
**“GOOGLING” YOUR WAY TO JUSTICE: HOW
JUDGE POSNER WAS (ALMOST) CORRECT IN HIS
USE OF INTERNET RESEARCH IN *ROWE V.
GIBSON***

M. CRISTINA MARTIN*

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INTRODUCTION

Pro se litigation is a daunting task for anyone, let alone an uneducated or indigent party who cannot afford representation. As of 2015, a criminal defendant has the right to counsel, but a civil party has no similar right.¹ In a survey of federal cases in 2009, the U.S. Courts of Appeals heard 27,905 cases of *pro se* litigants—“a surprising 48%” of the total number of cases heard in the courts that year.² It is also possible that uneducated or indigent appellants are represented by ineffective or incompetent counsel. This leads to the question: how does the court system reconcile a large number of cases being ineffectively handled (through no fault of the party) with the notions of justice?

* J.D. candidate, May 2016, Chicago-Kent College of Law, Illinois Institute of Technology.

¹ U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335 (1963).

² Michael Correll, *Finding the Limits of Equitable Liberty: Reconsidering the Liberal Construction of Pro Se Appellate Briefs*, 35 VT. L. REV. 863, 871 (2011).

Technology may provide an answer. Since the proliferation of the home computer and Internet access, laypeople can access a vast amount of specialized information from their home. Similarly, “[t]echnology in litigation has changed enormously since the adoption of the Federal Rules of Evidence in 1975.”³ The stereotype of Internet research is that it is completely unreliable, but much information available on the Internet is credible and can be a great resource in the right hands.⁴ The urge for trial courts, juries, and even appellate courts to simply “google”⁵ an aspect of the case is very tempting. Developing standards for a court’s use of this type of Internet search is critical in both limiting a court’s desire to impermissibly search outside of the record as well as providing a stepping-stone to assist *pro se* or indigent litigants who are getting lost in the system due to insufficient pleadings and evidence.

In the recent Seventh Circuit decision *Rowe v. Gibson*, Judge Posner relied on Internet research to reverse a district court’s finding of summary judgment against a *pro se* prisoner litigant.⁶ This article will discuss the controversial choices that Judge Posner made and will develop a framework to allow courts to adopt Internet research in the courtroom. By supplementing current judicial practices regarding *pro se* litigants with careful Internet research, courts may ensure that *pro se* litigants have the greatest access to justice.

Part I of this article examines the history of the record, case law surrounding the notion that an appellate court must not look outside of the record in making its determination, as well as the increasing use of technology in the courtroom. This section provides a backdrop to

³ *Verizon Directories Corp. v. Yellow Book USA, Inc.*, 331 F. Supp. 2d 136, 142 (E.D.N.Y. 2004).

⁴ See *Internet Accuracy: Is Information on the Web Reliable?* 18 CQ RESEARCHER 625, 630 (2008) (noting that Internet sources do not lie more than people “in real life” and Internet sources are not necessarily more biased than other information sources).

⁵ Google (v): to “enter (a search term) into the Google search engine to find information on the Internet; to search for information about (a person or thing) in this way.” *Google*, OXFORD ENGLISH DICTIONARY (3d ed. 2006).

⁶ *Rowe v. Gibson*, 798 F. 3d 622 (7th Cir. 2015).

Rowe v. Gibson and potential further uses of technology in the courtroom. Part II examines the recent Seventh Circuit decision *Rowe v. Gibson* and analyzes Judge Posner’s majority opinion, Judge Rovner’s concurrence, and Judge Hamilton’s dissent. Part III develops a test using current appellate practices regarding *pro se* litigants in order to adopt Internet research into these current practices. Part IV applies this test to the methodology of *Rowe v. Gibson* and evaluates Judge Posner’s use of Internet research in this case. That part concludes that while Judge Posner was correct in using Internet research in this situation, the kinds of websites he consulted varied too greatly. For Internet research to be a viable tool in a courtroom, the research must meet minimum standards of accuracy and reliability.

BACKGROUND & HISTORY OF THE RECORD, JUDICIAL NOTICE, AND APPELLATE JURISDICTION

It is generally accepted that a court cannot expand the record on appeal with materials that were not presented to the trial court. “Appellate courts have two primary institutional objectives: to develop the law in a particular area as guidance for future cases and to rectify egregious errors in discrete cases.”⁷ In order to best effectuate this goal, the appellate court must examine the entire record of the trial court to determine for itself if (after determining the correct standard of review) the trial court decision should stand.⁸

A reviewing court cannot correct a potential error “if the basis for the appellant’s assertion of error is not before the court.”⁹ Therefore, a complete record is necessary, and typically an appellate court must not consult matters outside of the record.¹⁰

⁷ Christopher M. Pietruszkiewicz, *Economic Substance and the Standard of Review*, 60 ALA. L. REV. 339, 341 (2009).

⁸ *Id.* at 351.

⁹ *Id.*

¹⁰ Brenda C. See, *Written in Stone? The Record on Appeal and the Decision-Making Process*, 40 GONZ. L. REV. 157, 160 (2004–2005).

The record first began to be used in the Court of England during Henry II's reign.¹¹ It was little more than pleadings and documentary evidence submitted at trial, and errors were commonplace.¹² The system developed over time, with clerks taking over the responsibilities for the record, and by the mid-1600s, the clerk of assize was a full-time administrative official.¹³ By 1872, every paper filed or used in a case became part of the record and was filed away in the court archives.¹⁴ This system subsequently carried over into Colonial America and was adapted differently in each state.¹⁵

The 1948 codification of the Federal Rules of Civil Procedure allowed appellate courts to “permit the original record to be sent as the record on appeal.”¹⁶ In 1960, Chief Justice Earl Warren appointed a committee to draft the Federal Rules of Appellate Procedure; these rules became effective in 1968, with the latest revision effective in 1998.¹⁷

Federal Rule of Appellate Procedure 10(a) describes the record on appeal as “(1) the original papers and exhibits filed in the district court; (2) the transcript of the proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk.”¹⁸ When reviewing the case, the appellate court is restricted to facts presented

¹¹ *Id.* at 161.

¹² *Id.* at 162.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ In Massachusetts, pleadings were oral until 1647, and at this point it was determined that evidence should be presented in writing, to the great consternation of lawyers. *Id.* at 163–64. In New York, jury trials were very informal and courts also acted as the administrative arm of the government. *Id.* at 164–65. In Pennsylvania, attorneys created a “code” for rules of proceeding through a trial—this provided that all pleadings be short and in “ordinary and plain character, that they may be understood and justice speedily administered.” *Id.* at 165–66. In the Southern Colonies, many judges were not lawyers and did not have training in the law, and the systems of recordkeeping and appeal were haphazard. *Id.* at 166–67.

¹⁶ *Id.* at 168.

¹⁷ *Id.*

¹⁸ FED. R. APP. P. 10(a).

in the record, and it cannot consider facts which one party could have presented to the district court but did not.¹⁹ If one or both of the parties to the case believe that anything pertinent to the proceedings has been omitted, or the record is otherwise incorrect, they can either stipulate as to what should be done to correct the record or (if they cannot agree) the party may file a motion with the trial court to supplement or correct the record on appeal.²⁰ Where the parties have not acted, it falls on the court to supplement the appellate record in a civil case.²¹

Historically, an appellate court could not go outside the record on appeal at all, either in review of the law or the facts.²² While the English system only recently accepted the custom of reviewing supplemental case law and relying on additional legal research outside of the record, the American appellate courts have long since departed from the harsh rule that they cannot consider additional legal precedent in reviewing district court cases.²³ However, an appellate court cannot as easily consider additional facts not in the record, because trial courts must “find” facts, and the task of the appellate court then becomes to determine whether the trial court properly applied the law to the facts it found.²⁴ “For a judge to go outside of the record in the search for additional facts, or for an advocate to encourage a judge to do so, has long been a cardinal taboo of American appellate practice.”²⁵

While this taboo is still a part of the American legal system, appellate courts have routinely considered additional facts and independent investigation in certain scenarios.²⁶ There are typically a

¹⁹ Hill v. Trustees of Indiana University, 537 F. 2d 248, 254 (7th Cir. 1976).

²⁰ See, *supra* note 10, at 174–75.

²¹ American National Fire Insurance Co. v. Esquire Labs of Arizona, Inc., 694 P. 2d 800, 808 (Ariz. App. 1984).

²² See Jeffrey C. Dobbins, *New Evidence on Appeal*, 96 MINN. L. REV. 2016 (2012).

²³ Frederick Schauer, *The Decline of “The Record”*: A Comment on Posner, 51 DUQ. L. REV. 51, 53 (2013).

²⁴ *Id.* at 53–54.

²⁵ *Id.* at 54.

²⁶ *Id.*

few different types of facts that appellate courts are able to consider outside of the appellate record: (1) Canon Three²⁷ and the use of disinterested experts; (2) appointment of an Appellate Expert; (3) appellate use of judicial notice of adjudicative facts; and (4) the court's determination of certain "legislative facts."²⁸

Taking the third scenario, Rule 201 of the Federal Rules of Evidence allows a court to take judicial notice of certain kinds of facts.²⁹ Rule 1101 of the Federal Rules of Evidence extends the Federal Rules of Evidence to trial courts, bankruptcy courts, and courts of appeals.³⁰ This means that a court can consider certain facts outside of the record, if these facts fall into certain categories: if the fact is "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."³¹ These are the sorts of facts which a district court would not necessarily find during the trial but can very easily ascertain. Common types of facts which courts take judicial notice of include: "(1) scientific facts: for instance, does the sun rise or set; (2) matters of geography: for instance, what are the borders of a state; or (3) matters of political history: for instance, who was president in 1958."³²

The Seventh Circuit took judicial notice of the time of sunset on a particular day using WeatherSpark, a website which reports the weather and other forecast information.³³ There is a limit to the sorts of facts of which a court may take judicial notice. For example, courts

²⁷ "[J]udge may obtain the advice of a disinterested expert on the law applicable to the proceeding . . . if the judge (1) gives the parties notice as to whom the judge is consulting, (2) reveals the substance of the advice sought, and (3) affords the parties reasonable opportunity to respond." See, *supra* note 10, at 184.

²⁸ *Id.* at 183–90; Schauer, *supra* note 23, at 56–57.

²⁹ FED. R. EVID. 201.

³⁰ FED. R. EVID. 1101(a).

³¹ FED. R. EVID. 201.

³² *Shahar v. Bowers*, 120 F. 3d 211, 214 (11th Cir. 1997).

³³ *Owens v. Duncan*, 781 F. 3d 360, 362 (7th Cir. 2015).

can only take judicial notice of adjudicative facts³⁴ which are not in dispute and which are either common knowledge or are capable of certain verification.³⁵ The judge's personal knowledge of the topic is not enough because the fact to be put on judicial notice must be accurate or its source must be an "uncontested matter of public knowledge."³⁶

The Federal Rules of Evidence (FRE) are in place to control what evidence can be introduced in United States courts.³⁷ FRE 201 controls which facts may be taken on judicial notice, and only allows adjudicative facts to be taken on judicial notice, not legislative facts.³⁸ Legislative facts are those facts which are not specific to the case-specific events in the litigation, but are relevant to the law-making functions of appellate courts.³⁹

In the seminal case *Marbury v. Madison*, Chief Justice Marshall concluded "[i]t is emphatically the province and duty of the judicial department to say what the law is."⁴⁰ Federal appellate courts may not find facts because that is the province of the factfinder (trial judge or jury).⁴¹ Courts have historically interpreted this as appellate courts do

³⁴ "[A]djudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses." 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 353 (1st ed. 1958).

³⁵ *Alvary v. United States*, 302 F. 2d 790, 794 (2d Cir. 1962).

³⁶ See, *supra* note 10, at 193.

³⁷ FED. R. EVID. 101.

³⁸ FED. R. EVID. 201(a).

³⁹ Schauer, *supra* note 23, at 58; See, *supra* note 10, at 191 ("'Legislative' facts concern matters which relate to what is known as the 'legislative' function of the court, where the court is in essence 'making law' either by filling a gap in the common law by formulating a rule, construing a statute, or framing a constitutional rule.").

⁴⁰ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

⁴¹ *E.g.*, *United States v. Bd. of Com'rs of Grady Cnty, Okl.*, 54 F.2d 593 (10th Cir. 1931).

not have jurisdiction to make original findings of fact.⁴² However, appellate courts are more and more regularly citing to information found on the Internet in making their determinations. This article explores the expansion of the appellate role as well as the application of Internet research.

ROWE V. GIBSON

A. *The Facts*

In 2015, the Seventh Circuit Court of Appeals considered a case in which an Indiana prison inmate named Jeffrey Rowe brought an appeal under 42 U.S.C. § 1983.⁴³ In 2009, Mr. Rowe, while an inmate at Pendleton Correctional Facility in Indiana, was diagnosed with gastroesophageal reflux disease (GERD).⁴⁴ This is a condition where a valve-like structure in the esophagus cannot close properly, and the contents of the stomach may back up into the esophagus.⁴⁵ The symptoms and complications produced by untreated GERD range from “persistent, agonizing pain” to esophageal scarring, and the increased risk of esophageal cancer.⁴⁶

The prison physician who diagnosed Mr. Rowe prescribed him the medication Zantac, with instructions to take a 150-milligram pill twice a day.⁴⁷ After this he was given the pills and permitted to keep them in

⁴² *E.g.*, *Cross v. Pasley*, 267 F.2d 824 (8th Cir. 1959); *Dixie Sand & Gravel Corp. v. Holland*, 255 F.2d 304 (6th Cir. 1958); *Kistler v. Gingles*, 171 F.2d 912 (8th Cir. 1949).

⁴³ *Rowe v. Gibson*, 798 F. 3d 622 (7th Cir. 2015).

⁴⁴ *Id.* at 623.

⁴⁵ *Id.* (citing *Diseases and Conditions: Esophagitis*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/esophagitis/basics/definition/con-20034313> (last visited Jan. 11, 2016)).

⁴⁶ *Id.* (citing *WebMD Answers: What Are the Complications of Long-Term GERD?*, WEBMD, <http://answers.webmd.com/search-results?ques=What%20Are%20the%20Complications%20of%20Long%20Term%20GERD?> (last visited Jan. 11, 2016)).

⁴⁷ *Id.* at 624.

his cell for more than a year.⁴⁸ In January 2011, his pills were confiscated, and he was then told that he would be allowed to take a pill only when a prison nurse gave it to him, at 9:30 AM and 9:30 PM.⁴⁹ He complained that he needed to take Zantac with his meals. In response, the head of health care at the prison told Rowe that he could keep in his cell any Zantac pills that he bought at the commissary, but he was unable to keep Zantac given to him by prison staff.⁵⁰ Unfortunately, Rowe was unable to afford the Zantac in the commissary, so he relied on the Zantac prescribed to him by the staff.⁵¹

In July 2011, his prescription lapsed, and although he made a series of requests for the medication, the nurses denied all of them because he had no prescription.⁵² He was told that his chronic condition did not warrant the continued use of Zantac, and he would have to purchase it from the commissary if he wished to continue taking it.⁵³ Rowe continued to request Zantac, and on July 13, 2011, a physician who worked at the prison (who was not a gastroenterologist) reviewed his medical records and noted that his condition did not require Zantac at all.⁵⁴ In August, he later relented and prescribed the medication once more.⁵⁵ Rowe could still only take it at 9:30 AM and 9:30 PM, “both times being distant from his meals.”⁵⁶

In an affidavit, the physician stated that “it does not matter what time of day Mr. Rowe receives his Zantac prescription. Each Zantac pill is fully effective for twelve hour increments. Zantac does not have to be taken before or with a meal to be effective.”⁵⁷ Judge Posner

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 625.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

noted that according to the website of the manufacturer of over-the-counter Zantac, Zantac should be taken “30 to 60 minutes before eating food or drinking beverages that cause heartburn.”⁵⁸ Judge Posner also noted instructions on the Mayo Clinic website that indicate that Zantac should be taken with water thirty to sixty minutes before eating a meal.⁵⁹

Rowe claimed that he was in pain for five and a half hours after eating, and that “he experienced pain for that length of time when he was not allowed to take Zantac with or shortly before his meals.”⁶⁰

B. District Court Opinion

Rowe subsequently brought a pro se § 1983 cause of action in the Southern District of Indiana in April 2014.⁶¹ Defendants filed a motion for summary judgment on all counts of the complaint, which the district court granted, finding that Rowe did not come forward with a genuine issue of material fact for either his medical care claims or retaliation claims.⁶² The defendants’ motion for summary judgment was unopposed because Rowe did not respond to the motion; by not responding, the district court noted that “plaintiff has conceded the defendants’ version of the facts.”⁶³

⁵⁸ *Id.* (quoting *Maximum Strength Zantac 150*, ZANTAC, <https://www.zantacotc.com/zantac-maximum-strength.html> (last visited Jan. 11, 2016)).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Rowe v. Vaisvilas*, No. 1:11-cv-00975-SEB-DKL, 2014 WL 1631636 (N. D. Ill. April 22, 2014) *aff’d in part, rev’d in part, and remanded by Rowe v. Gibson* 798 F.3d 622 (7th Cir. 2015).

⁶² *Id.* at *3.

⁶³ *Id.* at *1.

C. Appeal to Seventh Circuit

This case was appealed to the Seventh Circuit, and was heard by a panel consisting of Judges Posner, Rovner, and Hamilton.⁶⁴ At issue for the court was whether the motion for summary judgment was properly granted by the district court.⁶⁵ Judge Posner, writing the majority opinion, ruled that while the district court properly granted summary judgment with respect to most of the claims, the district court was incorrect in granting summary judgment with regard to the restriction of the time frame to take Zantac, which caused appellant extreme pain and discomfort.⁶⁶

1. Judge Posner's Majority Opinion

Judge Posner found a genuine issue of material fact in a rather unusual manner: he consulted Internet sources such as the Mayo Clinic, Healthline, and the Physicians' Desk Reference.⁶⁷ Judge Posner noted his skepticism of Dr. Wolfe, the expert witness provided by the defense. He noted that this physician had several suspicious qualities, which he felt diminished the quality of his testimony, these included: the fact that Dr. Wolfe was employed by Cortizon, but worked at the prison; the fact that he was a specialist in preventative medicine;⁶⁸ and the fact that Dr. Wolfe is a frequent defendant in prisoner civil rights cases.⁶⁹ Judge Posner expressed his skepticism of this expert witness and noted that his testimony was inadequate for these and many other reasons.⁷⁰

⁶⁴ *Rowe*, 798 F. 3d at 623.

⁶⁵ *Id.*

⁶⁶ *Id.* at 631–32.

⁶⁷ *Id.* at 626.

⁶⁸ Judge Posner also found this information online at Dr. Wolfe's profile on a website called Healthgrades at www.healthgrades.com/physician/dr-william-wolfe-2fgkl/background-check.

⁶⁹ *Rowe*, 798 F.3d at 625.

⁷⁰ *Id.*

As Mr. Rowe was a *pro se* litigant, he did not have the resources to effectively rebut Dr. Wolfe’s expert testimony.⁷¹ Because he could not rebut such expert testimony, his case was dismissed under summary judgment at the district court.⁷² Judge Posner, at the appellate level, came to Mr. Rowe’s aid by doing his own independent factual research.

First, Judge Posner considered the Zantac website, where he noted that the instructions available to the public (also on the labels of the boxes in which over-the-counter Zantac is sold) indicated that in order to prevent symptoms the medicine should be taken “30 to 60 minutes before eating food or drinking beverages that cause heartburn.”⁷³ Judge Posner also consulted the Mayo Clinic website⁷⁴ which noted that for “adults and teenagers—150 mg with water taken *thirty to sixty minutes before eating a meal* or drinking beverages you expect to cause symptoms. Do not take more than 300 mg in twenty-four hours.”⁷⁵

He next examined the nature of stomach acid, “[t]he foods you eat affect the amount of acid your stomach produces,” and “many people with GERD find that certain foods trigger their symptoms.”⁷⁶ He noted that this understanding of stomach acid will give us a full picture of the symptoms that Rowe was experiencing in order to find a genuine issue of material fact.⁷⁷

From there, he moved on to the Physician’s Desk Reference, which stated that

⁷¹ *Id.* at 629.

⁷² *See id.*

⁷³ *Id.* at 625 (quoting *Maximum Strength Zantac 150*, ZANTAC <https://www.zantacotc.com/zantac-maximum-strength.html>).

⁷⁴ *Histamine H2 Antagonist*, MAYO CLINIC, www.mayoclinic.org/drugs-supplements/histamine-h2-antagonist-oralroute-injection-route-intravenous-route/proper-use/drg-20068584 (last visited Jan. 11, 2016).

⁷⁵ *Rowe*, 798 F.3d at 626 (emphasis in original).

⁷⁶ *Id.* (quoting *Acid Reflux Diet and Nutrition Guide: Diet and Nutrition for GERD*, HEALTHLINE, <http://www.healthline.com/health/gerd/diet-nutrition#Overview1>) (last visited Jan. 11, 2016)).

⁷⁷ *Id.*

[A] 150-mg dose of Zantac inhibits 79 percent of food-stimulated acid secretion for up to three hours after it's taken. This implies that the drug's efficacy decreases over time and so supports Rowe's claim that a 150-mg dose does not suppress his food stimulated acid secretions when taken six and a half hours before a meal.⁷⁸

Judge Posner stated that all of these references are evidence that Rowe was in pain for five-and-a-half hours after eating his meals, and that he experienced the pain for that length of time when he was not allowed to take Zantac with his meals.⁷⁹ Judge Posner noted that for the purposes of summary judgment, "his attestations of extreme pain must be credited."⁸⁰ Noting once again that he believed Dr. Wolfe was not a credible witness because he is not a gastroenterologist, never truly examined Rowe, and gave no basis for his "off-the-cuff medical opinion," Judge Posner commented that a court should not admit opinion evidence "connected to existing data only by the ipse dixit of the expert."⁸¹

Partly by citing to "highly reputable medical websites,"⁸² Judge Posner ruled that summary judgment was improper because there was a genuine issue of material fact as to whether the plaintiff was in pain, and thus reversed the particular motion.⁸³

In part responding to the dissenting Judge's criticisms,⁸⁴ Judge Posner elaborated at length about the propriety of his Internet research for these particular circumstances, including a lengthy appendix where he addressed each of the dissent's individual concerns about his

⁷⁸ *Id.* at 627.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

⁸² *Id.* at 630–31.

⁸³ *Id.*

⁸⁴ *See id.* at 635–44 (Hamilton, J., concurring in part and dissenting in part).

ruling.⁸⁵ In particular, Judge Posner discussed the peculiar circumstances of this case: the plaintiff is a *pro se* litigant, who is unable to afford his own expert and is unsuited to properly refute the defendants' own expert testimony, and the expert witness provided by the defense is suspect for various reasons detailed above.⁸⁶

Interestingly, Judge Posner defended his use of Internet research by using a "legal realist" approach.⁸⁷ Judge Posner's understanding of legal realism is defined as a school of thought about judicial decision-making where the judge renders his opinion by considering the "plasticity of the American judicial system" in making decisions and "wants to do what he can to improve the system."⁸⁸ This philosophy is often contrasted with legal formalism, which Judge Posner describes as a judge's adherence to set rules and principles in deciding cases, in place so the judge does not have to (and in fact resists the temptation to) rely upon her own ideologies and personal conceptions of the law in deciding cases.⁸⁹

In deciding *Rowe*, Judge Posner looked closely at the plaintiff's situation as well as the reasoning why an appellate judge should look outside of the record in making his determinations.⁹⁰ Judge Posner commented that "[i]t is heartless to make a fetish of adversary procedure if by doing so feeble evidence is credited because the opponent has no practical access to offsetting evidence."⁹¹ He noted that it would be unfair to the plaintiff to lose this case on summary judgment just because he lacks the wherewithal to contest the defense's expert witness' testimony, however "implausible" it may be.⁹²

⁸⁵ *Id.* at 632–35 (majority opinion).

⁸⁶ *Id.*

⁸⁷ See Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge's Views*, 51 DUQ. L. REV. 3 (2013).

⁸⁸ *Id.* at 9.

⁸⁹ *Id.* at 7.

⁹⁰ *Rowe*, 798 F.3d at 631–32.

⁹¹ *Id.* at 630.

⁹² *Id.*

While Judge Posner noted that the vast majority of the decision was based upon Rowe's own declarations and the timeline of his inability to obtain Zantac, he supplemented the record with "cautious, limited Internet research that [the Court has] conducted in default of the parties' having done so."⁹³ Judge Posner seemed to be taking a stand with this decision vis-à-vis "parity between the adversaries."⁹⁴ Because the plaintiff was a *pro se* litigant with very few resources available to him (one of the main reasons why Rowe suffered for so long was because he was unable to afford Zantac from the prison commissary) and the fact that his claim was not frivolous (he was in serious pain for quite some time, necessitating this § 1983 action), Judge Posner suggested that the district court judge should recruit a lawyer to represent Rowe as well as appoint a "neutral expert witness, authorized by Fed. R. Evid. 706" to address the issues in this case.⁹⁵ Judge Posner's use of Internet research seemed to act as a stop-gap, keeping the case alive for future litigation.⁹⁶ His decision seemed to be based partly on the "unfairness" in the system, a critical notion for many legal realists.⁹⁷

Judge Posner ended with a critique of the health care system in American prisons, and noted that this case is a perfect illustration of these problems, thereby emphasizing his notion of the importance of the claim being brought.⁹⁸

⁹³ *Id.* at 630.

⁹⁴ *Id.* at 631–32.

⁹⁵ *Id.*

⁹⁶ *See id.*

⁹⁷ *See, e.g.,* Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue?* (University of Chicago Public Law & Legal Theory Working Paper No. 320, 2010).

⁹⁸ *Rowe*, 798 F.3d at 632.

2. Judge Rovner's Concurrence

Judge Rovner added a concurrence to this decision.⁹⁹ She noted that is a relatively simple case that has been hijacked “into a debate over the propriety of appellate courts supplementing the record with Internet research.”¹⁰⁰ She clearly believed that this case didn’t need to depart from the record at all because Rowe has consistently complained of “hours of severe pain” when not taking his medication with his meals, and because of the stage of the proceedings, the court must give Rowe the “benefit of all conflicts and draw all reasonable inferences in his favor as the nonmoving party.”¹⁰¹ She noted that Dr. Wolfe’s status as a defendant is an example of his self-interest and Rowe’s claims of persistent pain was sufficient to discredit his testimony at the summary judgment stage.¹⁰² Judge Rovner noted that the information found on Zantac’s website and other “reputable medical web sites” only bolsters the plausibility of the existence of a factual dispute, and this extra-record information is not necessary to the outcome at all.¹⁰³ Judge Rovner stood as a reasonable middle ground between Judge Posner’s legal realism approach and Judge Hamilton’s formalistic dissent, keeping out of this conflict altogether.¹⁰⁴

3. Judge Hamilton's Dissent

Judge Hamilton concurred in part and vigorously dissented in part.¹⁰⁵ He concurred with the court’s disposition affirming summary judgment for defendants on most of the claims.¹⁰⁶ Judge Hamilton

⁹⁹ *Id.* at 635 (Rovner, J., concurring).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *See id.*

¹⁰⁵ *Id.* at 635 (Hamilton, J., dissenting).

¹⁰⁶ *Id.*

vigorously dissented to the reversal of summary judgment on Rowe's last claim regarding the timing of the administration of Zantac between January and July of 2011 and after August 2011.¹⁰⁷ Like Judge Posner's legal realism arguments in the majority, Judge Hamilton tracked closely with a more formalistic approach to the role of an appellate court.¹⁰⁸

His criticisms focused on the Internet research which the majority used "to contradict the only expert evidence actually in the summary judgment record" and to find a genuine issue of material fact sufficient to reverse summary judgment.¹⁰⁹ Judge Hamilton's grievance was that the majority's inclusion of this extra-record evidence ran "contrary to long-established law and raises a host of practical problems the majority fails to address."¹¹⁰

First, Judge Hamilton analyzed the facts in the record to show that the majority based its decision primarily on its Internet research.¹¹¹ Judge Hamilton noted that the evidence in the record showed that the plaintiff believed that the prison schedule only allowing him to take the Zantac medication at particular times caused him unnecessary pain and that the prison physician, Dr. Wolfe, testified that in his professional opinion it did not matter what time of day the plaintiff took the medication.¹¹² In Judge Hamilton's opinion, the prison staff treated the prisoner's disease appropriately, and the evidence did not support a reasonable inference of deliberate indifference.¹¹³ Judge Hamilton disagreed with the majority's approach to this question because (despite its protests) the majority based its decision primarily on its independent Internet research.¹¹⁴ Without the Internet research, the plaintiff did not make enough of a case to avoid summary

¹⁰⁷ *Id.* at 636.

¹⁰⁸ *See, e.g.,* Leiter, *supra* note 96.

¹⁰⁹ Rowe, 798 F.3d at 636 (Hamilton, J., dissenting).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

judgment because the evidence in the case did not point to deliberate indifference on the part of the medical personnel at the prison.¹¹⁵ Judge Hamilton noted that as the average age of the prison increases, so too will the number of cases like this, with prisoners complaining of chronic pain.¹¹⁶ “The fact that a treatment for pain is not as effective as the prisoner would like should not be enough to support an inference that the prison staff are deliberately indifferent to his pain.”¹¹⁷ Only by relying upon independent factual research did the majority make its case that the course of treatment was “so clearly inadequate as to amount to deliberate indifference.”¹¹⁸

Next, Judge Hamilton discussed the federal law concerning the court’s factual research outside the record.¹¹⁹ He noted that the ease of Internet research has created a new temptation for judges to engage in factual extra-record fact-finding.¹²⁰ He distinguished between using “careful research to provide context and background information to make court decisions understandable” and using independent factual research to find a genuine issue of material fact, as is the case here.¹²¹ According to him, an appellate court must simply not use independent factual research to make its decision.¹²²

Judge Hamilton provided a string of precedents which are contrary to the majority opinion’s use of independent factual research.¹²³ He also stressed that this extra-record fact-finding runs contrary to Federal Rule of Evidence 201 and the law of judicial notice.¹²⁴ The majority of facts considered by courts when deciding cases are the product of the adversarial procedure between opposing

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 638.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 639.

parties.¹²⁵ Judge Hamilton noted that “[t]he foundation of our legal system is a confidence that the adversarial procedures will test shaky or questionable evidence.”¹²⁶ When a court bases its decisions on its own factual research that confidence in the system is lessened.¹²⁷

Judge Hamilton also criticized the majority’s interpretation of the exception of judicial notice.¹²⁸ “Judicial notice ‘substitutes the acceptance of a universal truth for the conventional method of introducing evidence,’ and as a result, courts must use caution and ‘strictly adhere’ to the rule before taking judicial notice of pertinent facts.”¹²⁹ According to Judge Hamilton, proper timing of Zantac medication for maximum efficiency is not “generally known within the trial court’s jurisdiction” and it cannot be readily determined from sources whose accuracy cannot reasonably be questioned, under Rule 201(b).¹³⁰

The majority has therefore impermissibly created a new category, between judicial notice and evidence presented by the adversarial process.¹³¹ This sort of evidence is impermissible under the Federal Rules of Evidence, and the majority cited no authority to support its creation of this new category.¹³² Hamilton was also not swayed by the majority’s noting that law clerks and judges routinely engage in research outside of the record for deciding cases—this research has always been understood to be legal in nature, and independent factual research crosses a line.¹³³

Judge Hamilton’s third point was where his dissent developed a real bite. Next, he considered the practical problems with the

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* (quoting *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997)).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 640.

¹³³ *Id.*

majority's approach.¹³⁴ Judge Hamilton did concede that the majority was correct in its assessment of the judicial system with regard to *pro se* litigants and most especially with those *pro se* litigants who are prisoners bringing claims of deliberate indifference.¹³⁵ He agreed that this is where the judicial system is least reliable because few prisoners have access to attorneys and medical experts to address these issues.¹³⁶ However, he disagreed with the measures that Judge Posner took in the majority opinion because of the profound consequences that such measures would have on the entire judicial system.¹³⁷

Plainly speaking, a judge (according to Hamilton) must not advocate for one side, and the majority opinion crossed this line.¹³⁸ Also, the majority offered this new take on the judge's role, but it offered no guidance on how to implement it and what standards should apply—"[u]nder the majority's approach, the factual record will never be truly closed."¹³⁹ This will inevitably create an incredibly expansive record and undue litigation regarding what information "should have been considered."¹⁴⁰ This leads to the question of how much independent factual research must judges do and when is it enough?¹⁴¹

Judge Hamilton also contended that the majority's solution to have district courts appoint attorneys and expert witnesses for *pro se* litigants is untenable, and it is similarly not fair to pass the costs of these attorneys and experts to the defendants.¹⁴² There are also practical problems when the case goes to trial—how does a judge present this new factual information to a jury?¹⁴³ The parties will also need to anticipate what evidence the judge will introduce on top of

¹³⁴ *Id.*

¹³⁵ *Id.* at 640–41.

¹³⁶ *Id.* at 641.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 642.

anticipating what each side will argue, which creates an additional burden on both sides in the litigation.¹⁴⁴

Judge Hamilton was concerned about the judge's role with Internet research, especially that "[t]he internet is an extraordinary resource, but it cannot turn judges into competent substitutes for experts or scholars such as historians, engineers, chemists, psychologists, or physicians."¹⁴⁵ By introducing Internet research, the majority was causing far-reaching problems in the judicial system as a whole.¹⁴⁶

Lastly, Judge Hamilton considered the question of the reliability of the Internet research in question.¹⁴⁷ He noted that the websites relied upon by the majority contain many "important disclaimers that emphasize the need for filtering their information through qualified medical advice, which no member of this court is qualified to provide."¹⁴⁸ Also, the content of the websites did not clearly support the majority's views that Dr. Wolfe's testimony about the timing of Zantac was so wrong that a jury could infer that prison staff were deliberately indifferent to Rowe's health needs.¹⁴⁹ The websites also indicated that those patients with a chronic condition should consult a physician regarding appropriate dosage.¹⁵⁰ Some of the sources did not indicate at all about the necessity of taking the pills with meals.¹⁵¹ Judge Hamilton concluded that the majority's use of the Internet research "is not a reliable substitute for proper evidence subjected to adversarial scrutiny."¹⁵² He found no basis for the majority's harsh criticism of Dr. Wolfe, especially because he has been given no

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 643.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 644.

¹⁵² *Id.*

opportunity to respond or explain his views.¹⁵³ “In the end, whether Dr. Wolfe’s testimony about the timing of Rowe’s doses was right or wrong in some pure and objective sense, or in a case tried with ample resources and talent on both sides, is not a question for us.”¹⁵⁴ Dr. Wolfe’s testimony was undisputed, and therefore this court should not reverse based on its own untested factual research.¹⁵⁵ This went well beyond the scope of the role of the appellate court.¹⁵⁶

CRAFTING A TEST FOR JUDICIAL NOTICE OF INTERNET FACTS IN *PRO SE* CASES

A. *Appellate Courts’ current considerations of information outside of the record.*

Appellate Courts already consider facts outside of the Record in certain circumstances. Appellate courts consider “social” or “legislative” facts often in considering specific cases, most commonly constitutional cases.¹⁵⁷ The Supreme Court is particularly guilty of such practices and has a long history of considering outside “legislative” facts in coming to its conclusions.¹⁵⁸ Courts and commentators consider “legislative” facts to be outside the purview of Rule 201, and, therefore, they consider a wider variety of “legislative facts” in reaching determinations.¹⁵⁹

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1 (2011).

¹⁵⁸ *Id.* at 27.

¹⁵⁹ FED. R. EVID. 201(a); FED. R. CIV. P. 52(a)(6); Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CAL. L. REV. 1185, 1191 (2013).

The Supreme Court has ruled on many cases where the Court considered outside legislative facts in reaching its determinations.¹⁶⁰ The notion of judicial notice itself allows any court to use case-specific facts without proof from the parties.¹⁶¹ Appellate courts do frequently take judicial notice of both legislative and adjudicative facts, often on their own initiative.¹⁶² As a general rule, appellate courts are hesitant to take notice of facts which were available to the moving party but were not raised at the trial level.¹⁶³ Judge Posner himself called this practice “sandbagging” and criticized sophisticated parties for gaming the system in such a way.¹⁶⁴ It is worth noting here that Judge Posner’s criticisms are focused upon a litigant knowingly withholding evidence and then asking the appellate court to take judicial notice of it.¹⁶⁵ Judge Posner does not address the situation of an unsophisticated litigant failing to address certain facts in his brief to the district court. The unsophisticated litigant most likely lacks the requisite intent to game the system in such a manner.

Appellate Courts can also consider facts raised for the first time in *amicus curiae* briefs. An *amicus curiae* brief is filed by an *amicus*,¹⁶⁶ a non-party to the case, who offers information that bears on the case, but has not been solicited by any of the parties. It is proper for amici to provide non-record facts that broadly and generally address the issues

¹⁶⁰ See, e.g., *United States v. Williams*, 553 U.S. 285 (2008), *Gonzales v. Carhart*, 550 U.S. 124 (2007), *Roe v. Wade*, 410 U.S. 113 (1973), *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–94 (1954).

¹⁶¹ 29 AM. JUR. 2D, EVIDENCE § 24 (2013).

¹⁶² See, e.g., *Hotel Emps. & Rest. Emps. Union, Local 100 of New York, N.Y. & Vicinity, AFL-CIO v. City of New York Dep’t of Parks & Recreation*, 311 F.3d 534, 540 (2d Cir. 2002); *In re Indian Palms Assoc. Ltd.*, 61 F.3d 197, 205 (2d Cir. 1995).

¹⁶³ *Zell v. Jacoby-Bender Inc.*, 542 F.2d 34, 38 (7th Cir. 1976).

¹⁶⁴ *Tamari v. Bache & Co.*, 838 F.2d 904, 907 (7th Cir. 1988).

¹⁶⁵ “A litigant cannot put in part of his case in the trial court and then, if he loses, put in the rest on appeal.” *Id.*

¹⁶⁶ “friend of the court”

in the case.¹⁶⁷ These cases often involve greater constitutional implications, and thus they draw the eye of public policy groups and governmental organizations with specialized knowledge of the background of the case.¹⁶⁸ Many watershed Supreme Court decisions ruling on constitutional protections have used new facts in *amicus* briefs as justification for their decisions. *Brown v. Board of Education* is one example of the Court relying on sociological research presented to the Court by way of an *amicus* brief.¹⁶⁹

Appellate courts consider facts outside the record in other areas as well. The Seventh Circuit has previously allowed plaintiffs appealing the dismissal of their complaints to provide the appellate court with non-record evidence, explaining how the plaintiffs might prove the dismissed claim if allowed to go forward.¹⁷⁰

How is allowing certain Internet research different from the notions of judicial notice or the inclusion of *amicus* briefs? If developed with standards requiring the judge to give notice to the parties and allow them opportunity to respond, independent limited research by an appellate judge should be no different than an appellate court's limited use of judicial notice or arguments advanced in *amicus* briefs.

¹⁶⁷ Sylvia H. Walbot & Joseph H. Lang, Jr., *Amicus Briefs: Friend or Foe of Florida Courts?*, 32 STETSON L. REV. 269, 291 (2003).

¹⁶⁸ Paul M. Collins, *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC. REV. 807 (2004).

¹⁶⁹ In *Brown*, the Court relied upon sociological research presented by the ACLU which detailed studies that concluded that segregation upon the basis of race has a detrimental effect upon schoolchildren. 347 U.S. 483, 493–94 (1954); Brief on Behalf of American Civil Liberties Union as Amici Curiae, Supporting Appellants, *Brown v. Bd. of Educ.*, 347 U.S. 482 (1954) 1952 WL 82040.

¹⁷⁰ See *Walker v. Thompson*, 288 F.3d 1005 (7th Cir. 2002); *Dawson v. General Motors Corp.*, 977 F.2d 369 (7th Cir. 1992); *Orthmann v. Apple River Campground, Inc.*, 757 F.2d 909 (7th Cir. 1985).

B. More Liberal Construction of Pleadings for Pro Se Litigants

A common trend in Supreme Court and appellate jurisprudence is the special effort courts put forth to liberally interpret *pro se* briefs to avoid dismissing or denying relief to *pro se* litigants. The Supreme Court decisions in *Conley v. Gibson* and *Haines v. Kerner* are seminal in the development of the rule for liberal construction of *pro se* complaints.¹⁷¹ Both cases advance the notion that *pro se* pleadings are held to “less stringent standards than formal pleadings drafted by lawyers.”¹⁷²

Different jurisdictions apply this concept in different ways concerning appellate briefs. Some jurisdictions take the approach that *pro se* litigants should be treated exactly the same as parties who are represented by lawyers in filing their appellate briefs.¹⁷³ Others are more lax about appellate *pro se* pleading requirements and find that liberal construction of *pro se* appellate briefs is appropriate.¹⁷⁴ Several jurisdictions, including the Seventh Circuit, have conflicting binding precedent on when a court may liberally construe *pro se* appellate briefs.¹⁷⁵ Only one jurisdiction applies a factored-approach rather than uniform *pro se* rules of liberal construction.¹⁷⁶ The Third Circuit considers “*pro se* liberality as a discretionary tool available to judges.”¹⁷⁷ A litigant’s *pro se* status is a single factor in how liberally the court shall interpret their pleadings.¹⁷⁸

¹⁷¹ *Conley v. Gibson*, 355 U.S. 41 (1957); *Haines v. Kerner*, 404 U.S. 519 (1972).

¹⁷² *Haines*, 404 U.S. at 520.

¹⁷³ These jurisdictions are the First, Fourth, Eighth and D.C. Circuits. Correll, *supra* note 2, at 876–79.

¹⁷⁴ These jurisdictions are the Second, Fifth, Ninth, and Eleventh Circuits. *Id.* at 879–83.

¹⁷⁵ These jurisdictions are the Sixth, Seventh and Tenth Circuits. *Id.* at 884–85.

¹⁷⁶ This jurisdiction is the Third Circuit. *Id.* at 883–84.

¹⁷⁷ *Id.* at 884.

¹⁷⁸ *Id.*

The issue of waiver becomes important in cases where an appellate court construes *pro se* briefs liberally.¹⁷⁹ The general rule is that an appellate court will not consider an argument raised for the first time on appeal, and will consider that argument “waived” because it is not in the pleadings from the trial court. Appellate discretion in liberal construction of appellate briefs implicates the notion of waiver because a court can interpret vague pleadings from *pro se* litigants in a way that avoids waiver of issues.¹⁸⁰

The Supreme Court’s ultimate goal in advancing the argument of liberal interpretation of *pro se* briefs was to create a way for *pro se* litigants to have better access to the courts.¹⁸¹ The Supreme Court is primarily interested in preventing *pro se* litigants from becoming a separate, underrepresented class in court.¹⁸² A court weighing the notion of equal protection against a “helping hand” for *pro se* litigants often tips the scale in favor of the helping hand.¹⁸³

Pro se litigants are not merely the beleaguered and downtrodden. Many attorneys also represent themselves *pro se* and other *pro se*

¹⁷⁹ *Id.* at 864–65.

¹⁸⁰ *Id.* at 880 (quoting *Audler v. CBC Innovis, Inc.*, 519 F.3d 239, 255 (5th Cir. 2008)) (“[P]ro se litigants’ briefs are liberally construed so as to avoid waiver of issues[;] the indulgence for parties represented by counsel is necessarily narrower.”).

¹⁸¹ *Id.* at 889. Correll notes that “[t]here is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance.” *Id.* (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)).

¹⁸² *Id.* at 890. “[O]nce established, [appellate] avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.” *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966).

¹⁸³ Correll, *supra* note 2, at 891–92; *see also* *Turner v. Rogers*, 131 S. Ct. 2507 (2011). In *Turner*, the Supreme Court reversed a civil contempt order for a *pro se* litigant because the trial court’s failure to provide procedural safeguards constituted a violation of the litigant’s due process rights. The fact that the litigant was *pro se* informed the Court’s view of due process. Turner’s obligations might lead courts to assure “fundamental fairness” through procedural safeguards, making the courts more open and accessible. *Id.* at 2519–20.

litigants are similarly educated and wealthy.¹⁸⁴ Correll considered this idea when developing a solution regarding *pro se* briefings and adopts the Third Circuit’s approach of using a factor-based system to determine liberality of appellate pleadings.¹⁸⁵ *Pro se* status acts as a trigger, and a court should also consider “material in the record regarding a *pro se* litigant’s education, reasons for proceeding without counsel, and success in presenting his arguments up to that point.”¹⁸⁶ These factors would allow courts to ensure that *pro se* litigants are able to advance their arguments without concern for potential waiver due to lack of knowledge. Correll also indicates that this approach could also solve the problem of “poor briefing by counsel” and similar issues raised by indigent litigants trusting their matters to incompetent counsel.¹⁸⁷

The Supreme Court has already advanced this argument that *pro se* litigants should be offered the benefit of the doubt in the form of liberal construction of pleadings. Some jurisdictions allow *pro se* litigants a chance to be heard on the merits without worrying about accidental waiver of their arguments. Similarly, the use of judicial notice and Internet research should be used by appellate courts in similar situations. If a *pro se* appellant has improperly developed the record on the trial level and the court feels that it can take judicial notice of such information, then it is proper for an appellate court to do so. This should be limited to the situations where *pro se* pleadings are to be interpreted liberally.

C. Judicial Notice and the Internet

Another area of growing concern for both trial and appellate courts is the increasing use of Internet research in the courtroom. Courts are beginning to take judicial notice of facts found on the Internet with increasing regularity. Many cases at both the trial and

¹⁸⁴ Correll, *supra* note 2, at 870–72.

¹⁸⁵ *Id.* at 897.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 897–98.

appellate levels have involved independent judicial research by the court.¹⁸⁸

Jeffrey Bellin and Andrew Guthrie Ferguson note this growing trend in their article, and specifically note that the ease of Internet research can create an incentive for judges and jurors to search for information on the Internet rather than simply rely upon the information provided by the parties.¹⁸⁹ By allowing a court to take judicial notice of information found online, we can limit the urge for the fact-finders to impermissibly search the Internet for their answers to how to interpret a case.¹⁹⁰ An appellate court could take judicial notice of such Internet facts in the same manner as it takes judicial notice of other adjudicative facts.

Bellin and Ferguson crafted a test on the admissibility standards for information discovered using the Internet. This test adopts Rule 201 so a court may properly determine the reliability of Internet sources in taking judicial notice of such information.¹⁹¹ Their test takes into account three attributes of the online source: “(1) knowledge of the subject matter, (2) independence from relevant bias, and (3) incentive to ensure accuracy.”¹⁹² By meeting these three criteria, information found online can be deemed to be sufficiently accurate to meet the parameters of information to be judicially noticed under Rule 201.¹⁹³

¹⁸⁸ See, e.g., *Laborer’s Pension Fund v. Blackmore Sewer Constr., Inc.*, 298 F.3d 600, 607 (7th Cir. 2002); *United States v. Bervaldi*, 226 F.3d 1256, 1266 n.9 (11th Cir. 2000); *Levan v. Capital Cities/ABC Inc.*, 190 F.3d 1230, 1235 n.12 (11th Cir. 1999).

¹⁸⁹ Jeffrey Bellin & Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 NW. L. REV. 1137, 1141 (2014).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1167.

¹⁹² *Id.*

¹⁹³ For example, websites maintained by government agencies contain seemingly accurate information due to the expertise of the agencies with regard to the subject matter, lack of bias due to governmental standards, and incentives to ensure the accuracy of the posted information. See *id.* at 1168–70. The authors also note that even if a source could be biased, such as crime statistics from New York City Police Department (who has an incentive to skew these statistics to show less

If an appellate court is able to take judicial notice of certain adjudicative facts *sua sponte*, then the court should also be able to take judicial notice of information found on the Internet in the same manner. A concern that appellate courts have about taking judicial notice relates to the “sandbagging” notion; appellate courts are reluctant to take notice of facts that a party could have raised in the trial court.¹⁹⁴ This is not an issue in cases where *pro se* litigants are appealing their cases with insufficiently pled facts. In these cases, this is not a tactic, but rather it is an example of the litigant’s lack of knowledge about the proper facts to allege. Like an appellate court liberally interpreting the *pro se* litigant’s pleadings to avoid waiver of issues on appeal, an appellate court could also conduct a limited investigation into Internet research under this expanded notion of judicial notice.

D. Judicial Notice of Internet Facts in Pro Se Appeals: A Test

The Supreme Court has emphasized that appellate pleadings submitted by *pro se* litigants should be interpreted leniently to avoid waiver of arguments because *pro se* litigants are in danger of having their cases dismissed due to procedural flaws.¹⁹⁵ The same sort of procedure should apply to appellate discretion in taking judicial notice of information found on the Internet so that *pro se* appellants do not waive arguments based on facts which were insufficiently pled.

By combining the Correll standard for judicial leniency for *pro se* appellants and the Bellin and Ferguson standard for appellate judicial notice of Internet facts, we can give further effect to the Supreme Court’s reasoning for assisting *pro se* litigants. Ideally, the litigants should be able to advance their own arguments using assistance from

crime), if the bias cuts against the fact to be established (e.g. if a public defender uses this information to show the *prevalence* of crime in the area) then the bias does not undermine the evidentiary value of the information. *Id.* at 1170.

¹⁹⁴ See *Tamari v. Bache & Co.*, 838 F.2d 904, 907 (7th Cir. 1988).

¹⁹⁵ Correll, *supra* note 2, at 895–96.

legal aid providers, court-appointed counsel, and online education.¹⁹⁶ These measures are often expensive or impractical as far as resources currently available to *pro se* litigants. The appellate court's use of limited Internet research can serve as a measure to ensure that these *pro se* litigants do not lose their arguments due to a procedural pitfall.

First, we must establish whether the party is *pro se* or similarly situated. By looking to factors that Correll considered, we can determine whether judicial leniency is even necessary. The Third Circuit treats *pro se* status as one "flag" in deciding whether to exercise discretionary waiver rules.¹⁹⁷ Other important factors which can be considered are the litigant's education, reasons for proceeding without counsel, and success in presenting his arguments up to that point.¹⁹⁸ This approach could therefore also work for indigent clients who are represented by incompetent counsel.¹⁹⁹

Next, we should determine whether judicial notice of Internet facts would be useful to assist courts in liberally interpreting a *pro se* litigant's pleadings. In a situation where a *pro se* litigant attempts to state a claim but has inartfully pled his case, or has only included conclusory statements rather than specific material facts, an appellate court should take judicial notice of facts in certain Internet sources. The purpose of lowered pleading standards for *pro se* litigants is to allow a court the opportunity to hear their cases on the merits, rather than allow the claims to be dismissed because they are inartfully pled.²⁰⁰ While a ruling on summary judgment is a decision on the merits of the case, a *pro se* litigant could unintentionally doom his own case by failing to allege facts correctly or relying on conclusory

¹⁹⁶ Shon R. Hopwood, *Slicing Through the Great Legal Gordian Knot: Ways to Assist Pro Se Litigants in Their Quest for Justice*, 80 FORDHAM L. REV. 1229, 1235–38 (2011).

¹⁹⁷ Correll, *supra* note 2, at 897; *see* United States v. Contents of Two Shipping Containers Seized at Elizabeth, 113 F. App'x 460, 462 n.2 (3d Cir. 2004) ("Pro se status by no means creates an automatic exception to the waiver rule, but we have relied on this factor to relax the waiver rule in the past.").

¹⁹⁸ Correll, *supra* note 2, at 897.

¹⁹⁹ *Id.* at 897–98.

²⁰⁰ *Id.* at 885–93.

statements, especially in cases that require specialized knowledge. In addition to reading the pleadings liberally, if a litigant fails to rebut expert testimony effectively, a court should consider careful Internet research as a way to counter an opposing expert's testimony and give effect to the Supreme Court's concern that *pro se* litigants be able to fully try their cases. At the early stage in the proceedings, this Internet research could also give a *pro se* litigant the benefit of the doubt, and provide him with more resources should his case go to trial.

Next, the court should consider the nature of the Internet source and whether the evidence can be judicially noticed. The Bellin and Ferguson standard for judicial notice of Internet information should be used.²⁰¹ The information should be of a type where an online source consulted is knowledgeable about the subject matter, is independent from relevant bias, and has incentive to be accurate.²⁰² There is much information on the Internet which could be helpful to a *pro se* litigant's case. Especially if the information is more technical, or requires an expert, a free source likely exists on the Internet. These standards will help narrow what sources are appropriate to consult for these facts and which ones are not.

Lastly, the court should consider specific examples of sources which might be accurate and reputable enough to satisfy the judicial notice requirement. For statistical information, many government websites such as websites maintained by the National Oceanic and Atmospheric Administration or Bureau of Justice Statistics fit these standards.²⁰³ For medical information, WebMD is a source that is maintained and edited by experts, making it an easily accessible and accurate source under FRE 201.²⁰⁴ Google Maps provides an extremely accurate mapping system, with Google having a great financial incentive to ensure the accuracy of the site.²⁰⁵ An Internet researcher can find information about the chain of title of a home or its

²⁰¹ Bellin and Ferguson, *supra* note 189, at 1167.

²⁰² *Id.*

²⁰³ *See id.* at 1168.

²⁰⁴ *See id.*

²⁰⁵ *See id.* at 1170.

current PIN number by searching County websites.²⁰⁶ The IRS website provides free information and resources about filing taxes.²⁰⁷ There are numerous other resources which pass the test and which courts could potentially use to take judicial notice of adjudicative facts.

DID JUDGE POSNER GET IT RIGHT?

To determine whether Judge Posner appropriately took judicial notice of this Internet information, a reviewer must evaluate his process and which websites he consulted. First, Rowe is a *pro se* prisoner, who expressly attempted to get access to both counsel and a medical expert, but his petitions were denied.²⁰⁸ It is appropriate for a court to exercise judicial discretion in interpreting pleadings and taking judicial notice of Internet facts.

Next, the judge should consider whether taking judicial notice of Internet facts is beneficial to the *pro se* litigant's case. In *Rowe*, the appellant was appealing from a motion granting summary judgment.²⁰⁹ The district court granted summary judgment in part because Rowe did not respond to the motion, thereby conceding defendants' versions of the facts.²¹⁰ The district court also denied Rowe's motion to appoint an expert to explain his medical condition more fully.²¹¹ These were procedural and economic pitfalls, which are the types of inequities the Supreme Court is hoping to balance by allowing *pro se* pleadings to be interpreted liberally.²¹² Using the framework advanced in this article, Judge Posner properly consulted the Internet for this specific appeal.

²⁰⁶ See, e.g., *Cook County Property Search*, COOK CTY. PROP. TAX PORTAL, <http://www.cookcountypropertyinfo.com/Pages/PIN-Search.aspx> (last visited Jan. 11, 2016).

²⁰⁷ IRS, <https://www.irs.gov/> (last visited Jan. 11, 2016).

²⁰⁸ *Rowe v. Gibson*, 798 F.3d 622, 629–30 (7th Cir. 2015).

²⁰⁹ *Id.* at 623.

²¹⁰ *Rowe v. Vaisvilas*, No. 1:11-cv-00975-SEB-DKL, 2014 WL 1631636, at *1 (N. D. Ill. April 22, 2014).

²¹¹ *Rowe*, 798 F.3d at 635 (Rovner, J., concurring).

²¹² See, e.g., *Haines v. Kerner*, 404 U.S. 519, 521 (1972).

Lastly, the court should consider the types of Internet sources which were consulted, to determine whether judicial notice is proper. Judge Posner considered a variety of websites in making his determination. National Institutes of Health,²¹³ Mayo Clinic,²¹⁴ and WebMD²¹⁵ are all medical websites providing expert advice to the masses. These websites are edited by experts in the medical field, and, therefore, they are reliable, unbiased, and have an incentive to be accurate.²¹⁶ Therefore, Judge Posner could take judicial notice of information regarding GERD generally, as well as the effects and proper dosing procedures of certain medications. Judge Posner’s citation to the Zantac website²¹⁷ is more suspect. The Zantac website is maintained by the company which is surely knowledgeable about the product it sells, but the company could have incentive for biased information to sell more of its product. Judge Posner noted that this is not suspect because “the manufacturer would be taking grave risks if it misrepresented the properties of its product.”²¹⁸ Still, a corporate

²¹³ *Gastroesophageal reflux disease*, NAT’L INST. OF HEALTH, www.nlm.nih.gov/medlineplus/ency/article/000265.htm (last visited Jan. 11, 2016).

²¹⁴ *Diseases and Conditions, Esophagitis*, MAYO CLINIC, <http://www.mayoclinic.org/diseases-conditions/esophagitis/basics/definition/con-20034313>; *Drugs and Supplements: Histamine H2 Antagonist (Oral Route, Injection Route, Intravenous Route)*, MAYO CLINIC, <http://www.mayoclinic.org/drugs-supplements/histamine-h2-antagonist-oral-route-injection-route-intravenous-route/proper-use/drg-20068584> (last visited Jan. 11, 2016).

²¹⁵ *Complications of Heartburn and GERD*, WEBMD, <http://www.webmd.com/heartburn-gerd/guide/untreated-heartburn> (last visited Jan. 11, 2016).

²¹⁶ See, e.g., Bellin & Ferguson, *supra* note 189, at 1178 n. 231 (quoting Art Chimes, *Website of the Week—WebMD*, VOICE OF AM., <http://www.voanews.com/content/a-13-2008-12-voa20/405489.html/> (Nov. 1, 2009, 3:37 P.M.) [stating that “everything is reviewed by experts” and quoting the WebMD Chief Medical Editor that “every piece of content on our site actually goes through a doctor’s eyes. A board-certified physician will look at the content, make sure it’s up to date, accurate, and doesn’t have anything misleading that might be misconstrued by a lay audience.”]).

²¹⁷ *Maximum Strength Zantac 150*, ZANTAC, <https://www.zantacotc.com/zantac-maximum-strength.html#drug-facts>.

²¹⁸ *Rowe v. Gibson*, 798 F.3d 622, 626 (7th Cir. 2015).

website stemming from a business model of selling as much Zantac as possible would include more suspect information than websites maintained by physicians which discuss the properties of the same medication. This information is corroborated, but the Zantac website should hold less weight than similar sources from either WebMD or The Mayo Clinic. Lastly, Judge Posner cited to Wikipedia²¹⁹ and Healthgrades²²⁰ for general information about Zantac as well as a background check on the defense's expert witness.²²¹ These websites are not maintained and edited by experts and, therefore, their information is suspect.²²² Judge Posner's use of the information on these websites is therefore improper and should have been excluded. Moreover, Judge Posner used the Healthgrades information to question the witness' credibility.²²³ This is not an appropriate application of judicial notice, and, therefore, it should not be verified using Internet research. In the future, if Judge Posner takes judicial notice of information found on the Internet, he should restrict his searches to reliable sources evaluated by this test.

CONCLUSION

The notion that *pro se* litigants overwhelmingly need a court's assistance is misleading and overbroad. Many *pro se* litigants are

²¹⁹ *Ranitidine*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Ranitidine> (last visited Jan. 11, 2016).

²²⁰ HEALTHGRADES, <http://www.healthgrades.com/> (last visited Jan. 11, 2016).

²²¹ *Rowe*, 798 F.3d at 624–25.

²²² *Terms of Use*, WIKIPEDIA, https://wikimediafoundation.org/wiki/terms_of_use (last visited Jan. 11, 2016) (“Because the Wikimedia Projects are collaboratively edited, all of the content that we host is provided by users like yourself, and we do not take an editorial role. This means that we generally do not monitor or edit the content of the Project websites, and we do not take any responsibility for this content.”); Ira S. Nash, *Web alert: Healthgrades*, 5 CURRENT CARDIOLOGY REPORTS 92–93 (2003) (“*The algorithms used to create the scores are proprietary; therefore, it is not possible to ‘score the scorecard.’ Many quality experts have expressed concern about the reliability and validity of such “black box” rating scales*”).

²²³ *Rowe*, 798 F.3d at 624–25.

educated, competent, and make the choice not to use representation.²²⁴ Many represented indigent parties seek out counsel who turn out to be incompetent.²²⁵ Applying a standard across the board is the way to ensure that a court will always reach the just result. Also, an appellate court can maximize the probability that litigants' claims are not dismissed due to procedural flaws by applying judicial notice to liberal pleading standards. The system must contain some representation of fairness. "Equality before the law, like universal suffrage, holds a privileged place in our political system, and to deny equality before the law delegitimizes that system . . . when these rights are denied, the expectation that the affronted parties should continue to respect the political system . . . has no basis."²²⁶

²²⁴ See Correll, *supra* note 2, at 867–75.

²²⁵ See *id.* at 897–98.

²²⁶ DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 264–66 (1988).