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Doing Unrepresented Status: The Social Construction and Production of *Pro se* Persons

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In this Article, I propose an understanding of the dynamic process through which society does unrepresented status that is informed by psychological and sociological research. In describing this doing of unrepresented status, I elaborate two new concepts: *the social construction of* pro se *status* and *the social production of unrepresented persons*. These concepts illuminate ways in which the doing of unrepresented status is a routine, recurring feature in how court officials, lawyers, and law-trained persons perceive and interact with unrepresented persons within our civil justice system.

A *pro se* party is not something that an unrepresented person is; rather *pro se* status is socially constructed.[1] Within our civil justice system, court officials and lawyers apply stereotypes, schemas, biases, expectations, and labels about *pro se* parties onto unrepresented persons.[2] This process of social construction unfolds in interactions among court officials, repeat-player lawyers, and unrepresented persons, and it varies with the contexts and conditions of these interactions.[3]

Pro se status is a social identity recreated and performed in both actual and anticipated social interactions.[4] It is something done by others onto persons who are unrepresented and who interact with the civil justice system. It is a category label applied to people who are unrepresented in the civil justice system. This social construction of *pro se* status involves a series of attributions, expectations, stereotypes, biases, thoughts, feelings, and related behaviors toward these individuals.[5] Many court officials and lawyers believe that being represented within the civil justice system is necessary for the healthy and stable functioning of the civil justice system. While represented status is constructed as natural and normal, being *pro se* is conceived of as a problem category—something abnormal and potentially deviant.

The social construction of *pro se* status depends upon context, and the social identities, roles, and the unique power, privilege, capabilities, and vulnerabilities of the persons involved.[6] Rather than a static binary of doing *pro se* status or not, this process involves a continuum of doings of *pro se* status that varies based on other conditions. For example, there are intersectional consequences of the label depending on other social identities of these unrepresented persons, including their relative power and capabilities, and the prejudices they experience in society. The net effect of this dynamic process of doing *pro*

[1] *See* Part II, *infra*, discussion in text and notes.
[2] *See* Part I, *infra*, discussion in text and notes. *See* Victor D. Quintanilla, Rachel A. Allen, and Edward R. Hirt, *The Signaling Effect of Pro se Status*, 42 L. & Soc. Inquiry 1091 (2017).
[3] *See* Part IV, *infra*, discussion in text and notes.
[4] *See* Part II, *infra*, discussion in text and notes.
[5] *See* Part I, *infra*, discussion in text and notes.
[6] *See* Part IV, *infra*, discussion in text and notes.

se status is that our society does unrepresented status in ways that disempower low-income members of society, outsiders, and persons from subordinated groups who interact with legal institutions.

At the same time, the presence and prevalence of unrepresented persons in a civil justice system are not natural, inherent, or fixed features of that civil justice system.[7] Rather, we socially produce unrepresented persons within our civil justice system through societal decisions and public policy decisions that shape the structures, processes, and design of our civil justice system. As these societal decisions affect the operation of our civil justice system and materially affect the enforcement of rights, power, and privilege through our civil justice system, these societal decisions are often influenced by political, ideological, psychological, and economic factors.[8] When these decisions materially increase the presence or prevalence of unrepresented persons in our civil justice system—whether intended or not—unrepresented persons are socially produced.[9]

Having offered broad outlines of this proposed theory of doing unrepresented status, I proceed as follows: In Part I, I introduce a series of psychological experiments that reveal how the mere presence or absence of legal representation affects not only evaluations and judgments about the meritoriousness and worthiness of a case, but also stereotypes and biases about unrepresented persons. I refer to this psychological phenomenon as the signaling effect of *pro se* status. In Part II, I then describe the social construction of these unrepresented persons into *pro se* parties. Contrary to what many court officials and lawyers believe about unrepresented people, *pro se* status is not an attribute or a thing that people are. Rather, we socially construct unrepresented persons into *pro se* parties by applying mental categories, labels, schemas, stereotypes, and expectations onto unrepresented persons, which affect their treatment, experiences, and outcomes in the civil justice system. Then in Part III, I describe the social production of unrepresented persons: that is, contrary to what many legal professionals believe, unrepresented persons are not an inherent, natural feature of a civil justice system. Rather we socially produce unrepresented persons through societal and public policy decisions that shape the operation of our civil justice system and materially lead to the presence and prevalence of unrepresented persons. Finally, in Part IV, I describe how both the social construction of *pro se* parties and the social production of unrepresented persons are not inherent or fixed. For example, these dynamic processes vary with contexts and conditions, and can be exacerbated, such as when an unrepresented person's *pro se* status intersects with other social identities belonging to socially disadvantaged groups. I also describe how institutional design changes, such as altering ethical proscriptions that preclude

[7] *See* Part III, *infra*, discussion in text and notes.
[8] *See* Part III, *infra*, discussion in text and notes.
[9] *See* Part III, *infra*, discussion in text and notes.

court officials from helping unrepresented persons, affect the social construction of *pro se* status.

I. Empirical Research on the Signaling Effect of *Pro se* Status

Before discussing psychological and structural explanations of the social construction and production of *pro se* persons, I first turn to empirical research on the signaling effect of *pro se* status.[10] The signaling effect of *pro se* status is a theory that explains the treatment and outcomes that unrepresented persons receive within the civil justice system as based upon the schemas, mental categories, stereotypes, expectations, and biases that court officials and lawyers hold about *pro se* parties.[11]

This theory differs from several other accounts of why unrepresented people fare worse than counseled parties in the civil justice system. For example, when explaining why counseled parties receive better outcomes than unrepresented persons, scholars often theorize that lawyers confer forms of legal and professional expertise: procedural, substantive, and relational.[12] Lawyers raise arguments, prepare pleadings, and ensure compliance with court procedures.[13] One implication of this explanation is that, if unrepresented persons receive similar kinds of legal expertise without lawyers, then the divergent treatment and outcomes that unrepresented persons obtain within the civil justice system will narrow or close.

Others theorize that divergent outcomes between unrepresented persons and counseled parties within the civil justice system are explained by attorney case-selection

[10] As this article largely discusses the social construction of *pro se* parties and the social construction of unrepresented persons, I provide less detail in this section than I desire. For readers interested in more detail on these empirical effects, I suggest the following two articles: *see* Victor D. Quintanilla, Rachel A. Allen, and Edward R. Hirt, *The Signaling Effect of Pro se Status*, 42 L. & Soc. Inquiry 1091 (2017), and Kathryn M. Kroeper, Victor D. Quintanilla, Michael Frisby, Amy Applegate, Steven J. Sherman, & Mary C. Murphy*, Underestimating the Unrepresented: Cognitive Biases that Disadvantage Pro se Litigants in Family Law Cases* (on file with author).

[11] *See* Quintanilla et al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __; Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impacts*, 80 Am. Sociol. Rev. 909 (2015) ("In the lower courts and administrative tribunals studied here, reputation is but one mechanism behind the impact of lawyers, but only in the barest sense: the presence of *any* lawyer, as opposed to no lawyer at all, signals something important about a case to the people involved in processing it.")

[12] *See* Rebecca L. Sandefur, *Elements of Professional Expertise: Understanding Relational and Substantive Expertise through Lawyers' Impacts*, 80 Am. Sociol. Rev. 909 (2015); Herbert M. Kritzer, Legal Advocacy: Lawyers and Nonlawyers at Work 15 (1998). Professor Sandefur describes these three kinds of expertise in this excellent paper. While substantive and procedural expertise differ from the psychological account provided, relational expertise as described partially overlaps with the signaling effect of *pro se* status. For example, Sandefur states that "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 that court to follow its own rules." *Id.* at 910.

[13] *See* Emily S. Taylor Poppe and Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 Pepp. L. Rev. 881, 934 (2016).

effects.[14] Some contend that plaintiffs' lawyers choose to represent claimants with more meritorious, higher-quality cases; therefore, unrepresented claimants have less meritorious, lower quality cases.[15] This theory predicates the divergent outcomes obtained by unrepresented persons on these underlying differences in case quality.[16] Under this view, while court officials apply the same legal criteria to all cases and engage in neutral, objective decision-making regardless of whether parties are unrepresented or not, because unrepresented persons have less meritorious cases, they fare worse. One implication of this theory is that, when the quality and meritoriousness of two cases is otherwise equal, regardless of whether one claimant has legal representation and the other does not, both claimants should obtain similar material outcomes.

Relatedly, others believe that personality-based differences best explain the ability of persons to secure legal representation.[17] In this form of endogeneity, litigants with certain kinds of cases and characteristics are thought to be more likely to obtain representation.[18] They contend that the kind of people who secure counsel in civil cases have different personalities or dispositional characteristics than those who are unable to secure counsel.[19] Under this view, people who obtain legal representation may be more diligent, more persuasive, and more sophisticated than those who do not.[20] This view explains divergent material outcomes received by unrepresented persons within the civil justice system as ultimately predicated on underlying dispositional or personality-based differences between unrepresented persons and parties with legal representation. An implication of this theory is that, when the quality of two persons' cases are otherwise comparable, two persons with similar personality and dispositional characteristics will be equally likely to secure legal

[14] *See* discussion in Greiner & Pattanayak, *Randomized Evaluation in Legal Assistance, supra* note __, at 2194; Poppe and Rachlinski, *Do Lawyers Matter?*, *supra* note __, at 888 ("Notably, litigants with more plausible claims might be more likely to obtain representation . . . because attorneys might be more likely to take more promising cases."); Herbert M. Kritzer, Legal Advocacy: Lawyers and Nonlawyers at Work 21 (1998).

[15] *See* 1 John E. Rolph Et. Al, Automobile Accident Compensation 24, 26 (1985) (discussing attorney case selection effects).

[16] Under this theory, counseled plaintiffs obtain more favorable outcomes than unrepresented claimants because of case screening decisions by plaintiffs' lawyers. This theory is predicated on the incentives that plaintiffs' lawyers encounter when choosing cases due to contingency fee arrangements and fee-shifting awards, which lead them to separate wheat from chaff. These forms of fee arrangements, however, rarely apply to defense counsel who often bill based on a flat fee or by the hour. As such, the theory of case-selection effects does not explain why counseled defendants fare better than unrepresented defendants.

[17] *See* Michael Millemann, Nathalie Gilfrich & Richard Granat, *Limited-Service Representation and Access to Justice: An Experiment*, 11 Am. J. Fam. L. 1, 5 (1997) (attributing observed differences to "a basic intelligence level; the absence of emotional and mental disabilities, and some degree of self-motivation, among other qualities").

[18] *See* Poppe and Rachlinski, *Do Lawyers Matter?*, *supra* note __, at 934 ("Endogeneity is unlikely to account for the observed benefits of representation across the many different areas of law.")

[19] *See id; see also* Quintanilla et. al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __; Kroeper et. al., *Underestimating the Unrepresented: Cognitive Biases that Disadvantage Pro se Litigants*, *supra* note ___, at ___.

[20] *See* discussion in Greiner & Pattanayak, *Randomized Evaluation in Legal Assistance, supra* note __, at 2191.

representation, regardless of whether other circumstances differ, including their relative power, privilege, social networks, and socioeconomic status.[21]

The signaling effect of *pro se* status departs from these explanations and theorizes that, when members of the public navigate the civil justice system as unrepresented persons, the system and the people within the system behave *differently* toward them relative to counseled parties.[22] These differences emerge regardless of whether the merit or quality of an unrepresented person's case is comparable to, or even equal to, a case brought by a party with legal representation.[23] In addition, these differences do not stem merely from the material advantages and substantive and procedural expertise that having legal counsel confers. Rather these differences emerge from the very presence or absence of counsel, which alters the psychological dynamic of decision-making and subsequent behaviors of court officials, lawyers, and law-trained individuals.[24] Court officials and lawyers impute onto unrepresented persons a variety of schemas, scripts, stereotypes, preconceptions, and biases about *pro se* parties, changing the way that these officials and lawyers think, feel, and behave toward unrepresented persons.[25] When viewed cumulatively and structurally across the millions of interactions that court officials, lawyers, and law-trained persons have with unrepresented people each year, this psychological phenomenon systematically changes the way the civil justice system behaves toward unrepresented persons relative to counseled parties.

Moreover, an unrepresented person's status as a *pro se* party intersects with other social identities, affecting the psychology of decision-making by court officials and lawyers. For example, while court officials and lawyers may be uncomfortable expressing bias toward subordinated groups or stigmatized members of society—including persons living in poverty, racial and ethnic minorities, or LGBTQ persons—the mere fact that these persons are unrepresented may psychologically license and legitimize negative treatment toward them.[26]

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[21] When this theory is applied narrowly to case selection by lawyers, the explanation no longer explains *why* counseled and unrepresented parties obtain divergent material outcomes, and instead explains *that* divergent material outcomes are produced from whether a person secures counsel or not. In this way, the theory collapses into the theory that lawyers confer professional expertise, previously discussed, but adds a predicate that *who* receives counsel varies based upon personality-based factors.

[22] *See, e.g.*, Quintanilla et. al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __; Kroeper et. al., *Underestimating the Unrepresented: Cognitive Biases that Disadvantage Pro se Litigants*, *supra* note ___, at __.

[23] *See, e.g.*, Quintanilla et. al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __; Kroeper et. al., *Underestimating the Unrepresented: Cognitive Biases that Disadvantage Pro se Litigants*, *supra* note ___, at __.

[24] *See, e.g.*, Quintanilla et. al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __; Kroeper et. al., *Underestimating the Unrepresented: Cognitive Biases that Disadvantage Pro se Litigants*, *supra* note __, at __. Sandefur, *Elements of Professional Expertise*, *supra* note__, at 925 ("Lawyers also appear to help courts follow their own rules. . . Evidence of some of the largest potential impacts of lawyers on case outcomes emerges from settings in which cases are often treated perfunctorily or in an ad hoc fashion by judges, hearings officers, and clerks.").

[25] *See* Quintanilla et al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __; Kroeper et al., *Underestimating the Unrepresented: Cognitive Biases that Disadvantage Pro se Litigants*, *supra* note __, at __.

[26] *See* Part IV, *infra*, discussion in text and notes.

While lawyers are uncomfortable expressing bias toward persons on the basis of some social identities, other social identities, such as *pro se* status, serve as seemingly legitimate or rationalizable bases to treat people differently.[27] As a result, the signaling effect of *pro se* status may intersect with, compound, and exacerbate existing societal biases.

The signaling effect of *pro se* status implies that, when two persons' cases are otherwise comparable (or held constant) in quality, and when one party has legal representation and the other does not, court officials and lawyers will think differently about and behave differently toward them.[28] These differences emerge not merely because of the legal expertise provided by the lawyer representing the counseled party; the counseled party will often receive more favorable treatment than the unrepresented person because court officials and lawyers impute onto unrepresented persons a variety of schemas, scripts, and preconceptions about *pro se* parties that operate to the disadvantage of these unrepresented persons.[29] In this regard, over the past five years, I have conducted a series of psychological experiments and randomized control trials (RCTs) to examine both the causal inferences implied by this hypothesis and the nature of these psychological processes that operate to the disadvantage of unrepresented persons.

This research reveals that the mere presence or absence of legal representation is a distinction that has a psychological, signaling, or labeling effect among court officials, lawyers, and law-trained persons, even when controlling for case quality and merit.[30] For example, many court officials and lawyers hold preconceptions and stereotypes about *pro se* parties that they apply to unrepresented persons. Among court officials and lawyers, moreover, the mere presence or absence of counsel can alter the perceived meritoriousness and value of a case, even when holding the quality of a case constant,[31] a psychological effect that, in turn, influences how court officials and lawyers behave toward parties. For example, some lawyers who litigate cases against unrepresented parties anticipate and exploit the unique vulnerabilities of unrepresented parties, including their lack of familiarity about procedures and the worth of their case.[32] Finally, this research reveals that the schemas, scripts, stereotypes, preconceptions, and biases that court officials and lawyers hold about *pro se* parties emerge with socialization into the legal profession.[33] That is, these stereotypes

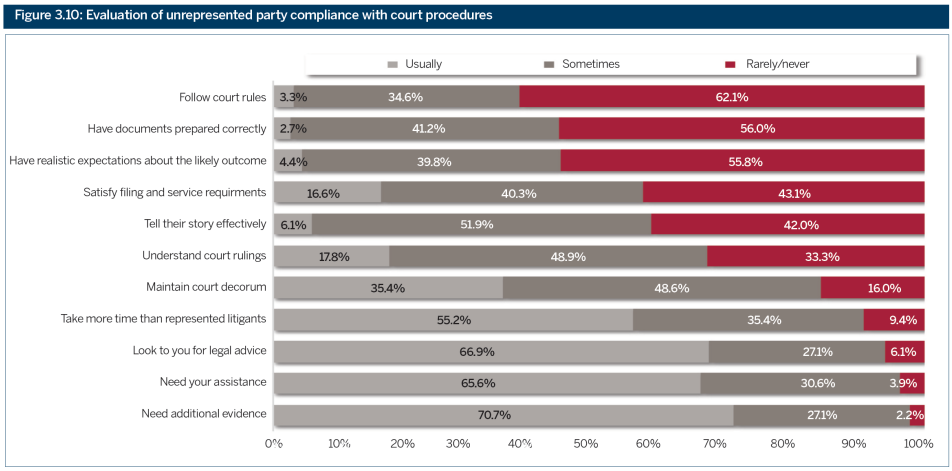
[27] *See* Part IV, *infra*, discussion in text and notes.
[28] *See* Quintanilla et al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __; Kroeper et al., *Underestimating the Unrepresented: Cognitive Biases that Disadvantage Pro se Litigants*, *supra* note ___, at ___.
[29] *See* Quintanilla et al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __; Kroeper et al., *Underestimating the Unrepresented: Cognitive Biases that Disadvantage Pro se Litigants*, *supra* note ___, at ___.
[30] *See* Quintanilla et al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __; Kroeper et al., *Underestimating the Unrepresented: Cognitive Biases that Disadvantage Pro se Litigants*, *supra* note ___, at ___.
[31] *See* Kroeper et al., *Underestimating the Unrepresented: Cognitive Biases that Disadvantage Pro se Litigants*, *supra* note ___, at ___.
[32] *See* Quintanilla et al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __.
[33] *See* Quintanilla et al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __.

and cognitive categories about unrepresented persons are not prevalent within and widely shared among members of the lay public.

For example, a recent statewide legal needs study in Indiana, surveying over 100 members of Indiana's judiciary and clerks of court, examined the attitudes and expectations that these court officials hold about unrepresented parties (*see* Figure 1).[34] Consistent with findings in studies conducted by the Conference of Chief Justices, the Conference of State Court Administrators, and the Federal Judicial Center,[35] these court officials reported negative attitudes and expectations about the degree to which unrepresented persons comply with court procedures.[36] These court officials responded that unrepresented persons never or rarely follow court rules, that they never or rarely have documents prepared correctly, that they never or rarely tell their story effectively, and that they never or rarely have realistic expectations about likely outcomes.[37] Moreover these court officials reported that unrepresented persons always or usually need assistance and look to them for legal advice.[38] Further, they reported negative attitudes about unrepresented litigant trends, including the belief that unrepresented litigation trends put pressure on courts to assist unrepresented parties, result in case-progression delays, and lead to more contested hearings.[39] These court officials overwhelmingly believed that the civil process was worse off because these persons were unrepresented parties.[40]

[34] *See* Victor D. Quintanilla & Rachel Thelin, *Indiana Civil Legal Needs Study And Legal Aid System Scan* (2019).
[35] *See* "The Importance of Funding for the Legal Services Corporation from the Perspective of the Conference of Chief Justice and the Conference of the State Court Administrators," Conference of Chief Justices and the Conference of State Court Administrators, 2013. http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Web%20Documents/LSC_WHTPR.ashx; Donna J. Stienstra et al., *Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Court and Chief Judges* (2011).
[36] *See* Quintanilla & Thelin, *Indiana Civil Legal Needs Study and Legal Aid System Scan*, *supra* note __, at ___.
[37] *See id.* at __.
[38] *See id.* at __.
[39] *See id.* at __.
[40] *See id.* at __.

Figure 1: Evaluations by Court Officials of Pro se Compliance with Court Procedures

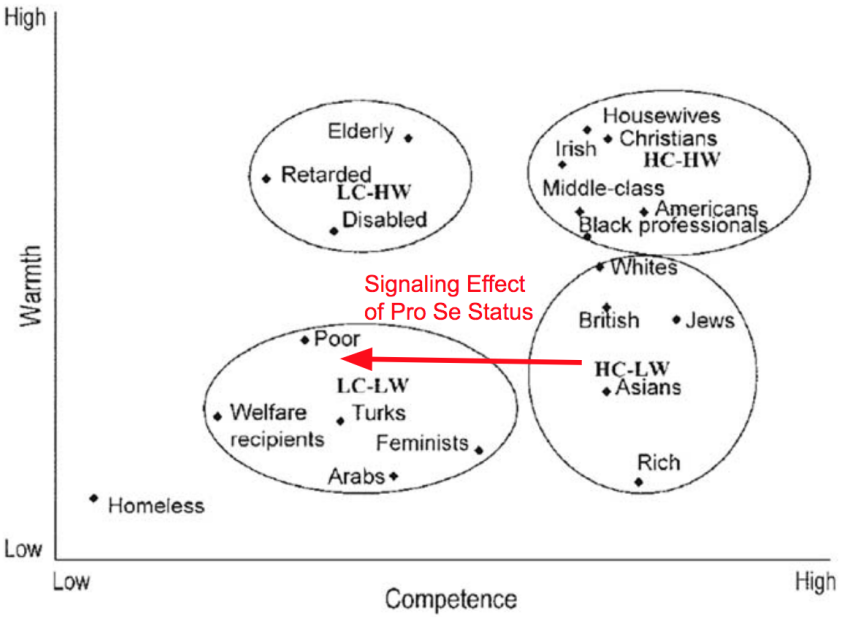


Source: Victor D. Quintanilla & Rachel Thelin, *Indiana Civil Legal Needs Study and Legal Aid System Scan* (2019)

Moreover, the mere quality of whether a person has legal representation or not produces stereotypes about that party among law-trained persons.[41] These stereotypes operate to disadvantage people without legal representation. As discussed elsewhere, this pattern of results is troubling in light of research on the BIAS map (*see* Figure 2)[42] given that a person's unrepresented status diminishes their perceived competence. Indeed, my prior psychological experiments evidence that, when an unrepresented party is socially constructed into a *pro se* party, this dampens beliefs about that person's competence on the BIAS map.[43] As a result, like welfare recipients and the poor, unrepresented parties may be treated with contempt, disgust, or neglect.[44]

[41] *See* Quintanilla et al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __.
[42] *See* Quintanilla et al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __ (citing Amy J.C. Cuddy, Susan T. Fiske, and Peter Glick, T*he BIAS Map: Behaviors from Intergroup Affect and Stereotypes*, 92 Journal of Personality and Social Psychology 631 (2007).
[43] *See* Quintanilla et al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __.
[44] *See* Cuddy, Fiske, and Glick, *supra* note __, at __.

Figure 2. Scatter Plot and Cluster Analysis of Groups on Competence and Warmth Ratings Indicating Signaling Effect of Pro Se Status

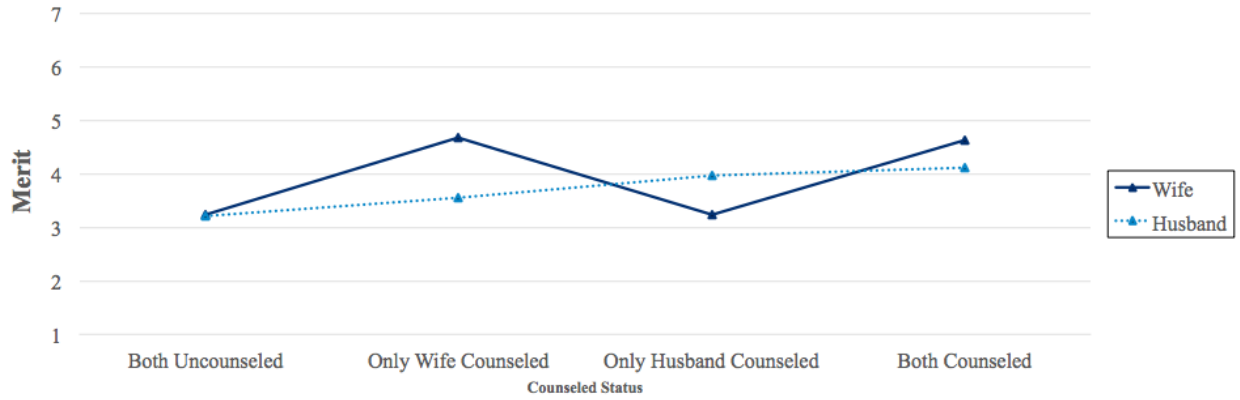


Source: Amy J.C. Cuddy, Susan T. Fiske, and Peter Glick, *The BIAS Map: Behaviors from Intergroup Affect and Stereotypes*, 92 Journal of Personality and Social Psychology 631 (2007).[45]

In another study, I conducted a psychological experiment (an RCT) presenting to more than 200 Indiana judges and Indiana lawyers highly realistic filmed vignettes of initial hearings in family law matters that experimentally manipulated whether a wife and husband were provided legal representation.[46] The experiment entailed four conditions: one in which both parties were unrepresented, two with asymmetries of legal representation, and one in which both parties were counseled. Consistent with the theory of the signaling effect of *pro se* status, judges and lawyers perceived persons with legal counsel to have more meritorious cases than persons without legal counsel, even when controlling for other case-related factors (*see* Figures 3 and 4). These findings reveal that the mere presence or absence of counsel alters perceptions and evaluations about cases among judges and lawyers.[47] Merely having counsel—even without factoring in the added legal expertise—alters the schemas, expectations, and preconceptions that persons with legal training hold in mind.

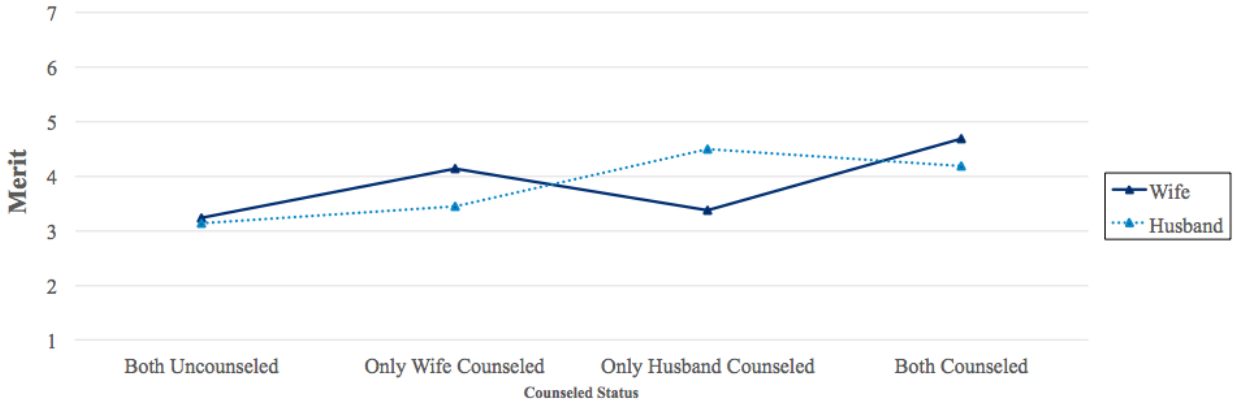
[45] HC-HW high-competence, high-warmth; HC-LW high-competence, low-warmth; LC-HW low-competence, high-warmth; LC-LW low-competence, low-warmth.
[46] *See* Kroeper et al., *Underestimating the Unrepresented: Cognitive Biases that Disadvantage Pro se Litigants*, *supra* note ___, at ___.
[47] *See* Kroeper et. al., *Underestimating the Unrepresented: Cognitive Biases that Disadvantage Pro se Litigants*, *supra* note ___, at ___.

Figure 3. Judges' Perceptions of Case Merit Varying with *Pro Se* Status



Source: Kroeper, et. al., *Underestimating the Unrepresented: Cognitive Biases that Disadvantage Pro Se Litigants in Family Law Cases*

Figure 4. Attorneys' Perceptions of Case Merit Varying with *Pro Se* Status



Source: Kroeper, et. al., *Underestimating the Unrepresented: Cognitive Biases that Disadvantage Pro Se Litigants in Family Law Cases*

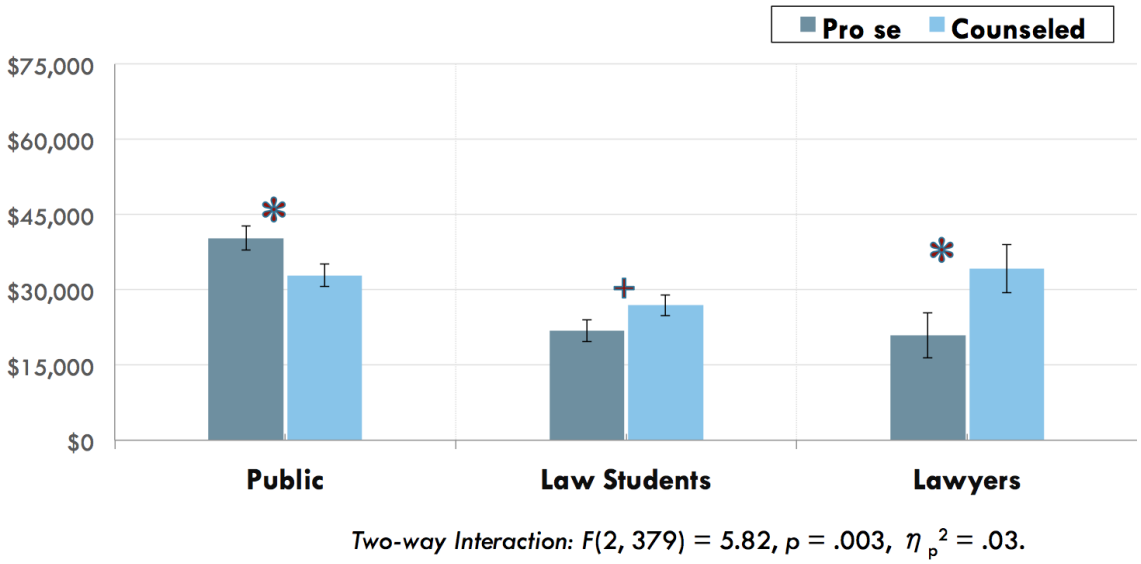
Moreover, in this psychological experiment, judges and lawyers predicted that unrepresented persons would experience the civil justice system as less fair and as less satisfying than counseled litigants, especially when resolving disputes with formal hearings or trials.[48] In other words, judges and lawyers held schemas and expectations about who would win and who would lose, which coincided with their expectations about who would experience the resolution of this adversarial dispute as fairer and more satisfying.

Further, this research revealed that the schemas and stereotypes associated with *pro se* status emerge as a function of legal socialization. That is, these experiments evidenced the

[48] *See* Kroeper et al., *Underestimating the Unrepresented: Cognitive Biases that Disadvantage Pro se Litigants*, *supra* note ___, at ___.

emergence of this signaling effect among law students and a substantial signaling effect among practicing lawyers when awarding settlement values.[49] Among persons with legal training, the presence or absence of counsel altered the value of settlement awards provided, with unrepresented parties receiving lower settlement awards. In marked contrast, members of the public awarded persons higher settlement values when unrepresented than when counseled—perhaps championing and rewarding the scrappy, uncounseled persons who decided to go it alone.[50] This series of psychological experiments conducted across members of the public, law students, and lawyers suggests that the effect of *pro se* status may be a product of socialization in the legal profession—as only the law-trained samples exhibited the effect and as the effect became sharper as law-trained individuals acquired more legal experience (*see* Figure 5).

Figure 5. Legal Socialization and the Signaling Effect of Pro se Status



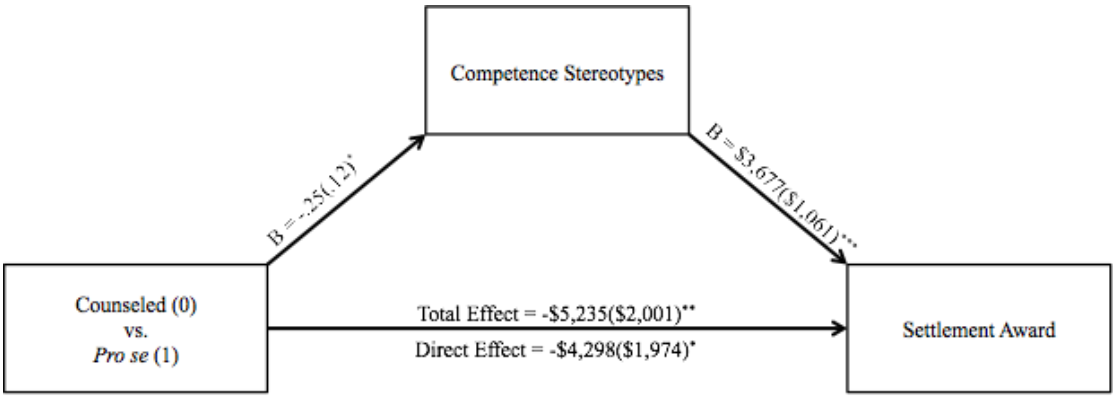
Source: Victor D. Quintanilla, Rachel A. Allen, and Edward R. Hirt, *The Signaling Effect of Pro Se Status*, 42 Law & Social Inquiry 1091 (2017).[51]

Finally, these experiments also revealed examples of how this labeling effect influences associated thoughts and behavior. For example, many lawyers rationalized awarding lower settlement values to unrepresented persons in ways that suggest that schemas, scripts, and expectations about *pro se* parties affected their decision-making.[52] Indeed, we found that the effect of *pro se* status on settlement awards was explained, in part,

[49] *See* Quintanilla et al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __.
[50] *See* Quintanilla et al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __.
[51] Estimated mean settlement values awarded by each group to the pro se/counseled claimant. Standard errors are represented by the error bars attached to each column. *p<.05, +*p <.10.*
[52] *See* Quintanilla et al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __.

by the negative stereotypes law-trained persons held about *pro se* parties and their lack of competence (*see* Figure 6).

Figure 6. Mediation Model Representing the Mediational Path of the Signaling Effect of Pro se Status on Settlement Awards through Competence Stereotypes about the Claimant



Source: Victor D. Quintanilla, Rachel A. Allen, and Edward R. Hirt, *The Signaling Effect of Pro se Status*, 42 Law & Social Inquiry 1091 (2017).[53]

When asked to explain their decision-making in open-ended responses, for example, one lawyer explained that "the procedural hurdles, hostile case law, overworked judges, and unsavvy pro se plaintiffs, along with the paucity of evidence in this case, make the entire scenario extremely unlikely to work out for [the claimant]."[54] Another lawyer explained their behavior as follows: "Not represented by counsel. It's meaningful but not so large that it will cause her to reevaluate her claim and hire counsel."[55] Another lawyer justified their behavior in the following way: "A settlement offer here needs to reflect the weight of the evidence and the relative weakness of Atlantic's case. However, the fact that [the claimant] is a pro se plaintiff must be considered. The offer cannot be so substantial as to communicate to her that [the defendant] believes she has [won]. They want to keep alive in her mind the fear that she might lose and walk away with nothing—a fear that likely would be very small if she were represented."[56]

II. The Social Construction of *Pro se* Status

We do unrepresented status through a process of social construction, by applying thoughts, meanings, labels, and preconceptions about *pro se* parties onto unrepresented persons. This form of doing unrepresented status is best referred to as *the social construction*

[53] *p<.05, ** p <.01, *** p <.001
[54] Quintanilla et al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __.
[55] Quintanilla et al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __.
[56] Quintanilla et al., *The Signaling Effect of Pro Se Status*, *supra* note __, at __.

of pro se *status*,[57] which involves, at the psychological level, imputing schemas, mental categories, stereotypes, attributions, expectations, and biases onto unrepresented persons and then treating them differently than counseled parties.[58] From this angle, a *pro se* party is not something that one is; rather *pro se* status is a socially constructed category laden with thoughts, meanings, and expectations about unrepresented people who seek to resolve legal problems within the civil justice system.

Court officials and lawyers engage in the social construction of *pro se* status when interacting with unrepresented people in particular settings and contexts within the civil justice system.[59] Unrepresented people become *pro se* parties when court officials and lawyers label, categorize, and treat them as such.[60] The social construction of *pro se* status occurs when law-trained persons presume that such people and their explanations have negative or frivolous qualities and behave accordingly.[61]

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[57] *See* Peter L. Berger & Thomas Luckman, The Social Construction of Reality: A Treatise in the Sociology of Knowledge (1967); *Setha M. Low*, *Spatializing Culture: The Social Production and Social Construction of Public Space in Costa Rica*, 23 American Ethnologist 861 (1996) ("The materialist emphasis of the term *social production* is useful in defining the historical emergence and political and economic formation of urban space. The term *social construction* may then be conveniently reserved for the phenomenological and symbolic experience of space as mediated by social processes. . ."); Martha Minow, *Identities*, 3 Yale L.J. & Human 97, 111 (1991).

[58] *See* Part I, *supra*. Scholars in neighboring disciplines have written about similar processes when studying the social construction of social identities and the self. *See* Paula M. L. Moya and Hazel Rose Markus, *Doing Race An Introduction* in Doing Race: 21 Essays for the 21st Century (2010) ("As depicted, race and ethnicity are social, relational processes that take place over time and across space."); Candace West and Don H. Zimmerman*, Doing Gender*, 1 Gender and Society 125 (1987) ("[O]ur attention shifts from matters internal to the individual and focuses on interactional and, ultimately, institutional arenas. In one sense, of course, it is individuals who "do" gender. But it is a situated doing, carried out in the virtual or real presence of others who are presumed to be oriented toward its production."). *See also* Michel Foucault, The History of Sexuality: An Introduction 43 (1990); Judith Butler, Gender Trouble: Feminism and the Subversion of Identity (1990); Berger & Luckman, The Social Construction of Reality, *supra* note __, at 173-183; John Dewey, Democracy and Education 16-39 (2004); George Herbert Mead, Mind, Self, & Society from the Standpoint of a Social Behaviorist 135-226 (1963). *Cf.* Robert A. F. Thurman, The Central Philosophy of Tibet, A Study and Translation of Jey Tsong Khapa's Essence of True Eloquence 89-100 (1984) (comparing Ludwig Wittgenstein's and Tsong Khapa's philosophical analysis); Nagarjuna, The Root Stanzas of the Middle Way, Chapter 24 (Padmakara Translation Group 2016) ("Whatever is dependently arisen This has been explained as empty. In dependence upon something else it is imputed [as existent]. This is the Middle Way indeed.")

[59] These socially constructed meanings among occur from the systematic interaction between court officials, lawyers, and *pro se* litigants. *See* Paris Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro se Litigant*, 27 J. Nat'l Ass'n Admin. L. Judiciary 447, 450 (2007) ("The fundamental problem for *pro se* litigants in having their claims or defenses heard is not primarily their lack of information or understanding, but the structural dynamics in the evidentiary hearing process which work to silence the pro se litigant even when she has some knowledge regarding her legal claims or defenses.").

[60] *See* Russell Engler, *And Justice For All–Including The Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987, 1992 (1999); Paris R. Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant*, 27 J. Nat'l Ass'n Admin. L. Judiciary 447, 451-453 (2007).

[61] *See* Jona Goldschmidt, Barry Mahoney, Harvey Solomon & Joan Green, Meeting The Challenge Of Pro Se Litigation: a Report And Guidebook For Judges And Court Managers 121 (1998) (quoting judges describing pro se litigants as "pest[s]," "nut[s]," "an increasing problem," "clogging our judicial system," and "no one likes [them]"); Paris R. Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant*, 27 J. Nat'l Ass'n Admin. L. Judiciary 447, 452 (2007) ("[T]he judicial process in most tribunals, even in relatively informal settings

This doing of unrepresented status occurs when legal professionals interpret the challenges that unrepresented people experience as stemming from character flaws, personal failure, or a lack of competence, and when they draw negative inferences about the blameworthiness, unworthiness, or unimportance of *pro se* parties relative to counseled parties.[62] Through this social construction of *pro se* parties, all else being equal, persons represented by counsel are perceived as more credible, more worthy of time and attention, and more important than persons without legal representation and treated differently.[63]

This social construction of *pro se* status also occurs when law-trained persons share stereotypical ideas and meanings about *pro se* parties with one another outside the presence of unrepresented persons; for example, within law offices, judicial chambers, or within courthouses.[64] This social construction of *pro se* status also occurs when these meanings and messages subtly leak into the self concepts of unrepresented persons and their beliefs about their own self-worth, when these meanings and messages lead unrepresented persons to experience non-belonging within the civil justice system, and when these meanings and messages alter the perceived legitimacy and justice of the civil justice system among unrepresented people. That is, court officials, lawyers, and persons with legal training construct unrepresented people into *pro se* parties.

Our civil justice system behaves—and a person's interactions with others in the civil justice system unfold—*differently* when a person is unrepresented.[65] This difference is not attributable merely to the professional skills of lawyers. Court officials and lawyers generally conceive of being represented as necessary for the healthy, stable functioning of the civil

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such as small claims courts and administrative hearings, rejects both the form and substance of the inevitable manner in which pro se litigants speak, i.e., narrative.).

[62] *See e.g.* John Doyle et al., *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 Annual Surv. Am. L. 117, 343 (1997) (revealing that "some judges who agree that their colleagues are unhappy with [employment discrimination] cases attribute the discontent to the fact that plaintiffs in them often appear *pro se,* and do not understand the law or the court's procedures. Many federal judges also appear to believe that the proliferation of small cases involving individual claimants clog up the federal courts and divert judges' attention from larger, purportedly more significant, civil cases.")

[63] Pro se litigants are more often interrupted than represented litigants which creates additional hurdles to accessing justice. Paris Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant*, 27 J. Nat'l Ass'n Admin. L. Judiciary 447, 451-453 (2007) (discussing how claimants were treated in administrative hearings; the ALJ "frequently had the effect of silencing the claimant, rather than assisting her in developing the factual record in the only way she knew how.").

[64] *See* Russell Engler, *Approaching Ethical Issues Involving Unrepresented Litigants*, Clearinghouse Rev. J. Policy L. and Poverty 377, 378 (2009) ("The rules on paper bear little relation to what occurs daily in courts that handle housing, family, and other civil cases in which litigants are often unrepresented.").

[65] *See* Sandefur, *Elements of Professional Expertise, supra* note __, at 910 (finding that the representation in the courtroom encourage the court to follow its own rules); Paris Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant*, 27 J. Nat'l Ass'n Admin. L. Judiciary 447, 451-453 (2007); *see also* Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts* 22 Geo. J. Poverty L. & Pol'y. 473 (2015); Engler, *supra* note, __, at 378.

justice system[66] because they conceive of being represented as natural, normal, and normative. In contrast, being unrepresented is often conceived of as abnormal, problematic, potentially deviant, and blameworthy.[67] Many court officials and lawyers believe that there is something unique and inherently different about people who are unrepresented in the civil justice system.[68] For example, many believe that lawyers choose not to represent unrepresented people because they have less meritorious cases or because they have more worrisome personality characteristics.

The social construction of *pro se* parties occurs, in part, because legal professionals are socialized into a different habitus and experience life from a different social strata than unrepresented persons, including low-income persons (e.g., indigent debtors and low-income tenants).[69] This habitus shapes how legal professionals perceive the world around them, the language they employ, and their mannerisms and patterns of behavior, and it orients their perspectives and feelings about the responsibilities of legal professionals toward the civil justice system. This habitus differs greatly from the lived experience of unrepresented parties from low-income households. Indeed, at times, this gap is so wide that unrepresented persons may feel, when interacting with legal professionals, as if they are interacting with persons from a foreign culture who use a foreign language and who hold different conceptions about justice.[70]

Despite the adversities that unrepresented persons face within the civil justice system, many court officials and lawyers refer to unrepresented persons as *self-represented litigants*.[71] This double-edged linguistic frame implies choice and volition, and

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[66] Judges have noted that the increase of pro se litigants creates a significant burden on the courts. *See Clearinghouse Review*, 40 J. of Poverty L. and Pol'y 228 (2006).

[67] *See e.g.* John Doyle et al., *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 Annual Surv. Am. L. 117, 343 (1997). These problematic stereotypes parallel negative stereotypes of indigent families. *See* Valerie Strauss, *Five Stereotypes About Poor Families and Education*, Wash. Post (Oct. 28, 2013), https://www.washingtonpost.com/news/answer-sheet/wp/2013/10/28/five-stereotypes-about-poor-families-and-education/?noredirect=on&utm_term=.4b67ace14719/

[68] *See* Russell Engler, *And Justice for All--Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987, 1988 (1999).

[69] *See* Pierre Bourdieu, *Distinction: A Social Critique of the Judgment of Taste* (1979) (describing theory of habitus, as a system of dispositions, perceptions, thoughts, and behaviors acquired and embodied by navigating within social structures and social fields); Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 The Hastings Law Journal 805, 807 (1987) ("[T]he practices within the legal universe are strongly patterned by tradition, education, and the daily experience of legal custom and professional usage. They operate as learned yet deep structures of behaviors within the juridical field--as what Bourdieu terms habitus.")

[70] *See* Matthew Desmond, Evicted 362, n.17 (2016) ("Tenants may have the right argument but wrong presentation: too rough or meandering, too angry or meek. It would be naive to think these considerations are uninformed by class, gender, racial dynamics between tenants, landlords, and court actors. . . And even if landlords are new to eviction, many are educated members of the middle class, just like the court clerks, commissioners, and judges, who on account of their similar class position all speak the same language and speak it in the same way.")

[71] *See, e.g.*, *Self-Represented Litigants*, California Courts, https://www.courts.ca.gov/7648.htm (last visited Apr. 11, 2019). *But see* Engler, *And Justice for All--Including the Unrepresented Poor*, *supra* note __, at 1992 (The concept

metaphorically connotes self-empowerment. On one hand, some unrepresented parties freely and purposefully choose to engage in self-representation rather than hiring counsel[72]; on the other, many do not.[73] Troublingly, this linguistic frame obscures the structural dimensions of doing unrepresented status (described in Part III) and the societal choices that we make that cause the presence and prevalence of unrepresented persons within the civil justice system.[74] That is, the term *self-represented litigant* obscures the deep structural dimensions and inequalities within our legal and economic systems that lead many low-income members of the public to become unrepresented in the first place. On one hand, this label casts the problem as the need to empower persons who choose to represent themselves; on the other, the label elides the power imbalances confronted by unrepresented persons whose adversaries litigate against them with legal representation and the negative schemas and stereotypes that lawyers hold toward them. As such, this double edged linguistic frame may subtly rationalize and license court officials' and lawyers' negative behavior toward unrepresented persons, especially when these unrepresented persons litigate against repeat players with counsel.[75]

The social construction of *pro se* status emerges within social interactions between court officials, lawyers, and law-trained persons and unrepresented persons in particular civil justice contexts. These meanings emerge as court officials, lawyers, and unrepresented people interact with one another and make sense of their experiences within the civil justice system. These court officials and legal professionals (including judges, lawyers, and clerks of the court, for example) with whom unrepresented persons interact represent the immediate social context of unrepresented persons. While outside this immediate social context, other people, including leaders of the bar and legal educators may influence the ideas, stereotypes, and expectations that these court officials and legal professionals ultimately hold about what it means to be a *pro se* party.

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of self-representation connotes the choice to forego counsel and probably some perceived ability to carry out the representation of oneself. . . This does not describe the predicament of most of the unrepresented poor. . .")

[72] *See* Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 Fordham Urb. L.J. 473 (2010) (arguing that some *pro se* litigants do choose to represent themselves to preserve "voice.").

[73] *See* Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro se*, 17 Geo. J. Legal Ethics 423, 425 (2004) ("[T]hose who appear in court without lawyers are, as a general matter, only 'choosing' to do so in the most formal sense. Rather, that 'choice' is a product of their economic situation and the cost of counsel."), Engler, *And Justice for All--Including the Unrepresented Poor*, *supra* note__, at 2024 ("[C]ourts routinely, and swiftly, conclude that the waivers are knowing, intelligent, and voluntary.")

[74] *See supra* Part III and accompanying text.

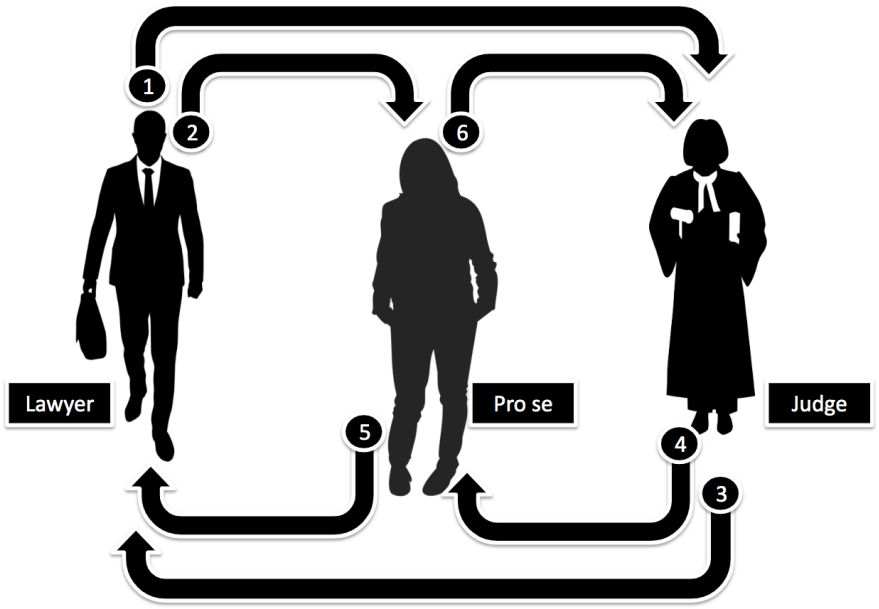
[75] *See generally*, Russell Engler, *And Justice for All--Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987, 1988 (1999) (discussing the view of judges and other "players" that unrepresented parties as people who have "chosen" to be unrepresented; noting that some lawyers and judges think "unrepresented litigants are using their status to gain an unfair advantage over represented parties" who are just "play[ing] by the rules").

I now turn to a model depicting how court officials and lawyers may consciously or unconsciously socially construct *pro se* status by applying thoughts, meanings, labels, and preconceptions about *pro se* parties onto unrepresented persons. That is, I briefly depict the psychological process of imputing schemas, mental categories, stereotypes, attributions, expectations, and biases onto unrepresented persons, and the manner in which an unrepresented person may experience this particular interaction with court officials and lawyers in their immediate social context.

I illustrate this interaction with the all too common example of an unrepresented person drawn into the civil justice system as a defendant tenant in an eviction case by a repeat-player landlord who has legal representation.[76] In this regard, 2.3 million evictions cases were filed in the United States, and in New York City, 90 percent of landlords were represented, while 90 percent of tenants were not.[77] As is common, the unrepresented tenant may, in theory, have valid defenses to defeat the eviction.[78] Yet in these cases, dockets on any day are bulging with cases, hearing times are exceedingly short, and the adversarial process is totally broken.[79] In Milwaukee, the sound of eviction court is "the soft hum of dozens of people sighing, coughing, murmuring, and whispering to children interspersed with the cadence of a name, a pause, and three loud thumps of a stamp."[80]

[76] *See* Task Force to Expand Civil Legal Services in New York, 2010 Report to the Chief Judge 1 (2010) (finding that 99% of tenants in eviction cases, 99% of borrowers in consumer credit cases, and 97% of parents in child support matters are unrepresented in New York City).
[77] *See* Legal Services Corporation, Budget Request Fiscal Year 2020 at 25 (2019) (2.3 million evictions were filed in 2016, a rate of four per minute, 90% of landlords are represented while 90% of tenants are not; when tenants represent themselves in NYC, they are evicted in nearly 50% of cases, by contrast when they are represented by a lawyer, tenants win 90% of the time); Task Force to Expand Civil Legal Services in New York, 2010 Report to the Chief Judge 1 (providing statistic that 44% of homeowners in New York State are unrepresented in foreclosure cases.
[78] *See* Matthew Desmond, Evicted: Poverty and Profit in the American City (2017) ("Between 2009 and 2011, nearly half of all renters in Milwaukee experienced a serious and lasting housing problem. More than 1 in 5 lived with a broken window; a busted appliance; or mice, cockroaches, or rats for more than three days.")
[79] *See* Desmond, Evicted, *supra* note __; David Latham Eldridge, The Making of a Courtroom: Landlord-Tenant Trials in Philadelphia's Municipal Court (2001) (unpublished Ph.D. dissertation, University of Pennsylvania), https://repository.upenn.edu/cgi/viewcontent.cgi?article=2811&context=edissertations; Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 Geo. J. Pov. Law & Pol'y 453, 463 (2011); Engler, *And Justice for All--Including the Unrepresented Poor*, *supra* note__, at 1991; Sandefur, *Elements of Professional Expertise*, *supra* note__, at 925.
[80] Matthew Desmond, Evicted 97 (2016).

Figure 7. The Social Construction of *Pro se* Status



Lawyer's interactions with the unrepresented tenant and judge

The first and second arrows in the diagram represent the repeat-player lawyer's interactions with the unrepresented tenant and the judge. In Milwaukee, landlord lawyers sit toward the front of the room, in a reserved space with tables and plenty of empty chairs, wearing suits and power ties.[81] Here, the lawyer for the landlord will apply schemas, stereotypes, and expectations about what it means for this person to be a *pro se* party in this kind of eviction case.[82] For example, the landlord lawyer will impute onto the unrepresented tenant stereotypes and expectations about *pro se* parties, about the perceived merit of the *pro se* tenant's defenses to this suit, and the likelihood that the *pro se* tenant will be able to successfully raise any valid defense, including about whether the landlord has refused a repair making the dwelling uninhabitable. The landlord lawyer will also make attributions about the persuasiveness and sophistication of this *pro se* party and decide whether and how hard to press the *pro se* party in hallway negotiations.[83] Moreover, the repeat-player lawyer will engage in metaperception, meaning that that landlord lawyer will make predictions about what this *pro se* party likely knows about this eviction case and what this unrepresented tenant thinks about the lawyer for the landlord his or herself, and how susceptible this

[81] *See* Matthew Desmond, Evicted 96 (2016).
[82] *See* Russell Engler, *And Justice for All--Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 Fordham L. Rev. 1987, 1988 (1999).
[83] *See generally* Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. Pub. L. 373, 384 (2005).

unrepresented tenant will be to adversarial tactics and persuasion, particularly in informal "negotiations" about stipulations with tight payment schedules and mounting late fees.[84]

Further, the repeat-player lawyer will engage in meta-perception vis-a-vis the judge and predict how the judge will likely treat the opposing party and rule in this case as the landlord lawyer is litigating against a *pro se* party. Further, the landlord lawyer will likely have a variety of negative associations and feelings toward *pro se* parties, which may subtly justify treating the unrepresented tenant poorly and with less dignity and respect. These evaluations and negative attitudes, when coupled with an adversarial orientation, may lead the lawyer to use language and terminology that may be unfamiliar to the unrepresented debtor and, perhaps, seem like a foreign language. Worse yet, the lawyer may offer harmful legal advice to the unrepresented tenant.[85] All else being equal, in this all to common example of adversarialism and asymmetric representation within the civil justice system, the repeat-player lawyer for the landlord will seek to extract advantages and value from the debtor *because* the tenant is vulnerable as a *pro se* party.[86]

Judge's interactions with the lawyer and unrepresented tenant

The third and fourth arrows in the diagram represent the judge's interactions with the unrepresented tenant and the repeat-player lawyer for the landlord. Here too, the judge will apply schemas, stereotypes, and expectations about what it means to be a *pro se* party in this kind of eviction case.[87] For example, the judge may hold stereotypes and expectations about *pro se* parties, about the perceived merit of the *pro se* tenant's defenses, along with the likelihood that the unrepresented tenant will successfully raise those valid defenses.[88] The

[84] *See* Matthew Desmond, Evicted 40, 358 (2016) ("Tobin offered them both stipulation agreements, a civil court's version of a plea bargain. If they stuck to a tight payment schedule, Tobin would dismiss the eviction. If they deviated, Tobin could obtain a judgment of eviction and activate the sheriff's eviction squad."); Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 Calif. L. Rev. 79 (1997) (Although ethical rules prohibit lawyers from giving advice to unrepresented persons, it is commonplace in certain civil legal situations such as housing court. Because the unrepresented litigants are often poor, people of color, and are women, these ethical violations fall most heavily on these groups. The author calls for several responses, including expanded provision of counsel in civil actions to address this issue.)

[85] Russell Engler, *Out of Sight and Out of Line*, *supra* note ____ (discussing ethical rules that prohibit lawyers from giving advice to unrepresented persons in housing court)

[86] *See* Shanahan & Carpenter, *Simplified Courts Can't Solve Inequality*, *supra* note ____.

[87] *See* "The Importance of Funding for the Legal Services Corporation from the Perspective of the Conference of Chief Justice and the Conference of the State Court Administrators," Conference of Chief Justices and the Conference of State Court Administrators, 2013; Donna Stienstra, Jared Bataillon & Jason A. Cantone, *Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Court and Chief Judges* (2011).

[88] *See* Jessica Steinberg, *Demand Side Reform in the Poor People's Court*, 47 Conn. L. Rev. 741, 756 (2015); Jona Goldschmidt, Barry Mahoney, Harvey Solomon & Joan Green, Meeting The Challenge Of Pro Se Litigation: a Report And Guidebook For Judges And Court Managers 121 (1998) (quoting judges describing pro se litigants as "pest[s]," "nut[s]," "an increasing problem," "clogging our judicial system," and "no one likes [them]");

judge may also have beliefs about the likely outcome of the dispute, because the unrepresented tenant is *pro se*, rather than represented.[89]

The judge will also engage in meta-perception, making predictions about what the lawyer for the landlord expects from the judge in this case. Moreover, the judge will make predictions about what the unrepresented tenant expects from the judge in this case, and about what the *pro se* party may be thinking about interactions between the judge and the repeat-player lawyer.

The judge may, moreover, have a variety of explicit and implicit attitudes—likely negative—and aversive feelings toward *pro se* parties and low-income Black female tenants, which may subtly justify treating the unrepresented tenant with ambivalence.[90] These negative attitudes, when coupled with a role ethic orientation toward dispassionate impartiality[91] and judicial concerns about expediency with court time and resources, may lead the judge to adopt a detached bureaucratic orientation, despite the asymmetries of representation in this case.[92] Indeed, the court official may be more concerned with simply getting through the pile of backed up cases because the next day another pile will be waiting.[93] Relatedly, research reveals that judges often do not hold landlords to statutory burdens of proof, that they fail to examine eviction notices to confirm their validity, and that they often fail to recognize defenses raised by unrepresented tenants.[94] Further, the judge may mirror back unfamiliar terminology used by the lawyer for the landlord when interacting with the unrepresented tenant. When the unrepresented tenant asks for guidance about how and whether to raise defenses, the judge may shed little insight on the grounds that the unrepresented tenant has "chosen" to be a self-represented litigant. Understandably, many unrepresented persons believe court officials are rude.[95] Worse yet, the court official may hold out the threat of an eviction record to induce tenants to enter into a bad stipulation, to save the court time.[96] The net effect is that this process does little to level the playing field

[89] *See* Part I, *infra*, discussion and notes.
[90] Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 Fordham Urb. L.J. 305, 381 (2002); Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 Iowa L. Rev. 1263 (2016) (discussing the difficult experiences of minority litigants in civil litigation).
[91] *See* Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the New Civil Judges*, 2018 WIS. L. REV. 249 (2018).
[92] *See generally* Russell Engler, *The Toughest Nut: Handling Cases Pitting Unrepresented Litigants Against Represented One*s, 62 Juv. & Fam. Ct. J. 10, 31 (2011); *see also* National Center for State Courts, Civil Justice Initiative: The Landscape of Civil Litigation in State Courts (2015) (noting that most judicial code of ethics prevent judges from "giving the appearance of providing assistance").
[93] *See* Matthew Desmond, Evicted 304 (2016).
[94] *See* Sandefur, *Elements of Professional Expertise*, *supra* note__, at 925.
[95] *See* Matthew Desmond, Evicted 99 (2016).
[96] *See* Matthew Desmond, Evicted 398 (2016).

with the lawyer for the landlord who seeks to extract adversarial advantages and value from the tenant *because* the tenant is a *pro se* party.[97]

Unrepresented tenant's interactions with lawyer and judge

The fifth and sixth arrows in the diagram represent the unrepresented party's interactions with the lawyer for the landlord and the judge. In a typical month, 3 in 4 people in Milwaukee eviction court are black; of those, the majority are black women.[98] Here, the unrepresented tenant will have attributions about why they are unrepresented in this case, which may differ from the attributions made by the lawyer for the landlord and the judge. Moreover, the unrepresented party may hold beliefs about equal justice under the law or mistaken expectations about the likely success of self represented litigants who litigate against repeat-players with legal representation.[99] While some unrepresented parties may begin with reasonable confidence, many often quickly become disillusioned, frustrated, terrified, and overwhelmed by the complexity of their case and the prospect of speaking in court and interacting with opposing counsel.[100]

The unrepresented party will also engage in meta-perception, meaning that that unrepresented party will make predictions about what the lawyer for the landlord and judge think about their case. Moreover, the unrepresented party will seek to predict what the judge is thinking about the repeat-player lawyer when the judge interacts with the lawyer for the landlord. Further, the unrepresented party may have a variety of negative associations about the civil justice process, given their unfamiliarity with the setting and the language being used, even if they may have valid defenses against the threatened eviction.

The unrepresented party may attempt to use ordinary language discourse to explain their predicament, which is inconsistent with the legal terminology used by the repeat-player

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[97] *See* Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 Fordham Urb. L.J. 473, 475-77 (2010) (discussing how lawyers create and serve the "basic structure of the adversary system, allowing judges to preserve a passive role and sparing them the potential complexities of dealing with unprofessional litigants who are not invested in long-term relations with other legal actors that motivate people to adhere to rules of appropriate conduct when dealing with legal authorities.").

[98] Matthew Desmond, Evicted 97 (2016).

[99] *See* Zimerman & Tyler, *Between Access to Counsel and Access to Justice*, *supra* note__ (discussing the connection between being SRL and having voice).

[100] *See* Dr. Julie Macfarlane, *The National Self-Represented Litigants Project*: Identifying and Meeting the Needs of Self-Represented Litigants: Final Report (May 2013) ("Many SRL's described themselves are terrified about the prospect of appearing in court. Some broke into tears in our interviews just thinking about it. Many recounted being unable to sleep for several or many nights before their appearance, shaking with nerves as they stood to speak; leaving court feeling upset, shaken and even humiliated, and experiencing stress-related symptoms for days afterward."); Natalie Anne Knowlton, et. al., *Cases without Counsel: Research on Experiences of Self-Representation in U.S. Family Court* 40-41 (2016) (discussing interactions with court officials and opposing counsel).

lawyer and the judge. As a result, the unrepresented tenant may ask the judge, and perhaps, the repeat-player lawyer for clarification, guidance, or advice on whether and how to raise defenses.[101] Yet the unrepresented tenant may feel that this help is insufficient and perhaps vent about the unfairness of the process to the collections lawyer and judge. This very behavior may merely confirm and harden the negative preconceptions that many lawyers and judges hold about *pro se* parties. The mere presence of a lawyer for the unrepresented tenant may curb a frivolous eviction and unchecked abuses and help prevent tenants from signing bad stipulations.[102] In sum, empirical research reveals that represented tenants are much less likely to be evicted.[103]

III. The Social Production of Unrepresented Persons

The very presence, and certainly the vast percentage, of unrepresented persons within a civil justice system is not a fixed, natural, or inherent quality of that civil justice system. From one angle, for example, the percentage of unrepresented people within our federal and state civil justice systems has changed over time and has risen rapidly over the last several decades.[104] Indeed, the percentage of unrepresented people within our civil justice system has more than quadrupled across case categories where basic human needs are at stake, including landlord-tenant, debt collection, and family law.[105] Similarly, the percentage of claimants without legal representation in federal civil rights actions, such as federal employment

[101] *See* Matthew Desmond, Evicted 304 (2016).
[102] *See* Matthew Desmond, Evicted 398-399 (2016).
[103] *See* D. James Greiener, Cassandra Wolos Pattanayak, and 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 (2013); Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment* 35 Law and Society Rev. 419 (2001). *See generally*, Legal Services Corporation, Budget Request Fiscal Year 2020 8, table 6 (2019) (using Hawaii, Philadelphia, Virginia reports to illustrate that compared to represented tenants, those without representation are 3x as likely to default on payments and more than twice as likely to incur damage payments, required to pay plaintiffs' attorneys fees in more cases, and more than twice as likely to incur other costs); *id.* at 25 (showing when tenants represent themselves in NYC, they are evicted in nearly 50% of cases, by contrast when they are represented by a lawyer, tenants win 90% of the time).
[104] *See* Bruce D. Sales, Connie J. Beck, & Richard K. Haan, *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, St. Louis Univ. L.J. (1993) (study showed that the percentage of domestic relation cases that involved a self-represented litigant rose from 24% in 1980 to 47% in 1985); Jessica Steinberg, *Demand Side Reform in the Poor People's Court*, 47 Conn. L. Rev. 741, 752 (2015); Judicial Services Division, Administrative Office of the Courts, An Analysis of Pro Se Litigants in Washington State 1995-2000 t.1 (2001) (Washington state study found that from 1995 to 2001, 80% of paternity cases and 95% of domestic violence petitions involved *pro se* litigants.).
[105] *See* Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 Lewis & Clark L. Rev. 439, 440 (2009); Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the "New" Civil Judges*, 2018 Wisc. L. Rev. 249 (2018) (discussing change over time in number of represented parties); National Center for State Courts, Landscape study (showing that the percentage of unrepresented persons has changed markedly over time, particularly for unrepresented defendants in consumer and housing cases).

discrimination actions, has risen as well.[106] From another angle, the levels of access afforded by our federal and state civil justice systems, as revealed by the proportion of unrepresented people flowing through these civil justice systems, differs markedly from that of other Western liberal democracies.[107] Again, the very presence and the vast percentage of unrepresented people within our civil justice system are not fixed or inherent qualities of our civil justice system.

Rather our society engenders unrepresented persons through societal decisions and public policy choices that we make (and have made) that combine to form our civil justice system. These societal decisions and public policy choices, when taken together, produce and reproduce the structures, processes, and institutional design of our civil justice system.[108] These societal decisions are shaped by social, economic, political, and ideological factors, as these decisions affect who is afforded voice and power, and whether and how persons can enforce rights and duties or assert power and privilege through legal institutions.[109]

In this essay, I introduce two intertwined aspects of the doing of unrepresented status. While I refer to the form of doing *pro se* status, described in Part II, as the *social construction of* pro se *status*, in this section, I introduce a concept best described as *the social production of unrepresented persons*. That is, some societal decisions and public policy choices are causes and conditions that have the material effect, whether intended or not, of increasing the likelihood that persons will navigate the civil justice system as unrepresented parties. These societal decisions are often path dependent[110] or historically contingent[111] and influenced by socio-political[112], economic, psychological, and ideological factors.[113] The *social production of unrepresented persons* emphasizes societal decisions that affect the structures, processes, and institutional design of our civil justice system, which result in the

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[106] *See* Cheryl R. Kaiser and Victor D. Quintanilla, *Access to Counsel: Psychological Science Can Improve the Promise of Civil Rights Enforcement*, 1 Policy Insights from the Behavioral and Brain Sciences 95 (2014); *See* Amy Myrick, Robert L. Nelson & Laura Beth Nielsen, *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. Legis. & Soc. Pol'y 705, 757 (2012).

[107] *See* Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: Legal Resources for Ordinary Americans*, *in* Beyond Elite Law: Access to Civil Justice in America 21, 23 (Samuel Estreicher & Joy Radice eds., 2016).

[108] *See, e.g.*, Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 Fordham Urb. L.J. 129, 134 (2010) ("[T]he U.S., despite being one of the most law-based socio-economic systems on the planet, arguably devotes significantly less support than most other countries both developed and developing-to the legal markets and institutions necessary to make all this law the organizing principle in fact, not just theory.").

[109] *See* Lincoln Caplan, *The Invisible Justice Problem*, 148 Daedalus __, 131 (Winter 2019).

[110] *See* Paul Pierson, Politics in Time: History, Institutions, and Social Analysis (2004).

[111] *See* Carrie Menkel-Meadow, *The Historical Contingencies of Conflict Resolution*, 1 Int'l J. Conflict Engage. & Resol. 32 (2013).

[112] *See* Caplan, *The Invisible Justice Problem*, *supra* note __.

[113] *See* Larry Kramer, Beyond Neoliberalism: Rethinking Political Economy (2018); *see also* John Maynard Keynes, The General Theory of Employment, Interest and Money (1936) ("[I]t is ideas, not vested interests, which are dangerous for good and evil); Dan Rodgers, Age of Fracture (2011).

presence of persons who do not have legal representation within our civil justice system. Taken together, these societal decisions affect the presence and prevalence of persons without legal representation within our civil justice system.

One of the most significant institutional design choices that has materially increased the presence of persons without legal representation within our civil justice system is the nonrecognition of a federal constitutional right to the appointment of counsel in civil cases,[114] even on a limited basis for indigent persons when basic human needs are at stake.[115] In *Gideon v. Wainwright*, the U.S. Supreme Court held that indigent criminal defendants have the right to free counsel.[116] Over the past several decades, many advocates of Civil Gideon hoped that this decision and concerns about fundamental fairness for low-income members of our society would lead to its extension into civil matters.[117] As will be described, the nonrecognition of this right (and the recognition of this right at state and local levels) has been influenced by socio-political, economic, and ideological factors and movements and is a condition leading to the presence of indigent unrepresented persons within our civil justice system.

The U.S. Supreme Court has twice rejected a constitutional right to the appointment of counsel in civil cases. First, in *Lassiter v. Department of Social Services of Durham County,* 101 S.Ct. 2153 (1981), the U.S. Supreme Court in a closely divided (5-4) decision held that the Constitution does not require the appointment of counsel for indigent parents in parental-status termination proceedings.[118] In *Lassiter*, the majority reached its decision after imposing a presumption that an indigent litigant's right to counsel would attach only when the litigant may lose their physical liberty if they lose the civil litigation.[119] In reaching its conclusion, the majority expressed concerns about the economic impact of providing counsel in this category of cases.[120] Justice Blackmun[121] and Justice Stevens disagreed with both the application of this presumption and the majority's weighing of fiscal concerns, and each authored dissenting opinions that would have recognized a constitutional right to the appointment of counsel in parental-status termination proceedings.[122]

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[114] *See e.g.*, Tonya L. Brito, *The Right to Civil Counsel*, Daedalus, Winter 2019, at 56, 57; Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 Conn. L. Rev. 741, 745 (2015).
[115] *See, e.g.*, Laura K. Abel, *Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws,* 42 LOY. L.A. L. Rev. 1087, 1088–89 (2009).
[116] 372 U.S. 335, 344 (1962).
[117] *See, e.g.*, Brito, *The Right to Civil Counsel*, *supra* note __.
[118] 452 U.S. 18, 33 (1981).
[119] *Id.* at 25.
[120] *Id.* at 28.
[121] *Id.* at 36 (Blackmun, J., dissenting) ("Reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.").
[122] *Id.* at 59–60, (Stevens, J., dissenting) ("In my opinion the reasons supporting the conclusion that the Due Process Clause of the Fourteenth Amendment entitles the defendant in a criminal case to representation by counsel apply

Next in *Turner v. Rogers*, 131 S.Ct. 2507 (2011), the U.S. Supreme Court concluded that the Constitution does not require the appointment of counsel in civil contempt hearings, even when an indigent person may potentially face incarceration, but the state must have in place alternative procedures to ensure a fundamentally fair determination.[123] In *Turner*, a majority of the court expressed concern about appointing counsel in civil contempt proceedings that stem from unpaid child-support orders as many of these cases are brought by unrepresented custodial parents who may themselves be relatively poor, unemployed, and unable to afford counsel.[124] That is, the Court was concerned with the creation of a right that may lead to asymmetries in representation: given the non-recognition of a constitutional right to appointed counsel for the indigent custodial parent prosecuting the case, the majority was not prepared to recognize a right to the appointment of counsel for the indigent noncustodial parent who was defending the case and threatened with incarceration.[125] The majority ultimately vacated the decision, however, because the state did not provide sufficient alternative procedures to ensure fundamental fairness.[126] Justice Thomas, in a dissent joined by Justice Scalia, Chief Justice Roberts, and Justice Alito, would have limited the right to appointed counsel to indigent defendants in felony cases and other criminal cases resulting in a sentence of imprisonment.[127]

While the majority in *Turner v. Rogers* vacated the contempt decision on grounds that the state did not provide alternative procedural safeguards to ensure the respondent a fundamentally fair determination, the majority's holding may have the ironic effect of increasing the prevalence of unrepresented parties.[128] The decision is an institutional design choice that may license states wishing to avoid the fiscal impact of providing state-funded counsel with a lower constitutional floor, thereby increasing the prevalence of unrepresented parties. In *Turner*, the Court signaled that the appointment of counsel is not the legal minimum required under the Constitution when indigent persons may be incarcerated if they lose a civil case, so long as a state provides unrepresented persons notice about their proceedings, forms that elicit information, and opportunity to respond (without counsel), and so long as courts articulate their findings.

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with equal force to a case of this kind. The issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits. Accordingly, even if the costs to the State were not relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases. For the value of protecting our liberty from deprivation by the State without due process of law is priceless.").

[123] 564 U.S. 431, 435 (2011).

[124] *Id.* at 446–47.

[125] *Id.* at 447.

[126] *Id.* at 449.

[127] *Id.* at 452 (Thomas, J., dissenting).

[128] *See* Stephanos Bibas, *Shrinking* Gideon *and Expanding Alternatives to Lawyers*, 70 Wash. & Lee L. Rev. 1287, 1307 (2013).

Given this nonrecognition of a federal constitutional right to the appointment of counsel in civil cases, much institutional design activity has taken place at the state and local levels, as well as with the American Bar Association and state bar associations. For example, for the past several decades, many states have provided a categorical right to the appointment of counsel in a subset of family-law matters, including to children in abuse and neglect cases (CHINS), to parents in state-initiated termination of parental-rights cases, and to people facing involuntary civil commitment.[129]

In 2006, the American Bar Association House of Delegates voted in favor of a resolution that "urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake . . ."[130] More recently, in 2010, the American Bar Association adopted the Model Access Act, which, if adopted by states, would provide public legal services to indigent persons in any adversarial proceeding in which basic human needs are at stake.[131]

On the heels of this renewed interest and resurgence in the mobilization of Civil Gideon, state and local levels have made recent gains. For example, New York City has recently enacted legislation to provide low-income tenants legal representation when faced with eviction.[132] In addition, state courts across the country are experimenting with pilots that provide for the appointment of counsel in limited cases, including for low-income tenants at risk of eviction.[133]

In the United States, economic and political factors have impeded the recognition of Civil Gideon rights at the federal, state, and local levels.[134] Yet those who seek to shrink the ambit of *Gideon v. Wainwright* rarely discuss the fiscal impact of savings that flow from recognizing these rights, such as the fiscal savings that flow from recognizing a right to the appointment of counsel to indigent defendants in eviction cases that relate to avoiding

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[129] *See, e.g.*, Tonya L. Brito, David J. Pate, Jr., Daanika Gordon & Amanda Ward, *What We Know and Need to Know About Civil Gideon*, 67 S.C. L. Rev. 223, 229 (2016).
[130] Howard H. Dana, Report to the House of Delegates, A.B.A. H.D. Rep. 112A (August 2006), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf.
[131] *See, e.g.*, Brito et al., *What We Know and Need to Know About Civil Gideon*, *supra* note ___, at 230–31.
[132] Brito, *The Right to Civil Counsel*, *supra* note ___; Ashley Dejean, *New York Becomes First City to Guarantee LAwyers to Tenants Facing Eviction*, Mother Jones, August 11, 2017.
[133] *See e.g.,* Bos. Bar Ass'n Task Force on the Civil Rights to Counsel, The Importance of Representation in Eviction Cases and Homelessness Prevention (March 2012), https://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf.
[134] *See* Bibas, *supra* note ___, at 1291–93 (discussing the economic resource constraints and political challenges of extending *Gideon v. Wainwright* to indigent civil litigants).

homelessness and emergency shelter services.[135] Nonetheless, the short-term, immediate fiscal costs of these rights weakens the political will to afford these rights to indigent persons, especially given competing perspectives on how best to use the pool of finite resources to address poverty, human wellbeing, and societal inequality.[136]

Moreover, a newly emerging restrictive attitude toward *Gideon v. Wainwright* was expressed by Justice Thomas and Justice Gorsuch in *Garza v. Idaho*.[137] In *Garza*, Justice Thomas and Justice Gorsuch, writing in dissent, signaled that they may be prepared to overrule *Gideon v. Wainwright*, and to reinterpret the Sixth Amendment, as no longer granting a right to the appointment of counsel for defendants in criminal proceedings.[138] Under their view, the Sixth Amendment would merely prevent states from prohibiting the appointment of counsel for criminal defendants.[139]

This nonrecognition of a federal right to the appointment of counsel in civil cases is not a natural or inherent feature of our civil justice system, and neither are the presence and percentage of unrepresented people that result from this institutional design decision. For example, over 50 countries around the world afford a right to the appointment of counsel for indigent persons in civil cases, including 49 European member countries in the Council of Europe (COE), Australia, Canada, India, New Zealand, Hong Kong, JAPAN, Zambia, South Africa, and Brazil; the United States, however, does not provide for this federal right.[140] These other countries have recognized a federal right to the appointment of counsel for a variety of reasons, including to promote the rule of law, confidence in the judiciary, and to reduce poverty.[141] This comparative perspective reveals the relative nature of the nonrecognition of this right within the structure of our civil justice system, and it illuminates one way in which the non-recognition of this right is a socially dependent condition that produces unrepresented persons.[142]

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[135] *See* Martha Minow & Sharon Browne, *Funding Civil Legal Aid: A Bipartisan Issue*, The Hill (Apr. 13, 2015), https://thehill.com/blogs/congress-blog/judicial/238480-funding-civil-legal-aid-a-bipartisan-issue (citing proposition that studies show that for each dollar spent on civil legal assistance, three to six dollars of public funding needed to deal with the consequences is saved); *see also* Florida, Louisiana, Maine, and Minnesota 2016 reports regarding lost savings for the state. Bos. Bar Ass'n, *supra* note ___, at app. A; Brito, *The Right to Civil Counsel, supra* note ___.
[136] *See* Brito, *The Right to Civil Counsel*, *supra* note ___.
[137] 139 S.Ct. 738 (2019).
[138] *Id.* at 757.
[139] *Id.* at 759.
[140] Raven Lidman, *Civil Gideon as a Human Right: Is the U.S. Going to Join Step with the Rest of the Developed World*, 15 Temp. Pol. & C.R. L. Rev. 769, 770–71 (2006).
[141] *Id.* at 771.
[142] Whether a party with a legal issue seeks advice from another to solve the problem varies globally as well. *See* World Justice Project, Global Insights on Access to Justice 10-54 (2018) https://worldjusticeproject.org/sites/default/files/documents/WJP_Access-Justice_April_2018_Online.pdf. *Cf.* Robert A. Kagan, Adversarial Legalism: The American Way of Law (2001) (U.S. socioeconomic life is substantially more reliant on law and legal management of relationships, yet the U.S. devotes far fewer resources to providing legal services needed to translate the law).

A second example of the social production of unrepresented persons relates to the annual appropriations that Congress provides to the Legal Services Corporation (LSC). The LSC is the largest funder of civil legal aid in the country, providing civil legal assistance to the poor, and distributing the vast majority of its federal funding to independent legal aid organizations which serve low-income clients with civil legal needs across the country.[143] Congressional appropriations provide funding for legal aid attorneys and their staff. While Congress should be applauded for allocating $410 million to the LSC in 2019, an increase over the past two years, this funding purchases less than half of what it did in 1980.[144] At the same time, the population of Americans eligible to receive LSC services, at or under 125% of the FPL, has grown over the past 30 years to nearly one if five Americans, or 19.2% of the U.S. population.[145] Recent studies suggest that 71% of low-income households experienced at least one non-trivial civil legal problem per year, which equates to nearly 8 million low-income American households.[146] Troublingly, this contraction in federal funding has resulted in the elimination of full-time legal aid attorney and staff positions and in deficits among civil legal aid providers.[147] Moreover, the contraction of funding for civil legal aid providers has resulted in a decrease in the client services provided and increased the numbers of indigent clients who seek services who are turned away.[148] In addition to changes over time, funding varies so greatly across regions that some have concluded that "geography is destiny," in the receipt of legal aid services.[149] For example, in Indiana, our recent legal

[143] Legal Services Corporation, 2017 Annual Report 5-7 (2018).

[144] In inflation adjusted dollars, the LSC's appropriation of $300,000,000 in 1980 reflects an appropriation of $892,427,184 in 2017. Hence, the allocation reflects a reduction in inflation adjusted dollars of 45.94 percent. Press Release, LSC, LSC Receives $25 Million Spending Boost from Congress (Mar. 23, 2018), https://www.lsc.gov/media-center/press-releases/2018/lsc-receives-25-million-spending-boost-congress; Alan W. Houseman, Civil Legal Aid In The United States An Update For 2015: A Report For The International Legal Aid Group (Dec. 2015) https://repository.library.georgetown.edu/bitstream/handle/10822/761858/Houseman_Civil_Legal_Aid_US_2015.pdf.

[145] *See* U.S. Census Bureau, Poverty Status in the Past 12 Months ACS 5-Year Estimates, 2013-2017 (showing that 60.01 million--that is, nearly one in five Americans were at or below 125 percent of the FPL, or 19.2% of the U.S. population), and therefore eligible for LSC-funded services).

[146] *Compare* Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans* (June 2017) (finding that 71% of low-income households experienced one or more legal problems *with* U.S. Census Bureau, Poverty Status in the Past 12 Months of Families ACS 5-Year Estimates, 2013-2017 (showing 11.17 million households living at or below 125% of the FPL.) *See also* Rebecca L. Sandefur, *The Impact of Counsel: An Analysis of Empirical Evidence*, 9 Seattle J. for Soc. Just. 51, 56 (2010).

[147] Joy Radice, *Federally Funded Civil Legal Services*, *in* Beyond Elite Law: Access to Civil Justice in America 249, 252 (Samuel Estreicher & Joy Radice eds., 2016).

[148] LSC, Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans 20-21 (2009), www.lsc.gov/JusticeGap.pdf (LSC-funded programs turned away about half of the poor who sought assistance in 2009); LSC, Budget Request Fiscal Year (2019) (noting that as funding for civil legal aid changes so does the number of legal cases closed, e.g. when LSC funding peaked at $394 million in 2010, so did the number of cases closed by LSC grantees to 932,000).

[149] Rebecca L. Sandefur & Aaron C. Smyth, Access Across America: First Report of the Civil Justice Infrastructure Mapping Project 17-20 (2011) (regional variability on money spent/"geography is destiny").

needs study revealed that, to survive in resource scarce times, civil legal aid providers have reduced the percentage of their clients who receive direct legal representation, and increased the proportion of the clients who receive brief services, unbundled services, and SRL forms.[150]

This federal commitment to fund civil legal aid providers who serve low-income clients is neither inherent nor fixed. Federal funding has declined over time in inflation-adjusted dollars[151] yet this level of funding itself is a socially produced condition that materially shapes the presence of unrepresented parties in the civil justice system. The net result in the U.S. is that low-income Americans receive little or no professional help for 86% of their civil legal problems[152], and in Indiana, is that our system of civil legal aid is unable to address over 95 percent of the legal problems that low-income households experience.[153] When left unaddressed, these problems interact with other social, environmental, and economic circumstances to undermine human well-being and the fulfillment of essential needs, including access to medical services and healthcare; maintenance of safe, habitable housing; the receipt of benefits, such as disability and Social Security payments; support for family law matters, including child support and child custody actions; protection from abusive relationships; and relief from financial exploitation.[154] In Indiana, this decline in funding coincides with the rise of the proportion of unrepresented parties by over 33 percent in the past decade.[155]

A final example of the social production of unrepresented parties radiates beyond the structure of our civil justice system and connects with the nature of inequality within our society and economic system. Many U.S. households are not sufficiently indigent to be eligible for LSC-funded civil legal aid services because their incomes exceed 125 percent of the federal poverty level (FPL).[156] In 2019, for a family of four, 125 percent of the FPL

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[150] Given recent empirical work on this question, one might reasonably have concerns about the efficacy of this limited advice or unbundled assistance, especially in housing eviction cases. *See generally* D. James Greiner, Cassandra Wolos Pattanayak & Jonathan Hennessey, *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 Harv. L. Rev. 901 (2013); *see also* Deborah L. Rhode, Access to Justice 13-14 (2004).

[151] Specialist in Social Policy, Cong. Research Serv., RL34016, Legal Services Corporation: Background and Funding 5-6 (2016); Radice, *Federally Funded Civil Legal Services*, *supra* note __, at 252.

[152] *See* LSC, 2017 Justice Gap Report (2018) (low-income Americans receive little to no professional help for 86% of their civil legal problems), https://www.lsc.gov/media-center/publications/2017-justice-gap-report.

[153] Victor D. Quintanilla & Rachel Thelin, INDIANA CIVIL LEGAL NEEDS STUDY AND LEGAL AID SYSTEM SCAN 33 (2019).

[154] *See* Ab Currie, The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians 43-44 (2007) (problems compound & intersect);

[155] *See* Quintanilla & Thelin, INDIANA CIVIL LEGAL NEEDS STUDY AND LEGAL AID SYSTEM SCAN, *supra* note __ at __.

[156] *See* Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice through the (Un)Corporate Practice of Law*, 38 Int'l Rev. L. & Econ. 43, 43 (2014) (concluding that "ordinary people" are largely denied access to legal services and that it is not "fundamentally a problem of poverty"); *Income Eligible*, LSC,

equates to $32,188, whereas 150 percent of the FPL equates to $38,625, and 200 percent of the FPL equates to $51,500.[157] According to the U.S. Census, there are over three million households who fall between 125 and 150 percent of the FPL, and more than six million households that fall between 150 and 200 percent of the FPL.[158] When these nine million households seek to assert their legal rights or to defend themselves in court, the structure of our civil justice system necessitates that they recruit counsel on their own, which turns on their ability to pay for counsel.[159] Yet, in our economic system, people's ability to pay for legal representation depends on their income, their economic resources, and their relative power and privilege in society.[160]

Because our civil justice system intersects with our economic system, rising levels of economic and social inequality operate as another societal condition that affects the presence of unrepresented parties.[161] In this regard, economic inequality has increased greatly over the past four decades with the share of total income going to the top 1 percent of earners, which stood at 8.9 percent in 1976, rising to 23.5 percent by 2007, while the average inflation-adjusted hourly wage has declined by more than 7 percent.[162] At the same time, household

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https://www.lsc.gov/income-eligible (last visited Apr. 12, 2019) (explaining the maximum income level for eligibility to receive LSC services is 125% of FPL).

[157] Gillian K. Hadfield & Jamie Heine, *Life in the Law-Thick World: Legal Resources for Ordinary Americans*, *in* Beyond Elite Law: Access to Civil Justice in America 21, 23 (Samuel Estreicher & Joy Radice eds., 2016) ("Our results suggest that, while the United States has a robust legal system with nearly twice as many lawyers per capita as most other countries, ordinary Americans have very little access to reasonably priced legal help in navigating that system."); Office of the Assistant Secretary for Planning and Evaluation, *Poverty Guidelines*, ASPE (Jan. 11, 2019), https://aspe.hhs.gov/poverty-guidelines.

[158] *See* Carmen DeNavas-Walt, Bernadette D. Proctor & Jessica C. Smith, Income, Poverty, and Health Insurance Coverage in the United States: 2012 6, 9 (2013), www.census.gov/prod/2013pubs/p60-245.pdf (describing the percent of households in the U.S. that were at specific income levels in 2012).

[159] Many ordinary Americans do not construe the legal problems they face as legal nature, and hence, often do not seek to recruit legal counsel to resolve these problems. *See* Rebecca Sandefur, *Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study*, American Bar Foundation (2014). Even when they do, many Americans choose to do nothing at all. *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95 (1974).

[160] *See* Bibas, *Shrinking* Gideon *and Expanding Alternatives to Lawyers*, *supra* note __, at 1295 (discussing the middle class's inability to afford legal services because the prices are too high and noting that middle class Americans "consume a much smaller share of legal services than their compatriots in other countries"); Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, *supra* note __, at 139–46 (discussing the legal services received by low and moderate-income Americans and concluding that "the vast majority of the legal problems faced by (particularly poor) Americans fall outside of the 'rule of law,' with high proportions of people-many more than in the U.K., for example-simply accepting a result determined not by law but by the play of markets, power, organizations, wealth, politics, and other dynamics in our complex society").

[161] *See* Administrative Office of the Courts, Handling Cases Involving Self-Represented Litigants: A Bench Guide for Judicial Officers 3-2 (2007) (the most common reason that litigants appear without representation is that they cannot afford a lawyer).

[162] *See* Robert H. Frank, *How Rising Income Inequality Threatens Access to Justice*, 148 Daedalus 10 (2018); Robert H. Frank, *Income Inequality: Too Big to Ignore*, N.Y. Times (Oct. 16, 2010), https://www.nytimes.com/2010/10/17/business/17view.html.

savings rates have declined from 6 percent in 1976 to 1.3 percent in 2004.[163] In addition, unlike some consumer goods that have decreased in inflation-adjusted costs relative to consumer purchase power, direct legal representation has not decreased in inflation adjusted terms relative to consumer purchasing power. Most Americans are unable to afford or (rationally choose not to pay for counsel) especially in state court where the average judgment in state court has fallen, such that 75% of all judgments in state court are less than $5,200, meaning that most lawyers cost more than potential judgments.[164]

While beyond the scope of this essay, the complex causes of this growing social inequality reflect a series of interconnected and interrelated societal, political, legal, and policy choices,[165] resulting in a level of inequality which not only does not exist everywhere, but that most Americans do not find desirable.[166] In addition, the societal decisions that tolerate widening economic inequality are conditions that produce unrepresented persons and reproduce social inequality itself.[167]

IV. Intersectionality and Variation Across Civil Justice Contexts

In Part II, I described *the social construction of pro se status* and the way in which *pro se* status is a socially constructed category laden with thoughts, meanings, and expectations about unrepresented people who seek to resolve legal problems within the civil justice system. Yet these meanings and expectations about *pro se* parties are not fixed or unchanging. Indeed, the social construction of *pro se* status—and the material impact of this social construction on the experiences of unrepresented parties—will vary across contexts and arise depending on particular conditions. Further the *social production of unrepresented persons*, described in Part III, will vary across contexts and social conditions as well. I will briefly describe conditions that shape the way society does unrepresented status, including the kinds of legal claims and defenses raised by an unrepresented person, the ethical rules and professional norms applied in an unrepresented person's immediate social context, and an unrepresented person's social identity, power, and privilege.

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[163] Kevin L. Kliesen, *Do We Have a Savings Crisis?*, Fed. Res. Bank of St. Louis (July 2005), https://www.stlouisfed.org/publications/regional-economist/july-2005/do-we-have-a-saving-crisis#figure1 (showing savings rate as percentage of gross domestic product).

[164] National Center for State Courts, The Landscape of Civil Litigation in State Courts iv (2015).

[165] *See* Bibas, *Shrinking* Gideon *and Expanding Alternatives to Lawyers supra* note __, at 1291; Rebecca L. Sandefur, *Access to What?*, Daedalus 49 (2019), https://www.amacad.org/sites/default/files/publication/downloads/19_Winter_Daedalus_Sandefur.pdf.

[166] *See* Michael Norton & Dan Ariely, *Building a Better America--One Wealth Quintile at a Time*, 6 Persp. on Psychol. Sci. 9, 10 (2011).

[167] Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Non-Legal Institutions of Remedy*, 42 Loy. L.A. L. Rev. 949, 976 (2009) ("Inequality in access to justice has the potential to create social and economic inequality, because different groups of people can experience different consequences from similar justice problems.").

To begin, the social construction of *pro se* status varies, in part, with the legal claims and defenses invoked by unrepresented persons. For example, the schemas, stereotypes, attributions, and biases applied to unrepresented persons who bring federal civil rights claims differ from those of other unrepresented persons. When a plaintiff files a federal civil rights lawsuit, such as a claim that their employer unlawfully discriminated against them in violation of Title VII, attorney's fee awards can theoretically be awarded under Section 1988.[168] Section 1988 provides attorney's fee awards to plaintiffs who are deemed prevailing parties.[169] Many court officials and legal professionals believe that, given the possibility of attorney's fee awards in federal civil rights cases, plaintiff-side attorneys choose to represent worthy claimants and meritorious claims. Conversely, when persons proceed without representation in federal civil rights cases, plaintiffs-side attorneys have chosen not to represent them. Many court officials and legal professionals interpret the failure to secure counsel as an indicator of the lack of merit of these claims, and relatedly, many court officials and legal professionals hold negative biases against unrepresented persons who bring federal civil rights cases.[170] In this way, the legal claims and legal defenses invoked by an unrepresented party may exacerbate the social construction of *pro se* status.

Secondly, the social construction of *pro se* status—and the detrimental effects of this social construction on the experiences of unrepresented persons—will vary depending on the institutional design of ethical rules, professional norms, and dispute-resolution logics applying to court officials and legal professionals in an unrepresented person's immediate social context. For example, in the asymmetric scenario in which repeat players who have legal representation litigate against unrepresented persons, the ethical and professional rules that apply to repeat-player lawyers and court officials will shape how *pro se* status is done in an immediate context.[171] All else being equal, when repeat-player lawyers believe that they must serve as zealous advocates for their clients,[172] the harms that flow from this social construction of *pro se* status would be exacerbated. Relatedly, when court officials believe that judicial ethics require (or allow) them to serve as problem solvers who potentially assist unrepresented persons in these scenarios, then the harms that flow from this social construction may be somewhat attenuated.[173] Another series of ethical rules are the rules that

[168] 42 U.S.C. § 1988 (2018).
[169] *Id.*
[170] *See* Amy Myrick, Robert L. Nelson & Laura Beth Nielsen, *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. Legis. & Soc. Pol'y 705, 757 (2012). *See e.g.*, John Doyle et al., Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, 1997 Ann. Surv. Am. L. 117, 310-11, 343 (1997).
[171] *See* Engler, Approaching Ethical Issues Involving Unrepresented Litigants, *supra* note __; *see also* Yolanda F. Sonnier, *Approaching Your Case Against the Pro Se Litigant*, 36 Fam. Adv. 11–12 (2013).
[172] *See generally* Model Rules of Prof'l Conduct r. 4.3, r. 4.3 cmt. (Am Bar Ass'n 2018).
[173] *See* Anna E. Carpenter, *Active Judging and Access to Justice*, 93 Notre Dame L. Rev. 647 (2017); Anna E. Carpenter, Jessica Steinberg, Colleen F. Shanahan and Alyx Mark, *Studying the "New" Civil Judges*, Wisconsin L. Rev. 249 (2018); Erika Rickard, *The Agile Court: Improving State Courts in the Service of Access to Justice and the*

prevent non-lawyers from serving as representatives who might offer legal assistance, when lawyers are not available or within reach.[174]

Relatedly, on one hand, technology may empower some parties to effectively self-represent themselves in a dispute. Legal services and state bar and access to justice organizations are increasingly focusing on the role of online intake and form generators, video technology, and digital maps and illustrations as tools that could close access to justice gaps.[175] These technologies provide unrepresented parties with substantive and procedural expertise, helping them navigate disputes more successfully. On the other hand, it is possible that when unrepresented parties come into court with these tools, they will face additional bias from repeat-player lawyer adversaries. The legal profession in particular has reacted with suspicion and opposition to online tools such as LegalZoom, which has faced lawsuits throughout the country for violating unauthorized practice of law (UPL) regulations.[176] Deborah L. Rhode's research on UPL claims suggests that the lawyers' use of the claims as enforcement mechanism does more to benefit the profession than the public.[177] Further, research on UPL suits brought against the use of "cyber lawyer" tools typically only allege general harms, and the suits are most often brought by unauthorized practice of law committees, not individual litigants who have been harmed by the use of these tools.[178] Thus, hostility to the use of these tools, which may be perceived as a threat to the legal profession by repeat-player lawyers, may actually increase bias against unrepresented parties who use them.

Finally, the social production of unrepresented persons and the social construction of *pro se* status varies with the social identities, and the unique power, privilege, capabilities,

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Court User, 39 W. New Eng. L. Rev. 227 (2017); Richard Zorza, *A New Day for Judges and the Self-Represented: The Implications of Turner v. Rogers*, 50 Judges J. 16 (2011).

[174] Herbert M. Kritzer, Legal Advocacy: Lawyers and Nonlawyers at Work (1998); Rebecca L. Sandefur, *The Fulcrum Point of Equal Access to Justice: Legal and Nonlegal Institutions of Remedy*, 42 Loy. L.A. L. Rev. 949 (2009) (discussing limited availability of lawyers and legal assistance) (cite for idea that non-legal representatives might alter); Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 19 Geo. J. Pov. L. & Pol'y 453, 463 (unbundling/limited advice).

[175] *See* James J. Sandman, *The Role of the Legal Services Corporation in Improving Access to Justice*, Daedalus, 148(1), 115-117 (describing LSC's Technology Initiative Grants (TIGs)); J. J. Prescott, *Improving Access to Justice in State Courts with Platform Technology*, 70 Vand. L. Rev. 1993 (2017); Gordon J. Glover, *Online Legal Service Platforms and the Path to Access to Justice*, 90 Fla. B.J. 88 (2016).

[176] *See, e.g.*, Catherine J. Lanctot, *Does LegalZoom Have First Amendment Rights?: Some Thoughts about Freedom of Speech and the Unauthorized Practice of Law*, 20 Temp. Pol. & Civ. Rts. L. Rev. 255, 258-61 (2011) (discussing lawsuits and bar opinions arguing that LegalZoom is engaged in the unauthorized practice of law); Michael E. McCabe, Jr., *May The LegalForce Be With You: California IP Firm Sues To Stop LegalZoom's Unauthorized Practice Of Trademark Law*, McCabe Law (Dec. 19, 2017) *available at*, https://www.ipethicslaw.com/may-the-legalforce-be-with-you-california-ip-firm-sues-to-stop-legalzooms-unauthorized-practice-of-trademark-law/.

[177] *See generally* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan. L. Rev. 1 (1981).

[178] *See* Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public: Rethinking Unauthorized-Practice Enforcement*, 82 Fordham L. Rev. 2587, 2605 (2014); Mathew Rotenberg, *Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources*, 97 Minn. L. Rev. 709, 722 (2012).

and vulnerabilities of the unrepresented persons involved.[179] Rather than a static binary of doing *pro se* status or not, there are intersectional consequences of the label depending on other social identities, privileges, and prejudices experienced in society; there is no solitary "default," "natural," or "natural" category in which pro se status is done. Few examples will fit cleanly into the discrete categories of *pro se* status or not, given the multiple layers of other social identities, roles, power, privilege, and vulnerabilities. Persons with power and privilege are less likely to have their rights routinely violated, and more likely to gain access to counsel than outsiders, such as poor persons and subordinated groups.[180] For example, "If incarceration [has] come to define the lives of men from impoverished black neighborhoods, eviction [is] shaping the lives of women. Poor black men were locked up. Poor black women were locked out."[181] Recent scholarship has revealed the ways in which structural racism within the criminal justice system extracts wealth from marginalized communities and that over policing, rightly or wrongly, breeds cynicism toward the role of lawyers and court officials.[182] These inequalities in the ability to access counsel magnify with the differential impact of the social construction of *pro se* status across class, race, gender, ethnicity, and religious groups.[183]

In short, there are intersectional consequences of the label depending on other social identities, privileges, and prejudices experienced in society.[184] How legal officials and law-trained persons do *pro se* status to an unrepresented party who is a 45-year-old white, non-disabled, highly educated male in the upper-middle class will differ from how these law-trained persons do *pro se* status to an unrepresented party who is a 70-year-old white,

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[179] *See* 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. 3017 (2015) (investigating how attorney representation affects civil court proceedings for low-income litigants, particularly through the lens of critical race empiricism).

[180] *See* Amy Myrick, Robert L. Nelson & Laura Beth Nielsen, *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. Legis. & Pub. Pol'y 705 (2012).

[181] *See* Desmond, Evicted at 98.

[182] *See* Monica C. Bell, *Hidden Law in the Time of Ferguson*, 132 Harv. L. Rev. 1 (2018); Laura Beth Nielsen, *Race and Determination of Discrimination: Vigilance, Cynicism, Skepticism, and Attitudes about Legal Mobilization in Employment Civil Rights*, 51 L. & Soc'y Rev. 669; Amy Myrick, Robert L. Nelson & Laura Beth Nielsen, *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. Legis. & Pub. Pol'y 705 (2012); Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U. Pa. J. of Lab. & Emp. L. 55 (2004); Theresa Zhen & Brandon Greene, Pay or Prey: How the Alameda County Criminal Justice System Extracts Wealth from Marginalized Communities (2018).

[183] *See* Sandefur, *Elements of Professional Expertise, supra* note __, at 924 ("[T]he focus party frequently labors under double stigmas of a disesteemed social position--poor, disabled--and a disesteemed legal position--cast as a delinquent or malingerer. Lawyer representation may act as an endorsement of lower-status parties.")

[184] *See* Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 Iowa L. Rev. 1263 (2016) (describing members of poor and minority groups discussing experiences in the legal system and how their lack of trust leads to a lack of access to legal aid); Myrick, Nelson & Nielsen, *Racial Disparities in Legal Representation*, *supra* note__ . Consider also the experiences of persons experiencing homelessness who are also members of minority groups or who suffer from mental illness. *See* Alice Giannini, *An Intersectional Approach to Homelessness: Discrimination and Criminalization*, 19 Marq. Benefits & Soc. Welfare L. Rev. 27, 34-36 (2017).

disabled male, who is among the working poor and who did not complete high school.[185] Moreover, how *pro se* status is done to an unrepresented party will differ for a 45-year old black, disabled female who is among the working poor and who did not complete high school.[186] In this way, some unrepresented parties will benefit from the existing structure of the civil justice system, as they have the privilege, power, literacy, advances, and social status to be conceived of as different from the more general category of negative other *pro se* parties; instead *these* unrepresented persons are conceived of as empowered self-represented parties and treated with more respect.

In this regard, for many court officials and lawyers, an unrepresented person's *pro se* status may operate as a doorway that opens for the expression of other societal biases, including racial biases.[187] Over the past several decades, for example, social psychologists have demonstrated that situational contexts shape and influence the suppression, justification, and expression of bias.[188] On the one hand, many court officials and lawyers aspire to be non-prejudiced and to avoid discriminating against stigmatized group members in situational contexts with strong egalitarian norms, where discrimination would be obvious to others and themselves. Yet these same persons may express bias subtly and in ways that can be rationalized under conditions of situational ambiguity, especially when bias against stigmatized group members can be rationalized on some factor other than their stigmatized identity, such as their racial, gender, or religious social identity.[189] Troublingly, in these situations, court officials and lawyers may discriminate against subordinated group members in ways that allow them to maintain non-prejudiced self-concepts, such as by rationalizing their differential treatment toward these stigmatized group members on the grounds that they are *pro se* parties.[190] This is especially the case in state civil justice systems where subordinated groups are heavily surveilled and the very same court officials who oversee and

[185] Tonya L. Brito, *The Right to Civil Counsel*, Daedalus, Winter 2019, at 56, 59–60 (discussing the impact of lack of representation on low-income, black fathers in child support proceedings who may be perceived as "deadbeat dad[s]").
[186] *Id.*
[187] *See e.g.*, Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal's Effect on Claims of Race Discrimination,* 17 Mich. J. Race & L. 1 (2011) ("Iqbal has had a significant effect on unrepresented Black plaintiffs because, like other pro se plaintiffs, they tend to assert claims in a more broad, general fashion than represented parties; on balance, courts characterize many more of their allegations as legal conclusions. * * * In addition, the powerful cultural stereotypes for the subgroup of Blacks who are poor and cannot afford counsel may subtly affect analysis of these pro se plaintiff's claims."); Victor D. Quintanilla & Cheryl R. Kaiser, *The Same-Actor Inference of Nondiscrimination: Moral Credentialing and the Psychological and Legal Licensing of Bias*, 104 Cal. L. Rev. 1 (2016).
[188] *See* Crandall and Eshleman, *A Justification-Suppression Model of the Expression and Experience of Prejudice*, *supra* note___, at ____; Quintanilla & Kaiser, *Moral Credentialing and the Psychological and Legal Licensing of Bias*, *supra* note___, at ___.
[189] *See* Crandall and Eshleman, *A Justification-Suppression Model of the Expression and Experience of Prejudice*, *supra* note___, at ____; Quintanilla & Kaiser, *Moral Credentialing and the Psychological and Legal Licensing of Bias*, *supra* note___, at ___.
[190] *See* Christian S. Crandall and Amy Eshleman, *A Justification-Suppression Model of the Expression and Experience of Prejudice*, 129 Psych. Bulletin 414 (2003).

administer racialized criminal justice systems[191] are called to make decisions over members from the same low-income communities who bring claims to court *pro se*.[192]

These intersectional differences unfold, in part, because doing *pro se* status is more than a process in which unrepresented people become passive objects that have no agency. That is, each unrepresented person will interact with court officials and lawyers and respond somewhat differently. Some unrepresented persons will have more power and privilege to shape the meanings and consequences of what it means to be an unrepresented person in a particular kind of civil justice dispute. Others will be more vulnerable and more subordinated, lacking the power and ability to avoid these biasing effects. Still others may incorporate ideas and practices about what it means to be an unrepresented party into their identities, perhaps seeking to embrace them to their advantage.

Yet no unrepresented person is situated outside the web of meanings and relationships that create and maintain the doing of unrepresented status. Even when an unrepresented person resists having the label of *pro se* status imposed on them, their identity within the civil justice system will be formed in relation to the social construction of *pro se* status. At the same time, the way in which our society produces unrepresented persons and the meanings ascribed to these *pro se* persons are never final facts and can be contested. This contestation for justice is continuous. The struggle itself lights the path for our society to reach "higher levels of human, social, economic, political, and religious relationship,"[193] and the aim of treating all members of our society with dignity and compassion.

[191] *See* Bell, Hidden Law in the Time of Ferguson, *supra* note __; Victor M. Rios, Punished: Policing the Lives of Black and Latino Boys 40, 42 (2011); Forrest Stuart, Down, Out, and Under Arrest 37-77 (2016).
[192] *See* Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 Yale L. J. 2176, 2183 (2013).
[193] *See* Martha Minnow, *Forward* in Beyond Elite Late: Access to Civil Justice in America xvii (2016) (quoting Bayard Rustin. A. Phillip Randolph: Dean of Civil Rights, 76 The Crisis No. 4. Apr. 1969).