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# The Pro Se Phenomenon

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## I. INTRODUCTION

Why would anyone choose to go to court without a lawyer? It is a simple question. In the varied host of television dramas, attorneys, not the parties, are always arguing the cases. Only on reality/entertainment oriented shows like “Judge Judy” and the like do people argue their own cases. Such pro se appearances typically result in the parties being mocked, berated, and the law ignored.<sup>1</sup> These examples hardly show any positive aspects of going to court without counsel. Attorneys’ own lexicon even encourages against proceeding pro se with the adage that “one who is his own lawyer has a fool for a client.”<sup>2</sup>

The answer to the simple question of why people proceed pro se, however, is not quite so straightforward. While there is a great deal of anecdotal evidence as to why people represent themselves in court, there has been relatively little substantive research into the issue.<sup>3</sup> While it may not be understood why people go to court without counsel, it is certainly perceived by many commentators that more are doing so now than ever before.<sup>4</sup> Another perception is that people litigating their own

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1. See, e.g., Associated Press, *A Talent Scout for TV Courtroom?*, THE MORNING SUN ONLINE (Feb. 28, 1999), available at [http://www.morningsun.net/stories/022899/usw\\_0228990015.shtml](http://www.morningsun.net/stories/022899/usw_0228990015.shtml).

2. See, e.g., *Faretta v. California*, 422 U.S. 806 (1975) (Blackmun, J., dissenting); Edward M. Holt, *How to Treat “Fools”: Exploring the Duties Owed to Pro Se Litigants in Civil Cases*, 25 J. LEGAL PROF. 167, 173 (2001).

3. 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, 310 (2002) (stating that there has been only one study that has examined federal pro se case data).

4. See, e.g., Bruce D. Sales et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS U. L.J. 553, 597 (1993); Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 475, 479 (2002); Ronald W. Staudt & Paula L. Hannaford, *Technology and Legal Practice Symposium Issue: Access to Justice for the Self-Represented Litigant: An Interdisciplinary Investigation By Designers And Lawyers*, 52 SYRACUSE L. REV. 1017, 1018 (2002); John M. Stanoch, *Working With Pro Se Litigants: The Minnesota Experience*, 24 WM. MITCHELL L. REV. 297 (1998); Jona Goldschmidt, *The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36 (2002); Jona Goldschmidt, *Access*

cases are a problem—a problem for both themselves and our courts.<sup>5</sup> This Note examines the rise of pro se litigation in recent years, which can be called the pro se phenomenon, and offers some alternatives to these common misperceptions regarding pro se litigants. By examining the ability to proceed pro se, the frequency of pro se litigation, the reasons why pro se litigants exist, and the legal implications for pro se litigants and the rest of society, this Note suggests that the reason for pro se litigation is not as black and white as it is imagined to be. As courts around the United States contemplate creating procedures to better assist or accommodate pro se litigants, it is imperative that the reason for pro se litigation be understood. Without an accurate understanding of the current pro se environment, changes to the system might be made for the wrong reasons or end up being ineffective.

## II. THE ABILITY TO PROCEED PRO SE

The right to represent oneself in United States courts dates back to the founding of the country.<sup>6</sup> Having its roots in the British common law,<sup>7</sup> the right to pro se appearances evolved as a combined proposition of “natural law,” an early anti-lawyer sentiment,<sup>8</sup> and the egalitarian “all men are created equal” concept that “financial status should not have a substantial impact on the outcome of litigation.”<sup>9</sup> The American legal

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*to Justice Conference September 11, 2001: In Defense Of Ghostwriting*, 29 FORDHAM URB. L.J. 1145 (2002); Michael J. Mueller, (*The Thirty-Second Thomas M. Cooley Lectures Constitutional Protection of Human Rights: Perspectives from Abroad: Note*) *Abusive Pro Se Plaintiffs in the Federal Courts: Proposals for Judicial Control*, 18 U. MICH. J.L. REFORM. 93, 101 (1984); Amy C. Henderson, *Meaningful Access to the Courts?: Assessing Self-Represented Litigants' Ability to Obtain a Fair, Inexpensive Divorce in Missouri's Court System*, 72 UMKC L. REV. 571, 574 (2003); Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 107 (2001); Russell Engler, *And Justice For All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2022 (1999); Mike Jay Garcia, *Key Trends in the Legal Profession*, 71 FLA. BAR J. 16, 20 (1997); Tiffany Buxton, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103 (2002).

5. Rosenbloom, *supra* note 3, at 312-14 (stating that the negative perception of pro se litigants has not been objectively studied or documented, but is rather based on anecdotal evidence); Connie J. A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y AND L. 989, 993 (2000); Berenson, *supra* note 4, at 112; Buxton, *supra* note 4, at 114-15.

6. Jona Goldschmidt, *Cases and Materials on Pro Se Litigation and Related Issues*, remarks prepared for the ABA Lawyers' Conference Annual Meeting, Tucson, Arizona, May 1-4, 1997, available at <http://www.pro-selaw.org/pro-selaw/research.asp> (last visited June 5, 2004) (citations omitted); Holt, *supra* note 2, at 168.

7. Buxton, *supra* note 4, at 107; Eric J.R. Nichols, *Preserving Pro Se Representation in an Age of Rule 11 Sanctions*, 67 TEX. L. REV. 351, 379-80 (1988) (citations omitted).

8. Goldschmidt, *supra* note 6.

9. Tiffany Buxton, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT'L L. 103, 109 (2002).

ideal is that both the wealthy and the pauper could have access to the courts and could be treated equally with the resulting decisions being as fair as possible.<sup>10</sup> The development of pro se rights in the United States has been tied to the rights of indigents to have access to the courts.<sup>11</sup> Open access to the courts for all citizens has also been viewed as being important for the development of law and public policy and the avoidance of citizens' resorting to non-judicial self-help.<sup>12</sup>

The Judiciary Act of 1789 was an early codification of this belief.<sup>13</sup> It granted "parties the right to 'plead and conduct their own case personally' in any court of the United States."<sup>14</sup> Many states, either through their constitutions or statutorily, also provide individuals with the right to proceed pro se.<sup>15</sup> It is unclear, however, if there is a *right* to self-representation pursuant to the United States Constitution.<sup>16</sup> The Sixth Amendment guarantees criminal defendants the right to have assistance of counsel; by implication, the Amendment has served as a basis to hold that criminal defendants can waive that right and appear pro se.<sup>17</sup> Additionally, the First, Fifth, and Fourteenth Amendments have served as support for the right of individuals to have access to the courts without being represented.<sup>18</sup> Whatever right there is to proceed pro se, however, it has not been extended by the Supreme Court to civil cases.<sup>19</sup> While federal and state courtroom procedures<sup>20</sup> have been modified to accommodate the right to proceed pro se in criminal cases, there have

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10. *Id.* at 111.

11. *Id.* at 103.

12. Eric J.R. Nichols, *Preserving Pro Se Representation in an Age of Rule 11 Sanctions*, 67 TEX. L. REV. 351, 379-80 (1988) (citations omitted).

13. 1 Stat. 73, 92 (1789).

14. See generally Buxton, *supra* note 9, at 109-10; Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 660-61 (1988); Holt, *supra* note 2, at 168. This privilege continues today as codified in 28 U.S.C. § 1654 (2004).

15. Bradlow, *supra* note 14; Candice K. Lee, *Access Denied: Limitations on Pro Se Litigants' Access to the Courts in the Eighth Circuit*, 36 U.C. DAVIS L. REV. 1261, 1265-66 (2003).

16. See Joseph M. McLaughlin, *Note: An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule*, 55 FORDHAM L. REV. 1109 (1987); Lee, *supra* note 15, at 1265.

17. Bradlow, *supra* note 14; Goldschmidt, *supra* note 6; Holt, *supra* note 2, at 168; see *Faretta v. California*, 422 U.S. 806, 816 (1975).

18. Nichols, *supra* note 12.

19. Nichols, *supra* note 12 at 379 (citations omitted); Lee, *supra* note 15, at 1280-81 (citations omitted) (stating indigents do not have a right to counsel for civil matters); Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL'Y 47, 49-50 (2003).

20. Pro se pleadings are to be read liberally, and in some jurisdictions, pro se litigants must be advised by the court or the opposing party of the ramifications of failing to respond to a summary judgment motion. See *Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam); *Madyun v. Thompson*, 657 F.2d 868, 876 (7th Cir. 1981); McLaughlin, *supra* note 16, at 1122.

been few changes to accommodate pro se litigants in civil cases even though the number of civil pro se cases has risen considerably.<sup>21</sup>

### III. THE FREQUENCY OF PRO SE LITIGATION

Having pro se litigants in many United States courts is a reality. In “poor people courts”—the state courts that handle traffic, landlord/tenant, and child support or other domestic relations issues—the number of cases in which at least one side is pro se far outnumbers those in which counsel represents both parties.<sup>22</sup> The number of unrepresented litigants in these types of cases has surged nationwide, especially in family law cases.<sup>23</sup> Some reports indicate that eighty to ninety percent or more of family law cases involve at least one pro se litigant.<sup>24</sup> While in many cases both sides will be unrepresented, in perhaps one-third or more of all litigation, a pro se litigant opposes a represented party.<sup>25</sup> Even more spectacular than the number of pro se litigants is the growth rate of pro se litigation. For instance, in 1971, only one percent of litigants in divorce cases in California were pro se.<sup>26</sup> By 1985, the rate had risen to forty-seven percent and currently, the rate is approaching seventy-five percent.<sup>27</sup> Regardless of the exact percentages, pro se litigation rates have been growing at an exponential rate and many commentators believe they are much higher now than ever before in United States history.<sup>28</sup>

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21. Buxton, *supra* note 4.

22. Engler, *supra* note 4, at 1987.

23. Berenson, *supra* note 4, at 105.

24. Engler, *supra* note 4, at 2047; Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879, 1884 (1999) (reporting the results of an Arizona study that found approximately ninety percent of divorce cases involved at least one pro se litigant and in fifty-two percent of divorce cases both parties were pro se); Bonnie Rose Hough, *Description of California Court's Programs for Self-Represented Litigants*, prepared for the meeting of the International Legal Aid Group, Harvard University (2003), at <http://www.unbundlelaw.org/Program%20Profiles/California%20SRL%20Projects.pdf>.

25. Engler, *supra* note 4, at 2048.

26. Hough, *supra* note 24; Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, *supra* note 4.

27. Frances L. Harrison et al., *Courts Responding to Communities: California's Family Law Facilitator Program: A New Paradigm for the Courts*, 2 J. CENTER CHILD. & CTS. 61 (2000) (citations omitted).

28. Hough, *supra* note 24; Engler, *supra* note 4; Paul D. Healey, *In Search of the Delicate Balance: Legal and Ethical Questions in Assisting the Pro Se Patron*, 90 LAW LIBR. J. 129, 132 (1998); Lee, *supra* note 15, at 1280 (citations omitted) (referring to the increase as a “floodtide”); John M. Greacen, *Self Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know 1* (July 20, 2002) (unpublished manuscript, on file with author) (referring to the increase as an “explosion”). *But see id.* (manuscript at 4) (citing data that suggests that the numbers of pro se litigants are not increasing, but rather remaining constant in those cases in which

State courts are not alone in having more pro se litigants; federal courts have seen an increase in pro se litigants as well, particularly in the areas of civil rights claims involving employment discrimination and fair housing issues.<sup>29</sup> One study of federal litigation found that pro se litigants appeared in thirty-seven percent of all cases, with the number of pro se litigants in federal appeals courts having increased by forty-nine percent in a two-year period.<sup>30</sup> Each term, approximately 2,000 civil litigants file a petition for a writ of certiorari with the Supreme Court of the United States, with only five percent actually being heard and decided by the Court.<sup>31</sup> Rarely is a pro se petition for a writ of certiorari granted—one study found that only one-third of one percent of pro se petitions are heard and decided by the Court.<sup>32</sup> Some argue that this represents bias by the Supreme Court against pro se litigants and therefore against the poor; others respond that it demonstrates merely that most of the issues being raised by pro se litigants do not meet the review criteria of the Court.<sup>33</sup>

Unfortunately, as more and more parties are representing themselves in court, the need for legal counsel in litigation has also increased.<sup>34</sup> In the last sixty years, legal services “have become more of a necessity and less of a luxury when compared to the past.”<sup>35</sup> For example, family law cases have not only grown in number but also in complexity.<sup>36</sup> Child support litigation, a rarity just thirty years ago, now affects one out of four children in the United States and involves close to one-hundred billion dollars owed in unpaid support being pursued by state child support enforcement agencies employing dedicated attorneys and support staff.<sup>37</sup>

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pro se litigants are common—domestic relations, domestic violence, child support, traffic, and landlord/tenant).

29. Buxton, *supra* note 4, at 105; Holt, *supra* note 2, at 167.

30. Buxton, *supra* note 4, at 112 (citations omitted).

31. Kevin H. Smith, *Justice for All?: The Supreme Court's Denial of Pro Se Petitions for Certiorari*, 63 ALB. L. REV. 381, 382 (1999).

32. *Id.* at 384.

33. *See id.* at 381 (analyzing why the Supreme Court accepts or declines cases).

34. Buxton, *supra* note 4, at 111; *see also* Raul v. Esquivel, III, *The Ability of the Indigent to Access the Legal Process in Family Law Matters*, 1 LOY. J. PUB. INT. L. 79, 80 (2000) (noting that the increase in domestic relations cases is out of proportion to the increase in the population).

35. Buxton, *supra* note 4, at 111.

36. *Compare* Berenson, *supra* note 4, at 105 (discussing the growth of family law litigation) with Report of the Massachusetts Supreme Court, *Gender Bias Study of the Court System in Massachusetts*, 24 NEW ENG. L. REV. 745, 764 (1990) (discussing the increase in complexity of family law cases).

37. *See generally* Drew A. Swank, *The National Child Non-Support Epidemic*, 2003 MICH. ST. DCL L. REV. 357 (2003).

## IV. WHY PRO SE LITIGATION EXISTS

Popular opinion holds that the reason for the increase in pro se appearances is the high cost of attorneys and litigation.<sup>38</sup> Furthermore, the common belief is that all “[p]ro se civil litigants want counsel to represent them . . .,”<sup>39</sup> and that no person would choose to be pro se.<sup>40</sup> The inability of a large portion of American society to afford “attorney assistance has been deemed one of the glaring failures of our system, straining the principle of equal justice under the law.”<sup>41</sup> The perceived result is that pro se litigants are reluctant participants in the legal system.<sup>42</sup>

These popular opinions, however, are misguided. In one survey, forty-five percent of pro se litigants stated that they chose to represent themselves because their case was simple—often involving a single, clear cut issue—and not because they could not afford an attorney.<sup>43</sup> Only thirty-one percent stated they were pro se because they could not afford to retain counsel.<sup>44</sup> Almost half implied that they had the necessary funds to hire an attorney, but chose not to.<sup>45</sup>

There are many reasons for the growth of pro se litigation other than the cost of securing legal assistance. Some of the reasons cited in various surveys include:

- (1) increased literacy rates,<sup>46</sup>
- (2) increased sense of consumerism,<sup>47</sup>

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38. Barry, *supra* note 24 (citations omitted); Bradlow, *supra* note 14, at 669-70 (citations omitted); Buxton, *supra* note 4, at 111; Esquivel, *supra* note 34, at 85 (stating that the cost of litigation prevents many matters that need to be litigated from coming to court); Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, *supra* note 4; Harrison, *supra* note 27; Healey, *supra* note 28, at 133 (stating most commentators would agree that the majority of individuals are pro se due to an inability to afford counsel); Lee, *supra* note 15, at 1280-81; McLaughlin, *supra* note 16, at 1132-33.

39. Candice K. Lee, *Access Denied: Limitations on Pro Se Litigants' Access to the Courts in the Eighth Circuit*, 36 U.C. DAVIS L. REV. 1261, 1265 (2003).

40. *Id.*

41. McLaughlin, *supra* note 16, at 1132-33.

42. *See generally* Holt, *supra* note 2.

43. Goldschmidt, *supra* note 6 (citations omitted); *see also* Greacen, *supra* note 28, at 3.

44. Jona Goldschmidt, *Cases and Materials on Pro Se Litigation and Related Issues*, remarks prepared for the ABA Lawyers' Conference Annual Meeting, Tucson, Arizona, May 1-4, 1997, available at <http://www.pro-selaw.org/pro-selaw/research.asp> (last visited June 5, 2004).

45. *Id.* *But see* Engler, *supra* note 4, at 2027 (stating that while some litigants who could afford counsel refrain from doing so, the notion that most litigants choose to forego legal representation is fictitious in many contexts).

46. Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, *supra* note 4.

47. *Id.*

- (3) increased sense of individualism and belief in one's own abilities,<sup>48</sup>
- (4) an anti-lawyer sentiment,<sup>49</sup>
- (5) a mistrust of the legal system,<sup>50</sup>
- (6) a belief that the public defender in criminal cases is overburdened,<sup>51</sup>
- (7) a belief that the court will do what is right whether the party is represented or not,<sup>52</sup>
- (8) a belief that litigation has been simplified to the point that attorneys are not needed,<sup>53</sup> and
- (9) a trial strategy designed to gain either sympathy<sup>54</sup> or a procedural advantage over represented parties.<sup>55</sup>

Still another reason why individuals appear pro se is that they are *advised* to proceed on their own. According to one survey in Idaho, thirty-one percent of pro se litigants consulted counsel before trial and were advised that they did not need an attorney either because their case was uncontested or simple enough to handle on their own.<sup>56</sup> Some pro se litigants, based upon repeated experiences with the legal system, may actually be better able to represent themselves in court than would counsel.<sup>57</sup> In some rural locations, even if a litigant wishes to hire an attorney, there may be none to be found.<sup>58</sup> Likewise, there are some areas of law in which few attorneys' practice, such as landlord/tenant disputes and in certain areas of family law, thereby resulting in the necessity of pro se appearances.<sup>59</sup> Absent dictating to attorneys where they can live

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48. *Id.*; Healey, *supra* note 28 (citations omitted).

49. Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, *supra* note 4; Bradlow, *supra* note 14, at 661-62; Greacen, *supra* note 28, at 3 (citations omitted); Healey, *supra* note 28 (citations omitted).

50. Nichols, *supra* note 12, at 380; Healey, *supra* note 28.

51. Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 661-62 (1988).

52. *Id.*; Healey, *supra* note 28, at 133 (citations omitted).

53. Healey, *supra* note 28 (citations omitted).

54. Bradlow, *supra* note 51.

55. Healey, *supra* note 28, at 133 (citations omitted).

56. Frances H. Thompson, *Access to Justice in Idaho*, 29 FORDHAM URB. L.J. 1313, 1316 (2002).

57. Healey, *supra* note 28, at 133 (citations omitted). Some pro se litigants, through dealing with the same issue for years, not only gain a mastery of the facts relevant to the case but also "develop an advanced and sophisticated knowledge of litigation and the law" regarding their case. *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. 124, 308-09 (1997).

58. Thompson, *supra* note 56, at 1315; Harrison, *supra* note 27; Hough, *supra* note 24.

59. Thompson, *supra* note 56, at 1315; Engler, *supra* note 4, at 2016 (citing the shortage of available lawyers for the poor).

and what type of law they will practice, this situation is unlikely to change anytime soon.

Although Judge Posner's position in *Merritt v. Faulkner* was severely criticized both in the opinion and subsequently, it has some truth to it. For certain types of cases in which there is potential for a large judgment—such as personal injury or medical malpractice—and a high probability of success, the market will more often than not provide attorneys to represent those plaintiffs.<sup>60</sup> However, where little or no profit motive exists—where the potential client is a plaintiff in an unprofitable case, a defendant, or where only injunctive or declaratory relief is sought—the market is highly unlikely to provide the necessary representation.<sup>61</sup>

Another reason for the lack of supply to meet the demand is the failure of low- or no-cost legal assistance mechanisms to provide legal assistance to those who need it. Legal assistance traditionally comes from three sources: the government or private sector in the form of legal services programs, the courts in the form of court-appointed counsel, or the bar.<sup>62</sup> All of these programs, offering traditional, full-service legal representation at no- or very low-cost to the litigant, have fallen short of meeting demand.<sup>63</sup> Both governmentally and privately funded legal services programs lack resources to help many civil litigants even though they are eligible for assistance.<sup>64</sup> Only a small fraction gets assistance, and the assistance the litigants receive is minimal—usually only brief advice and not the needed full-service legal representation.<sup>65</sup>

Prior to the 1960s, there was little government assistance for representation in civil litigation<sup>66</sup> and recently, this lack of assistance has

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60. *Merritt v. Faulkner*, 697 F.2d 761 (7th Cir. 1983); *Merritt v. Faulkner*, 823 F.2d 1150 (7th Cir. 1987). For a critique of Judge Posner's argument, see Robin Paul Malloy, *Framing the Market: Representations of Meaning and Value in Law, Markets, and Culture*, 51 *BUFF. L. REV.* 1 (2003).

61. Lee, *supra* note 15, at 1280-81; Bradlow, *supra* note 14 (citations omitted).

62. Government and private sector programs can range from efforts by law schools to official legal aid programs. See generally Margaret Martin Barry, *Access to Justice Conference September 11, 2001: Access to Justice: On Dialogues with the Judiciary*, 29 *FORDHAM URB. L.J.* 1089 (2002); Barry, *supra* note 24, at 1888; Helen B. Kim, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to Be Heard*, 96 *YALE L.J.* 1641, 1643 (1987). Efforts by the bar can range from free clinics ran by attorneys for pro se litigants to pro bono representation. See generally *Access to Justice: Does it Exist in Civil Cases?*, 17 *GEO. J. LEGAL ETHICS* 455 (2004).

63. Harrison, *supra* note 27.

64. Nichols, *supra* note 12, at 384 (citations omitted).

65. Rhode, *supra* note 19, at 54.

66. Buxton, *supra* note 4, at 105-106; Caroline Durham, *Law Schools Making a Difference: An Examination of Public Service Requirements*, 13 *LAW & INEQ.* 39, 40 (1994) (noting the importance of legal clinics and that the demand for their services outstrips the supply); see also Barry, *supra* note 24. Ms. Barry writes that the Economic Opportunity Act of 1964 instituted the first federally supported legal services program for the poor. Prior to 1964, there were about 150 legal aid societies in the United States employing 600 lawyers with a combined budget of \$4 million;

gotten worse. Over the last two decades, federal funding for legal services programs has been cut by one-third while greater restrictions have been placed on the type of cases and the type of clients that government-funded programs can help.<sup>67</sup> The lack of funding has resulted in four-fifths of the legal needs of the poor and two- to three-fifths of the legal needs of the middle class being unmet.<sup>68</sup> The net result is that there is only one lawyer available to serve approximately 9,000 low-income persons,<sup>69</sup> and in the mid-1990s, approximately 9.1 million Americans' legal needs went unmet.<sup>70</sup> It has been estimated that it would take three to four billion dollars a year to merely meet the minimal civil legal needs of low-income Americans—ten-times the \$300 million now being spent.<sup>71</sup>

Other means of providing legal services to the poor have likewise failed. Except in very limited circumstances, courts routinely decline to provide court-appointed counsel in civil cases.<sup>72</sup> While courts can appoint counsel for a variety of reasons, they often do not.<sup>73</sup> With state budgets in crisis, the states and courts have little incentive to use available funds to provide counsel in civil cases.<sup>74</sup> Surveys indicate that the vast majority of the public favors legal representation for the poor, but only if it does not result in increased cost to the taxpaying public.<sup>75</sup> The majority of respondents prefer legal assistance from volunteer attorneys and not government subsidies, and forty percent want the government to provide advice only, not representation in litigation.<sup>76</sup> It is

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within a few years of the Act's passage, that number grew to over 2500 lawyers with a budget in excess of \$60 million. Barry, *supra* note 24.

67. Buxton, *supra* note 4, at 105-06; Rhode, *supra* note 19, at 50.

68. Engler, *supra* note 4; Rhode, *supra* note 19.

69. Rhode, *supra* note 19.

70. Barry, *supra* note 24, at 1885.

71. Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL'Y 47, 50 (2003).

72. *Id.* at 55.

73. *Id.*, at 49-50; Nichols, *supra* note 12, at 384 (citations omitted).

74. See Jeffrey Cohan, *Alleghany County's legal defense fund runs dry*, POST-GAZETTE.COM, Aug. 20, 2002, at [http://www.post-gazette.com/localnews/20020820defense\\_0820p2.asp](http://www.post-gazette.com/localnews/20020820defense_0820p2.asp); see also Eric Bartels, *Protest Arrests May Clog Courts*, PORTLAND TRIBUNE, Mar. 28, 2003, available at <http://www.portlandtribune.com/archview.cgi?id=17336> (stating that the state budget crisis has resulted in elimination of court days and delayed trials for months); see generally David M. Herszenhorn, *How Did Such a Rich State Get So Poor?*, N.Y. TIMES, Dec. 22, 2002, available at <http://www.ccsu.edu/aaup/csu/herszenhornarticle.htm>; Jeffrey L. Rabin, *State Spent Its Way Into Budget Crisis*, L.A. TIMES.COM, Oct. 29, 2002, at [www.caltax.org/LATimes-StateSpentWayIntoBudgetCrisis10-29-02.pdf](http://www.caltax.org/LATimes-StateSpentWayIntoBudgetCrisis10-29-02.pdf); Robert Sandler, *State Lawmakers are Calling This the Worst Budget in Years*, MISSOURI DIGITAL NEWS, Mar. 1, 2002, at <http://www.mdn.org/2002/Stories/Budget3.htm>.

75. Deborah L. Rhode, *Equal Justice Under Law: Connecting Principle to Practice*, 12 WASH. U. J.L. & POL'Y 47, 53 (2003).

76. *Id.*

important to note that “[a]lmost four-fifths of Americans incorrectly believe that the poor are now entitled to legal aid in civil cases, and only a third think that they would have a very difficult time obtaining assistance.”<sup>77</sup>

The private bar has also failed in providing assistance to those who cannot afford legal representation.<sup>78</sup> “State supreme courts have adopted only aspirational standards, coupled in a few jurisdictions with occasional court assignments or mandatory reporting systems. Yet, most lawyers have failed to meet these aspirational goals and the performance of the profession as a whole remains at a shameful level.”<sup>79</sup> As one commentator noted:

[R]ecent surveys indicate that most lawyers provide no significant pro bono assistance to the poor. In most states, fewer than a fifth of lawyers offer such services. The average pro bono contribution is under half an hour a week and half a dollar a day . . . Fewer than a fifth of the nation’s 100 most financially successful firms meet the ABA’s standard of providing fifty hours a year of pro bono service. Over the past decade, when these firms’ revenues grew by over fifty percent, their average pro bono hours decreased by a third. For many other employers, salary wars have pushed compensation levels to a new height that has eroded, rather than expanded, support for pro bono programs.<sup>80</sup>

The small amount of pro bono work currently being provided has done little to relieve the need for legal services.<sup>81</sup>

Despite the various mechanisms to provide legal assistance to the poor, according to a report of the American Bar Association, seventy to eighty percent or more of low-income persons are unable to obtain legal assistance when they need and want it.<sup>82</sup> Legal aid societies lack the funding to provide more services to more individuals.<sup>83</sup> Courts lack the funds to appoint counsel to represent litigants except in mandatory or unusual cases.<sup>84</sup> Private attorneys lose money by providing pro bono

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77. *Id.*

78. *Id.* at 59.

79. *Id.*

80. *Id.* at 59-60 (citations omitted).

81. Barry, *supra* note 24, at 1884-85.

82. Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 *FORDHAM L. REV.* 2241 (1999) (citations omitted); *see also* Barry, *supra* note 24, at 1883-84.

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

84. *See supra* notes 10-11 and accompanying text.

services.<sup>85</sup> While the lack of money at a variety of levels may be the cause of the problem, the results for litigants are far reaching. The lack of a cohesive means for low- and middle-income individuals to have legal representation results in them failing to resolve their legal issues, abandoning their rights, or attempting to do it on their own. Pro se litigants normally have no access to any sort of professional legal advice.<sup>86</sup>

Access to legal counsel is just one aspect of the problem. According to another American Bar Association survey, the legal issues of less than thirty percent of low-income households and forty percent of moderate-income households are brought to the justice system, whether or not legal counsel is involved.<sup>87</sup> While these individuals could bring their problems to court themselves, there are multiple reasons why they do not. These include:

- (1) the belief that legal intervention would not help,
- (2) concerns about the cost even without attorneys,
- (3) the belief that the problem was not serious or “legal” enough to take to court,
- (4) the desire to avoid confrontation, and
- (5) the desire to handle the problem on their own.<sup>88</sup>

For these individuals, the justice system as a whole is not a viable means of conflict resolution.

As previously discussed, there will always be individuals who wish to have counsel and cannot afford it, and there will likewise always be individuals who simply choose to proceed pro se.<sup>89</sup> The fact that some pro se litigants choose to represent themselves does not suggest that the cost of litigation and attorneys is not a barrier for many individuals from participating in the judicial process. For individuals living paycheck to paycheck, getting paid only for the hours they work, the ability to attend hours of court hearings is as much out of their reach as the money needed to hire an attorney. The cost of litigation and attorneys is certainly a significant but it is not the solitary reason for pro se litigants.<sup>90</sup> No matter how much funding legal aid organizations have or how many pro bono

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85. See *supra* notes 11-12 and accompanying text.

86. Esquivel, *supra* note 34, at 93.

87. Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 *FORDHAM L. REV.* 1879, 1883-84 (1999) (citations omitted).

88. *Id.*

89. Thompson, *supra* note 56.

90. See *supra* pp. 7-8.

hours attorneys donate, there will always be some individuals who will want to litigate pro se.

#### V. THE IMPLICATIONS OF PROCEEDING PRO SE

Not having representation can negatively affect both the litigant and others. Pro se litigants are regularly perceived in a negative manner; they are “most often attacked for the judicial inefficiencies many judges, attorneys, and observers believe they create. Pro se litigants are more likely to neglect time limits, miss court deadlines, and have problems understanding and applying the procedural and substantive law pertaining to their claim.”<sup>91</sup> Routinely they are described as “‘pests,’ ‘nuts,’ ‘an increasing problem,’ [and they are blamed for] ‘clogging our judicial system.’”<sup>92</sup> They are thought of as being underprivileged, uneducated,<sup>93</sup> and almost certainly “lack[ing] . . . both the skill and knowledge adequately needed to prepare their defense.”<sup>94</sup> They are believed to be unduly burdensome on judges, clerks, and court processes;<sup>95</sup> many pro se litigants require additional time at the clerk’s office and in the courtroom because they do not understand the procedures or the limitations of the court.<sup>96</sup> Pro se litigants may clutter up cases with rambling, illogical pleadings, motions, and briefs.<sup>97</sup> Lawyers and judges even express concerns that pro se litigants are using their status to gain an unfair advantage over represented parties, who are required to “play by the rules.”<sup>98</sup>

One example of how pro se litigants have had a negative effect on the judicial system can be found in New York’s Housing Court. The problems of pro se litigants in the court have become so vast that there are now periodic calls for the elimination of that court entirely.<sup>99</sup>

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91. Buxton, *supra* note 4, at 114 (citations omitted); Barry, *supra* note 24, at 1894.

92. Rosenbloom, *supra* note 3, at 381.

93. McLaughlin, *supra* note 16, at 1118.

94. Holt, *supra* note 2, at 167.

95. Engler, *supra* note 4, at 2050-51; Greacen, *supra* note 28.

96. Hough, *supra* note 24.

97. Nichols, *supra* note 12, at 351.

98. Engler, *supra* note 4, at 1988.

99. Engler, *supra* note 4, at 2065 (citing criticisms of the New York Housing Court including overcrowding, unsympathetic and hostile court staff and judges, and attorneys intentionally misleading and bullying pro se litigants); *see also* Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers’ Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79 (1997).

## VI. CONCLUSION

As with most issues, there are two competing visions of the current pro se environment. On one hand, the pro se litigant is viewed as the poor person who cannot afford counsel and is therefore unable to participate in the hyper-technical procedural maze of the modern judicial system. On the other hand, the pro se litigant is perceived as a nut who files rambling, illogical lawsuits to settle personal vendettas and advance his or her own social and political agenda.<sup>100</sup> This negative perception of pro se litigants, however, has not been objectively studied or documented. Nor is there extensive research to support the perceived negative effect pro se litigants supposedly have on our courts.<sup>101</sup> While “[t]he image of the inexperience of a pro se litigant creating dilemmas and frustrations during a trial or hearing has a basis in reality,” the data from studies that are available suggests that this picture is not the norm.<sup>102</sup> One study compared pro se and represented-party cases finding that represented-party cases were the most time consuming and had the most docket entries.<sup>103</sup> Additionally, pro se cases were being settled at virtually the same rate as those with represented parties, again belying the notion that pro se cases always go to trial and do not settle.<sup>104</sup>

Pro se litigants, in many courts, have become the norm. While undoubtedly there needs to be greater efforts to provide legal assistance—whether through legal aid organizations or pro bono work by the bar—there are individuals who for a variety of reasons will choose to proceed pro se. This pro se phenomenon creates several competing issues for courts and the justice system. There is a need to provide individuals who cannot afford or do not desire representation with meaningful access to the courts, while at the same time protecting the ability of the courts to provide impartial and timely justice.<sup>105</sup> If having pro se litigants creates problems for our courts, the solution is not to eliminate the parties’ ability to represent themselves, but rather to put forth concerted efforts to study and address the underlying issues and mechanisms relating to how pro se litigants interact with the court.

Currently, some commentators are calling for greater accommodation for pro se litigants in comparison to represented parties.<sup>106</sup> For instance, some have argued that procedural and

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100. Nichols, *supra* note 12.

101. Rosenbloom, *supra* note 3, at 312-14.

102. Greacen, *supra* note 28, at 11 (citations omitted).

103. Rosenbloom, *supra* note 3, at 358-59.

104. Buxton, *supra* note 4, at 145-46.

105. Harrison, *supra* note 27, at 70.

106. *See, e.g.*, Engler, *supra* note 4, at 1987; Buxton, *supra* note 4, at 103; Lee, *supra* note 15,

evidentiary rules should not apply to pro se litigants.<sup>107</sup> Others have argued that judges and clerks owe a duty to actively assist pro se litigants both inside and outside the courtroom, providing legal advice and information as needed by the litigant.<sup>108</sup> Many of these suggestions are premised on the belief that pro se litigants are involuntarily representing themselves, something that the available data contradicts in part.<sup>109</sup> Policy makers, in determining whether to modify rules of procedure and evidence or the roles of judges and court staff, need to have a firm understanding of why individuals are proceeding pro se so as to best justify any changes to the traditional adversarial system used throughout our courts. The justification to make changes is much weaker when pro se litigants choose to represent themselves—as in effect they would be “choosing” to opt out of the rules and procedures that apply to every other litigant—as opposed to being forced by economic necessity to proceed pro se. If changes are going to be made to our legal system to better accommodate pro se litigants, we need to be sure that they are being made for the right reasons.

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at 1261; McLaughlin, *supra* note 16. *But see Access to Justice: Does it Exist in Civil Cases?*, *supra* note 62 (stating that the suggestion that the rules of procedure and evidence should not apply to all to pro se litigants is nothing new).

107. Lee, *supra* note 15, at 1270-71; McLaughlin, *supra* note 16, at 1122; Bradlow, *supra* note 14, at 683; Buxton, *supra* note 4, at 106.

108. Holt, *supra* note 2, at 167; Engler, *supra* note 4, at 2037-38; Margaret Martin Barry, *Access to Justice Conference September 11, 2001: Access to Justice: On Dialogues with the Judiciary*, 29 FORDHAM URB. L.J. 1089, 1102 (2002); Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, *supra* note 4, at 48-49; *see generally* Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423 (2004).

109. *Compare* Bradlow, *supra* note 14, at 659, Engler, *supra* note 4, at 1987, and McLaughlin, *supra* note 16, with *supra* pp. 7-8.