jones, too, could proceed on a retaliation claim,[234] as could five other pro se litigants in the early and middle of 2020.[235]

ii. Employment Law

Shifting beyond the prison context, fairly representative cases of distributive precedents appeared in employment law cases. For instance, in a 2012 case, Jamie Lichtenstein had worked in psychiatry at the University of Pittsburgh Medical Center.[236] She requested leave to take care of her mother who was undergoing an extended hospitalization; soon after, Lichtenstein was fired.[237] She hired a large multistate law firm[238] to represent her on a number of claims against the medical center, in particular that she had taken medical leave under the Family and Medical Leave Act and that, as a result, the university had fired her, in an action that would violate the federal legislation.[239] The Western District of Pennsylvania granted the university's motion for summary judgment,[240] but the Third Circuit reversed, finding that Lichtenstein had provided sufficient evidence that the medical leave request directly caused the firing.[241]

229. Weston v. Baldwin, No. 19-cv-01020, 2020 WL 1915691, at *3–6 (S.D. Ill. Apr. 20, 2020).

230. *Id.*

231. Jones v. Lawrence, No. 20-cv-00158, 2020 WL 707268, at *1–2 (S.D. Ill. Feb. 12, 2020).

232. *Id.* at *2.

233. *Id.*

234. *Id.* at *4–5.

235. *See, e.g.*, Dixon v. Baldwin, No. 19-cv-00825, 2020 WL 607106, at *2–3 (S.D. Ill. Feb. 7, 2020); Lovejoy v. Lashbrook, No. 19-cv-00969, 2020 WL 263556, at *2–4 (S.D. Ill. Jan. 17, 2020); Walker v. Brookhart, No. 19-cv-00618, 2020 WL 4219981, at *1–3 (S.D. Ill. July 23, 2020); Thornton v. Baldwin, No. 20-cv-00518, 2020 WL 5057487, at *3 (S.D. Ill. Aug. 27, 2020); Hoskins v. Swisher, No. 20-cv-00302, 2020 WL 4933655, at *1–2 (S.D. Ill. Aug. 24, 2020).

236. *See* Lichtenstein v. Univ. of Pittsburgh Med. Ctr., 691 F.3d 294, 296–97 (3d Cir. 2012).

237. *Id.* at 298–300.

238. *Id.* at 296; *see also Offices*, MARGOLIS EDELSTEIN (2022), https://www.margolisedelstein.com/our-offices [https://perma.cc/T3JU-6WTV] (providing information on the locations of the firm that took the case for Lichenstein).

239. *Lichtenstein*, 691 F.3d at 299–300.

240. *Id.*

241. *Id.* at 309–12.

Lichtenstein became important in 2020 to Michael Still, a laborer whose job had been to make aluminum products.[242] According to his pro se complaint, despite having won employee-recognition awards for his efforts at the aluminum company, he was still subject to harassment including the use of racial epithets at work.[243] The harassment peaked in 2019, when, out on medical leave, he learned that the company had fired him.[244] He alleged that the leave caused the firing.[245] The company filed for summary judgment, but based on *Lichtenstein*, the Middle District ruled for Still, saying that he had provided sufficient evidence that the firing resulted directly from the leave request.[246] In this way, Still benefited from *Lichtenstein*'s lawyered precedent.

iii. Consumer Protection

The Telephone Consumer Protection Act ("TCPA") provides a representative example of how precedent distributes its benefits in the consumer protection area. In *Coleman v. Rite Aid of Georgia*, Donald Coleman had a problem likely all-too-familiar to readers: lots of unwanted robocalls.[247] Rite Aid's automated calling system kept calling Coleman about someone else's prescriptions.[248] Coleman called the number making the calls, spoke to a live person, and explained the problem, but the robocalls did not stop.[249] Motivated to do something about his robocall problem, Coleman hired a lawyer and sued Rite Aid for violating the TCPA.[250] The TCPA prevents: "(1) the defendant call[ing] a cellular phone, (2) using an automated telephone dialing system or prerecorded message or artificial voice, (3) without the recipient's prior consent."[251] Based on this statute, the District Court ruled in Coleman's case that Coleman had alleged enough facts to proceed with his suit.[252]

In 2020, this ruling became relevant for a pro se robocall recipient. Coleman's case, because it involved a pharmacy, implicated a number of complicated health care regulatory issues.[253] Michael Condo's case did not.[254] In *Condo v. Convergent Outsourcing, Inc.*, it was a collections agency calling about

242. Still v. Hydro Extruders, LLC, No. 19-cv-2089, 2020 WL 2112333, at *1, *6–7 (M.D. Pa. May 4, 2020).

243. *Id.* at *1.

244. *Id.* at *2.

245. *Id.*

246. *Id.* at *6–8.

247. Coleman v. Rite Aid of Georgia, Inc., 284 F. Supp. 3d 1343, 1344–46 (N.D. Ga. 2018).

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 1350.

253. *See id.* at 1346–50.

254. *See* Condo v. Convergent Outsourcing, Inc., No. CV 119-136, 2020 WL 904863 2, at *1 –3 (S.D. Ga. May 14, 2020).

someone else's bill.[255] Condo's complaint in the Southern District of Georgia read in full:

> Defendant continues to call in order to contact previous owner of cell phone. Was informed number no longer belongs to said person. And was informed multiple times since 8/18 not to contact number further. However, I continue to be contact [sic] by human and robot callers from said company. [D]espite being on do not call registry.[256]

The collections agency moved for judgment on the pleadings, claiming it did not use an automatic calling system.[257] However, the court ruled in Condo's favor, citing *Coleman* for the proposition that all Condo had to show in order to proceed was that the collections agency "called his cell phone using a prerecorded voice without [his] consent," whether an automatic calling system was involved or not.[258]

2. The Geography of Distributive Precedent

A second pattern evident in the data on pro se successes is that some states produced substantially more distributive precedents than other states. This finding squares with Gough and Poppe's research, which showed, "substantial differences in rates of pro se litigation across jurisdictions."[259] As Gough and Poppe maintain, the geographic distribution "raises important questions about variation in access to justice across space, which is a topic of increasing interest to scholars and policy makers."[260] The Gough and Poppe data pointed to potential "spatial variation of individuals' legal needs and the resources provided to pro se litigants by the courts and the availability of legal representation through pro bono,"[261] as well as to "[v]ariation in local court rules."[262]

Compounding these disparities, precedent itself also may play a role in creating geographical inequities via a cumulative process by which a pro-se-favorable case in a given circuit then serves as binding precedent for district courts in the circuit and as particularly relevant precedent in appellate courts in that same circuit. Under the influence of that pro-se-favorable case, courts decide future cases similarly, and then those too become consequential precedents. In this way, some circuits build up bodies of pro-se-helpful case law for similar groups of pro se litigants. As a result, similarly situated

255. *Id.* at *1; *see also Welcome to Convergent Outsourcing*, CONVERGENT, https://www.convergentusa.com/outsourcing [https://perma.cc/L9RC-TWBD] (displaying Convergent's services).

256. *Condo*, 2020 WL 9048632, at *1 (alterations in original).

257. *Id.* at *1–2.

258. *Id.* at *2–3.

259. Gough & Poppe, *Pro Se Litigation*, *supra* note 2, at 585.

260. *Id.* (citation omitted).

261. *Id.* (citation omitted).

262. *Id.*

unrepresented parties in different geographic areas may face very different legal regimes. Different publication practices also may affect regional precedent patterns.

In the dataset, the highest number of previously lawyered cases cited in a successful pro se case was 117, from Illinois, then sixty from Texas, thirty-one from Wisconsin, twenty-six from Indiana, twenty-four from the state of Washington, seventeen from Louisiana, fifteen from Georgia, fifteen from Florida, fourteen from Pennsylvania, and then single-digit numbers from every other state, including the studied states of California (eight), Kansas (three) and Massachusetts (two).[263]

That said, however, these states differ in too many ways to pinpoint here what causes the disparities, although doing so would be a fruitful topic for future research. However, the biggest geographical source of distributive precedent, Illinois, is in the Seventh Circuit, and two of the other top sources, Wisconsin and Indiana, are as well.[264] As Part III will discuss, the Seventh Circuit, perhaps in response to Judge Posner's departure from the court over pro se issues, has recently devoted particular attention to how it treats pro se litigants.[265] Notably, the Seventh Circuit, and Illinois in particular, now have in place both relevant precedent and relevant policies for recruiting pro bono lawyers to assist pro se litigants in promising cases.[266] These practices, as Part III will discuss, may be generating particular amounts of distributive precedent in Illinois.[267] Judge-made and other institutional changes, it turns out, may materially affect pro se success rates.

3. General Distributive Precedent

Turing now to the third overall patten revealed by the datasets: There is a subset of distributive precedents that seem to hold particularly high value to pro se litigants. These precedents emerged over and over again in the data on pro se successes. Such precedents seem to constitute a body of law that governs especially in pro-se-heavy areas of law. These frequently cited cases fall into the category of what Landes and Posner call "general precedents."[268] For Landes and Posner, a "general precedent" is:

---

263. *See supra* Section II.A; *supra* notes 210–13 and accompanying text. Note that several of the states with mid-level citation numbers are not states I studied. This is because pro se cases in the states I did study sometimes cited precedent from outside of their own state, unsurprisingly, often from the same circuit. It is notable, and a testament to the singular nature of the Seventh Circuit in this study, that Indiana emerged as a front runner, even though I did not include Indiana pro se cases in the Successes Database.

264. U.S. FEDERAL COURTS CIRCUIT MAP, U.S. CTS., https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf [https://perma.cc/D2M7-YUT6].

265. *See infra* Section III.B.

266. *Id.*

267. *Id.*

268. Landes & Posner, *supra* note 29, at 268.

> [one that] is less likely to be rendered obsolete by a change in the social or legal environment in which the precedent is applied; for example, a decision laying down a broad principle of tort liability should retain its precedential force—be cited—for a longer period of time than one holding that railroads must station flagmen at certain crossings.[269]

Landes and Posner speak to the value of a general precedent. It is "like a machine that, being adaptable to a number of different uses, is less subject to technological obsolescence than one specialized to a particular . . . task."[270] As Landes and Posner argue, general precedents function like public goods whose value substantially exceeds what they are worth to the individual recipients.[271] Based on the data, it appears that some distributive general precedents are particularly worthwhile to pro se litigants.

The bulk of these distributive general precedents pertain to incarceration. In fact, every precedent (from the database) that received double-digit citations from pro se success cases involved prison.[272] One such case was *Miranda v. County of Lake*.[273] In this case, a police officer arrested Lyvita Gomes, a fifty-two-year-old Indian national, for failing to report for jury duty, and she wound up in county jail.[274] There, she refused to eat or drink for an extended period of time.[275] Jail staff identified her as having a mental health condition but did little about it, and Gomes died in jail.[276] Her estate represented by counsel sued the county and some of the jail officials.[277] The case went to the Court of Appeals for the Seventh Circuit, which took the opportunity to address the standard for constitutional claims on the part of pretrial detainees.[278] Here, the Seventh Circuit held that while a person who is currently incarcerated post-trial has to show that prison officials were subjectively unaware of the medical or other problem, a pretrial detainee only has to show that prison officials' conduct was objectively unreasonable.[279]

---

269. *Id.*

270. *Id.*

271. *Id.* at 264–68.

272. There were nine cases. *See generally* Farmer v. Brennan, 511 U.S. 825 (1994) (twenty-three pro se cites); Hudson v. McMillian, 503 U.S. 1 (1992) (fifteen pro se cites); Estelle v. Gamble, 429 U.S. 97 (1976) (twenty pro se cites); Miranda v. Cnty. of Lake, 900 F.3d 335 (7th Cir. 2018) (fifteen pro se cites); Petties v. Carter, 836 F.3d 722 (7th Cir. 2016) (seventeen pro se cites); Perez v. Fenoglio, 792 F.3d 768 (7th Cir. 2015) (ten pro se cites); Gomez v. Randle, 680 F.3d 859 (7th Cir. 2012) (eleven pro se cites); Townsend v. Fuchs, 522 F.3d 765 (7th Cir. 2008) (eleven pro se cites).

273. *Miranda*, 900 F.3d at 340–43.

274. *Id.* at 341.

275. *Id.*

276. *Id.* at 342.

277. *Id.*

278. *Id.* at 350–54.

279. *Id.*

Although this decision arrived too late to help Gomes, it came in time for fifteen pro se parties in the first part of 2020.[280] For instance, in 2019, Jerry Ezebuiroh was also in jail but not yet convicted of any crime.[281] According to his complaint, he started receiving threats from others in his cell block.[282] He asked the jail administrator if he could move, but she said no.[283] The others in the cell block then did attack him, many times.[284] He sustained a number of injuries but no one provided him medical care, and the jail administrator still would not let him move cells.[285] Under *Miranda*, his case as a pretrial detainee against the jail administrator survived screening.[286]

Similarly, Derek Britz, also in jail and awaiting trial, started, according to his filing, to have pain near his kidneys.[287] He asked jail officials for pain relievers or hot showers but was ignored.[288] He then started to experience bloody urine and "unbearable pain," but jail officials still ignored him.[289] Finally, a month after he started complaining, the jail's medical officer saw him and ordered a CT scan, which showed kidney stones.[290] At that point, Britz was able to get emergency surgery for kidney stone removal.[291] Under *Miranda,* this case too was able to proceed.[292]

4. Fact Specific Distributive Precedent

The fourth pattern observed in my data was that the substantive facts of the distributive precedents sometimes tracked fairly closely the substantive facts in the pro se cases that cited those precedents. I speak of this as a

280. These were *Harrell v. Morgan*, No. 19-cv-01089, 2020 U.S. Dist. LEXIS 70 (S.D. Ill. Jan. 2, 2020); *Ellis v. Mertja*, No. 19-4221, 2020 U.S. Dist. LEXIS 8189 (C.D. Ill. Jan. 17, 2020); *Huertas v. Milwaukee Cnty. Common Counsel*, No. 19-C-592, 2020 WL 819273 (E.D. Wis. Feb. 19, 2020); *Hooker v. Hanes*, No. 20-C-39, 2020 WL 978676 (E.D. Wis. Feb. 28, 2020); *Seals v. Tori*, No. 19-cv-1350, 2020 WL 669684 (S.D. Ill. Feb. 11, 2020); *Ezebuiroh v. Benzing*, No. 20-cv-00135, 2020 WL 2418440 (S.D. Ill. May 12, 2020); *Britz v. Langhurst*, No. 19-cv-01379, 2020 WL 1812405 (S.D. Ill. April 9, 2020); *Speagle v. Wexford Health Sources, Inc.*, No. 20-4089, 2020 U.S. Dist. LEXIS 70589 (C.D. Ill. April 22, 2020); *Coffey v. Coles Cnty. Jail*, No. 20-2071, 2020 U.S. Dist. LEXIS 71546 (C.D. Ill. April 23, 2020); *James v. Smith*, No. 20-3131, 2020 U.S. Dist. LEXIS 97216 (C.D. Ill. June 3, 2020); *Ortiz v. Livingston Cnty. Jail*, No. 20-1191, 2020 U.S. Dist. LEXIS 103085 (C.D. Ill. June 12, 2020); *Singer v. Schettle*, No. 19-cv-004, 2020 WL 3510679 (E.D. Wis. June 29, 2020); *Books v. Savill*, No. 20-1221, 2020 U.S. Dist. LEXIS 135101 (C.D. Ill. July 30, 2020); and *Balderas v. Hale*, No. 20-cv-00516, 2020 WL 4732195 (S.D. Ill. Aug. 14, 2020).

281. *See Ezebuiroh*, 2020 WL 2418440, at *1.

282. *Id.* at *1–2.

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.* at *2.

287. Britz v. Langhurst, No. 19-cv-01379, 2020 WL 1812405, at *1 (S.D. Ill. Apr. 9, 2020).

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at *2.

"pattern," although "partial pattern" would be more accurate, because the fifth pattern, described below, is in some ways the opposite of the fourth pattern.

The fourth pattern highlights the importance of pro bono work in creating the distributive precedents for common fact scenarios faced by pro se litigants. The most typical fact patterns in the Successes Database involved facts that are particularly common among members of oppressed groups who cannot afford lawyers. For example, people who are currently incarcerated cannot usually hire lawyers. For this reason, lawyered precedent in prison harassment cases frequently (in an estimated 150 cases) involved pro bono attorneys. In the Seventh Circuit in particular, many distributive precedents arose out of litigation in which an elite business firm had taken on an apparently pro bono prison case, possibly upon court appointment.[293]

Outside of the prison context, some of the factually overlapping distributive precedents cited by pro se litigants were in legal areas where representation appears to be relatively inexpensive and common. For instance, not everyone can afford a lawyer to represent them in a Social Security appeal, but some paid lawyers do specialize in Social Security cases,

293. *See, e.g.*, Goodloe v. Sood, 947 F.3d 1026, 1027 (7th Cir. 2020) (Jones Day); United States v. Jackson, 962 F.3d 353, 354 (7th Cir. 2020) (Foley & Lardner LLP); Gabb v. Wexford Health Sources, Inc., 945 F.3d 1027, 1030 (7th Cir. 2019) (Jones Day); Gentry v. Duckworth, 65 F.3d 555, 557 (7th Cir. 1995) (Jenner & Block); Knight v. Grossman, 942 F.3d 336, 338 (7th Cir. 2019) (Perkins Coie LLP); Pope v. Perdue, 889 F.3d 410, 412 (7th Cir. 2018) (Jones Day); Wilborn v. Ealey, 881 F.3d 998, 1001 (7th Cir. 2018) (Winston & Strawn LLP); Wilson v. Adams, 901 F.3d 816, 818 (7th Cir. 2018) (Mayer Brown LLP); Isby v. Brown, 856 F.3d 508, 511 (7th Cir. 2017) (Jenner & Block LLP); Gray v. Hardy, 826 F.3d 1000, 1003 (7th Cir. 2016) (Foley & Lardner LLP); Gomez v. Randle, 680 F.3d 859, 861 (7th Cir. 2012) (McDermott, Will & Emery); King v. McCarty, 781 F.3d 889, 892 (7th Cir. 2015) (McDermott, Will & Emery); Perez v. Fenoglio, 792 F.3d 768, 774 (7th Cir. 2015) (Gibson Dunn & Crutcher LLP); Turley v. Rednour, 729 F.3d 645, 647 (7th Cir. 2013) (WilmerHale); Warren v. Baenen, 712 F.3d 1090, 1094 (7th Cir. 2013) (Winston & Strawn LLP); Santiago v. Walls, 599 F.3d 749, 752 (7th Cir. 2010) (Skadden, Arps, Slate, Meagher & Flom, LLP); Bridges v. Gilbert, 557 F.3d 541, 544 (7th Cir. 2009) (Jenner & Block); Lewis v. Downey, 581 F.3d 467, 469 (7th Cir. 2009) (McDermott, Will & Emery); Rodriguez v. Plymouth Ambulance Serv., 577 F.3d 816, 819 (7th Cir. 2009) (Mayer Brown LLP); Grieveson v. Anderson, 538 F.3d 763, 766 (7th Cir. 2008) (Mayer, Brown, Rowe & Maw); Townsend v. Fuchs, 522 F.3d 765, 766 (7th Cir. 2008) (Heller Ehrman); Virsnieks v. Smith, 521 F.3d 707, 709 (7th Cir. 2008) (Mayer Brown); Edwards v. Snyder, 478 F.3d 827, 828 (7th Cir. 2007) (Winston & Strawn); Pruitt v. Mote, 503 F.3d 647, 649 (7th Cir. 2007) (Winston & Strawn); Freeman v. Berge, 441 F.3d 543, 544 (7th Cir. 2006) (Heller Ehrman LLP); Johnson v. Doughty, 433 F.3d 1001, 1003 (7th Cir. 2006) (Jenner & Block); Cooper v. Casey, 97 F.3d 914, 915 (7th Cir. 1996) (Kirkland & Ellis); Greeno v. Daley, 414 F.3d 645, 648 (7th Cir. 2005) (Jenner & Block); Calhoun v. DeTella, 319 F.3d 936, 938 (7th Cir. 2003) (Foley & Lardner); Vance v. Peters, 97 F.3d 987, 988 (7th Cir. 1996) (McDermott, Will & Emery); Black v. Lane, 22 F.3d 1395, 1396 (7th Cir. 1994) (Jenner & Block); McWright v. Alexander, 982 F.2d 222, 223 (7th Cir. 1992) (Sidley & Austin); Hughes v. Joliet Corr. Ctr., 931 F.2d 425, 426 (7th Cir. 1991) (Sidley & Austin); Tucker v. Randall, 948 F.2d 388, 389 (7th Cir. 1991) (Jenner & Block).

and those lawyered cases resulted in useful Social Security precedent.[294] Other factually overlapping distributive precedents came from areas where some cases may yield significant enough damages to bring in private lawyers; that may be the case, for instance, in employment and disability law cases.[295]

5. Procedural Distributive Precedent

The fifth pattern that emerged from my data was that distributive precedents also included a sizeable subset of procedural cases.[296] This subset of cases deviated from the fourth pattern in that they did *not* revolve around factual overlaps between the cases of the represented and the pro litigants.[297] The contrasting fifth pattern arose because, even when the facts of their cases do not overlap, pro se and represented litigants sometimes find themselves in similar procedural postures.[298] For example, a large company with robust representation may find itself subject to the same motion-filing requirements as an impoverished pro se litigant. My finding that procedural cases were particularly likely to yield benefits for pro se parties may be especially surprising in light of existing scholarship on the "paradox of process," which views procedure as tilted toward the "haves."[299]

An illustrative case where the factual substance of the distributive precedent and the pro se case did not overlap, but procedural issues did, was *Integrity Global Security v. Dell*.[300] Integrity Global Security and its partner companies ("IGS") made software for the storage and use of classified information.[301] Dell and IGS were working together to develop a product that would be federally "Top Secret" certified.[302] Dell had contracted to pay IGS for its work on the product.[303] However, the certification did not come

294. *See, e.g.*, Singletary v. Bowen, 798 F.2d 818, 819–23 (5th Cir. 1986). A Findlaw search for law firms taking Social Security appeals in this author's mid-size metropolitan area yielded 13 results. *Top Madison Social Security Disability Lawyers – Wisconsin*, FINDLAW, https://lawyers.findlaw.com/lawyer/firm/social-security-disability/madison/Wisconsin [https://perma.cc/3UZK-R5EE] (search in search bar for "Social Security appeals" in "Madison Wisconsin").

295. *See, e.g.*, Jay v. Intermet Wagner Inc., 233 F.3d 1014, 1015–17 (7th Cir. 2000).

296. *See supra* Sections II.A–.B; *supra* notes 210–13 and accompanying text. I coded each precedent's relevant holding as "substantive" or "procedural" but really, the substantive/procedural distinction is more of a spectrum than a binary, so any effort to determine precisely how many holdings were completely procedural would not be meaningful.

297. *Supra* notes 210–13 and accompanying text.

298. *Id.*

299. *See, e.g.*, Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1453–54 (2016) (describing the paradox of process as follows: "as procedural safeguards increase to preserve democratic access or rights, elite economic interests will perversely be better able to navigate those complexities").

300. Integrity Glob. Sec., LLC v. Dell Mktg. L.P., 579 S.W.3d 577, 581–84 (Tex. App. 2019), *judgment set aside and remanded by agreement* (Feb. 26, 2021).

301. *Id.* at 580.

302. *Id.* at 581.

303. *Id.*

through on the predicted timetable, and Dell stopped its multimillion-dollar payments.[304] IGS sued, first in federal, then in Texas state court, for breach of contract.[305] Dell argued, among many other things, that the statute of limitations on the claim had passed.[306] However, a Texas Statute stops the statute of limitations if one of the parties had been mistakenly pursuing its claim in the wrong jurisdiction.[307] IGS argued that is exactly what had happened: Time had paused because IGS had mistakenly filed in federal court.[308] Dell contended that IGS had incorrectly filed in federal court either negligently or intentionally.[309] The Texas court, however, ruled that the relevant rule exempts from the statute of limitations even parties who file in the wrong court negligently.[310] Only those who file in the wrong court deliberately still face the full statute of limitations.[311] Dell could not show deliberate behavior on the part of IGS, so IGS could proceed despite the otherwise applicable statute of limitations.[312]

The IGS ruling was useful to the plaintiffs in a very different set of factual circumstances in *Aubrey v. D Magazine Partners*.[313] Steven Aubrey and Brian Vodicka were a married couple initially living in Dallas.[314] The Dallas police believed they had been involved in the murder of another man, Ira Tobolowsky.[315] Aubrey and Vodicka believed that police officers engaged in a variety of misconduct in the investigation, including leaking information about them to a local publication, *D Magazine*.[316] Pro se, the two sued the police officers and the magazine, first in Florida, where the couple had moved.[317] The Florida court found that it lacked jurisdiction, so Aubrey and Vodicka refiled in Texas.[318] The defendants argued that the statute of limitations for filing in Texas had expired.[319] However, the Texas court applied a Texas state law that protects plaintiffs who incorrectly file in the wrong court from the relevant statute of limitations.[320] Citing *Integrity Global Security*, the court

304. *Id.* at 581–82.
305. *Id.* at 582–83.
306. *Id.* at 582–83, 586–89.
307. *Id.* at 586–89, 588–89 nn.10–11.
308. *Id.* at 586–93.
309. *Id.*
310. *Id.* at 590–93.
311. *Id.*
312. *Id.*
313. *See* Aubrey v. D Mag. Partners, L.P., No. 19-cv-0056, 2020 WL 1479025, at *6–7 (N.D. Tex. Mar. 26, 2020).
314. *Id.* at *1.
315. *Id.* at *1–2.
316. *Id.*
317. *Id.* at *2–6.
318. *Id.*
319. *Id.* at *3–6.
320. *Id.* at *3–6, *11–12.

held that the police officers and magazine could not show that the men had filed in the wrong court intentionally.[321] As a result, they could proceed with their suit regardless of the statute of limitations.[322] While a pro se gay couple facing purported police harassment may have little in common with two large, represented companies litigating a high-dollar contract dispute, the pro se couple was able to take advantage of the lawyered precedent on its exact legal issue.

Of course, lawyered and pro se cases can share *both* substantive and procedural circumstances. Typical of this situation are a pair of family law cases, also in Texas. In *In re H.S.N.*, both halves of a divorcing couple had lawyers, and a dispute emerged in the divorce proceeding about placement of H.S.N., their child.[323] The court issued several orders on the matter.[324] After the first proceeding, the mother, Rhonda Winstead, petitioned to have a possession order changed due to the fact that Dustin Noska, the father, had changed addresses and not told her.[325] The trial court issued the order.[326] On appeal, Noska argued that the court had no authority to modify its original order.[327] The Appeals Court ruled against him, holding that trial courts in Texas have "wide discretion" to act in family court proceedings, as long as they do so "in the best interest of the child."[328]

In a subsequent Texas family court proceeding, *In the Interest of M.M.,* a couple, Brenda Maldonado and Miguel Martinez, divorced.[329] She had a lawyer, and he appeared pro se.[330] At issue in the divorce case was placement of their daughter M.M.[331] The trial court awarded Martinez the right to determine the child's primary residence.[332] Later on, Maldonado returned to court challenging the custody order.[333] The trial court declined to revisit the issue and Maldonado appealed, claiming the trial court did not have discretion to deny her request to change the custody order.[334] Citing *Gillespie v. Gillespie.*, the appeals court found that the trial court had "broad discretion" to modify the custody order as it wanted, including denying the request for change.[335]

---

321. *Id.* at *6–7.
322. *Id.* at *6–7, *11–13.
323. *In re* H.S.N., 69 S.W.3d 829, 830–32 (Tex. App. 2002).
324. *Id.*
325. *Id.*
326. *Id.*
327. *Id.*
328. *Id.* at 831–33 (quoting TEX. FAM. CODE ANN. §153.252 (West 1996)).
329. *In re* M.M., No. 13-19-00028-CV, 2020 WL 3116355, at *1 (Tex. App. June 11, 2020).
330. *Id.*
331. *Id.*
332. *Id.*
333. *See id.* at *1–2.
334. *Id.*
335. *Id.* at *2 (citing Gillespie v. Gillespie, 644 S.W.2d 449, 451 (Tex. 1982)); *see In re* H.S.N., 69 S.W.3d 829, 831 (Tex. App. 2002).

While these facts are of course not precisely the same as the ones in *In re H.S.N.*, the situations are broadly similar: Both are divorce cases involving child custody, one parent wanting to modify an original custody order and the other opposing.[336]

The sixth pattern shown in my data is that the distributive precedents, while valuable to pro se litigants eventually, may have been of little or no value to the original parties involved. This was especially true of distributive precedents involving prison. *Miranda*, discussed above, is a tragic example, as were the six other precedents in which the party who had experienced legal rights violations in prison died.[337] In some instances, the case that set the distributive precedent was, in fact, an overall loss for the person who was experiencing, or had experienced, incarceration. For instance, in *Torzala v. United States*, Christopher Torzala was a millionaire licensed real estate broker in Milwaukee who wanted to sell some properties.[338] He found a loan originator at a company called Bayshore Mortgage to help him sell the properties.[339] However, Bayshore told Torzala that he would have to pay $5000 for each sale, "to bring his own funds to the closing to cover the costs traditionally paid by the buyer," and to conceal these facts on the closing documents.[340] Soon after, an FBI agent interviewed Torzala about potential fraud at Bayshore.[341] "Torzala later admitted making several false statements during that [FBI] interview, including that he had never provided funds to a buyer at [a real estate] closing . . . to falsify equity in [the] deal."[342] Shortly afterward, a grand jury indicted the head of Bayshore "on counts of fraud and money laundering."[343] Torzala was charged with obstruction of justice, and he agreed to plead guilty to a felony in exchange for "a sentence of eighteen months' imprisonment and two years' supervised release."[344]

After Torzala was released from prison, Torzala's lawyer filed a motion to vacate the felony sentence pursuant to a federal statute, claiming that Torzala

336. *M.M.*, 2020 WL 3116355, at *1–2; *H.S.N.*, 69 S.W.3d at 830–32; *see Gillespie*, 644 S.W.2d at 450–51.

337. Miranda v. Cnty. of Lake, 900 F.3d 335, 341–43 (7th Cir. 2018); Chatham v. Davis, 839 F.3d 679, 682–83 (7th Cir. 2016); Est. of Henson v. Wichita Cnty., 795 F.3d 456, 460–61 (5th Cir. 2015); Hinojosa v. Livingston, 807 F.3d 657, 661–63 (5th Cir. 2015); Estate of Miller, *ex rel.* Bertram v. Tobiasz, 680 F.3d 984, 987–88 (7th Cir. 2012); Rice *ex rel.* Rice v. Corr. Med. Servs., 675 F.3d 650, 654–63 (7th Cir. 2012); Taylor v. Wausau Underwriters Ins. Co., 423 F. Supp. 2d 882, 884–86 (E.D. Wis. 2006); Hare v. City of Corinth, 74 F.3d 633, 635–36 (5th Cir. 1996) (en banc).

338. Torzala v. United States, 545 F.3d 517, 520 (7th Cir. 2008).

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.* at 520–21.

had never intended to plead guilty.[345] Torzala's status as a felon was preventing him from owning a gun.[346] The district court denied the motion and Torzala appealed.[347] The relevant statute allows only "'[a] prisoner in custody' to seek relief."[348] The appeals court held that, despite this statutory language, Torzala could still proceed, even though he was no longer in custody.[349] Even so, the appeals court affirmed the denial of his motion to vacate.[350] His guilty plea and status as a felon stood.[351]

The appeals court's positive ruling on the statutory language was of little use to Torzala, but it served as a valuable distributive precedent for Kenneth Churchill, a person who experienced incarceration after he pled guilty to possessing and distributing heroin.[352] Pro se, he filed a motion to vacate his sentence based on what he saw as errors made in his initial proceedings.[353] As the court acknowledged, "[a]lthough the petitioner filed his petition in February 2018, the court was far from prompt in screening it."[354] As a result, Churchill had already "been released from custody."[355] However, under *Torzala*, Churchill's case was still allowed to move forward.[356]

Even when the precedent is a major win for the original litigant, the decision may not translate into actual relief. That was the case, for example, in *Bridges v. Gilbert*.[357] Jimmy Bridges was at one point incarcerated in Wisconsin and witnessed the death of another person who was then incarcerated.[358] He helped the deceased's family by filing an affidavit in a wrongful-death suit.[359] After that, Bridges alleged, prison officials retaliated by delaying his mail, kicking his door, turning his cell lights off and on, startling him when he was sleeping, and instigating and then upgrading disciplinary proceedings against him.[360] The District Court for the Western District of Wisconsin denied Bridges's First Amendment retaliation claim.[361] Represented by the elite Chicago firm of Jenner and Block, Bridges appealed to the Seventh Circuit, which overturned the District Court and found for him

345. *Id.* at 521.
346. *Id.*
347. *Id.*
348. *Id.* (citing 28 U.S.C. § 2255).
349. *Id.*
350. *Id.* at 523–25.
351. *See id.*
352. Churchill v. United States, No. 18-cv-295, 2020 WL 8675914, at *1 (E.D. Wis. July 13, 2020).
353. *Id.*
354. *Id.* at *2.
355. *Id.*
356. *Id.*
357. Bridges v. Gilbert, 557 F.3d 541, 544–45, 552–56 (7th Cir. 2009).
358. *Id.* at 544.
359. *Id.*
360. *Id.* at 544–45.
361. *Id.*

on the First Amendment issue, noting that "[e]ven though some of these allegations would likely not be actionable in and of themselves, if the acts were taken in retaliation for the exercise of a constitutionally protected right, then they are actionable." [362] However, when the case returned on remand to the Western District of Wisconsin, Judge Barbara Crabb found that the judge who had originally heard the case had incorrectly allowed Bridges to proceed *in forma pauperis*.[363] Recall that the PLRA, discussed above, forbids people currently incarcerated from filing more than three cases in *forma pauperis*.[364] Apparently, Bridges had already used up his three filings.[365] As a result, for the case to proceed, he would need to pay a $350 filing fee.[366] He appears not to have been able to do so, and he was already out of prison anyway,[367] so the court dismissed the case.[368]

Despite the fact that Jimmy Bridges had to abandon his case despite his favorable Seventh Circuit ruling,[369] in 2020, in *Blanchard v. Jeffreys*, Antonio Jeffreys was likely pleased that Bridges persisted as long as he did.[370] Jeffreys filed a case pro se, alleged that he had submitted grievances against prison officials at Illinois's Dixon Correctional Center for using racial slurs, and that, to retaliate, the officials subjected him to otherwise unwarranted disciplinary proceedings.[371] Under *Bridges*, the District Court allowed his First Amendment claim to proceed.[372] Three other people experiencing incarceration in 2020 were also able to bring First Amendment retaliation claims under *Bridges*.[373]

The paired stories of Jimmy Bridges and Antonio Jeffreys do raise the question of what value *Bridges* as a precedent really has to Jeffreys, if he too is unable to turn his initial success in court into concrete relief. This question relates to a further question with which law-and-society scholars literature

362. *Id.* at 544–45, 552.

363. Order at *1, Bridges v. Huibregtse, No. 06-cv-544, 2009 WL 10709191 (W.D. Wis. Apr. 23, 2009).

364. *See* 28 U.S.C. § 1915(g); *supra* Section I.C.1.

365. Order, *supra* note 363, at *1.

366. *Id.*

367. *See id.* at *1–2.

368. Bridges v. Huibregtse, No. 06-C-544, 2007 WL 98459, at *1–2 (W.D. Wis. Jan. 8, 2007), *aff'd in part, rev'd in part sub nom.* Bridges v. Gilbert, 557 F.3d 541 (7th Cir. 2009).

369. *See generally Bridges*, 557 F.3d (ruling favorably for Bridges).

370. Blanchard v. Jeffreys, No. 20-3003, 2020 WL 5026541, at *1–3 (C.D. Ill. Aug. 25, 2020); *see also* POSNER, *supra* note 79, at 135 ("Sometimes the pro se prevails on appeal, yet often to prevail is merely to delay defeat until the case is remanded to the district court or until a subsequent appeal by the pro [se party] from defeat on remand.").

371. *Jeffreys*, 2020 WL 5026541 at *1–3.

372. *Id.*

373. *See* Hall v. Scott, No. 19-4230, 2020 U.S. Dist. LEXIS 8196, at *1–3 (C.D. Ill. Jan. 17, 2020); Schlagenhaft v. Karen, No. 18-cv-1541, 2020 WL 8679635, at *2–3 (E.D. Wis. July 14, 2020); Tuduj v. Boswell Pharm. Servs. LLC, No. 20-4162, 2020 WL 5026544, at *1–2 (C.D. Ill. Aug. 25, 2020).

grapple: To what extent are rights important if, for social reasons, the rightsholders cannot really access them?[374]

Bridges will, in fact, likely be more valuable to Jeffreys if Jeffreys eventually wins complete victory at trial. Nonetheless, as law in Jeffreys's favor (even if the case does not go to trial), *Bridges* has an impact on the other side's potential willingness to settle the case and on the size of the potential settlement.[375] In addition, *Bridges* sets forth a number of rules about what kind of conduct is and is not permissible for prison officials, rules that may then influence the rules and norms that, going forward, govern employees of carceral facilities, including the one where Jeffreys is currently confined.[376] Some of the employees may even obey those rules.

Further, scholars of procedural justice would argue that merely getting to proceed with his case, as *Bridges* allowed Jeffreys to do, brings value to Jeffreys. Rebecca Hollander-Blumoff, a leading authority on the psychology of civil procedure, has written that, "[i]n considering the Federal Rules of Civil Procedure, it is clear that affording the parties a sense of their own voice in litigation is critical, and that this voice begins with the pleading process."[377] She continues, "[t]he back and forth of the pleading system (complaint, answer, reply, ability to amend the complaint), and the motion system (motion, response, reply) provide all litigants with opportunities to express their views and have them considered by the decisionmaker."[378] If pro se parties survive screening and get to participate in the litigation process, Hollander-Blumoff's work suggests they may derive value from the multiple opportunities the process affords to be heard.

Procedural justice scholars Nourit Zimerman and Tom Tyler echo the point. They note that "the opportunity to present one's arguments to the decision-maker . . . [is] central to individuals' evaluations of the fairness of trial procedures."[379] In fact, "people value the opportunity to present their

374. *See, e.g.*, Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y REV. 11, 12–20 (2005); Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087, 1088–93 (2007); Calvin Morrill, Karolyn Tyson, Lauren B. Edelman & Richard Arum, *Legal Mobilization in Schools: The Paradox of Rights and Race Among Youth*, 44 LAW & SOC'Y REV. 651, 652–59 (2010).

375. *See* Bridges v. Gilbert, 557 F.3d 541, 546–56 (7th Cir. 2009).

376. *See id.*

377. Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 HASTINGS L.J. 127, 152 (2011).

378. *Id.*

379. Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 486 (2010) (citing JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 117–24 (1975)). For more on the importance of procedural justice to people currently incarcerated, see David. M. Bierie & Ruth E. Mann, *The History and Future of Prison Psychology*, 23 PSYCH., PUB. POL., & L. 478, 481–84 (2017) (summarizing research on the extent to which people currently incarcerated value procedural justice and the extent to which it encourages compliance with prison rules).

arguments to legal authorities in either a formal or an informal legal procedure."[380] "Having an opportunity to voice their perspective has a positive effect upon people's experience with the legal system irrespective of their outcome, as long as they feel that the authority sincerely considered their arguments before making a decision."[381] For this reason, a precedent (like *Bridges*) has value as a procedural justice tool if it allows pro se cases emanating from prison to survive screening and go forward and in this way, permits more people currently experiencing incarceration to tell more of their stories.

III. POLICY INTERVENTIONS

This Article approaches the widening pro se crisis by presenting new data on the conditions under which pro se litigants achieve some kind of legal success despite the disadvantages they face.[382] The study has focused on the precedents used by pro se parties and investigated the characteristics of the precedents that have enabled pro se litigants to achieve successful outcomes. Understanding the value of precedent to pro se parties is important because it opens up several new avenues for policy interventions to help pro se litigants amid the pro se crisis. These policy interventions fall into two categories: measures to increase the *supply* of distributive precedent and measures to increase *access* to the supply.

A. SUPPLY OF DISTRIBUTIVE PRECEDENT

The primary finding of this research is that pro se litigants are particularly likely to rely on precedent from cases with lawyers. As a result, to increase the supply of distributive precedent would require more lawyers to take on cases that might be valuable to pro se litigants. Some of the distributive precedents concern issues on which the benefit to pro se litigants is likely hard to foresee. For instance, in *Integrity Global Security v. Dell*, Integrity Global Security had no way to know that its favorable ruling on a statute of limitations issue would later help pro se victims of police harassment. On the other hand, pro se litigants are particularly common in some areas of the law, and increasing representation in those areas would likely grow the supply of distributive precedent.

Ironically, former judge Richard Posner's resignation and subsequent book focus on how inadequate the practices of the Seventh Circuit are for pro se litigants.[383] His critique notwithstanding, my data on the large quantity of

380. Zimerman & Tyler, *supra* note 379, at 486.

381. *Id.* at 487.

382. *See supra* Sections I.A–.C.

383. *See, e.g.*, POSNER, *supra* note 79, at 135 ("The pro se—lawyerless, typically a poor person ignorant of the subtleties of law and with only a slight chance (because by definition he has no lawyer) of being allowed oral argument; usually poorly educated, often unhealthy mentally or physically or both . . . —rarely engages the sympathy of my judicial colleagues, or of their law clerks or of the staff attorneys.").

distributive precedents produced in the Seventh Circuit (see data above) shows that pro se parties there are encountering one of the most pro-se-friendly legal regimes in the country.[384] The data suggest that the Seventh Circuit should continue and extend its current precedent practices, and that other circuits should follow the Seventh Circuit's lead with the goal of increasing the supply of distributive precedents.

For one, the Seventh Circuit has particularly favorable case law stipulating when courts in the circuit should appoint counsel for pro se parties.[385] In various cases, the Seventh Circuit has suggested that courts should appoint counsel when they are presented with evidence that that pro se "party lacked understanding of the law or procedural matters, even when these matters were not complex."[386] The Seventh Circuit has even reversed district court cases for their failure to appoint counsel or to apply the correct reasoning to requests for counsel.[387] In particular, the Seventh Circuit requires courts to "analyze the plaintiff's competence to litigate his claims,"[388] and has held that "'failure to undertake this necessary inquiry is an abuse of discretion.'" [389] "Perfunctory statements are . . . not enough,"[390] and courts in the Seventh Circuit "must actually engage with the facts of each case before denying counsel."[391]

Presently, only one other circuit, the Third Circuit, appears to have similarly favorable law about when courts must appoint counsel.[392] My data suggest, however, that the Third Circuit either is not producing the quantity of distributive precedents as the Seventh Circuit or that the Third Circuit may not be doing enough make these precedents available.[393] However, regardless of what is going on in the Third Circuit, the number of distributive precedents in the data from the Seventh Circuit does suggest that having decisions in place that encourage counsel appointments may increase the quantity of distributive precedents. The many circuits whose case law is less aggressive

384. It is possible that other circuits have as much if not more distributive precedent but do not publish the pro se successes necessary to identify it. Concealing pro se successes and their precedents is a huge potential problem for would-be pro se litigants hoping to identify relevant precedent. *See infra* Section III.B (discussing the pathologies of the opinion publication process and potential fixes).

385. *See* Schnorrenberg, *supra* note 125, at 304–06.

386. *Id.* at 304.

387. *See, e.g.*, Pruitt v. Mote, 503 F.3d 647, 554–61 (7th Cir. 2007) (concluding that the plaintiff was prejudiced by the district court's denial of his requests for counsel and remanding to the district court for retrial with pro bono counsel).

388. Schnorrenberg, *supra* note 124, at 305.

389. *Id.* (quoting *Pruitt*, 503 F.3d at 660).

390. *Id.*

391. *Id.*

392. *Id.* at 303–06.

393. *See supra* Sections II.A–.B.

about counsel appointments should consider how that case law affects not just individual pro se litigants, but the entire regimes of pro-se-friendly precedent.

In addition, appellate courts can take active practical steps to encourage lower courts to recruit counsel, especially in cases likely to result in a key distributive precedent. Andrew Hammond, the pro se procedure scholar, notes that appellate court behavior can substantially influence the extent to which district courts work to recruit counsel for pro se parties.[394] Here, too, according to Hammond, the Seventh Circuit is a leader:

> Over the last decade, the Seventh Circuit has repeatedly criticized the Southern District of Indiana for not doing more to secure counsel for poor litigants. The Seventh Circuit has stated that "courts should strive to implement programs to help locate pro bono assistance for indigent litigants." And the Court of Appeals went out of its way to explain that the "mandatory nature" of other districts' pro bono panels are superior to strictly voluntary programs like the Southern District of Indiana's. The federal court in Indiana got the message, and through a new local rule, created an obligatory pro bono panel[395]

The data here show that the appellate court's criticism seems to have had effect.[396] Indiana was one of the most fruitful sources of distributive precedent, even though the data did not include Indiana pro se success cases.[397] What this means is that even pro se litigants from other states are relying on Indiana's distributive precedents. Other circuits should consider the means that they, too, have for building up a robust body of helpful precedent for disadvantaged pro se litigants by signaling to district courts the importance of appointing counsel and creating pools of available attorneys.

Some district courts are already doing so. Hammond also examined district court practices in recruiting counsel for pro se litigants.[398] He found that, "[t]here are roughly forty district courts that have created panels of lawyers, typically members of the district's bar who will accept court appointments to represent litigants for free."[399] One of the examples Hammond studied in detail is, again from the Seventh Circuit, the Northern District of Illinois.[400] He explains:

> All members of the district court's trial bar become part of the pro bono pool, not unlike residents comprising a jury pool. Every year, the Clerk of the Court randomly selects trial bar members from the

394. Hammond, *supra* note 112, at 2693–96, 2720–23.
395. *Id.* at 2720 (footnotes omitted).
396. *See supra* Sections II.A–.B.
397. Hammond, *supra* note 112, at 2711, 2720–23.
398. *Id.* at 2704–21.
399. *Id.* at 2718.
400. *Id.* at 2718–23.

> pool to create a pro bono panel. Members of that panel are then assigned to represent pro se litigants for free. . . . Relieved attorneys return to the pro bono panel or certify to the court within one year that the attorney has provided pro bono assistance in the district court through one of the court's other pro se assistance programs. If an attorney fails to do the latter without good cause, the court will remove the attorney from the trial bar.[401]

Again, the data on distributive precedents show that some combination of the Seventh Circuit's case law, advocacy, and pro bono practices are having the desired effect on increasing lawyer supply.[402] The data identify more than three dozen instances in which elite Chicago firms took on prison cases pro bono and created distributive precedents.[403] The case law does not indicate whether these firms are responding to the bar program, or whether judges are contacting the firms and appointing their lawyers as counsel, but a mix of these practices are inspiring (or demanding) Chicago firms to turn out in relative droves for this pro bono work.[404] Other bar associations should follow the Northern District of Illinois's lead here.

Finally on the supply side, and closely related to the following recommendations about access, courts should consider enlisting pro bono attorneys in limited engagements that help pro se litigants identify precedent relative to their cases. Jona Goldschmidt, another leading authority on pro se litigation, has touted the potential of "advisory counsel" relationships.[405] He writes that "[a]dvisory counsel is generally used to describe the situation when a self-represented defendant is given technical assistance by an attorney in the courtroom, but the attorney does not participate in the actual conduct of the trial."[406] He adds that some courts "have [explicitly] recognized the efficacy of hybrid representation to aid *pro se* defendants and protect the integrity of the trial process."[407] In addition to offering technical procedural advice, lawyers serving in the role of advisory counsel could run searches for pro se litigants or even compile packets of possibly relevant precedent to distribute to parties who do not have lawyers or access to legal search engines.

B. Access to Distributive Precedent

For distributive precedents to benefit pro se litigants, those precedents need to be accessible. Pro se litigants cannot use distributive precedents if they cannot even find them. Put differently: The law that applies to these

401. *Id.* at 2719–20 (footnotes omitted).
402. *See id.* at 2718–23; *supra* Sections II.A–.B.
403. *See supra* Sections II.A–.B.
404. *See supra* Sections II.A–.B.
405. Goldschmidt, *supra* note 123, at 231–47 tbls.1–3.
406. *Id.* at 239 tbl.2, 244 tbl.3 (quoting Locks v. Sumner, 703 F.2d 403, 407 (9th Cir. 1983)).
407. *Id.* (quoting *Locks*, 703 F.2d at 407).

litigants, and to anyone, should not be kept secret. Unfortunately, however, current court, lawyer, and search-engine practices conspire to guard the vault of case law from the public. This Article has several suggestions to reduce this legal secrecy.

First, courts need to publish their decisions and make sure those decisions find their way online. Civil procedure scholar Merritt McAlister has recently documented that significant judicially issued materials, including those that judges themselves consider public, and that encompass broad swaths of distributive precedent, are simply not available on the widely used legal search engines like Lexis, Westlaw, and Bloomberg.[408]

According to McAlister, legal scholars have long realized that some judge-made law is missing from the major legal search engines.[409] However, she finds "that the problem of access to circuit-level decisions is much bigger than anyone—including the commercial databases —has realized."[410] Among the missing items are decisions from the appellate courts, which are not available for free on court websites.[411] Absence from the major commercial databases "renders [court documents] essentially useless to all but court insiders and the parties themselves—an access and use limitation that rule changes and technological shifts sought to ameliorate long ago."[412] Further, and "[m]ore problematic, still, is that what's missing from commercial databases appears to include disproportionately appeals from the most vulnerable litigants—including pro se litigants, criminal appellants, and noncitizens."[413]

McAlister advocates a solution that accords with the results of this study, and which I endorse wholeheartedly.[414] She writes that she "urge[s] the Judicial Conference—the policy-making branch of the federal courts—to charge the Chief Judges of each circuit with ensuring free public access to all unsealed final, judge-issued decisions from the federal appellate courts."[415] I fully concur.

McAlister also raises the problem of judges themselves choosing to issue "unpublished decisions."[416] In a recent article, McAlister finds that "[o]ver the last fifty years, federal courts have increasingly relied on the so-called 'unpublished decision' to combat a caseload volume 'crisis.'"[417] She observes

408. *See generally* McAlister, *supra* note 173 (documenting the many gaps between what courts issue and what the legal search engines publish).

409. *Id.* at 1104–08.

410. *Id.* at 1104 (footnote omitted).

411. *Id.* at 1104–05.

412. *Id.* at 1106–07.

413. *Id.* at 1107.

414. *Id.* at 1158–63.

415. *Id.* at 1160.

416. Merritt E. McAlister, *"Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533, 534–561 (2020). Posner makes a similar recommendation in his aforementioned book on pro se litigants. *See* POSNER, *supra* note 79, at 29–33.

417. McAlister, *supra* note 416, at 535 (citing Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1112 n.9 (2011)).

that "[t]hese decisions are not precedential and make no law; they are often short, perfunctory, unsigned opinions drafted for the benefit of the parties, not the public,"[418] and "[e]ven their greatest judicial defender once referred to unpublished decisions as 'not safe for human consumption.'"[419] What is more, "[d]ata, historical accounts, and anecdotal evidence all suggest that the unpublished decision revolution aligns closely with the rise of pro se appeals—the appellate justice system's 'have-nots.'"[420] Notably, "[a]ppeals from these vulnerable litigants occupy half of the federal appellate docket, but they surely receive far less than half of judges' attention."[421]

Her proposed solution again is for appellate judges to stop the slide toward unpublished decisions and, instead, to publish reasons for all of their decisions.[422] Again, that recommendation meshes precisely with the data presented in this Article. For this reason, I join McAlister in supporting this proposal, and would, in fact, extend it to district court and even state court opinions. If the obstacle is, as judges claim, a resource shortage,[423] I would propose, further, that judges devote their limited resources to issuing published decisions in cases that have potential as distributive precedent.

Second, courts should provide access to distributive precedent for pro se litigants who do not have Lexis, Westlaw, or similar legal search engines. Decades ago, when lawyers and pro se parties alike did their research in physical law libraries, the pro se parties may have lacked the knowledge and expertise of the lawyers, but the two groups at least operated in the roughly same research environment.[424] At the present time, however, lawyers are able to type search terms into electronic tools that, in a matter of seconds, produce relevant results, link to other helpful cases, and warn about any potential adverse law.[425] Often lawyers pay for specialized artificial-intelligence products to assist them further in searching for precedent.[426] Courts do little to make parties who lack searchable databases aware of what the law even is; courts mostly wait for Lexis, Westlaw, and the other commercial services to collect their decisions and make them navigable.[427] Courts should not be privately outsourcing the crucial public role of telling citizens what the law is.

To be sure, courts cannot replicate, say, the AI-enhanced "Lexis Advance" experience for every pro se litigant; but courts could, at the least, allow pro se

418. *Id.* (footnote omitted).

419. *Id.* (quoting Alex Kozinski, *In Opposition to Proposed Federal Rule of Appellate Procedure 32.1*, FED. LAW., June 2004, at 36, 37).

420. *Id.* at 536.

421. *Id.* (footnote omitted) (emphasis removed).

422. *Id.* at 582–94.

423. *Id.* at 541.

424. *See* McAlister, *supra* note 173, 108–46.

425. *See id.*

426. *See id.*

427. *See id.*

parties to read relevant cases. Like the electronic tools, courts know both from experience and from their own clerks' use of those tools, which precedents are particularly relevant to pro se parties. As this article suggests, high citation counts, and especially high citation counts in pro se successes, are easily measured indicia of value to pro se parties. To print out a list of pro-se-favorable "general precedents," as discussed above, would take a court clerk a few hours at most and would make those precedents significantly more available to pro se parties. As documented above, courts often assume that pro se litigants lack the ability to work online and, therefore, should use paper instead of e-filing.[428] That same principle should apply to identifying precedential cases.

Third, courts, legal services organizations, pro bono lawyers, and even bar associations should furnish, in plain language, subject-specific updates on potentially valuable distributive precedents. Lawyers and legal academics can stay current on frequently changing areas of law through the subject-specific digests that Lexis, Westlaw, Bloomberg, and area-specific publications like *Tax Notes* produce, often multiple times a day.[429] Lawyers may receive up to a dozen emails per day notifying them of possibly relevant new decisions and statutes. These mechanisms provide a huge professional advantage. Not even lawyers, and certainly not would-be pro se parties, have the capacity to search even the legal search engines multiple times a day to find precedential cases that might bear on a legal issue of interest. Compiling similar digests in clear, simple language, on pro-se-heavy areas of law would be an important project in the public interest.

Courts could produce these digests themselves, or attorneys working individually or through bar associations could produce them pro bono. Contributing to such a project might be an attractive pro bono opportunity for lawyers who lack the time or expertise to take on full free representations. In regard to this topic, Posner also discusses the importance of having legal information available for pro se parties presented to them in ways that are easy to understand.[430] He observes that many disadvantaged pro se litigants do not read at a high level and lack relevant educational background.[431] For this reason, even if they have a precedential case in front of them, they may not appreciate what it has to offer. Pro se litigants could access distributive precedent much more readily if a third party could make it easier to consume.

---

428. *See supra* Section I.C.

429. *See, e.g.*, *Bloomberg Law News*, BLOOMBERG L., https://pro.bloomberglaw.com/law-news [https://perma.cc/56HF-2EWS]; *Mealey's Daily News*, LEXISNEXIS, https://www.lexisnexis.com/mealeysdailynews [https://perma.cc/99JR-MWQM]; *Federal News and Analysis*, TAXNOTES, https://www.taxnotes.com/products/news-analysis/federal [https://perma.cc/WG8Y-E3S2]; *Westlaw Today*, WESTLAW, https://legal.thomsonreuters.com/en/products/westlaw-today [https://perma.cc/8FN8-JFKV].

430. *See* POSNER, *supra* note 79, at 19–29.

431. *See id.*

Fourth, courts should revise help desk rules and practices to include helping pro se parties locate relevant precedent. Hammond's research examined in detail the non-lawyer assistance that federal courts offer pro se litigants.[432] He discovered that a number of "district courts offer guides or handbooks for self-represented litigants on their court websites."[433] Content varies. Several, "like the District of Vermont's, simply summarize local rules specific to pro se litigants," whereas others include sample forms.[434] Some districts have their own "Pro Se Packets," which describe how to file a complaint and which include the necessary forms, whereas some districts merely point pro se parties to a guide that the Federal Bar Association created for these litigants.[435]

In addition, Hammond found that "[n]ineteen district courts run a pro se help desk or similar assistance program. . . . [T]ypically operated by court staff or volunteer attorneys who assist pro se litigants in understanding federal [court] procedure and substantive law."[436] As Hammond notes:

> For example, the Northern District of Illinois offers an assistance program to civil pro se litigants. Under th[is] program, volunteer attorneys can provide information about federal court procedure and substantive law, explain the status of a case, help litigants prepare court documents, refer pro se parties to legal services, and maintain confidentiality.[437]

However, Hammond discusses like many other such endeavors:

> [T]he [Illinois self-help] program prohibits volunteer attorneys from appearing on the litigant's behalf in court, researching or writing court documents for the litigant, investigating the facts of the party's case, communicating with the litigant's opponent or opponent's attorney, filing, serving, or mailing anything on the pro se party's behalf, assisting a currently incarcerated party, or assisting with a criminal case.[438]

This effectively prevents the program from really doing anything that might help pro se parties access precedent.[439] Some districts further limit the availability of help desks. Hammond notes that "[t]he Western District of North Carolina's program is not available for prison litigation, habeas cases, Social

---

432. Hammond, *supra* note 112, at 2704–21.
433. *Id.* at 2714.
434. *Id.*
435. *Id.* at 2714–15.
436. *Id.* at 2716.
437. *Id.* (footnotes omitted).
438. *Id.* (footnote omitted).
439. *Id.*

Security cases, bankruptcy appeals, and any case (except employment discrimination) in which the United States is a party."[440]

Going forward, courts should remove these barriers to self-help or help desk access for pro se parties. In particular, courts should remove any impediments to help desk staffers helping with legal research. Preventing some of the most common pro se parties, such as prisoners, from using self-help programs and help desks and then prohibiting these endeavors from finding favorable precedential cases for pro se litigants perpetuates the secrecy surrounding case law.

Instituting procedures to allow and even encourage self-help programs and help desks to undertake work involving case law might also improve the quality of pro se pleadings. Courts often complain that pro se filings are terrible; that pro se litigants list irrelevant facts; and that these litigants have no idea what a viable legal claim might be. This complaint is perplexing, for how would pro se parties know how to identify pertinent facts and distributive precedents if courts refuse to make that law available or let anyone assist non-lawyers in finding it? Courts believe they currently have a severe overload problem, and they may believe that increasing access to case law will exacerbate the problem. Even so, such concerns do not entitle courts to disregard an essential legitimizing function of a legal system: giving notice of what the law is. Were courts to do a better job in this regard, were they to afford would-be filers better access to precedent, courts might actually find themselves sifting through fewer hopeless filings.

Removing the secrecy surrounding existing case law by publishing all decisions, making precedent accessible, issuing legal updates, and expanding help desk practices may also help judges better comply with their ethical obligations to pro se litigants—obligations that are becoming more extensive.[441] For example, an Illinois judicial ethics provision states that "'[a] judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.'"[442] "Thirty-three states and the District of Columbia have [recently] modified their judicial ethics rules by adding" a comparable provision to this one.[443] In Wisconsin, for instance, the ethical guidelines in fact, say:

> A judge may exercise discretion consistent with the law and court rules to help ensure that all litigants are fairly heard. . . . Reasonable steps that a judge may take in the exercise of such discretion include, but are not limited to, the following: 1. Construe pleadings to facilitate

440. *Id.* at 2717–18 (footnote omitted).

441. Goldschmidt, *supra* note 123, at 247–50.

442. *Id.* at 248 (quoting Ill. Supp. Ct. R. 63(A)(4)); *see Code of Judicial Conduct*, ILLONIS.GOV: STATE OF ILLINOIS JUDICIAL INQUIRY BROAD, https://jib.illinois.gov/code.html [https://perma.cc/2SLS-VR6J].

443. Goldschmidt, *supra* note 123, at 248.

> consideration of the issues raised. 2. Provide information or explanation about the proceedings. 3. Explain legal concepts in everyday language. 4. Ask neutral questions to elicit or clarify information. 5. Modify the traditional order of taking evidence. 6. Permit narrative testimony. 7. Allow litigants to adopt their pleadings as their sworn testimony. 8. Refer litigants to any resources available to assist in the preparation of the case or enforcement and compliance with any order. 9. Inform litigants what will be happening next in the case and what is expected of them.[444]

The policy suggestions presented above align with this ethical advice. For instance, a help desk that explained and printed out the content of the law would "[p]rovide information or explanation about the proceedings."[445] Written digests of relevant distributive precedent would "[e]xplain legal concepts in everyday language" and perhaps obviate the need for duplicative judicial efforts in this regard.[446] Help desks that did research and published versions of precedential cases would be useful (and relatively inexpensive) resources to which a judge could refer a pro se litigant. In these ways, the policy prescriptions suggested by the findings of this study of distributive precedent could provide concrete ways for judges to act upon their developing ethical obligations to parties without lawyers.

CONCLUSION

The U.S. legal system currently faces a crisis in pro se litigation. Parties who lack legal representation are at major disadvantages and regularly lose at every stage of the legal process. Due to hardened legal and sociolegal pathologies, well-off represented parties are usually able to hoard the legal system's resources privately.

However, by taking a novel empirical approach of studying the circumstances in which pro se litigants actually had some *success*, this Article has spotlighted that the legal system offers one public good whose benefits are available even to unrepresented parties: precedent. This Article has documented that the rare pro se successes rest on a body of favorable precedent.

This Article is the first to open the black box of precedent as it is used by successful pro se litigants and to conduct a comprehensive study of this previously neglected phenomenon. To do this, I created two large hand-coded datasets. One is the first known dataset of decisions in cases where pro se litigants succeeded. The second is the first known dataset on the characteristics of the precedents that are beneficial to pro se litigants.

---

444. Graycynthia, *Pro Se Litigants in the Code of Judicial Conduct*, JUD. ETHICS & DISCIPLINE (Nov. 25, 2014), https://ncscjudicialethicsblog.org/2014/11 [https://perma.cc/EPS3-G9FZ] (quoting Wis. Sup. Ct. R. 60.04(1) cmt.).

445. *Id.*

446. *Id.*

The data show that precedents from cases where both parties had lawyers are most likely to be useful to pro se litigants. Via these "distributive precedents," the legal system distributes previously concentrated legal resources to individuals who lack them.

The data also identified several previously unknown patterns that pertain to distributive precedents. First, reliance on distributive precedents by successful pro se litigants occurs in many different areas of law: prisoners' rights in particular, but also civil procedure, criminal procedure, employment law, family law, Fourth Amendment law, public benefits law, immigration law, housing law, contracts, torts, disability rights law, bankruptcy law, tax law, consumer protection law, open records law, and elsewhere as well. Second, there is geographical variation in the production of distributive precedents; some states generate substantially more of these precedents than other states. Third, some distributive precedents are significantly more valuable to pro se litigants than other precedents; they function like what scholars have called "general precedents." Fourth, distributive-precedential cases and the pro se cases that rely on them often (as one would expect) had large substantive overlaps. Fifth, and inversely, distributive precedents also included a significant number of cases where the overlaps were procedural, rather than substantive. Sixth, some of the most valuable distributive precedents were primarily valuable as precedent; the original litigants never realized any substantial benefits from them.

These findings open up several broad avenues for future research. To start with some remaining descriptive questions: To what extent would the findings reported in this Article vary if the data grew to include other states, and other years? On what kinds of motions are pro se parties most likely to succeed? In which circuits? On appeal, or at the district court level? By what means do distributive precedents command the attention of clerks or judges and become so useful in pro se cases? How would the patterns observed here compare to patterns in precedent that is unfavorable to pro se parties?

Turning to more causal questions that remain for future research: To what extent do the successes of pro se litigants in their use of distributive precedent turn on their own pleadings? What matters more to the eventual outcome of these cases: the relevant legal precedents and rules or sociolegal factors? In regard especially to the prison cases, how do pro se successes vary by race, gender, age, or other categories of repression and marginalization? What measures might reduce the secrecy that currently shrouds distributive precedent from the view of pro se litigants? And, most importantly, which interventions might increase the supply of distributive precedent and improve access to that supply?

The final part of this Article took initial steps toward addressing these last qestions of supply and access, which are so central to attacking the pro se curisis. From this angle, perhaps the most important task for the immediate

future is to determine which of these steps is most feasible and effective for more widely distributing to pro se litigants the benefits of distributive precedent.