

Underestimating the Unrepresented: Cognitive Biases Disadvantage Pro Se Litigants in Family Law Cases

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The majority of civil cases in the United States involve at least one pro se party—more often than not, at least 1 litigant is unrepresented by legal counsel. Despite efforts to provide pro se parties with information that decreases the procedural complexity of litigation, wide access to justice gaps persist between counseled and pro se litigants. We argue that, although helpful, information alone is not enough to close access-to-justice gaps, because the mere presence of counsel gives represented litigants a persuasive edge over pro se litigants in the eyes of legal officials. Two randomized experiments with civil court judges (Experiment 1) and attorney-mediators (Experiment 2), wherein only the presence of counsel varied (whereas other case-related factors were held constant), found that legal officials, on average, devalued the case merit of pro se litigants relative to otherwise identical counseled litigants. This case devaluation, in turn, shaped how legal officials expected pro se (vs. counseled) litigants to fare as they sought justice. Judges, attorneys, and mediators forecasted that pro se litigants would experience the civil justice system as less fair and less satisfying than counseled litigants, especially when the dispute resolution mechanism was trial (vs. mediation). These results suggest that perceptions of case merit are strongly influenced by a litigant's counseled status. Comprehensive solutions to address access-to-justice gaps must consider ways to reduce legal officials' biased perceptions of pro se litigants, so that they are not underestimated before their cases are even heard.




Keywords: pro se, self-represented, unrepresented, access-to-justice, cognitive bias

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The promise of *justice for all* under the law is lauded in the United States, yet realities of the U.S. court system fall far short of this civic ideal. Access-to-justice gaps persist between high- and

low-income Americans (e.g., Agrast, Botero, Martinez, Ponce, & Pratt, 2013; Legal Services Corporation, 2009, 2017). Indeed, the vast majority of low-income Americans with civil legal problems

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(86%) receive inadequate assistance or, worse, no legal assistance at all (Legal Services Corporation, 2017). As a result, more litigants than ever before encounter the civil justice system pro se (e.g., Feitz, 2008; Mather, 2003; McMullen & Oswald, 2010; Steinberg, 2015), meaning without counsel.

Without legal representation, pro se parties are severely disadvantaged (Quintanilla, Allen, & Hirt, 2017; Seron, Frankel, Ryzin, & Kovath, 2001), particularly when encountering opponents who have legal representation (Shanahan, Carpenter, & Mark, 2016). Motivated to bridge these gaps, legal scholars have debated the pros and cons of solutions at length (e.g., Barton, 2010; Carpenter, 2017; Rhode, 2014; Schwarz, 2004). These solutions typically involve proposals to level the playing field by making legal information and resources more available and navigable to those without a law school degree—because disparities in legal expertise are thought to be a major cause of the pro se disadvantage (Sandefur, 2015). Doubtless, improving access to legal information and resources is an important step toward reducing access-to-justice gaps; however, these proposals alone may not be enough to overcome the problems pro se litigants face.

In the present experiments, we use a social psychological approach to investigate a commonly overlooked factor that exacerbates access-to-justice gaps between pro se and counseled parties. Namely, we examine whether cognitive biases lead legal officials—that is, judges and attorney-mediators—to devalue the merit of pro se litigant cases. Judges occupy positions of power in the courtroom and litigants must abide by their decisions. If those decisions are grounded in biased cognitive processes, then expanding access to legal information alone may not be enough to overcome the disadvantages of pro se status. Similarly, although mediators are not supposed to make decisions for litigants, many attorney-mediators use an evaluative style of mediation (Bush, 2002; Kichaven, 2008; Kovach & Love, 1996) and, in such situations, unrepresented litigants may be disadvantaged by their biases as well.

By examining how legal officials perceive and construe pro se claimants (vs. counseled claimants), while holding all other factors constant (e.g., case details, preparedness, etc.), we hypothesize that pro se parties encounter more than disparities in legal expertise within the courtroom. The present research explores whether legal officials' preconceptions influence their judgments about pro se litigants' case merit and their expectations about how pro se litigants will fare in the civil justice system. Indeed, these schemas and scripts may be so pronounced that legal officials' expectations about how litigants will fare in different dispute resolution procedures (trial vs. mediation) may be affected by the presence/absence of counsel as well. Thus, we assessed whether legal officials' expectations about how parties would fare in these different dispute resolution procedures varied depending on being counseled or uncounseled.

Understanding the Access-to-Justice Problem

The traditional adversarial model of adjudication assumes that both parties have legal representation (Engler, 1999; Rhode, 2006, 2014); this assumption, however, is inconsistent with the day-to-day reality (Agrast et al., 2013; Gray, 2007; Feitz, 2008; Mather, 2003; McMullen & Oswald, 2010; National Center for State Courts, 2015; Steinberg, 2015; Rhode & Cavanagh, 1976). Unlike

litigants in criminal cases (*Gideon v. Wainwright*, 1963), litigants in civil cases are not guaranteed the right to counsel (Cantrell, 2002; Galanter, 1974). Because of the social, economic, and political challenges posed by implementing a civil justice system that guarantees counsel to all persons with limited means, let alone all civil litigants (see Barton, 2010; Carpenter, 2017; Rhode, 2014; Steinberg, 2015), many U.S. legal scholars have focused on addressing gaps between counseled and pro se parties by improving self-help resources (e.g., Greiner, Jiménez, & Lupica, 2017).

Consistent with the legal expertise disparity hypothesis, pro se parties lack much of the required legal and strategic expertise to successfully navigate complex legal systems (e.g., not knowing how to file paperwork correctly, prepare for hearings, or gather appropriate evidence; Hannaford-Agor, 2003; Sandefur, 2015). Given these legal expertise disparities, it is perhaps unsurprising that uncounseled litigants generally fare worse than counseled litigants at every stage of litigation (e.g., Quintanilla et al., 2017; Seron et al., 2001) and that most of the proposed solutions addressing these problems involve enhancing the legal “know-how” of pro se persons (e.g., Barton, 2010; Carpenter, 2017; Rhode, 2014; Schwarz, 2004). Courts have designed educational programs, drafted easy-to-understand forms, and made self-help kiosks available so that litigants can better represent themselves (e.g., Barton, 2010; Landsman, 2009, 2012; Swank, 2005). Scholars have also worked to increase the availability of alternative dispute resolution (ADR) procedures, which provide flexible alternatives to trial (American Bar Association, 2019). There are many different ADR procedures, but one of the most common is mediation—where a (presumed) impartial mediator engages in problem solving and encourages the parties to reach a mutually acceptable solution. At first glance, mediation appears to be a friendlier and fairer way to handle legal disputes involving pro se litigants compared to trial (e.g., Brown, 1982; Delgado, 2017) because both counseled and uncounseled parties are on equal footing before a neutral problem solver. Understanding the cognitive biases that mediators have toward unrepresented persons, and the factors associated with legal officials' decisions to recommend mediation (vs. trial) are, therefore, important contributions of the present research.

Cognitive Biases Against Pro Se Litigants

Relying on self-help resources alone to level the playing field between counseled and unrepresented persons presumes that legal officials perceive and treat pro se parties in the same manner as otherwise equivalent counseled parties. If, however, legal officials hold negative stereotypes and low expectations about pro se litigants simply because of their pro se status, then regardless of the self-help resources or dispute resolution procedures available, unrepresented persons will continue to be subordinated relative to counseled litigants. Consistent with this view, recent experimental evidence revealed that cognitive biases held by law students and lawyers led to worse outcomes for pro se litigants compared to counseled litigants in employment discrimination cases (e.g., Quintanilla et al., 2017). Why? The law students and lawyers appeared to stereotype pro se parties as less competent than otherwise identical counseled parties. In light of these findings, it stands to reason that pro se parties may encounter similar cognitive

biases from legal officials in civil cases (e.g., family law disputes)—a question we explore in the present research.

Overview of the Present Research

The present research examines how legal officials perceive and draw inferences about pro se claimants (vs. counseled claimants). First, we empirically examined whether the pro se or counseled status of litigants would influence legal officials' perceptions of case merit. As suggested by previous research (Quintanilla et al., 2017), we expected legal officials to evaluate the cases of pro se parties as less meritorious than those of counseled parties. Second, we examined whether the counseled status of litigants influenced legal officials' expectations about how well parties would fare in the civil justice system. How fair and satisfying did legal officials think litigants would experience the outcomes of trial or mediation to be and does this vary based upon a party's pro se status? Overall, we predicted legal officials would expect pro se litigants to fare worse than counseled litigants (e.g., to feel that they were treated less fairly and report lower outcome satisfaction)—in part, because their cases would be deemed less meritorious—and that these worse outcomes would be especially noticeable when legal officials considered trial (vs. mediation) as the dispute resolution procedure.

Institutional Partnerships

As we sought to examine the cognitive biases of legal officials, and because the public does not appear to have the same schemas about pro se litigants that legal officials hold (Quintanilla et al., 2017), we selected a sample acculturated in the legal domain. We recruited samples of legal professionals: civil court judges (Experiment 1) and attorney-meditators (Experiment 2). To reach these specialized populations, we developed institutional partnerships with the Indiana Judicial Conference's Alternative Dispute Resolution (ADR) Committee, the Indiana State Bar Association's Family Law Section and ADR Committee, the Indiana Association of Mediators, the Indianapolis Bar Association (IndyBar) Family Law Section, and the Indiana Commission for Continuing Legal Education (ICCLE). By forming these partnerships, we were able to recruit sitting civil court judges to participate in exchange for continuing judicial education (CJE) credit (Experiment 1) and practicing attorneys and mediators to participate in exchange for continuing legal education (CLE) credit (Experiment 2).

Power Analyses

Given the relatively small population of Indiana judges, attorneys, and mediators, we conducted power analyses using simulation methods in R (Version 3.5.2; R Core Team, 2019) to determine whether recruiting an adequate sample size to detect a medium-sized effect would be possible.¹ This analysis revealed that, for a mixed model experimental design with one between-subjects factor (i.e., counseled status) and two within-subjects factors (i.e., dispute system and target), a minimum sample size of 80 people (at least 20 people per Counseled Status condition) would be sufficient to detect a medium-sized effect, with an alpha of .05 and 80% power, assuming correlations of .30 among the variables.

With this minimum required sample size in mind, we attempted to recruit as many legal officials as possible. The Indiana Judicial Conference's ADR committee provided us with contact information for 464 Indiana judges. The Indiana State Bar Association (ISBA) sent the invitation to participate in our study to Indiana attorneys who were members of its ADR and Family Law Sections. We also compiled a list of attorney-mediators from the ICCLE's website, which contained a list of 427 registered attorney-mediators.

Experiment 1

To investigate whether cognitive biases were operating against pro se litigants among civil court judges, we employed a 4 (counseled status) \times 2 (dispute system) \times 2 (target) mixed model, experimental design. We investigated this question using a divorce case depicted by a series of professional quality films. In this experiment, counseled status was a between-subjects factor, such that each judge viewed a case in which a husband and wife were either counseled or pro se. Each judge then rated aspects of the case, including within-subjects items relating to the target (husband, wife) and dispute system (trial, mediation). First, we expected that judges would evaluate the cases of pro se parties to be less meritorious than those of counseled parties. Second, we predicted that judges would forecast less fair experiences and reduced outcome satisfaction for pro se parties compared to counseled parties, particularly when the dispute resolution procedure was trial (vs. mediation).

Method

Participants. One-hundred and 39 civil court judges^{2,3} (70.5% aged 50 years or older, 66.2% men,⁴ 95% White) were recruited to participate in a brief study assessing their procedural preferences in family law disputes. This sample was highly expe-

¹ The R code we used to conduct the power analysis is included in the [online supplemental materials](#).

² Two-hundred and nineteen judges began the survey. Thirty-two of these judges exited the survey before being assigned to an experimental condition. At the end of the survey, judges were asked two memory check questions assessing whether they correctly remembered the counseled status of the litigants depicted in the film they viewed. Judges who incorrectly answered these questions ($N = 11$) were excluded from all analyses.

³ To obtain this highly specialized sample of judges, the researchers worked closely with the Indiana Judicial Conference's ADR Committee. Successful research partnerships with outside agencies require mutual respect and compromise. Our partners had their own research questions. To accommodate their research interests, we collected additional data not reported in the main text. Specifically, our partners asked us to test whether reminding judges about the availability of ADR funds—or funds earmarked to help litigants of limited means afford alternative forms of dispute resolution—affected their procedural preferences for dispute resolution. A fifth experimental condition was included. The film shown to judges randomly assigned to this fifth condition was nearly identical to the film shown to judges assigned to the Both Pro Se condition, except that an explicit mention of ADR funds was added. Judges randomly assigned to this condition ($N = 37$) were excluded from all analyses described in the main text. Readers who are interested in these results can refer to the [online supplemental material](#).

⁴ Approximately two-thirds of the judges recruited for this study were male. Given this gender imbalance, we explored whether the judges' gender predicted any of our outcomes. Judges' gender was not a significant covariate in any of our analyses ($ps > .51$) and will not be discussed further.

rienced and specialized: the majority of judges reported at least 5 years of judicial experience (70.5%) and handling family law cases in their judicial practice (81.3%).⁵

Procedure and materials. After providing informed consent online, all judges were shown one of several short films depicting an initial hearing of a divorce proceeding.⁶ Judges were randomly assigned to one of four experimental conditions in which we manipulated counseled status of the litigants, a husband and wife. This resulted in four experimental conditions: two symmetric conditions, in which (a) the husband and wife were both counseled or (b) the husband and wife were both uncounseled, as well as two asymmetric conditions, in which (c) the husband was counseled and the wife was uncounseled or (d) the wife was counseled and the husband was uncounseled. All other case details presented in the short films were held constant.⁷ Across all conditions, the litigants described themselves as having two children from the marriage as well as two categories of unresolved, contested differences, including a dispute about parenting time and physical custody of the children and a dispute regarding the correct amount of child support that must be paid by each parent. Both the husband and wife were described as holding full-time, low-wage employment.

After viewing the short film, judges were asked about the perceived merit of each litigant's case (the order of the rated litigant was counterbalanced within subjects to minimize order effects).^{8,9} Next, judges were asked to adopt the perspective of each litigant and indicate how fair and satisfied¹⁰ they thought the husband and wife would experience trial and mediation (counterbalanced within subjects). Finally, the judges were thanked for their participation, debriefed, and compensated.

Measures.

Perceived merit. To assess the perceived merit of the two litigants' cases, judges were asked to rate the persuasiveness of each party's argument on a scale ranging from 1 (*not at all*) to 7 (*very*).¹¹

Perspective-taking. Two forms of perspective-taking were measured: perceived fairness and outcome satisfaction. Judges were asked to adopt the perspectives of the husband and wife (counterbalanced within subjects) and indicate how they thought each party would experience trial and mediation.

Fairness. Judges were asked to adopt the perspectives of the husband and wife and indicate how fair each party would likely feel the two dispute resolution procedures to be on a scale ranging from 1 (*not at all*) to 7 (*very*).

Outcome satisfaction. Similarly, for each of the two dispute resolution procedures, judges were asked to adopt the perspectives of the husband and wife and indicate how satisfied or dissatisfied each party would likely be with the outcome of the case on a scale ranging from 1 (*very dissatisfied*) to 6 (*very satisfied*).

Results

Perceived case merit.

Data analytic strategy. Judges were asked to evaluate the merit of each litigant's case. We conducted a 4 (counseled status: both uncounseled, both counseled, only husband counseled, only wife counseled) \times 2 (target: husband, wife) mixed model analysis of variance (ANOVA), with counseled status as a between-subjects factor and target as a within-subjects factor. To break down these complex relationships, we planned to examine contrasts between several conditions of interest. De-identified data files, analysis scripts,

and codebooks for Studies 1 and 2 are publicly available on the Open Science Framework website (for link, see Kroeper et al., 2020).

Mixed model ANOVA. The mixed model ANOVA revealed a significant main effect of counseled status, $F(3, 135) = 10.38, p < .001, \eta_p^2 = .19 (\eta_G^2 = .12)$, which was qualified by a significant Counseled Status \times Target interaction, $F(3, 135) = 10.69, p < .001, \eta_p^2 = .17 (\eta_G^2 = .07)$; see Table 1.¹²

Planned contrasts. To understand the pattern of relationships among the variables, we conducted simple effects tests. Comparing the both uncounseled condition to the both counseled condition (Contrast 1), we found that judges perceived the cases of the husband and the wife to be significantly more meritorious when both parties had counsel ($M_{\text{Husband}} = 4.11, SD_{\text{Husband}} = 1.11; M_{\text{Wife}} = 4.63, SD_{\text{Wife}} = 0.97$) compared to when both parties lacked counsel ($M_{\text{Husband}} = 3.20, SD_{\text{Husband}} = 1.35; \Delta_{\text{Husband}} = 0.91, p = .003, d = 0.75; M_{\text{Wife}} = 3.23, SD_{\text{Wife}} = 1.29; \Delta_{\text{Wife}} = 1.40, p < .001, d = 1.25$).¹³ Next, by comparing the both uncoun-

⁵ This study received research ethics committee approval at Indiana University.

⁶ Links to view these short films and written transcripts are available in the [online supplemental material](#).

⁷ Before hiring the actors who portrayed the husband, wife, and attorneys (the judge remained consistent across films), we pilot tested their acting headshots—finding that the actors playing the various roles (e.g., husband, wife, attorneys) were perceived to be similarly attractive, warm, and competent. Thus, we do not believe that these extraneous factors influenced our results.

⁸ In addition, we asked judges to report their procedural beliefs about dispute resolution procedures (i.e., their familiarity with and their beliefs about the fairness and effectiveness of trial and mediation) and their procedural preferences regarding the presented family law dispute. In general, we found that judges and attorneys-mediators were highly familiar with trial and mediation as dispute resolution procedures and perceived both approaches to be fair and effective methods of resolving the family law dispute. That said, judges, on average, were slightly more familiar with trial than with mediation whereas attorney-mediators were slightly more familiar with mediation than with trial. Both samples, however, tended to perceive mediation as a fairer dispute resolution procedure than trial. Judges and attorney-mediators overwhelmingly preferred mediation (over trial) to resolve this family law case. Procedural beliefs and preferences will not be discussed further in the main text of this article. Interested readers can review these results in the [online supplemental material](#).

⁹ Judges were also asked to rate their beliefs and preferences for a third dispute resolution procedure: non-binding arbitration. Nonbinding arbitration was a very unpopular choice. Only five judges (3.6% of the entire sample) chose this option as their preferred dispute resolution procedure. For this reason, nonbinding arbitration will not be discussed further in the main text of this article. For results pertaining to nonbinding arbitration, please see the [online supplemental material](#).

¹⁰ Judges were also asked to estimate, in dollars, the total amount of fees and costs the husband and wife would likely pay during the dispute resolution process. In general, analyses revealed that judges and attorney-mediators expected people to pay more when they obtain counsel than when they lack counsel, especially when trial (vs. mediation) was the dispute resolution procedure. This outcome will not be discussed in the main text of this article. For a description of these measures and the results, refer to the [online supplemental material](#).

¹¹ All exact measures for Experiments 1 and 2 are provided in the [online supplemental material](#).

¹² The main effect of target was not statistically significant, $F(1, 135) = 3.25, p = .07, \eta_p^2 = .02 (\eta_G^2 = .009)$.

¹³ Within the both uncounseled condition, the difference in perceived merit for the husband's and wife's cases are not significantly different ($p = .91$); likewise, within the both counseled condition, the difference is not statistically significant ($p = .05$). We used the Sidak adjustment for multiple comparisons.

Table 1
Perceptions of Case Merit by Counselor Status and Target

Counseled status	Experiment 1: Judges						Experiment 2: Attorney-mediators					
	Husband			Wife			Husband			Wife		
	<i>n</i>	<i>M</i> (<i>SD</i>)	95% CI	<i>n</i>	<i>M</i> (<i>SD</i>)	95% CI	<i>n</i>	<i>M</i> (<i>SD</i>)	95% CI	<i>n</i>	<i>M</i> (<i>SD</i>)	95% CI
Both uncounseled	35	3.20 (1.35)	[2.78, 3.62]	35	3.23 (1.29)	[2.84, 3.62]	28	3.13 (1.04)	[2.69, 3.56]	28	3.23 (0.96)	[2.77, 3.69]
Both counseled	35	4.11 (1.11)	[3.70, 4.53]	35	4.63 (0.97)	[4.24, 5.02]	26	4.17 (0.80)	[3.73, 4.62]	26	4.67 (0.96)	[4.19, 5.15]
Only husband counseled	35	3.97 (1.15)	[3.55, 4.39]	35	3.23 (0.97)	[2.84, 3.62]	25	4.50 (1.26)	[4.04, 4.96]	25	3.38 (1.51)	[2.89, 3.87]
Only wife counseled	34	3.56 (1.40)	[3.13, 3.98]	34	4.68 (1.39)	[4.28, 5.07]	26	3.44 (1.42)	[3.00, 3.89]	26	4.14 (1.43)	[3.66, 4.61]

Note. CI = confidence interval.

seled condition to the only wife counseled condition (Contrast 2), we found that when the wife goes from uncounseled ($M_{\text{Wife}} = 3.23$, $SD_{\text{Wife}} = 1.29$) to counseled ($M_{\text{Wife}} = 4.68$, $SD_{\text{Wife}} = 1.39$), her case is seen as significantly more meritorious ($\Delta_{\text{Wife}} = 1.45$, $p < .001$, $d = 1.10$); expectedly (because the husband's counseled status does not change in this comparison), the perceived merit of the husband's case is unchanged (both uncounseled: $M_{\text{Husband}} = 3.20$, $SD_{\text{Husband}} = 1.35$; husband uncounseled, wife counseled: $M_{\text{Husband}} = 3.56$, $SD_{\text{Husband}} = 1.40$; $\Delta_{\text{Husband}} = .36$, $p = .24$, $d = 0.27$). Likewise, comparing the both uncounseled condition to the only husband counseled condition (Contrast 3), when the husband goes from uncounseled ($M_{\text{Husband}} = 3.20$, $SD_{\text{Husband}} = 1.35$) to counseled ($M_{\text{Husband}} = 3.97$, $SD_{\text{Husband}} = 1.15$), his case is seen as more meritorious ($\Delta_{\text{Husband}} = .77$, $p = .01$, $d = 0.62$), whereas the perceived merit of the wife's case is unchanged (both uncounseled: $M_{\text{Wife}} = 3.23$, $SD_{\text{Wife}} = 1.29$; wife uncounseled, husband counseled: $M_{\text{Wife}} = 3.23$, $SD_{\text{Wife}} = 0.97$; $\Delta_{\text{Wife}} < 0.01$, $p > .99$, $d < .001$). Turning now to the comparison between the only wife counseled condition and only husband counseled condition (Contrast 4), the move from uncounseled to counseled for the wife is significant (only husband counseled: $M_{\text{Wife}} = 3.23$, $SD_{\text{Wife}} = 0.97$; only wife counseled: $M_{\text{Wife}} = 4.68$, $SD_{\text{Wife}} = 1.39$; $\Delta_{\text{Wife}} =$

1.45, $p < .001$, $d = 1.23$); her case is perceived as more meritorious when she obtains counsel. The direction of the effect is the same for the husband; when he moves from uncounseled to counseled his case is perceived as more meritorious, though this effect does not reach statistical significance (only wife counseled: $M_{\text{Husband}} = 3.56$, $SD_{\text{Husband}} = 1.40$; only husband counseled: $M_{\text{Husband}} = 3.97$, $SD_{\text{Husband}} = 1.15$; $\Delta_{\text{Husband}} = 0.41$, $p = .17$, $d = 0.33$). This finding suggests that judges perceive the wife to be more disadvantaged by a lack of counsel (and more advantaged by obtaining counsel) than the husband, at least when comparing the two asymmetric conditions (i.e., only husband counseled, only wife counseled). That is, the effect of counseled status appears larger for the wife than the husband, in situations where only one party is counseled. Within these asymmetric conditions, we found that when the wife had counsel, but the husband did not (only wife counseled), her case was perceived to be significantly more meritorious than his ($p < .001$, $d_z = 0.55$). Likewise, when the husband had counsel, but the wife did not (only husband counseled), his case was perceived to be significantly more meritorious than hers ($p = .004$, $d_z = 0.63$).

Consistent with predictions, judges perceived the cases of parties with legal counsel to be more meritorious than the cases of parties without legal counsel (see Figure 1), even when all other case-related

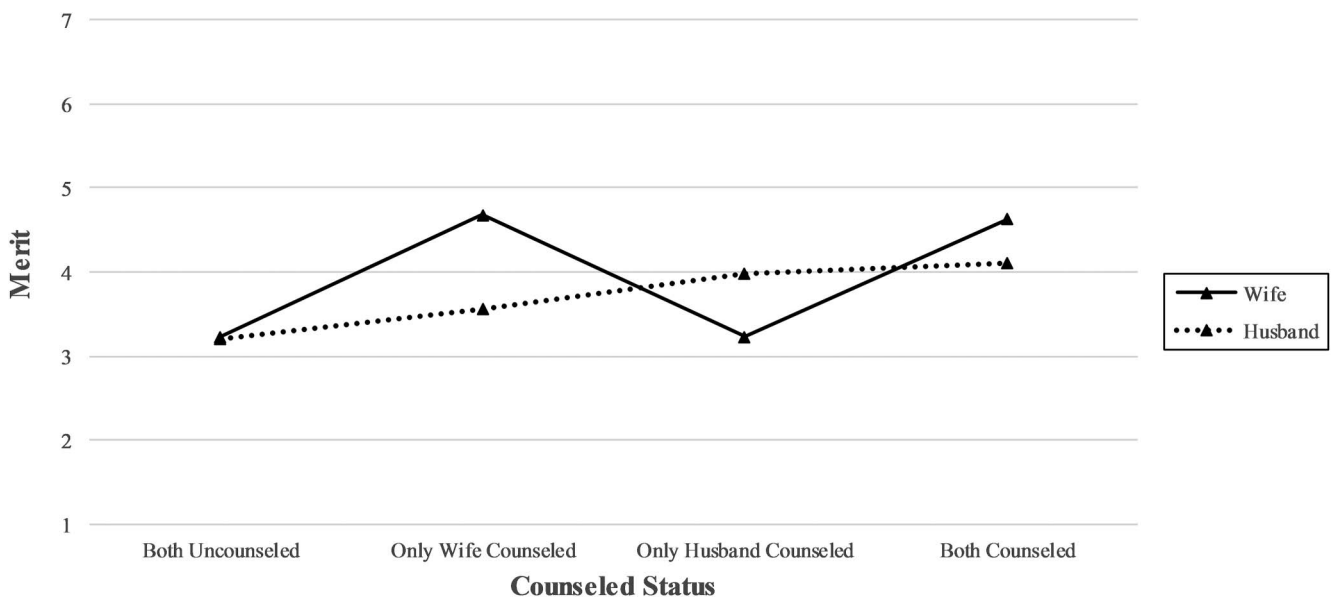


Figure 1. Experiment 1: Judges beliefs about case merit by counseled status and target.

factors are held constant. These findings suggest that judges devalue the case merit of uncounseled litigants. The mere presence or absence of counsel, holding case quality constant, affects the inferences judges make about a case's merit. This effect of counseled status may be especially large for the wife (vs. the husband) in situations where only one party has counsel.

Perspective taking outcomes.

Data analytic strategy. As perceptions of merit were influenced by Counseled Status, we next explored whether judges' perceptions of how each litigant would experience trial and mediation would be shaped by their Counseled Status. We were particularly interested in how these dispute resolution procedures would affect judges' beliefs about whether the litigants would experience each procedure as fair and whether they would be satisfied with each procedure's outcome. To test these questions, we conducted 4 (counseled status: both uncounseled, both counseled, only husband counseled, only wife counseled) \times 2 (target: husband, wife) \times 2 (dispute system: trial, mediation) mixed model ANOVAs, with counseled status as a between-subjects factor and target and dispute system as within-subjects factors (see Table 2). Then to break down these complex relationships, we conducted planned contrasts (see Table 3 for the detailed results of the planned contrasts, separated by trial and mediation).

Forecasted fairness. First, we examined judges' expectations about whether the husband and wife would experience each procedure as fair. We expected that this would depend on Counseled Status, such that judges would expect pro se parties to experience both dispute resolutions as less fair than counseled litigants. However, we expected that this difference would be larger when judges were rating trial (vs. mediation) as the dispute resolution procedure. We expected this because trial is widely considered to be an adversarial, winner-take-all procedure (McAdoo & Welsh, 2004) whereas mediation is thought (rightly or wrongly) to be a friendlier, more equitable procedure (e.g., Brown, 1982; Delgado, 2017).

The analysis revealed the predicted three-way counseled status \times target \times dispute system interaction, $F(3, 129) = 8.17, p < .001, \eta_p^2 = .16 (\eta_c^2 = .02)$.¹⁴ Although this interaction is complex, there are a few key takeaways (see Figure 2).¹⁵ Chiefly, judges expected all litigants to experience mediation ($M = 5.33, 95\% \text{ CI } [5.15, 5.52]$) as fairer than trial ($M = 4.34, 95\% \text{ CI } [4.11, 4.56]$, $p < .001$). Moreover, the gaps between the husband's experience of fairness and the wife's experience of fairness were expected to be much larger when trial was the dispute resolution procedure ($M_{\text{Difference}} = 0.61, SE = .15, p < .001, d_z = .30$), compared to when mediation was the dispute resolution procedure ($M_{\text{Difference}} = 0.16, SE = .06, p = .01, d_z = .22$). This makes sense as mediation is largely thought to be a collaborative procedure, whereas trial is considered more adversarial. In other words, when trial is the dispute resolution procedure, judges expect that moving from uncounseled to counseled status will result in large increases in experienced fairness for the now counseled litigant; however, when mediation is the dispute resolution procedure, the same change is perceived as less impactful. It appears that judges expect, regardless of Counseled Status, that mediators will ensure litigants experience mediation as fair.

Forecasted outcome satisfaction. Next, we examined the judges' expectations about the husband's and wife's satisfaction

with the outcome of each procedure. Again, we predicted that judges would expect pro se litigants to experience lower outcome satisfaction than counseled litigants. We expected that this difference would be larger when trial (vs. mediation) was considered as the dispute resolution procedure. The analysis revealed the predicted three-way Counseled Status \times Target \times Dispute System interaction, $F(3, 127) = 9.15, p < .001, \eta_p^2 = .18 (\eta_c^2 = .02)$; see Figure 3).¹⁶ Consistent with fairness expectations above, judges expected both the husband and wife to be more satisfied with the outcomes of mediation ($M_{\text{Husband}} = 4.24, SD_{\text{Husband}} = 0.89$; $M_{\text{Wife}} = 4.48, SD_{\text{Wife}} = 0.83$) than of trial ($M_{\text{Husband}} = 3.05, SD_{\text{Husband}} = 1.15, p < .001, d_z = 0.91$; $M_{\text{Wife}} = 3.80, SD_{\text{Wife}} = 1.24, p < .001, d_z = 0.51$). Moreover, judges expected the gaps between the husband's and wife's outcome satisfaction to be much larger when they considered trial ($M_{\text{Difference}} = 0.73, SE = 0.12, p < .001, d_z = 0.48$) compared to mediation ($M_{\text{Difference}} = 0.26, SE = 0.07, p < .001, d_z = 0.28$). Overall, judges expected that moving from counseled status to uncounseled status would result in more outcome dissatisfaction for litigants involved in a trial, particularly when the opposing party was counseled; however, moving from a counseled to an uncounseled status was expected to be less impactful for litigants involved in mediation. Again, judges expect that, regardless of counseled status, litigants will be relatively satisfied with the outcomes of mediation.

Discussion

Consistent with hypotheses, judges evaluated pro se litigants as having less meritorious cases (despite identical case content) and expected these litigants to experience the civil justice system as less fair and satisfying than counseled litigants, especially when trial (vs. mediation) was pursued. Thus, judges are aware of the disadvantages that pro se litigants face (ironically, the same disadvantages that judges, themselves, exhibit when evaluating case merit). Judges expect that the (counseled) party who is forecasted to win will experience trial as fairer than the (pro se) party who is expected to lose. By contrast, judges expect that all parties (counseled and pro se litigants) will experience mediation as fairer and more satisfying than

¹⁴ For forecasted fairness perceptions, the main effect of dispute system, $F(1, 129) = 51.82, p < .001, \eta_p^2 = .29$, the main effect of target, $F(1, 129) = 20.40, p < .001, \eta_p^2 = .14$, the two-way interaction between counseled status and target, $F(3, 129) = 14.99, p < .001, \eta_p^2 = .26$, and the two-way interaction between dispute system and target were all statistically significant, $F(1, 129) = 9.25, p = .003, \eta_p^2 = .07$. As described in the main text, these main effects and two-way interactions were qualified by a significant three-way interaction between Counseled status, target, and dispute system, $F(3, 129) = 8.17, p < .001, \eta_p^2 = .16$. All other main effects and interactions were non-significant ($ps \geq .17$).

¹⁵ Differences in degrees of freedom across analyses are attributable to survey attrition—some judges stopped answering questions toward the end of the survey.

¹⁶ For forecasted outcome satisfaction, the main effect of dispute system, $F(1, 127) = 91.95, p < .001, \eta_p^2 = .42$, the main effect of target, $F(1, 127) = 35.25, p < .001, \eta_p^2 = .22$, the two-way interaction between counseled status and target, $F(3, 127) = 13.55, p < .001, \eta_p^2 = .24$, and the two-way interaction between dispute system and target were all statistically significant, $F(1, 127) = 19.29, p < .001, \eta_p^2 = .13$. As described in the main text, these main effects and two-way interactions were qualified by a significant three-way interaction between counseled status, target, and dispute system, $F(3, 127) = 9.15, p < .001, \eta_p^2 = .18$. All other main effects and interactions were nonsignificant ($ps \geq .63$).

Table 2

Experiment 1: Descriptive Statistics: Judges' Perspective Taking by Counselor Status, Dispute System, and Target

Counseled status	Husband						Wife					
	Trial			Mediation			Trial			Mediation		
	<i>n</i>	<i>M (SD)</i>	95% CI	<i>n</i>	<i>M (SD)</i>	95% CI	<i>n</i>	<i>M (SD)</i>	95% CI	<i>n</i>	<i>M (SD)</i>	95% CI
Fairness												
Both uncounseled	34	3.56 (1.50)	[3.02, 4.10]	34	4.94 (1.37)	[4.53, 5.35]	34	4.65 (1.50)	[4.13, 5.16]	34	5.32 (0.98)	[4.95, 5.69]
Both counseled	34	4.21 (1.61)	[3.67, 4.74]	34	5.50 (1.08)	[5.09, 5.91]	34	4.76 (1.54)	[4.25, 5.28]	34	5.47 (1.11)	[5.10, 5.84]
Only husband counseled	35	4.71 (1.51)	[4.18, 5.24]	35	5.77 (1.09)	[5.37, 6.17]	35	3.86 (1.75)	[3.35, 4.36]	35	5.66 (1.14)	[5.29, 6.02]
Only wife counseled	30	3.63 (1.73)	[3.06, 4.21]	30	4.80 (1.24)	[4.37, 5.23]	30	5.30 (1.15)	[4.75, 5.85]	30	5.20 (1.13)	[4.81, 5.59]
Outcome satisfaction												
Both uncounseled	34	2.70 (1.03)	[2.33, 3.08]	34	4.06 (0.98)	[3.76, 4.36]	34	4.09 (1.19)	[3.69, 4.49]	34	4.62 (0.65)	[4.34, 4.89]
Both counseled	32	2.88 (1.16)	[2.49, 3.26]	32	4.19 (0.97)	[3.88, 4.50]	32	3.66 (1.29)	[3.25, 4.07]	32	4.56 (0.76)	[4.28, 4.85]
Only husband counseled	31	3.65 (1.17)	[3.25, 4.04]	31	4.48 (0.72)	[4.17, 4.80]	31	3.03 (1.22)	[2.62, 3.45]	31	4.29 (0.94)	[4.00, 4.58]
Only wife counseled	34	2.94 (1.04)	[2.57, 3.31]	34	4.24 (0.85)	[3.93, 4.54]	34	4.29 (0.97)	[3.88, 4.69]	34	4.53 (0.86)	[4.26, 4.80]

Note. CI = confidence interval.

trial, perhaps because mediation is widely viewed as more friendly and collaborative than trial and because mediators are expected to be unbiased officials who help the parties solve problems.

Experiment 2

Experiment 2 replicates and extends Experiment 1 by recruiting a sample of attorney-mediators.¹⁷ Judges are not the only legal officials with power in civil cases—attorney-mediators have considerable power as well. Mediation is thought to be a fairer dispute resolution procedure than trial (Brown, 1982). But do attorney-mediators have the same cognitive biases that judges hold toward pro se parties? The purpose of Experiment 2 was to test this question.

Method

Participants. One-hundred and eight attorney-mediators^{18,19} from the State of Indiana ($M_{age} = 51.5$ years, 55.7% women, 84.3% White) were recruited to participate in a brief study assessing their procedural preferences for family law disputes. In this sample, the majority of respondents reported having more than 5 years of legal and mediation experience. In addition, most respondents reported handling at least 25 separate family law cases within the past year.

Procedure and materials. The procedure for Experiment 2 was identical to that of Experiment 1.²⁰

Measures. Experiment 2 measures were almost identical to those presented to judges in Experiment 1, with the exception that we added one more question about the perceived merit of each litigant's case (i.e., the item "how *meritorious* is each party's argument?" was included in addition to "how *persuasive* is each party's argument" from Experiment 1), changing perceived merit from a one-item measure to a two-item measure. This allowed us to create a more reliable measure of perceived merit in Experiment 2, $\alpha_{Wife} = .90$, $\alpha_{Husband} = .84$. All other measures were identical to Experiment 1.

Results

Data analytic strategy. The data analytic strategies used in Experiment 2 were identical to that of Experiment 1.

Perceived case merit.

Mixed model ANOVA. This analysis revealed a significant main effect of Counselor Status, $F(3, 101) = 7.21$, $p < .001$, $\eta_p^2 = .18$ ($\eta_G^2 = .13$), which was qualified by the predicted Counselor Status \times Target interaction, $F(3, 101) = 9.74$, $p < .001$, $\eta_p^2 = .22$ ($\eta_G^2 = .08$; see Table 1).²¹

Planned contrasts. Consistent with judges' perceptions, attorney-mediators perceived the cases of parties who had counsel to be more meritorious than the cases of parties without counsel (see Figure 4). Comparing the both uncounseled condition to the both counseled condition (Contrast 1), we found that attorney-mediators perceived the husband's and wife's cases to be significantly more meritorious when parties ob-

¹⁷ Most of our respondents described themselves as both attorneys and mediators (79.6%), with only a small proportion describing themselves as only attorneys (8.3%) and others as only mediators (12.1%). Thus, we combined all respondents into a single group of "attorney-mediators."

¹⁸ Two-hundred and six attorney-mediators began the survey. Thirty-two of these attorney-mediators exited the survey before being assigned to an experimental condition. At the end of the survey, attorney-mediators were asked two memory check questions to assess whether they correctly remembered the counseled or uncounseled status of the litigants depicted in a short film they were asked to view. Individuals who incorrectly answered these questions ($N = 32$) were excluded from all analyses.

¹⁹ To obtain this desirable sample of attorney-mediators, the researchers collaborated with community partners: the Indiana State Bar Association's Family Law Section and ADR Committee, the Indiana Association of Mediators, the Indianapolis Bar Association (IndyBar) Family Law Section, and the ICCLE. The researchers collected additional data to help these collaborators answer their own research questions. Again, we added a fifth condition about the availability of ADR funds. Attorney-mediators randomly assigned to this condition ($N = 34$) were excluded from all analyses described in the main text. These results can be found in the online supplemental material.

²⁰ Like the previous study, this study received research ethics committee approval at Indiana University.

²¹ The main effect of target was not statistically significant, $F(1, 101) = 0.12$, $p = .12$, $\eta_p^2 = .001$ ($\eta_G^2 < .001$).

Table 3
Experiment 1: Planned Contrasts: Judges' Perspective Taking

Contrast	Trial						Mediation					
	Wife			Husband			Wife			Husband		
	Δ	p	η_p^2	Δ	p	η_p^2	Δ	p	η_p^2	Δ	p	η_p^2
Fairness												
Contrast 1	.08	.82	<.01	.58	.13	.02	.19	.47	<.01	.60	.04	.03
Contrast 2	.61	.11	.02	.05	.90	<.01	-.10	.72	<.01	-.07	.82	<.01
Contrast 3	-.83	.02	.04	1.09	.005	.06	.33	.21	.01	.83	.005	.06
Contrast 4	-1.43	<.001	.10	1.04	.009	.05	.43	.11	.02	.90	.003	.07
Outcome satisfaction												
Contrast 1	-.42	.14	.02	.20	.47	<.01	-.06	.78	<.01	.13	.56	<.01
Contrast 2	.18	.52	<.01	.20	.46	<.01	-.09	.65	<.01	.18	.42	<.01
Contrast 3	-1.05	<.001	.09	.88	.001	.08	-.33	.11	.02	.43	.06	.03
Contrast 4	-1.23	<.001	.12	.68	.014	.05	-.24	.24	.01	.25	.26	.01

Note. Contrast 1 compared the both uncounseled condition to the both counseled condition; Contrast 2 compared the both uncounseled condition to the only wife counseled condition; Contrast 3 compared the both uncounseled condition to the only husband counseled condition; and, lastly, Contrast 4 compared the only wife counseled condition to the only husband counseled condition. Sidak corrections for multiple comparisons were used.

tained counsel ($M_{\text{Husband}} = 4.17, SD_{\text{Husband}} = 0.80; M_{\text{Wife}} = 4.67, SD_{\text{Wife}} = 0.96$) than when parties lacked counsel ($M_{\text{Husband}} = 3.13, SD_{\text{Husband}} = 1.04, \Delta_{\text{Husband}} = 1.05, p = .001, d = 1.14; M_{\text{Wife}} = 3.23, SD_{\text{Wife}} = 0.96, \Delta_{\text{Wife}} = 1.44, p < .001, d = 1.53$), with a tendency to perceive the wife's case as more meritorious than the husband's case.²² When comparing the both uncounseled condition to the only wife counseled condition (Contrast 2), we found that when the wife goes from uncounseled ($M_{\text{Wife}} = 3.23, SD_{\text{Wife}} = 0.96$) to counseled ($M_{\text{Wife}} = 4.17, SD_{\text{Wife}} = 0.80$), her case is seen as significantly more meritorious ($\Delta_{\text{Wife}} = 0.90, p = .008, d = 1.08$); however, the perceived merit of the husband's case is unchanged—which is expected, because the husband's counseled status does not change in this comparison (both uncounseled: $M_{\text{Husband}} = 3.13, SD_{\text{Husband}} = 1.04$; husband uncounseled, wife counseled: $M_{\text{Husband}} = 3.44, SD_{\text{Husband}} = 1.42; \Delta_{\text{Husband}} = 0.32, p = .31, d = 0.26$). We see a similar pattern when comparing the both uncounseled condition to the only husband counseled condition (Contrast 3), when the husband goes from uncounseled ($M_{\text{Husband}} = 3.13, SD_{\text{Husband}} = 1.04$) to counseled ($M_{\text{Husband}} = 4.50, SD_{\text{Husband}} = 1.26$), his case is seen as more meritorious ($\Delta_{\text{Husband}} = 1.38, p < .001, d = 1.22$), whereas the perceived merit of the wife's case is unchanged (both uncounseled: $M_{\text{Wife}} = 3.23, SD_{\text{Wife}} = 0.96$; wife uncounseled, husband counseled: $M_{\text{Wife}} = 3.38, SD_{\text{Wife}} = 1.51; \Delta_{\text{Wife}} = 0.15, p = .66, d = 0.12$). Turning now to the comparison between the only wife counseled condition and only husband counseled condition (Contrast 4), the move from uncounseled to counseled for the wife (wife uncounseled, husband counseled: $M_{\text{Wife}} = 3.38, SD_{\text{Wife}} = 1.50$; wife counseled, husband uncounseled: $M_{\text{Wife}} = 4.13, SD_{\text{Wife}} = 1.43; \Delta_{\text{Wife}} = -0.76, p = .03, d = 0.52$) and the husband is significant (wife counseled, husband uncounseled: $M_{\text{Husband}} = 3.44, SD_{\text{Husband}} = 1.42$; wife uncounseled, husband counseled: $M_{\text{Husband}} = 4.50, SD_{\text{Husband}} = 1.26; \Delta_{\text{Husband}} = 1.06, p = .001, d = 0.80$). Their cases are perceived to be more meritorious when counsel is obtained (vs. not). Analyzing the data within these asymmetric conditions, when the wife had

counsel, but the husband did not, her case was perceived to be significantly more meritorious ($M = 4.13, SD = 1.43$) than his ($M = 3.44, SD = 1.42, p = .008, d_z = 0.42$). Likewise, when the husband had counsel, but the wife did not, his case was perceived to be significantly more meritorious ($M = 4.50, SD = 1.26$) than hers ($M = 3.38, SD = 1.51, p < .001, d_z = 0.77$).

Consistent with predictions and the results of the previous experiment, attorney-mediators perceived the cases of parties with legal counsel to be more meritorious than the cases of parties without legal counsel, even when experimentally controlling for other case-related factors (e.g., evidence, preparedness, etc.). These findings suggest that attorney-mediators, like judges, devalue the case merit of uncounseled litigants. The mere presence or absence of counsel, holding case quality constant, affects the inferences attorney-mediators make about a case's merit.

Perspective taking outcomes.

Forecasted fairness. The analysis examining attorney-mediators' fairness expectations revealed the predicted three-way Counseled Status \times Target \times Dispute System interaction, $F(3, 97) = 11.96, p < .001, \eta_p^2 = .27 (\eta_g^2 = .06; \text{see Figure 5})$.²³ Consistent with judges' expectations, attorney-mediators expected all parties to experience mediation ($M = 5.39, 95\% \text{ CI } [5.16,$

²² Within the both uncounseled condition, the difference in perceived merit for the husband's and wife's cases are not significantly different ($p = .67$); in the both counseled condition, the difference is also not significant ($p = .06$). This is very similar to judges' perceptions of merit in Experiment 1.

²³ For forecasted fairness perceptions, the main effect of dispute system, $F(1, 97) = 69.14, p < .001, \eta_p^2 = .42$, the main effect of target, $F(1, 97) = 19.88, p < .001, \eta_p^2 = .17$, the two-way interaction between counseled status and target, $F(3, 97) = 18.16, p < .001, \eta_p^2 = .36$, and the two-way interaction between dispute system and target were all statistically significant, $F(1, 97) = 15.45, p < .001, \eta_p^2 = .14$. As described in the main text, these main effects and two-way interactions were qualified by a significant three-way interaction between counseled status, target, and dispute system, $F(3, 97) = 11.96, p < .001, \eta_p^2 = .27$. All other main effects and interactions were non-significant ($ps \geq .40$).

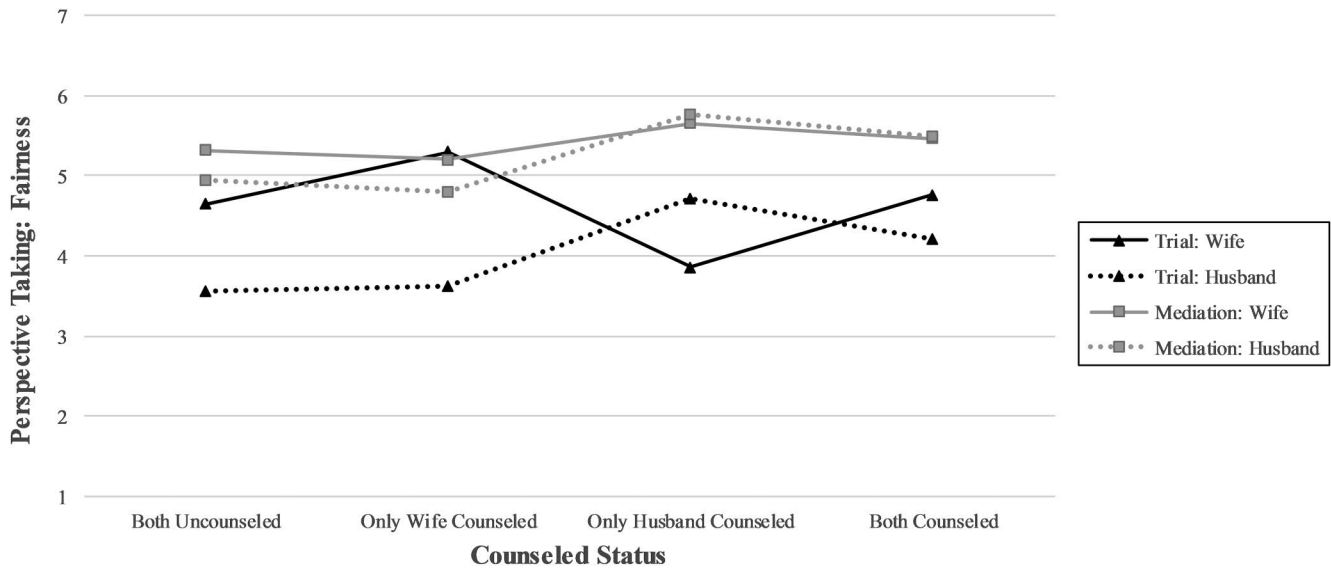


Figure 2. Experiment 1: Judges perspective taking on fairness experiences by counseled status, dispute system, and target.

5.61) as fairer than trial ($M = 3.91$, 95% CI [3.65, 4.18], $p < .001$). Again, the gaps between the husband's experience of fairness and the wife's experience of fairness are expected to be much larger when trial (vs. mediation) is the dispute resolution procedure ($M_{\text{Difference}} = 1.01$, $SE = .21$, $p < .001$, $d_z = 0.41$ vs. $M_{\text{Difference}} = .05$, $SE = .12$, $p = .65$, $d_z = 0.03$). Like judges, attorney-mediators forecasted that, in trial, moving from uncounseled to counseled would result in large increases in experienced fairness for the litigants. Much like the judges, attorney-mediators forecasted that both parties would experience mediation as fair.

Forecasted outcome satisfaction. The analysis examining attorney-mediators' forecasted outcome satisfaction revealed the predicted 3-way Counselor Status \times Target \times Dispute System interaction, $F(3, 100) = 8.15$, $p < .001$, $\eta_p^2 = .20$ ($\eta_c^2 = .03$; see Figure 6).²⁴ On average, attorney-mediators expected both the husband and wife to be more satisfied with the outcomes of mediation ($M = 4.48$, 95% CI [4.30, 4.65]) than of trial ($M = 3.08$, 95% CI [2.91, 3.25], $p < .001$). Like judges, attorney-mediators expected the gaps between the husband's outcome satisfaction and the wife's outcome satisfaction to be much larger when trial (vs. mediation) is the dispute resolution procedure ($M_{\text{Difference}} = 0.77$, $SE = .15$, $p < .001$, $d_z = 0.45$ vs. $M_{\text{Difference}} = 0.09$, $SE = .07$, $p = .19$, $d_z = 0.13$; see Table 4). In trial, the person with counsel is expected to be much more satisfied with the outcome than the person without counsel; in mediation, however, both parties are expected to be fairly satisfied with the outcome (see Table 5 for the detailed results of the planned contrasts, separated by trial and mediation).

Discussion

Much like the judges sampled in Experiment 1, attorney-mediators construed pro se litigants as having less meritorious claims (despite identical case content). Thus, even though media-

tion is widely perceived to be a fairer dispute resolution procedure, attorney-mediators show cognitive biases against pro se litigants (vs. counseled litigants) when evaluating case merit. Consistent with these appraisals of merit, attorney-mediators expected pro se litigants to experience the civil justice system as less fair and satisfying than counseled litigants, especially when trial (vs. mediation) was pursued.

General Discussion

Pro se parties are systematically disadvantaged in the U.S. civil justice system—experiencing worse outcomes than counseled parties at virtually every stage of civil litigation (e.g., Quintanilla et al., 2017; Shanahan et al., 2016; Seron et al., 2001). To mitigate these disadvantages, U.S. legal scholars have proposed solutions aimed at attenuating disparities in information and “know-how” between counseled and uncounseled litigants (e.g., improving self-help resources). Of course, improving self-help resources may improve conditions for pro se parties (e.g., Barton, 2010; Landsman, 2009, 2012; Swank, 2005), but these solutions alone will not fully address the pro se problem if legal officials treat pro se parties worse than (otherwise identical) counseled parties. Thus, the present research examined how legal officials perceive and draw inferences about pro se claimants (vs. counseled claimants), while experimentally holding all other case-details constant.

²⁴ For forecasted outcome satisfaction, the main effect of dispute system, $F(1, 100) = 139.19$, $p < .001$, $\eta_p^2 = .58$, the main effect of target, $F(1, 100) = 24.16$, $p < .001$, $\eta_p^2 = .20$, the two-way interaction between counseled status and target, $F(3, 100) = 12.67$, $p < .001$, $\eta_p^2 = .28$, and the two-way interaction between dispute system and target were all statistically significant, $F(1, 100) = 20.01$, $p < .001$, $\eta_p^2 = .17$. As described in the main text, these main effects and two-way interactions were qualified by a significant three-way interaction between counseled status, target, and dispute system, $F(3, 100) = 8.15$, $p < .001$, $\eta_p^2 = .20$. All other main effects and interactions were nonsignificant ($ps \geq .22$).

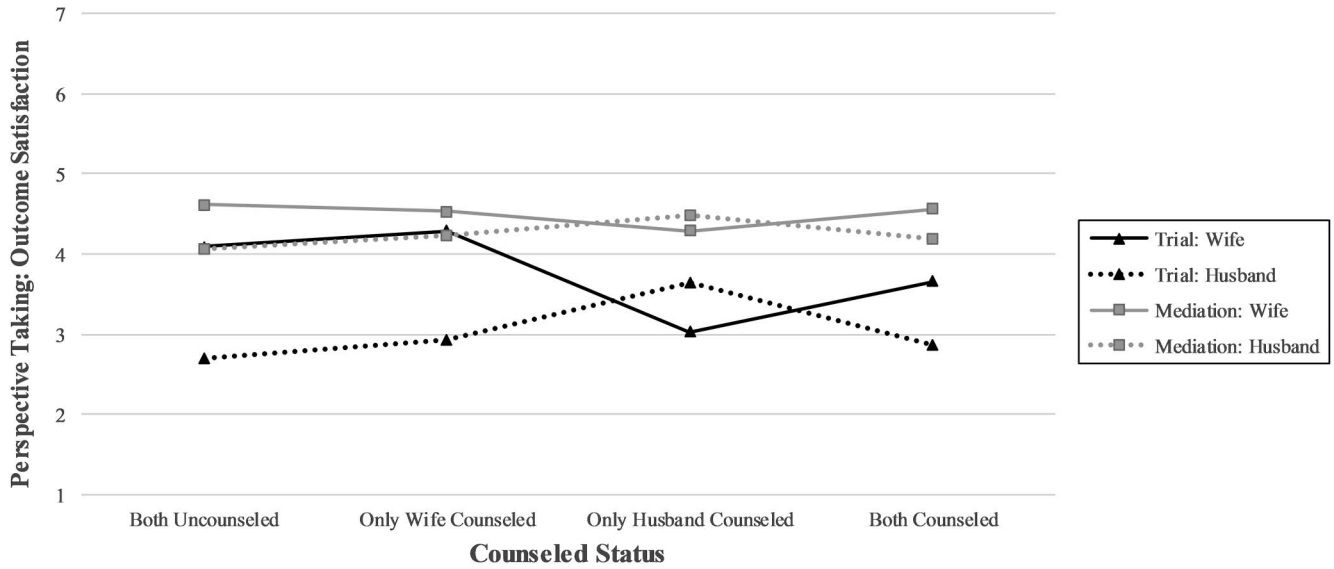


Figure 3. Experiment 1: Judges perspective taking on outcome satisfaction by counseled status, dispute system, and target.

Across two experiments with samples of judges and attorney-mediators, we found that these legal officials systematically appraised the cases of pro se parties as less meritorious than the cases of counseled parties. These studies add to the growing literature suggesting that the mere presence of counsel gives litigants a material and symbolic edge in the courtroom (see also Quintanilla et al., 2017; Sandefur, 2015). Further, we found that legal officials expected pro se litigants to fare worse than counseled litigants in the courtroom. Judges and attorney-mediators forecasted that pro se litigants would experience the civil justice system as less fair and satisfying than counseled litigants, especially when trial (vs.

mediation) was considered to be the dispute resolution procedure. Yet attorney-mediators themselves exhibited the same cognitive biases that judges held toward pro se litigants.

Given these findings, it seems probable that when legal officials forecast the outcomes of trial, they expect that the litigant who will likely win (i.e., the one with more *case merit*) will have a more positive trial experience than the litigant expected to lose. The cases of pro se litigants (vs. counseled litigants) were systematically perceived to be less meritorious (though, objectively, they did not differ), which fueled legal officials' downward expectations for pro se litigants at trial—pro se litigants were expected to

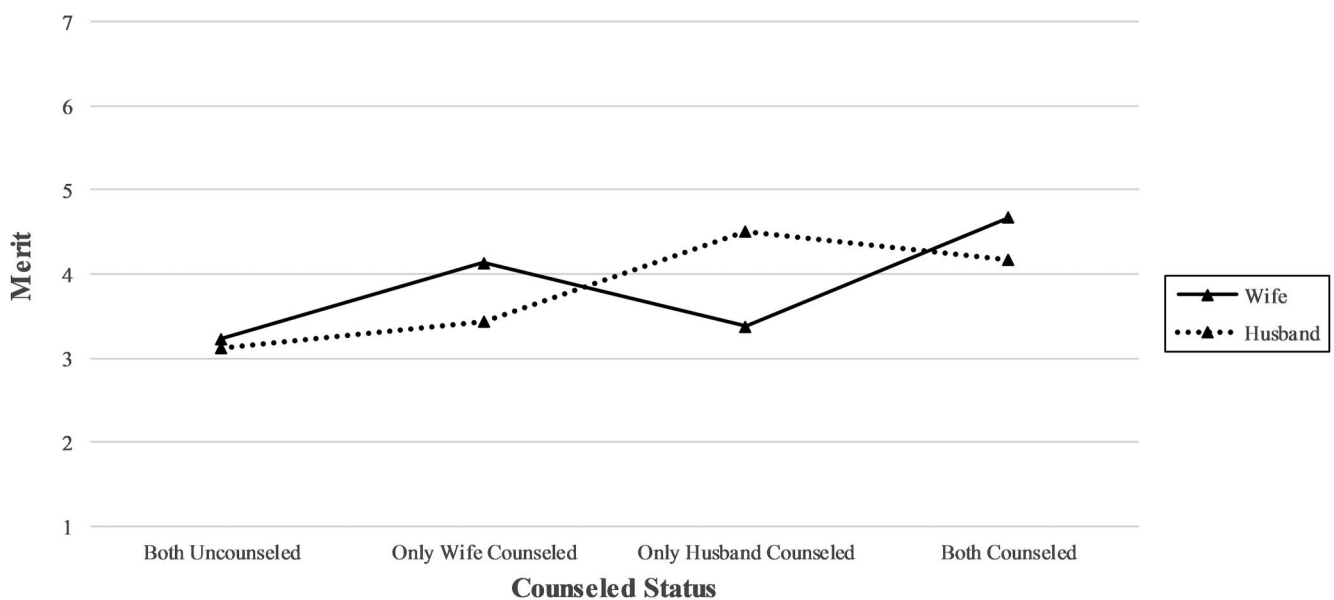


Figure 4. Experiment 2: Attorney-mediator beliefs about case merit by counseled status and target.

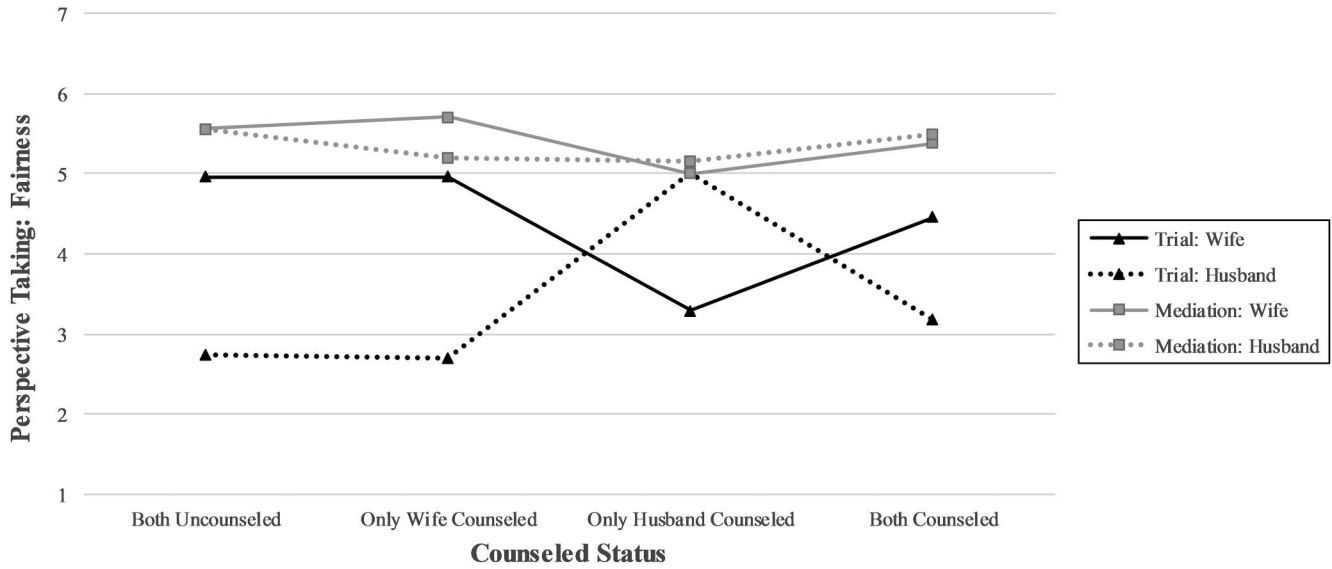


Figure 5. Experiment 2: Attorney-mediator perspective taking on fairness experiences by counseled status, dispute system, and target.

experience the civil justice system as less fair and less satisfying than counseled litigants. These forecasts changed, however, when mediation (vs. trial) was imagined as the dispute resolution procedure. When legal officials imagined mediation as the dispute resolution system, counseled and pro se litigants were expected to experience dispute resolution as relatively fair and satisfying.

On balance, legal officials perceive parties with counsel to be more meritorious than parties without counsel; however, we found that judges (but not attorney-mediators) perceive the wife to be more disadvantaged by a lack of counsel (and more advantaged by obtaining counsel) than the husband. Moreover, judges' (but not

attorney-mediators') preference for mediation (over trial) was amplified in situations where only the wife lacked counsel (see the [online supplemental material](#)). Although unexpected, these findings suggest that judges may, at least in some custody dispute cases, be more sensitive to pro se disadvantages facing women compared to men, which is consistent with other research showing that judges generally prefer mothers over fathers in custody disputes (Stamps, 2002). One possibility is that judges feel more pity toward the uncounseled woman (vs. man), as suggested by research on benevolent sexism and the pervasive societal stereotypes about women as in need of protection (Fiske, Cuddy, Glick, & Xu,

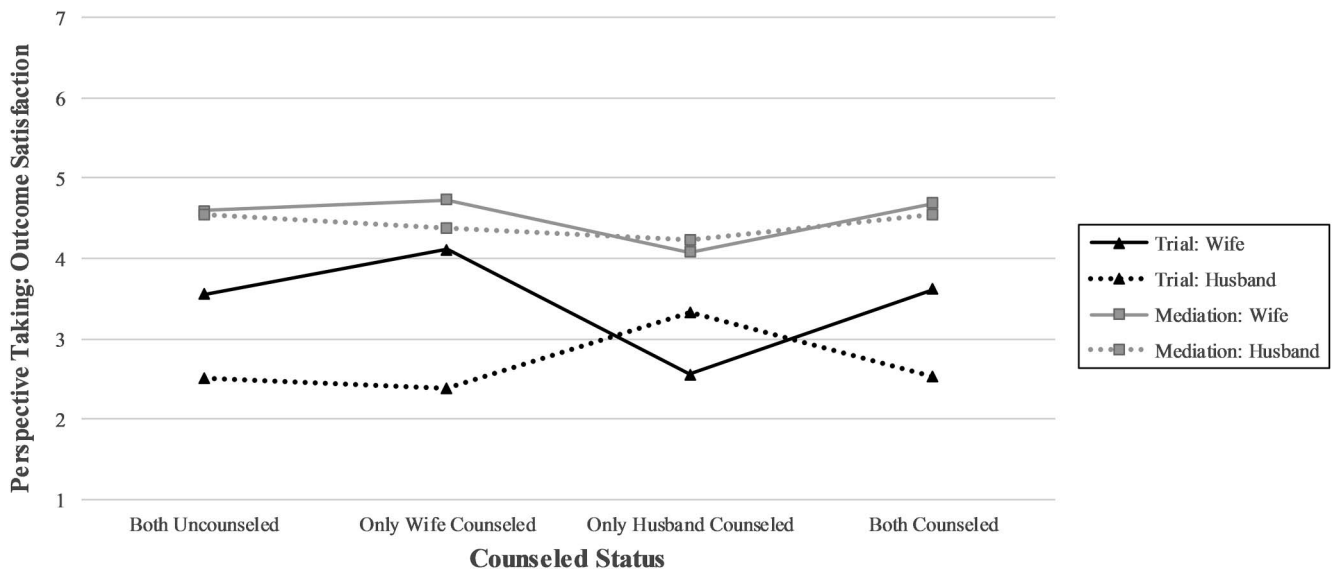


Figure 6. Experiment 2: Attorney-mediator perspective taking on outcome satisfaction by counseled status, dispute system, and target.

Table 4
Experiment 2: Descriptive Statistics: Attorney-Mediator Perspective Taking by Counselled Status, Dispute System, and Target

Counselled status	Husband						Wife					
	Trial			Mediation			Trial			Mediation		
	<i>n</i>	<i>M (SD)</i>	95% CI	<i>n</i>	<i>M (SD)</i>	95% CI	<i>n</i>	<i>M (SD)</i>	95% CI	<i>n</i>	<i>M (SD)</i>	95% CI
Fairness												
Both uncounseled	27	2.74 (1.48)	[2.13, 3.35]	27	5.56 (1.19)	[5.04, 6.07]	27	4.96 (1.60)	[4.27, 5.65]	27	5.56 (0.93)	[5.09, 6.02]
Both counseled	26	3.19 (1.65)	[2.57, 3.82]	26	5.50 (0.95)	[4.97, 6.03]	26	4.46 (1.75)	[3.76, 5.16]	26	5.38 (1.10)	[4.91, 5.86]
Only husband counseled	24	5.00 (1.77)	[4.35, 5.65]	24	5.17 (1.52)	[4.62, 5.72]	24	3.29 (2.12)	[2.56, 4.02]	24	5.00 (1.69)	[4.51, 5.49]
Only wife counseled	24	2.71 (1.52)	[2.06, 3.36]	24	5.21 (1.69)	[4.66, 5.76]	24	4.96 (1.73)	[4.23, 5.69]	24	5.71 (1.00)	[5.22, 6.20]
Outcome satisfaction												
Both uncounseled	27	2.52 (1.12)	[2.10, 2.94]	27	4.56 (0.80)	[4.17, 4.94]	27	3.56 (1.16)	[3.09, 4.02]	27	4.59 (0.93)	[4.24, 4.95]
Both counseled	26	2.54 (0.99)	[2.11, 2.96]	26	4.54 (0.95)	[4.15, 4.93]	26	3.62 (1.17)	[3.14, 4.09]	26	4.69 (0.84)	[4.33, 5.06]
Only husband counseled	25	3.32 (1.22)	[2.89, 3.75]	25	4.24 (1.27)	[3.84, 4.64]	25	2.56 (1.23)	[2.08, 3.04]	25	4.08 (1.19)	[3.71, 4.45]
Only wife counseled	26	2.38 (1.02)	[1.96, 2.81]	26	4.38 (0.94)	[4.00, 4.77]	26	4.12 (1.31)	[3.64, 4.59]	26	4.73 (0.72)	[4.37, 5.09]

Note. CI = confidence interval.

2002; Glick & Fiske, 1996). Or perhaps this occurs because judges expect that women (vs. men) are typically responsible for the bulk of child care duties and are viewed as “better suited” to be child caregivers (Costa, Esteves, Kreimer, Struchiner, & Hannikainen, 2019; Stamps, 2002). Understanding exactly why judges (but not attorney-mediators) were more sensitive to the pro se status of women is beyond the scope of this project, but it does highlight the importance of taking an intersectional approach to studies of the effect of pro se status in the courtroom. Pro se women (vs. pro se men) may face two axes of disadvantage instead of just one—disadvantage due to a lack of counsel and disadvantage due to gender. More strongly preferring mediation over trial when women are uncounseled may be necessary to counteract the historical subjugation of women; however, this behavior raises interesting questions about whether women and men (mothers and fathers) are indeed being treated equally under the law (Braver, Shapiro, & Goodman, 2006). Further investigation of the benevolent stereotypes about women being more vulnerable than men is needed—such stereotypes may underlie why women are perceived to be even more disadvantaged by lack of counsel than are men.

Why Are Pro Se Litigants’ Cases Devalued?

Our findings indicate that legal officials devalue the case merit of pro se parties and, in turn, this cognitive bias has consequences for how pro se litigants are expected to fare in the courtroom and in mediation. Still, there are lingering questions about this kind of underestimation of the underrepresented. Some may surmise that legal officials drew on their past experiences that pro se litigants fare more poorly in court when making inferences about case merit in this family law case and, therefore, wonder whether this phenomenon should be understood as a cognitive bias. We do not disagree that these merit evaluations may be predicated on past experience. In this particular scenario, however, this phenomenon can be best understood as cognitive bias. This is because legal officials appear to be overextending experiential knowledge (i.e., that pro se litigants fare poorly in court) to a situation where its use is inappropriate and distorts evaluations (Manstead et al., 1996, p. 89). Although pro se litigants fare more poorly than counseled litigants in general, this preexisting belief has no bearing on the underlying merit of most family law cases. Indeed, whether parties

Table 5
Experiment 2: Planned Contrasts: Attorney-Mediator Perspective Taking

Contrast	Trial						Mediation					
	Wife			Husband			Wife			Husband		
	Δ	<i>p</i>	η_p^2	Δ	<i>p</i>	η_p^2	Δ	<i>p</i>	η_p^2	Δ	<i>p</i>	η_p^2
Fairness												
Contrast 1	-.50	.31	.01	.45	.31	.01	-.17	.61	.003	-.06	.88	<.001
Contrast 2	-.003	.99	<.001	-.02	.96	<.001	.15	.65	.002	-.35	.36	.01
Contrast 3	-1.67	.001	.10	2.26	<.001	.21	-.56	.11	.03	-.39	.31	.01
Contrast 4	-1.67	.002	.10	2.28	<.001	.20	-.71	.05	.04	-.04	.92	<.001
Outcome satisfaction												
Contrast 1	.06	.86	<.001	.02	.95	<.001	.10	.70	.002	-.02	.95	<.001
Contrast 2	.56	.10	.03	-.13	.66	.002	.14	.59	.003	-.17	.54	.004
Contrast 3	-1.00	.004	.08	.80	.01	.07	-.51	.05	.04	-.32	.26	.01
Contrast 4	-1.56	<.001	.17	.94	.003	.09	-.65	.01	.06	-.15	.61	.003

Note. Contrast 1 compared the both uncounseled condition to the both counseled condition; Contrast 2 compared the both uncounseled condition to the only wife counseled condition; Contrast 3 compared the both uncounseled condition to the only husband counseled condition; and, lastly, Contrast 4 compared the only wife counseled condition to the only husband counseled condition. Sidak corrections for multiple comparisons were used.

are represented or not in family law cases largely depends on whether parties have the ability to pay for a lawyer, not on the merit of their positions regarding child custody or the division of property. As such, there are many reasons why pro se status is negatively associated with worse case outcomes that do not turn on underlying case merit. For example, litigants with lawyers often benefit from their lawyer's legal and procedural expertise (e.g., Sandefur, 2015) and may have greater resources to prepare their cases (Applegate & Beck, 2013; Greacen, 2003; Legal Services Corporation, 2009, 2017). In this family law case, the facts were held constant, and the presence/absence of counsel altered inferences about case merit. Legal officials relied on preconceptions of pro se litigants rather than evidence presented to them. Even under practically perfect conditions where case information was held constant, legal officials were affected by their preconceived notions about pro se litigants over available data. We find this troubling. In real-world settings, this phenomenon may disadvantage pro se litigants with meritorious cases.

This said, the present findings do not suggest that these biases are grounded in negativity toward pro se litigants. It is possible that legal officials are biased in favor of counseled litigants—possibly because having counsel makes a judge's job easier (Sandefur, 2015) or signals shared group membership (Brewer, 1999; Greenwald & Pettigrew, 2014). For applied researchers who may be interested in successfully intervening on legal officials' perceptions of pro se litigants and the merit of their cases, it will be important to determine how much of the cognitive biases revealed here are due to negative feelings toward pro se litigants versus favorable feelings toward counseled litigants. Understanding the direction of these biases will help researchers design effective bias mitigation interventions.

Some readers may wonder whether, in the absence of lengthy case files, it is reasonable for legal officials to use their preconceptions about pro se litigants to draw inferences about the strength of a case. To this point, the films presented to participants were produced based upon actual transcripts of initial hearings in cases that were resolved in 5 min or less (and reviewed by judges to ensure their authenticity). Still, the information available in this family law dispute may be more limited than the information in other courtrooms. Thus, the most conservative interpretation of our findings would be that, on balance, when details about a dispute are limited, legal officials fill in the gaps with their schemas and preconceptions about pro se parties (Darley & Gross, 1983; Kahneman & Tversky, 1973; Snyder, Tanke, & Berscheid, 1977). Yet we strongly suspect that legal officials draw inferences that disadvantage unrepresented persons even with greater case-specific knowledge, and that legal officials will, in effect, confirm preconceptions that anchor later judgments (*confirmation bias*; Koriat, Lichtenstein, & Fischhoff, 1980; Wason, 1960). We add that recent, well-regarded research on civil courts, particularly inner-city courts that resolve cases affecting low-income communities has revealed that many high-volume courts spend less than 2 min on many cases with unrepresented parties (Desmond, 2016)—less time than the cases depicted in this study. Thus, our findings may be especially relevant to areas of law where it is common for judges to spend little time deliberating on the evidence in cases before them with unrepresented parties.

Limitations

All studies have limitations; our hope is that the limitations of the present studies will inspire additional research on the role of cognitive bias in courtroom decision-making. One limitation of this work is our reliance on one- and two-item measurement scales. In general, it is recommended that researchers use multiple-item measures over single-item measures to reduce measurement error (Nunnally, 1978). In our case, we used one- and two-item measures for two reasons. First, we aimed to recruit a specialized population that does not often participate in empirical research and whose time to participate is very limited. And second, our institutional partners who reviewed all study materials and measures requested that the studies remain as brief and nonredundant as possible. Thus, in some cases, multiple-item measures were trimmed to the most face-valid items. As suggested by psychometrics experts, we developed scales to best fit our situational constraints (Gardner, Cummings, Dunham, & Pierce, 1998). Nevertheless, multiple-item measures of perceived case merit may capture nuances that our measures do not.

By using video-based stimuli (vs. more traditional vignette-based stimuli), the depicted family law dispute came alive for our participants, while we held other incidental features of the dispute constant. The videos were developed based on actual transcripts of initial hearings in family law cases and reviewed by state judges to ensure authenticity. In addition, the professional quality of the videos—a film production company and professional actors were retained—heightened this realism. All of these features enhanced the external and ecological validity of the study. Still, using video stimuli allows some experimental control to be lost. Despite attempts to vary only the experimental dimension of interest (pro se vs. counseled status), the videos may have differed in minor ways that affected the ratings. In contrast, using vignettes may have offered more experimental control, but far less external validity as this is not the way that these family law cases actually appear before judges. Thus, we believe the tradeoff made was justified. We reasoned that because previous studies assessing similar questions used vignettes (Quintanilla et al., 2017), increasing the present work's external validity is an important extension of the earlier work. We took great care, however, to keep the videos and scripts as consistent as possible across conditions (even employing the same focal actors across conditions). These controls allowed us to increase the internal validity of the studies. Future research with additional stimuli, across different kinds of cases, intersecting with different social identity characteristics of the parties, should be conducted (Judd, Westfall, & Kenny, 2012).

Future Directions

What can be done to make the system fairer? One commonly advocated solution to the access-to-justice problem is Civil Gideon, adopting a right to legal representation in civil legal matters, particularly for low-income persons. Although proponents of this approach argue that appointing everyone an attorney would lead to more favorable outcomes for vulnerable parties (Brito, 2019; Cantrell, 2002; Galanter, 1974), critics point out that guaranteeing counsel is not actually feasible, given current funding constraints and the ever increasing volume of pro se claimants (Bibas, 2013). Other critics call attention to the “deeply flawed implementation” of this approach in the criminal justice system—

citing that the numerous “overworked and underfunded lawyers” suggest that a comparable approach in the civil justice system is doomed to fail (Barton, 2010). If appointing everyone counsel is not possible (at least in the foreseeable future), are there other things that courts can do to reduce the underestimation of the unrepresented? One prescription may be educating judges and attorney-mediators about cognitive biases related to pro se status by making them aware of their general tendency to devalue the case merit of pro se (relative to counseled) litigants and reminding them of their duty to evaluate the content of the case, irrespective of whether the claimant is counseled. This educational approach, however, must be carefully designed to ensure that the approach is effective (Forscher et al., 2019). Moreover, thoroughly testing how long the bias reduction effects last and under what conditions will be similarly important.

Lay beliefs about trial versus mediation as a dispute resolution procedure. Across experiments, judges and attorney-mediators perceived trial and mediation to be fair and effective dispute resolution procedures; however, mediation was generally perceived to be fairer and more effective than trial. As such, legal officials overwhelmingly preferred mediation to trial as the dispute resolution procedure for the presented family law case (see analyses on legal officials’ procedural preferences in the [online supplemental material](#)). Additional research is needed to understand these preferences. Scholars have suggested that legal officials may endorse the lay belief that mediation is more friendly and collaborative than trial—that in trial there are “winners” and there are “losers,” but in mediation everyone wins by reaching a mutually agreed upon solution (Beck & Sales, 2000; McAdoo & Welsh, 2004). This explanation for the mediation preference seems plausible—and self-report data from mediators and litigants suggests that mediation is experienced positively (e.g., McAdoo & Welsh, 2004)—but it should be empirically vetted. Perceptions of mediation as a friendlier more collaborative process, particularly for pro se parties, are not necessarily consistent with the on-the-ground reality. Indeed, the present research examined the perceptions and appraisals of mediators and found that mediators showed the same perceptual biases against pro se litigants that judges and attorneys did.

Conclusion

Taken together, the present research suggests that the mere presence or absence of pro se status affects the inferences that legal officials make about parties in the civil justice system. Legal officials appraised the cases of pro se parties as less meritorious than the cases of counseled parties and predicted that unrepresented persons would experience the civil justice system as less fair and satisfying than counseled litigants, even when all case facts were held constant, and especially when trial (vs. mediation) was considered to be the dispute resolution mechanism. Until now, the majority of solutions to the pro se problem involve attenuating legal expertise gaps between counseled and uncounseled litigants (e.g., increasing access to self-help materials and ADR procedures, simplifying court documents, etc.). We hope that by acknowledging the cognitive biases among legal officials that work against unrepresented persons and considering these biases when crafting policies to level the playing field, we can move closer to aligning the

on-the-ground realities of the civil justice for some of our more vulnerable citizens with our civic ideal of justice for all.

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