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Posner Tackles the Pro Se Prisoner Problem: A Book Review of *Reforming the Federal Judiciary*

Katherine A. Macfarlane*

I. INTRODUCTION

*The underlying problem is the downright indifference of most judges to the needs of pro se's.*¹

After Judge Richard Posner announced he was retiring from the Seventh Circuit effective September 2, 2017, effusive praise poured in. Posner was described as a leading public intellectual² and “[o]ne of the nation’s most influential judges and legal writers.”³ The reception to Posner’s sixty-sixth book, *Reforming the Federal Judiciary: My Former Court Needs to Overhaul Its Staff Attorney Program and Begin Televising Its Oral Arguments*, has been less flattering. Posner’s decision to include Seventh Circuit memoranda, draft opinions, and internal emails has raised ethical concerns.⁴ The discussion surrounding Posner’s self-published book has centered on its descrip-

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1. RICHARD A. POSNER, *REFORMING THE FEDERAL JUDICIARY: MY FORMER COURT NEEDS TO OVERHAUL ITS STAFF ATTORNEY PROGRAM AND BEGIN TELEVISIONING ITS ORAL ARGUMENTS* 31 (2017).

2. Lorelei Laird, *Judge Richard Posner Retires from the 7th Circuit After 36 Years*, ABA J. (Sept. 1, 2017, 5:22 PM), http://www.abajournal.com/news/article/judge_richard_posner_retires_from_the_7th_circuit_after_36_years.

3. David Schaper, *Federal Judge Richard Posner, a Leading Legal Voice, Retiring from Bench*, NPR (Sept. 1, 2017, 9:10 PM), <http://www.npr.org/sections/thetwo-way/2017/09/01/548027406/federal-judge-richard-posner-retiring-from-the-bench>.

4. Debra Cassens Weiss, *Is Posner’s ‘Baffling’ Book an Ethics Breach? Chief Judge Objects to Release of Internal Memos*, ABA J. (Sept. 21, 2017, 11:48 AM), http://www.abajournal.com/news/article/is_posners_book_an_ethics_violation_chief_judge_objects_to_re.

tions of disputes with former colleagues, Posner's decision to publish internal court documents, and his frustration that the Seventh Circuit rejected his offer to "re-write all his circuit's staff attorneys' memos and draft opinions before they went to his fellow judges."⁵

Unfortunately, the book's tone and ethical red flags are drowning out its potential for true reform. As Matthew Stiegler noted in a widely-shared blog post:

Blazing a spotlight on the separate-but-equal appellate review that pro [se] litigants receive is vitally important. Hardly anyone understands how pro se appeals are handled by the federal courts – that is, how *differently* than appeals by litigants wealthy enough to hire lawyers. And hardly anyone cares. Posner is on to something big here.⁶

Posner worked to draw attention to the pro se aspects of his newest project. He gave several interviews after his retirement in which he previewed the subject of *Reforming the Federal Judiciary* and emphasized his interest in the pro se. In one interview, he declared himself newly committed to the "plight of litigants who represent[] themselves in civil cases," those with real grievances whom the legal system nevertheless treats "impatiently, dismissing their cases over technical matters."⁷ "I didn't think the pro se litigants were getting a fair break," he explained.⁸ In an email to the *Chicago Daily Law Bulletin*, he went further, commenting that "how the court treats pro se litigants" accelerated his retirement.⁹

Reforming the Federal Judiciary calls for transforming the Seventh Circuit's staff attorney program as a result of its author's concern for the down-trodden litigants whose fate the staff attorneys decide. Staff attorneys and the courts are not doing enough for the pro se, Posner concludes, because decisions in pro se cases are incomprehensible to pro se litigants.¹⁰ Moreover, because judges have little interest in pro se cases, most staff attorney opinion

5. Matthew Stiegler, *Posner's New Book Is Bananas, but You Might Want It Anyway*, CA3BLOG (Sept. 18, 2017), <http://ca3blog.com/judges/posners-new-book-is-bananas-but-you-might-want-it-anyway/>.

6. *Id.*

7. Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), <https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html?mcubz=1>.

8. David Lat, *Judge Posner, Uncensored: 'I Don't Really Care What People Think'*, ABOVE L. (Sept. 14, 2017, 7:41 PM), <http://abovethelaw.com/2017/09/judge-posner-uncensored-i-dont-really-care-what-people-think/>.

9. Patricia Manson, *Posner Says Friction on 7th Circuit Bench Led to His Retirement*, CHI. DAILY L. BULL. (Sept. 6, 2017, 2:22 PM), <http://www.chicagolawbulletin.com/Articles/2017/09/06/Posner-bench-friction-9-6-17>.

10. POSNER, *supra* note 1, at 135.

drafts are rubber stamped by judges and receive little judicial scrutiny.¹¹ Posner recommends that each staff attorney-authored opinion be written for an audience of limited intelligence.¹² Before resigning, he volunteered to review and edit staff attorney opinion drafts to make them more accessible to an uneducated pro se reader.¹³ His proposals regarding the Seventh Circuit's staff attorney program were rejected. This led to his resignation.¹⁴

The Preface to *Reforming the Federal Judiciary* describes Posner's August 16, 2017, decision to publish his latest book through Amazon's CreateSpace, as opposed to a university press.¹⁵ He announced his retirement on September 1, 2017. The book's preface is dated September 5, 2017,¹⁶ and the book was available on Amazon as of September 7, 2017.¹⁷ Though it was published after his resignation, it appears that it was completed while he was still a Seventh Circuit judge.

This book review is focused on what Posner deemed the book's "most important theme" – "the need for better treatment by the federal courts of pro se litigants."¹⁸ His staff attorney proposals offer the most reform potential.¹⁹

11. *Id.* at 138.

12. *Id.* at 139.

13. *Id.* at 145.

14. *Id.* at 149.

15. *Id.* at xv.

16. *Id.* at xiv.

17. *Reforming the Federal Judiciary*, AMAZON, https://www.amazon.com/Reforming-Federal-Judiciary-Televising-Arguments/dp/1976014794/ref=sr_1_1?ie=UTF8&qid=1519696291&sr=8-1&keywords=reforming+the+federal+judiciary (last visited Mar. 23, 2018) (identifying the book as a September 7, 2017 paperback).

18. POSNER, *supra* note 1, at 270.

19. Beyond the scope of this book review are the book's ethical implications. Also unaddressed is Posner's proposal about televising oral arguments, which takes up only a sliver of the book's pages and, unlike his other proposals, is free of controversy, having already garnered significant support in the Seventh Circuit. David Lat, *The Seventh Circuit Responds to Judge Richard Posner*, ABOVE L. (Sept. 15, 2017, 2:28 PM), <http://abovethelaw.com/2017/09/the-seventh-circuit-responds-to-judge-richard-posner/> (In a statement sent to David Lat, Chief Judge Wood noted that "as for televising oral arguments, there is actually not as much disagreement with Dick's views as one might think" and the Seventh Circuit is "moving forward with a plan for televising, and I expect to see it in place before too much longer."). A former Seventh Circuit staff attorney has already eloquently criticized Posner's writing criticisms. See Zoran Tasić, *Reforming Richard Posner: The Former Federal Judge Needs to Overhaul His Assessment of the Seventh Circuit's Staff Attorney Program and Correct the Errors in His Book* 12 (2017) (unpublished manuscript) (available at https://drive.google.com/file/d/0B_yKMHMEBvcDMTNXOHR6dzJIQ1U/view) (describing the writing criticism as "perhaps the most confused and misleading part of the book because Posner discusses these documents as though they were written by staff attorneys for pro se litigants. But only three of the 12 documents that Posner scrutinizes fall into that category"). See also *id.* at 15–16 ("Staff attorneys walk a fine line. More often than not, one of the judges on a three-judge panel will want a Spar-

Following this introduction, Part II summarizes Posner's description of the problems vexing pro se litigants. Though the book's title suggests that Posner prescribes system-wide judicial reform, Posner most thoroughly studied the Seventh Circuit's practices.²⁰ Posner did not directly study the impact of staff attorney work in district courts.²¹

Part III examines the assumptions underlying Posner's desire to assist pro se litigants, including the conclusions that pro se litigants are: "very often poorly educated and/or of limited intelligence";²² "ignorant of the subtleties of the law";²³ and "basically fairly normal people who because of bad luck, psychological problems, poor judgment, lack of family support, or other internal or environmental misfortunes, simply have great difficulty living a law-abiding life."²⁴ It will consider whether staff attorneys should, as Posner suggests, apply a test determining whether their orders are readable by pro se litigants by assessing the litigants' "educational level."²⁵ In examining Posner's newfound empathy for the pro se, this review will argue that empathy is not always a proxy for meaningful institutional change.

Part IV concludes that though Posner has identified unjustifiable structural inequality, his recommendations would not necessarily fix it. If pro se litigants deserve equal treatment, eliminating all staff attorney programs is a necessary step toward promoting procedural equality.²⁶ Assign pro se cases directly to judges' chambers, make staff attorneys law clerks, and allow the new law clerks to work directly with jurists like Richard Posner.

II. THE PRO SE PROBLEM, ACCORDING TO POSNER

Though never expressly described as a book about pro se prisoners, prisoner cases are those Posner is most concerned with.²⁷ His book came

tan recommendation, while another will want the staff attorney to address every single one of a pro se litigant's 26 contentions, even if all of them are frivolous or incoherent. Moreover, staff attorneys must make recommendations based on precedent.").

20. The book's subtitle, "My Former Court Needs to Overhaul Its Staff Attorney Program and Begin Televising Its Oral Arguments," better describes its target.

21. Others have described how district courts assign pro se prisoner cases. See, e.g., Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475 (2002).

22. POSNER, *supra* note 1, at 65.

23. *Id.* at 135.

24. *Id.* at 69–70.

25. *Id.* at 70–71, 86.

26. I proposed similar reform at the district court level. See Katherine A. Macfarlane, *Shadow Judges: Staff Attorney Adjudication of Prisoner Claims*, 95 OR. L. REV. 97 (2016).

27. It is initially unclear which pro se prisoners Posner is writing about: those who collaterally attack state or federal convictions, those who bring conditions of confinement claims involving state or federal prisons, or federal criminal defendants. Based on his reliance on statistics created by the federal courts regarding pro se appel-

about, he explains, because his attitude about pro se prisoners has evolved.²⁸ He believes that pro se prisoners deserve his empathy and describes them, using Dickensian terms, as “the downtrodden” and “these unfortunates.”²⁹ As he notes, half of the appellants in the Seventh Circuit are pro se,³⁰ and half of that group are incarcerated.³¹ Posner is concerned that “most of the litigants who interact with staff attorneys” are unrepresented and “have the further handicap of being prison inmates.”³² He focuses on reforming staff attorney programs because “staff attorneys . . . handle most pro se cases,”³³ and “staff attorneys’ interaction with pro se litigants” is the aspect of staff attorney work that interests him the most.³⁴ That is, if staff attorney programs are reformed, then pro se prisoners will receive more justice.

Posner’s emphasis is on the Seventh Circuit’s staff attorney program, which he compares to programs in other circuits.³⁵ To explain why he targets staff attorney programs for reform, Posner spends several chapters introducing the unfamiliar reader to staff attorneys by describing the staff attorney

lants, it is likely that his concerns are limited to cases involving habeas petitions and conditions of confinement claims. See POSNER, *supra* note 1, at 13 (citing TABLE 2.4 – U.S. COURTS OF APPEALS – PRO SE CASES FILED (Sept. 30, 2015), http://www.uscourts.gov/sites/default/files/data_tables/Table2.04.pdf, for the proposition that “[i]n 2015 . . . 46 percent of the pro se’s were prisoners”). The table in question lists the number of pro se appeals filed in the U.S. Courts of Appeals (excluding the Federal Circuit) for the twelve-month period ending on September 30, 2015 (not the year 2015) and breaks the cases into eight categories, including private prisoner petitions, U.S. prisoner petitions, and criminal appeals. TABLE 2.4 – U.S. COURTS OF APPEALS – PRO SE CASES FILED, *supra*. The table identifies 26,883 total pro se appeals, and 12,406 prisoner petitions, or forty-six percent of the total. *Id.*

28. POSNER, *supra* note 1, at ix.

29. *Id.* at viii–ix.

30. *Id.* at 6. In the twelve-month period ending September 30, 2015, of the 2926 appeals brought in the Seventh Circuit, 1673 were pro se at the time of filing. TABLE B-9: U.S. COURTS OF APPEALS – PRO SE CASES COMMENCED AND TERMINATED, BY CIRCUIT AND NATURE OF PROCEEDING, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2015 at 3 (2015), http://www.uscourts.gov/sites/default/files/data_tables/B09Sep15.pdf [hereinafter TABLE B-9].

31. POSNER, *supra* note 1, at 270. In the twelve-month period ending September 30, 2015, of the 1673 appeals brought in the Seventh Circuit that were pro se at the time of filing, 163 were criminal cases, 297 were habeas petitions or prison condition cases brought by federal inmates, and 583 were habeas petitions or prison condition cases brought by state inmates. TABLE B-9, *supra* note 30, at 3. In 2016, across all circuits, “[a]ppeals involving pro se litigants . . . rose 18 percent.” *Judicial Business 2016*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/judicial-business-2016> (last visited Mar. 23, 2018).

32. POSNER, *supra* note 1, at viii–ix.

33. *Id.* at 14.

34. *Id.* at 33.

35. *Id.* at 1. The other circuits’ staff attorney programs are described in Chapter 3. See *id.* at 49–61.

program in the Seventh Circuit. There, staff attorneys are judicial advisors who inform judges “about the court’s cases that are not orally argued, often because the appellant has no lawyer.”³⁶ Unlike law clerks, who are hired by judges themselves, staff attorneys are hired by a senior staff attorney who directs the court’s staff attorney program.³⁷ The senior staff attorney reports to the court’s chief judge.³⁸ In the Seventh Circuit, staff attorney positions typically last two years, though supervisory staff attorneys have indefinite terms.³⁹ Staff attorneys are not assigned to an individual judge but work for the court.⁴⁰

Posner estimates that there are 401 staff attorneys in the federal appellate judiciary.⁴¹ There are “24 or 25” staff attorneys in the Seventh Circuit, compared to 11 judges and 43 law clerks.⁴² The cases staff attorneys work on, Posner tells the reader, “are on average less important than those handled by law clerks for their judges.”⁴³ Still, as compared to law clerks, staff attorneys “have more juridical influence” because judges tend to “rubber stamp” staff attorney recommendations.⁴⁴ Posner describes the staff attorney caseload as “heavy” and that unlike law clerks, staff attorneys have infrequent contact with judges.⁴⁵ Appeals brought by pro se litigants are referred “in the first instance” to staff attorneys, who draft orders and recommendation memoranda regarding how the cases should be decided.⁴⁶

According to Posner, many judges “regard pro se litigants as losers and pests, and as a result often in effect delegate the decision of pro se cases to staff attorneys.”⁴⁷ Though Posner does not ascribe to similar pejoratives, he does describe all staff attorney cases, including those involving pro se litigants, as less important. He never suggests that they be handled in chambers by law clerks.⁴⁸

Rather, throughout his book, Posner emphasizes the need to improve the quality of written decisions in pro se cases. He wants staff attorneys to draft decisions so that they are “complete, sufficient, and intelligible to the pro se litigants.”⁴⁹ He accepts that “most” “but not all” pro se appeals are “doomed

36. *Id.* at 3.

37. *Id.* at 4–5.

38. *Id.*

39. *Id.* at 5.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 6.

44. *Id.*

45. *Id.* at 14.

46. *Id.* at 6.

47. *Id.* at 270.

48. *See id.* at 7 (describing pro se litigation at the trial level as “plac[ing] a great strain on judge and jury – indeed, the pro se’s untutored self-advocacy may border on, or even cross over into, unintelligibility”).

49. *Id.* at 21.

to fail”⁵⁰ but does not wish to change how pro se cases are decided. Instead, he wants pro se litigants to be treated with empathy and decency.

To achieve these goals, orders and opinions in pro se cases must be intelligible to the pro se. He wants to treat pro se litigants decently because they have “intellectual and educational deficiencies” which, along with being unrepresented, give them a litigation disadvantage.⁵¹ Posner is also sympathetic because “American prison sentences tend to be far too long.”⁵² Posner notes that state prisons “often fail to provide inmates with proper protection and adequate medical care.”⁵³ Here, he comes close to suggesting that the law controlling prison conditions may be unnecessarily anti-prisoner, but stops short of this conclusion. Instead, safety and healthcare problems are just additional reasons to treat pro se litigants with decency, a goal accomplished through writing intelligible orders.⁵⁴

In introducing the reader to staff attorneys, Posner describes their responsibilities. The Seventh Circuit’s staff attorneys work on either habeas corpus filings, motions, or a merits unit, which “prepares bench memos for judges assigned to ‘short-argument days’ . . . and also for judges participating in ‘Rule 34’ conferences.”⁵⁵ During these conferences, judges and staff attorneys discuss cases deemed unsuitable for oral argument.⁵⁶ Prior to a Rule 34 conference, staff attorneys draft a proposed order regarding each Rule 34 case.⁵⁷ At the Rule 34 conference, judges suggest revisions to the staff attorneys’ draft orders, which are then “revised and issued.”⁵⁸

Posner is concerned that the orders issued after Rule 34 conferences do not adequately explain why oral argument was unnecessary.⁵⁹ He criticizes the phrasing inserted into post-Rule 34 conference orders that explains why oral argument was denied.⁶⁰ He suggests that “[a] good reason [to forego oral argument] in many cases would be that the appellant or appellee was pro se” and that orders should state as much.⁶¹ Posner never explains why a party’s pro se status is a good reason to deny oral argument.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 22.

54. Though Posner devotes a significant number of pages to the outcome in one pro se deliberate indifference case involving a serious medical condition, which he describes as “heartless,” *id.* at 26, he attributes the outcome not to staff attorneys but to judges. *Id.* at 27. This begs the question of why this particular case was included in a book that intends to reform staff attorney practices.

55. *Id.* at 36.

56. *Id.* at 11.

57. *Id.* at 9.

58. *Id.*

59. *See id.* at 11.

60. *Id.* at 11–12.

61. *Id.* at 11.

Posner describes Federal Rule of Appellate Procedure 34 as encouraging oral argument “if but only if it is likely to contribute to a sound result.”⁶² That is, he characterizes oral argument as the exception, available only if it will help judges reach a good outcome. The rule in fact provides that oral argument “*must* be allowed in every case,” unless:

[A] panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.⁶³

If one does not want to sit through a pro se oral argument, perhaps the presence of a pro se litigant is reason to conclude that “the decisional process would not be significantly aided by oral argument.”⁶⁴ Rules that eliminate oral argument, however, limit the opportunity for advocacy.⁶⁵ Concluding that any case involving a pro se litigant is per se unsuitable for oral argument is the kind of assumption Posner initially seemed to reject. Yet, he endorses differential treatment for purposes of oral argument.

Oral argument might be helpful to a pro se who can communicate arguments orally but cannot write well.⁶⁶ Yet, as Professor John Oakley has explained, when appellate cases are tracked to staff attorneys and identified by the staff attorneys as “appropriate for procedural short-cuts,” almost uniformly, one of the shortcuts is foregoing oral argument.⁶⁷ Local rules across cir-

62. *Id.* at 9.

63. FED. R. APP. P. 34(a)(2) (emphasis added).

64. See John B. Oakley, *The Screening of Appeals: The Ninth Circuit’s Experience in the Eighties and Innovations for the Nineties*, 1991 BYU L. REV. 859, 902 (1991). See also *id.* at 861 (asserting that staff attorneys replace judges “in the adjudication of screened cases” to “achieve procedural economies with no significant impact on substantive results”).

65. See Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1464 (2004) (describing the lack of oral argument in pro se cases as an example of “normalizing structural subordination”).

66. See *CPC International, Inc., v. Archer Daniels Midland Company: Appeal Nos. 94-1045, -1060: Brief for Amicus Curiae, in the United States Court of Appeals for the Federal Circuit*, 4 FED. CIRCUIT B.J. 269, 284 (1994).

67. Oakley, *supra* note 64, at 860.

cuits illustrate the courts' commitment to avoiding oral argument in pro se cases.⁶⁸ Chief Judge Diane Wood has referred to the Seventh Circuit's "Rule 34 docket," which includes cases in which oral argument is deemed unnecessary, as a docket involving "cases in which at least one party is pro se and thus that the court designates for decision without oral argument."⁶⁹

Posner does not advocate for a radical overhaul of the staff attorney program nor does he suggest that pro se litigants be given more oral arguments. Rather, his recommendations are aimed at judges and pertain to staff attorney order and opinion drafts. First, he recommends that if a pro se appeal is denied, the denial be accompanied by "brief statements of the reason(s)" for the denial.⁷⁰ Without a "lucid statement" of the reasons for the denial, a pro se may be left feeling "disillusioned about the federal courts and with no clue as to how he might continue and improve his efforts to alleviate his situation."⁷¹ Posner volunteered to add "lucid explanation[s]" to every pro se order entered by his court.⁷²

Second, he urges judges to "[p]articipate in periodic writing workshops with staff attorneys."⁷³ Chapter 6, "Improving Output," is devoted to illustrating perceived writing deficiencies and suggesting improvements that will make the final product that reaches pro se litigants "accessible, meaningful and intelligible" to its audience.⁷⁴

Third, judges should communicate with staff attorneys before they meet with them to discuss draft orders or opinions.⁷⁵ Fourth, if a judge edits a staff attorney draft, the staff attorney should be informed as to what changes the judge made.⁷⁶ Fifth, judges should speak with staff attorneys in advance of any short argument days involving the staff attorney's work to exchange ide-

68. See Michael Correll, *Finding the Limits of Equitable Liberty: Reconsidering the Liberal Construction of Pro Se Appellate Briefs*, 35 VT. L. REV. 863, 878 (2011). See also *id.* at 882 n.94 ("Similarly, the Second Circuit also has developed a number of local rules governing all pro se cases regardless of the sophistication of a given litigant. . . . Local Rule 27(j) erects additional barriers to entry by requiring a precise statement of issues for appeal as an initial filing requirement, and Local Rule 34 reduces pro se oral arguments to just five minutes – well less than the standard ten to fifteen minutes afforded to represented parties."); Karen J. Williams, *Foreword*, 60 S.C. L. REV. 1165, 1167 (2009) ("All pro se appeals filed in the Fourth Circuit are scheduled for informal briefing and are decided on the briefs unless a panel member believes that the case warrants formal briefing and oral argument.").

69. Diane P. Wood, *Snapshots from the Seventh Circuit: Continuity and Change, 1966–2007*, 2008 WIS. L. REV. 1, 22–23 (2008).

70. POSNER, *supra* note 1, at 29.

71. *Id.* at 41.

72. *Id.* at 41–42.

73. *Id.* at 30. According to Posner, staff attorney memos are far too verbose. *Id.* at 38.

74. See *id.* at 87–134.

75. *Id.* at 30.

76. *Id.*

as.⁷⁷ Sixth, judges should recruit more pro bono counsel for pro se appellants.⁷⁸ Seventh, a staff attorney recommendation “should not be rubber stamped by the judges.”⁷⁹ Here, Posner notes that “[t]he underlying problem is the downright indifference of most judges to the needs of pro se’s.”⁸⁰ They rubber stamp staff attorney recommendations because they are “distracted, preoccupied, or uninterested in pro se cases.”⁸¹

Finally, Posner recommends that there should be no difference between decisions labeled orders and those labeled opinions.⁸² Generally, only opinions are published, and therefore, they are written with greater care. Both orders and opinions should be published, he contends. If orders, the label typically affixed to decisions in pro se cases, were indistinguishable from opinions, then their overall quality might improve. Pro se litigants deserve this additional attention to the writing that decides their cases.⁸³

Posner’s decision to focus on staff attorneys and the treatment of pro se litigants is one that leads him to describe himself, with respect to his latest book, as “a fighter.”⁸⁴ He self-published his book and plans to distribute free copies to federal judges and staff attorneys. In October 2017, Posner announced plans to form a pro bono group comprised of “lawyers and consultants” to assist pro se litigants.⁸⁵ On December 21, 2017, Posner appeared as

77. *Id.*

78. *Id.* Posner suggests that “[t]here are law firms, in Chicago particularly, that encourage their junior lawyers . . . to represent pro se’s at no cost to the pro se’s.” *Id.* It may be true that large law firms encourage associates to engage in pro bono work. However, many law firms implicitly cap the number of pro bono hours associates are entitled to accumulate by only counting a set number of pro bono hours towards associates’ yearly billable hour total. They may penalize associates for working too many hours on a pro bono case. After all, law firms are for-profit entities, and discouraging pro bono work is good for business. In my own days as a Big Law associate, I assumed pro bono representation of a formerly pro se prisoner in a conditions of confinement case in the Central District of California. It was a thrilling experience that made me a much better lawyer. Still, during the performance review that encompassed the time I spent on my prisoner case, I was criticized for the 600 hours I devoted to it, even though I had also met the firm’s 2100 hour yearly minimum and received positive reviews about the quality of my billable work. My representation was lauded by the federal judge who presided over the prisoner case and brought positive attention to my firm. Still, in my own workplace, it was not perceived as an endeavor that advanced my career.

79. *Id.* at 31.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 32.

84. *Id.* at 2.

85. Debra Cassens Weiss, *Posner Says He Is Organizing a National Pro-Bono Group that Includes Ex-Prisoner*, ABA J. (Oct. 24, 2017, 9:33 AM), http://www.abajournal.com/news/article/posner_says_he_is_organizing_a_national_pro_bono_group_that_includes_ex_pri.

counsel of record for William Bond, a formerly pro se Fourth Circuit appellant.⁸⁶

Many of Posner's recommendations are stylistic and propose that decisions involving pro se parties should be easier for a pro se to read and comprehend. There are also recommendations to increase pro bono representation and the number of meetings between staff attorneys and judges. However, Posner does not recommend treating pro se cases like all other matters, in which law clerks draft bench memoranda for a three-judge panel that will always include the judge the law clerks work for. Moreover, he does not seek to alter the outcomes in pro se cases (though the suggestion that the court attempt to recruit more pro bono counsel comes close).

III. ASSUMPTIONS UNDERLYING POSNER'S PERCEPTION OF THE PRO SE PROBLEM

Reforming the Federal Judiciary recommends reforming staff attorney programs to better serve pro se litigants based on two important assumptions: first, pro se prisoners share traits that render them worthy of empathy, and second, if staff attorneys write decisions that are intelligible to pro se litigants, the worst problem vexing staff attorney programs will be solved. But if these assumptions are incorrect, then perhaps Posner's proposed solutions are imperfect. This part examines the generalizations that motivated Posner's reform proposals.

A. Common Pro Se Prisoner Traits

Pro se litigants, according to Posner, are poorly educated, of limited intelligence, ignorant of the law, and "basically fairly normal people who because of bad luck, psychological problems, poor judgment, lack of family support, or other internal or environmental misfortunes, simply have great difficulty living a law-abiding life."⁸⁷ Therefore, they deserve empathy and better treatment.⁸⁸ If only the judiciary had more empathy and put in "modest effort,"⁸⁹ his simple goal (better treatment of the pro se through improved writing in pro se cases) could be achieved.

Studies support Posner's assumption that the incarcerated are less educated than the general public.⁹⁰ If most prisoners are less educated than the

86. Appearance of Counsel, *Bond v. United States*, No. 17-2150 (4th Cir. Dec. 21, 2017). Prior to entering an appearance, Posner had attempted to participate in Bond's case as advisory counsel. Letter by Appellant William C. Bond, *Bond v. United States*, No. 17-2150 (4th Cir. Nov. 30, 2017).

87. POSNER, *supra* note 1, at 69–70.

88. *Id.* at 270–71.

89. *Id.* at 271.

90. See, e.g., CAROLINE WOLF HARLOW, EDUCATION AND CORRECTIONAL POPULATIONS 2 (Apr. 15, 2003), <https://www.bjs.gov/content/pub/pdf/ecp.pdf> (stating

general public, then perhaps most pro se prisoner litigants are too. But Posner's oft-repeated assumption that pro se prisoner litigants are of limited intelligence is more difficult to support.⁹¹ Indeed, a pro se's ability to file a circuit court appeal despite his or her limited education, while incarcerated, and without the benefit of counsel's advice, suggests that prisoners who litigate pro se are quite intelligent.

Also questionable is the significance of Posner's assertion that the incarcerated are "basically fairly normal people."⁹² No explanation is provided as to what "basically fairly normal" means or how "basically fairly normal" is measured. This particular generalization is based on Posner's recent visit to Cook County Jail and a previous visit to a federal prison.⁹³ That is, he argues for better treatment of pro se litigants based on what he gleaned from visits to one jail and one prison where he interacted with a small number of detainees and inmates.⁹⁴ In Cook County, he spoke to five inmates and found them to be "pleasant, articulate, unthreatening, and . . . quite normal."⁹⁵ One was clearly "very intelligent."⁹⁶ He might have met "basically fairly normal" inmates who were abnormal litigants. It appears he never asked the inmates if they had any litigation experience. The reader will never know.

Even if Posner's assumptions about pro se litigant traits are correct, they are of questionable value. Pro se pleadings are liberally construed, and, in theory, we do not execute those who are severely intellectually disabled.⁹⁷ But the courts do not make additional procedural concessions for the uneducated or the unintelligent. If we choose lack of education or limited intelligence as factors that determine how parties should be treated, we might also wish to consider other characteristics that create systematic oppression, such as race, gender, and class. Others may believe that different kinds of experiences merit empathy, such as a recent divorce or illness. What one judge perceives to be a privileged trait might, to a different judge, be perceived as oppressive. Even if the generalizations about the pro se ring true, urging that different procedures apply to parties who one judge thinks are deserving of empathy is a slippery slope. Posner's standards may at first control who is

that "[c]orrectional populations report lower educational attainment than do those in the general population" and are less likely to graduate high school or take college-level courses).

91. Posner at times replaces his conclusion that pro se litigants are unintelligent with the conclusion that pro se litigants have low IQs. *See, e.g.*, POSNER, *supra* note 1, at 270.

92. *Id.* at 69.

93. *Id.* at 68 (noting that "about 300" of the jail's detainees file suits in federal district court each year and that "[t]hey are among the pro se's who are likely to appeal to my court if they lose in the district court").

94. *Id.* at 68–70.

95. *Id.* at 68.

96. *Id.*

97. *See Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the execution of mentally retarded criminals is excessive and unconstitutional).

worthy of empathy, but once subjective criteria begin to impact procedure, less deserving parties who other judges empathize with may also begin to receive procedural privileges.

B. Well-Written Decisions Containing Legal Advice Will Help the Pro Se

Posner pinpoints the failure to explain why a decision in a pro se case is granted or denied as “the most serious problem with the current [staff attorney] program.”⁹⁸ He proposes giving pro se litigants access to the memo or draft order staff attorneys prepare for the judges who decide their fate.⁹⁹

For this procedure to be effective, Posner contends that the memo or draft order must be intelligible to the pro se.¹⁰⁰ This can be achieved by writing in a manner that takes into account the pro se’s ability to understand a text. The pro se’s court submissions should be subject to “the Flesch-Kinkaid Reading Test, which is a simple algorithm . . . for determining the educational level necessary to understand a given text.”¹⁰¹ In addition, the material provided to pro se litigants should detail any available possible alternative remedy “to give [the pro se] . . . a fighting chance of future success.”¹⁰²

Posner grants that his proposal is unpopular with other judges who believe that assisting any litigant “discriminate[s] impermissibly against that litigant’s adversary.”¹⁰³ As a jurist, Posner resisted assisting one party over another, proclaiming that “[o]ur system of justice is adversarial, and our judges are busy people . . . they are not going to do the plaintiff’s research and try to discover whether there might be something to say against the defendants’ reasoning.”¹⁰⁴ Though Posner has acknowledged that pro se litigants should be advised by a judge “concerning some of the obscurer pitfalls of legal procedure,”¹⁰⁵ in one opinion, he emphasized that

[o]urs is an adversarial system; the judge looks to the parties to frame the issues for trial and judgment. Our busy district judges do not have the time to play the “proactive” role of a Continental European judge. True, they want to do justice as well as merely umpire disputes, and they should not be criticized when they point out to counsel a line of argument or inquiry that he has overlooked, although they are not

98. POSNER, *supra* note 1, at 82.

99. *Id.*

100. *Id.* at 83.

101. *Id.* at 70.

102. *Id.* at 71.

103. *Id.* at 270.

104. *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir. 1999) (Posner, J.).

105. *Ball v. City of Chicago*, 2 F.3d 752, 756 (7th Cir. 1993) (Posner, J.).

obliged to do so and (with immaterial exceptions) they may not do so when an issue has been raised.¹⁰⁶

Setting aside what happens when a judge advises one litigant at another's expense, it is unclear that the failure to provide an explanation alongside a decision is a problem in search of a solution. The most common decision in an appellate pro se case is "a decision affirming dismissal of his suit by a district court."¹⁰⁷ Why would a pro se benefit from knowing why he or she lost, if the outcome remains unchanged? This recommendation aligns with Posner's belief that all parties should know why they won or lost. But nowhere does Posner explain why a pro se litigant's life will be altered by knowing why he or she failed.

What of Posner's suggestion that providing an explanation as to why a pro se lost will help "give him a fighting chance of future success"?¹⁰⁸ Future success is a lofty goal for pro se prisoners who return to court. For example, a court may not grant *in forma pauperis* status to a prisoner who seeks to file a non-habeas civil action and "has, on 3 or more prior occasions, while incarcerated . . . , brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted."¹⁰⁹ The "three strikes" rule is significant: "approximately ninety-five percent of prisoner-initiated suits are filed IFP."¹¹⁰ If one of the appeals the Seventh Circuit denies relates to a case that constitutes a prisoner's third strike, the prisoner cannot file another case *in forma pauperis* and, therefore, will likely be unable to refile at all.

Second or successive habeas petitions are also subject to strict limits:

A district court cannot hear a second or successive habeas petition unless the Seventh Circuit Court of Appeals authorizes the court to consider the application. When a petitioner attempts to present claims that he could have raised in a prior petition, the court must dismiss them as successive, unless the claim fits one of two exceptions. First, the court may hear a successive claim if it relies upon a new rule of constitutional law made retroactive to review, which was previously unavailable. Second, the court may hear a successive claim if the factual predicate could not have been discovered previously and, if proven and considered in light of the evidence as a whole, would establish

106. *Burdett v. Miller*, 957 F.2d 1375, 1380 (7th Cir. 1992) (Posner, J.) (citations omitted).

107. POSNER, *supra* note 1, at 71.

108. *See id.*

109. *Coleman v. Tollefson*, 135 S. Ct. 1759, 1761 (2015) (quoting 28 U.S.C. § 1915(g) (2012)).

110. B. Patrick Costello, Jr., "Imminent Danger" Within 28 U.S.C. § 1915(g) of the Prison Litigation Reform Act: Are Congress and Courts Being Realistic?, 29 J. LEGIS. 1, 1 (2002).

that no reasonable factfinder would have found the petitioner guilty of the offense.¹¹¹

To the extent “stated reasons” would encourage direct appeals, this too is a recommendation without significant reform potential. A pro se petition for certiorari has next to no chance of being granted.¹¹²

Posner accepts that most pro se appeals will be denied. But it is unclear why sharing the reasons for denial will give a pro se litigant a second chance at anything.

IV. CONCLUSION

A book arguing that pro se litigants deserve better treatment warrants our attention. So does a book that dares to examine the work undertaken by staff attorneys, who Posner reveals draft orders and opinions that are rubber stamped by judges.

Swift disposal of pro se litigation is often deemed necessary to keep the federal courts running.¹¹³ Because pro se prisoner litigation is considered uninteresting and burdensome, it is assigned to staff attorneys as opposed to judges’ law clerks. Revealing these truths is an important first step toward acknowledging that not all cases are treated equally by our federal courts.

Yet the proposed solutions to the treatment an entire class of disadvantaged litigants receives do not do enough to change a broken system. Posner wants staff attorneys to improve their writing and believes that decisions in pro se cases should explain why appeals were denied (the most common outcome).¹¹⁴ These are changes that may improve the overall quality of Seventh Circuit opinions but will not do much for pro se litigants. It may appear that pro se litigants are receiving more empathy, but if their odds of obtaining relief never change, true reform never happens.

Posner does come close to a real solution. He recommends that judges interact more often with staff attorneys, by working with them to improve their writing through workshops. He thinks that judges and staff attorneys should communicate before staff attorneys deliver a draft order or opinion to a judge. Increased interaction might encourage judges to scrutinize staff attorney work more closely instead of rubber stamping it.

One change could accomplish all of the above: eliminate staff attorney positions and convert them all to in-chambers law clerk positions. The interaction between staff attorneys and judges Posner describes as ideal is exactly

111. *Hall v. Boatwright*, No. 09–CV–347, 2009 WL 3336098, at *1 (E.D. Wis. Oct. 15, 2009) (citations omitted).

112. Kevin H. Smith, *Justice for All?: The Supreme Court’s Denial of Pro Se Petitions for Certiorari*, 63 ALB. L. REV. 381, 383–84 (1999) (describing the next to impossible chance of a pro se petition for certiorari being granted).

113. See Drew A. Swank, *The Pro Se Phenomenon*, 19 BYU J. PUB. L. 373, 384 (2005).

114. See POSNER, *supra* note 1, at 71, 76.

the kind of interaction law clerks and judges enjoy already. Presumably, sitting in a judge's chambers as a law clerk allows for more interaction between opinion drafter and judge, limiting the kind of rubber stamping Posner has observed in other contexts. If pro se litigants deserve more help than the average party, why create a separate track for their cases? Assign pro se cases directly to judges' chambers, where they can be handled by individuals with the same status as those who preside over represented parties' claims.¹¹⁵

One recent development overshadows the potential of each recommendation in *Reforming the Federal Judiciary*. I am thrilled by the idea of Richard Posner, a brilliant jurist, turning his attention to pro se advocacy. It will be wonderful to see him represent formerly pro se prisoners. Suitable cases that survive summary judgment might be referred to him by district court pro bono committees. Through representation of and interaction with prisoners, he might discover that appellate decisions are the least of prisoner litigants' worries. As an advocate guided by his clients' wishes, he might also effect more concrete reform.

115. Professor Judith Resnik has discussed how the status of those who decide certain cases affects how the cases and the litigants the cases involve are handled by federal courts. See, e.g., Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909 (1990).