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An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule

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AN EXTENSION OF THE RIGHT OF ACCESS: THE PRO SE LITIGANT'S RIGHT TO NOTIFICATION OF THE REQUIREMENTS OF THE SUMMARY JUDGMENT RULE

INTRODUCTION

Although numerous cases have extolled the benefits of effective assistance of counsel,[1] the constitutional right of a criminal defendant to appear pro se is one of long standing in the American judicial system.[2] Whether this constitutional right extends to the civil litigant is less clear.[3] A federal statutory provision, however, ensures the right to self-representation in civil matters.[4]

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1. *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (right to counsel attaches when criminal defendant receives actual prison sentence); Gideon v. Wainright, 372 U.S. 335, 344-45 (1963) (felony prosecutions trigger right to counsel); Powell v. Alabama, 287 U.S. 45, 71 (1932) (establishing right to counsel in prosecutions for capital offenses). *But see* Scott v. Illinois, 440 U.S. 367, 373 (1979) (no right to counsel when prison sentence is authorized but not imposed).

2. Section 35 of the Judiciary Act of 1789, 1 Stat. 73, 92 (1789) provides that "the parties may plead and manage their own causes personally." The sixth amendment has been construed to incorporate this provision. *See* United States v. Plattner, 330 F.2d 271, 273-74 (2d Cir. 1964). For an extensive discussion of the historical origins of the right of self-representation, see Faretta v. California, 422 U.S. 806, 814-32 (1975). Neither the federal government nor a state may impose a lawyer upon a criminal defendant. *See Faretta*, 422 U.S. at 836 (1975); Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942); Johnson v. Zerbst, 304 U.S. 458, 468-69 (1938).

3. *See Adams*, 317 U.S. at 279 (answering affirmatively); Garrison v. Lacey, 362 F.2d 798, 799 (10th Cir. 1966) (same), *cert. denied*, 387 U.S. 911 (1967). *But see* Andrews v. Bechtel Power Corp., 780 F.2d 124, 137 (1st Cir. 1985) (answering negatively), *cert. denied*, 106 S. Ct. 2896 (1986); O'Reilly v. New York Times, 692 F.2d 863, 867 (2d Cir. 1982) (same). Legitimate arguments have been advanced for both sides. *Compare* Comment, *On Letting the Laity Litigate: The Petition Clause and Unauthorized Practice Rules*, 132 U. Pa. L. Rev. 1515, 1531-32 (1984) (constitutional right to appear pro se in civil cases), *with* Kaufman, *The Right of Self-Representation and the Power of Jury Nullification*, 28 Case W. Res. 269, 271 n.7 (1978) (no constitutional right to appear pro se in civil cases). The *Faretta* court reasoned that criminal defendants have the right to appear pro se because the criminal defendant personally bears the consequences of defeat and that to thrust a lawyer on a criminal defendant is likely to convince him that the justice system is against him. *See* Faretta v. California, 422 U.S. 806, 834 (1975). Although this reasoning arguably applies to civil litigants, the "non-constitutional right" side appears to have the stronger argument. *Faretta* based the constitutional right in the sixth amendment, which only applies to criminal defendants. *See id.* at 832; *see also* U.S. Const. amend. VI.

4. 28 U.S.C. § 1654 (1982) provides that "[i]n all courts of the United States the parties may plead and conduct their own causes personally." Although the excercise of this statutory right has caused significant distress to the federal courts, *see* Green v. McKaskle, 788 F.2d 1116, 1119-20 (5th Cir. 1986) (frivolous pro se litigation wastes judicial resources and impairs chance of success of meritorious claims); Urban v. United Nations, 768 F.2d 1497, 1499-1500 (D.C. Cir. 1985) (same); *In re* Martin-Trigona, 737 F.2d 1254, 1259 (2d Cir. 1984), *cert. denied*, 106 S. Ct. 807 (1986) (pro se litigant abusing legal system to harass defendants); Johnson v. Baskerville, 568 F. Supp 853, 855 (E.D. Va. 1983) (frivolous pro se litigation burdens court system), the right is enforced strictly. *See* Schilling v. Walworth County Park & Planning, Comm'n, 805 F.2d 272, 276 (7th Cir. 1986) (failure to obtain counsel may not be held against pro se litigant); Traguth v.

Pro se litigants, as well as those represented by counsel, are entitled to meaningful access to the courts.[5] Sufficient access to the courts, a right protected by the due process clause of the fourteenth amendment[6] and the first amendment,[7] guarantees to all persons use of the judicial process to redress alleged grievances.[8] At the same time, the complex requirements of the summary judgment rule[9] may frustrate the pro se litigant's access to the trial court.[10] When presented with a motion for summary judgment,[11] many pro se litigants are unaware of their obligation to submit a reply affidavit.[12] Consequently, summary judgment is entered fre-

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Zuck, 710 F.2d 90, 93 (2d Cir. 1983) (requirement that pro se litigant answer complaint through counsel held to violate statutory right); O'Reilly v. New York Times Co., 692 F.2d 863, 867 (2d Cir. 1982) (right to appear pro se valuable right not to be dishonored by courts). Consequently, pro se claims—largely prisoner civil rights suits—comprise a large percentage of the federal courts' caseload. *See* Zeigler & Hermann, *The Invisible Litigant: An Inside View of the Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. Rev. 157, 159-60 (1972).

5. *See* Bounds v. Smith, 430 U.S. 817, 828 (1977); Wolff v. McDonnell, 418 U.S. 539, 579 (1974); Ross v. Moffitt, 417 U.S. 600, 612-15 (1974) ; Johnson v. Avery, 393 U.S. 483, 485 (1969); Rudolph v. Locke, 594 F.2d 1076, 1078 (5th Cir. 1979). Although access to the courts includes at least the opportunity to file a complaint, *see Wolff*, 418 U.S. at 576; Bonner v. City of Prichard, 661 F.2d 1206, 1212 (11th Cir. 1981); Hatfield v. Bailleaux, 290 F.2d 632, 637 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961), it is not unrestricted. *See Bounds*, 430 U.S. at 823; *Wolff*, 418 U.S. at 578-79. For a discussion of what the right has been construed to require, see *infra* notes 41-54 and accompanying text.

6. *See Wolff*, 418 U.S. at 579-80; Corpus v. Estelle, 409 F. Supp. 1090, 1097 (S.D. Tex. 1975), *aff'd*, 542 F.2d 573 (5th Cir. 1976); Potuto, *The Right of Prisoner Access: Does* Bounds *Have Bounds?*, 53 Ind. L.J. 207, 215-19 (1977-78); Note, *Prisoners' Rights—Failure to Provide Adequate Law Libraries Denies Inmates' Right of Access to the Courts*, 26 U. Kan. L. Rev. 636, 643-44 (1978).

7. *See* Cruz v. Beto, 405 U.S. 319, 321 (1972) (right to petition Government for redress of grievances); NAACP v. Button, 371 U.S. 415, 428-29 (1963)(same).

8. *See* Bounds v. Smith, 430 U.S. 817, 825 (1977); Wolff v. McDonnell, 418 U.S. 539, 579 (1974); Johnson v. Avery, 393 U.S. 483, 488 (1969).

9. Fed. R. Civ. P. 56.

10. *See* Jacobsen v. Filler, 790 F.2d 1362, 1364-66 (9th Cir. 1986); Lewis v. Faulkner, 689 F.2d 100, 102 (7th Cir. 1982); Madyun v. Thompson, 657 F.2d 868, 876-77 (7th Cir. 1981).

11. *See* Fed. R. Civ. P. 56(e).

12. *See* Jacobsen v. Filler, 790 F.2d 1362, 1368 (9th Cir. 1986) (Reinhardt, J., dissenting) (laymen unable to appreciate procedural obligations); Ross v. Franzen, 777 F.2d 1216, 1219 (7th Cir. 1985) ("it is not realistic to impute to [a pro se litigant] withoutlegal background the awareness [of the consequences] of failing to respond . . . to a motion for summary judgment"); Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983) (district court erred in allowing forfeiture of pro se litigant's claim caused by litigant's lack of legal skills); Parisie v. Greer, 705 F.2d 882, 898 (7th Cir.) (Swygert, J.) (advocating duty on trial court to enlighten pro se litigants of procedural requirements when litigant is in state "of natural confusion"), *cert. denied*, 464 U.S. 918 (1983); Hooks v. Wainwright, 536 F. Supp. 1330, 1345 (M.D. Fla. 1982) (low level of most pro se litigants' education precludes assumption they can discern procedural obligations), *rev'd on other grounds*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 107 S. Ct. 313 (1986). The Prisoner Civil Rights Committee adds that "it must also be realized that prisoners proceeding *pro se* cannot be expected to know, understand, and follow the rules as required of attorneys. Therefore, it is important for the magistrate or judge to acquaint the prisoner with the relevant rules . . . ." Prisoner Civil Rights Committee, Federal Judicial Center, Recommended Proce-

quently against pro se litigants before they are able to present their claim adequately in the trial court.[13]

In holding that a criminal defendant who knowingly and intelligently waives his right to assistance of counsel may appear pro se, the Supreme Court has warned prospective pro se litigants that they will be accorded neither special treatment nor leniency.[14] Despite the Supreme Court's admonition in the criminal context, courts have tolerated informalities from civil pro se litigants.[15] Several courts of appeals recognize that a pro se litigant is entitled to notice of the consequences of failure to submit proper materials in response to a motion for summary judgment.[16] Other courts expressly reject the contention that pro se status confers incidental rights upon a litigant and hold that pro se litigants must com-

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dures for Handling Prisoner Civil Rights Cases in the Federal Courts 64 (1980) [hereinafter by year, e.g., 1980 Aldisert Report]; *accord* Zeigler & Hermann, *supra* note 4, at 181-82. *But see* Twyman v. Crisp, 584 F.2d 352, 357 (10th Cir. 1978) (noting exceptional quality of pro se litigant's response to motion for summary judgment); Dillbeck v. Duckworth, 585 F. Supp. 1074, 1076 n.1 (N.D. Ind. 1984) (complimenting pro se litigant's traverse).

13. *See, e.g.*, Jacobsen v. Filler, 790 F.2d 1362, 1366-67 (9th Cir. 1986); Hudson v. Hardy, 412 F.2d 1091, 1093 & n.1 (D.C. Cir. 1968).

14. *See* McKaskle v. Wiggins, 465 U.S. 168, 182-83 (1984); Faretta v. California, 422 U.S. 806, 835 n.46 (1975); Burgs v. Sissel, 745 F.2d 526, 528 (8th Cir. 1984); Dozier v. Ford Motor Co., 702 F.2d 1189, 1194 (D.C. Cir. 1983); Lecates v. Justice of the Peace Court, 637 F.2d 898, 908 (3rd Cir. 1980); United States v. Pinkey, 548 F.2d 305, 311 (10th Cir. 1977); Mazique v. Mazique, 356 F.2d 801, 805 (D.C. Cir.), *cert. denied*, 384 U.S. 981 (1966); Larkin v. United Ass'n of Journeymen, 338 F.2d 335, 336 (1st Cir. 1964) (per curiam), *cert. denied*, 380 U.S. 975 (1965); Murphy v. Citizens Bank of Clovis, 244 F.2d 511, 512 n.1 (10th Cir. 1957); Barnes v. United States, 241 F.2d 252, 253-55 (9th Cir. 1956). The *Faretta* admonition was premised on the presence of a criminal defendant who had knowingly and intelligently waived his right to assistance of counsel. *See Faretta v. California*, 422 U.S. 806, 834-35 (1975). It is this element of waiver that justifies the Court's refusal to assist the pro se litigant. Because there is no right to counsel in civil cases, *see* Maclin v. Freake, 650 F.2d 885, 886 (7th Cir. 1981); *see also* 28 U.S.C. § 1915(d) (1982) (court may request attorney to assist indigent litigant), this element of waiver is absent in civil cases. Courts declining to inform pro se litigants of procedural requirements because of their "choice" to appear pro se, *see, e.g.*, Jacobsen v. Filler, 790 F.2d 1362, 1364 & n.4 (9th Cir. 1986); Dozier v. Ford Motor Co., 702 F.2d 1189, 1194 (D.C. Cir. 1983); Birl v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981), thus demonstrate a misplaced reliance on criminal pro se precedent.

15. *See* Cel-A-Pak v. California Agric. Labor Relations Bd., 680 F.2d 664, 667 (9th Cir. 1982), *cert. denied*, 459 U.S. 1071 (1982); Alley v. Dodge Hotel, 501 F.2d 880, 883 (D.C. Cir. 1974), *cert. denied*, 431 U.S. 958 (1977).

16. *See, e.g.*, Moore v. Florida, 703 F.2d 516, 520-21 (11th Cir. 1983); Lewis v. Faulkner, 689 F.2d 100, 101-02 (7th Cir. 1982); Ham v. Smith, 653 F.2d 628, 630-31 (D.C. Cir. 1981) (per curiam); Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam); *cf.* Borzeka v. Heckler, 739 F.2d 444, 447-48 (9th Cir. 1984) (failure to meet personal service requirement does not mandate dismissal of pro se complaint); Garaux v. Pulley, 739 F.2d 437, 439-40 (9th Cir. 1984) (requiring explicit notice to pro se prisoner of court's intent to treat motion to dismiss as one for summary judgment); Mitchell v. Inman, 682 F.2d 886, 887 (11th Cir. 1982) (local court rule requiring timely response to motion to dismiss may not be used to dismiss pro se complaint where pro se litigant is not apprised of rule); Phillips v. United States Bd. of Parole, 352 F.2d 711, 714 (D.C. Cir. 1965) (per curiam) (limited opportunity of pro se prisoner to obtain documentary evidence precludes strict application of Rule 56).

ply with all applicable rules without any assistance from the judiciary.[17] One court provides notification of the requirements of the summary judgment rule only to prisoner pro se litigants.[18] In light of the confusion in the courts, a need exists for a uniform rule to promote consistent procedural fairness to pro se litigants.[19]

Part I of this Note discusses the summary judgment rule[20] and the difficulties it presents to all pro se litigants. Part II argues that judicial notification of the requirements of the summary judgment rule is a necessary element of the right of access to the courts, is a logical extension of courts' liberal treatment of pro se pleadings, is consistent with the judge's role in the adversary system, and furthers the public's interest in a full hearing on public law issues. Part III argues that the equal protection clause mandates that this procedural protection be extended to all pro se litigants and that courts that limit the protection to prisoner pro se litigants misapprehend the circumstances of most instances of self-representation.

I. THE SUMMARY JUDGMENT RULE AND PRO SE LITIGANTS

A motion for summary judgment is granted in the federal courts only when the pleadings and evidentiary materials submitted convince the court that no genuine issue of material fact exists entitling the movant to

17. *See, e.g.*, Jacobsen v. Filler, 790 F.2d 1362, 1365 n.7 (9th Cir. 1986); Birl v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981); United States v. Fowler, 605 F.2d 181, 183 (5th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); United States v. Pinkey, 548 F.2d 305, 311 (10th Cir. 1977); Larkin v. United Ass'n of Journeymen, 338 F.2d 335, 336 (1st Cir. 1964), *cert. denied*, 380 U.S. 975 (1965).

18. *See* Jacobsen v. Filler, 790 F.2d 1362, 1364 (9th Cir. 1986).

19. This Note addresses the treatment of pro se litigants in the federal courts. A similar problem exists in the state courts. *Compare* Mmoe v. Commonwealth, 473 N.E.2d 169, 172 (Mass. 1985) (pro se litigants held to less stringent standards than attorneys); Tyler v. Harper, 670 S.W.2d 14, 16 (Mo. App. 1984) (same), *cert. denied*, 469 U.S. 983 (1985); Blair v. Maynard, 324 S.E.2d 391, 396 (W. Va. 1984) (same) *with In re* Marriage of Snyder, 701 P.2d 153, 155 (Colo. App. 1985) (pro se litigants held to same standards as attorneys); Ronay v. Ronay, 369 N.W.2d 12, 14 (Minn. App. 1985) (same).

20. Disposition of a case by summary judgment represents a final adjudication on the merits. *See* J. Friedenthal, M. Kane & A. Miller, Civil Procedure § 9.1, at 434-35 (1985). It thus is crucial that pro se litigants be apprised of their obligations under the rule to facilitate "an opportunity to present every factual and legal argument available." Finn v. Gunter, 722 F.2d 711, 713 (11th Cir. 1984). Providing notice of the requirements of the summary judgment rule, however, will not afford adequate access to the courts in every case, *see* Curry v. Brown, 440 F.2d 259, 262 n.8 (D.C. Cir. 1971); Hudson v. Hardy, 412 F.2d 1091, 1095 (D.C. Cir. 1968), but it should be a constitutional minimum. *But see* Hatfield v. Bailleaux, 290 F.2d 632, 637 (9th Cir.) (opportunity to serve and file complaint satisfies right of access), *cert. denied*, 368 U.S. 862 (1961). For an excellent discussion of two circuits' treatment of pro se litigants who fail to file timely notices of appeal under Federal Rule of Appellate Procedure 4, see Note, *Pro Se Appeals in the Fifth Circuit: The Gradual Demise of the Notice Exception to Federal Rule of Appellate Procedure 4(a) and an Argument for Its Resurrection*, 4 Rev. of Litigation 71 (1983) [hereinafter *Fifth Circuit*] and Note, *Filing Period Extensions for* Pro Se *Litigants in Civil Appeals*, 42 Wash. & Lee L. Rev. 470 (1985).

judgment as a matter of law.[21] The party moving for summary judgment has the burden of establishing the absence of an issue of material fact,[22] and must give adequate notice of the motion to the opponent.[23]

A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)[24] is a request to the court to review the sufficiency of a claim solely on the pleadings.[25] Because a complaint usually can be amended, a motion to dismiss for failure to state a claim is not interchangeable with a motion for summary judgment.[26] A relation between the two rules, however, arises from the language of Rule 12(b). When a motion to dismiss is supported by matters outside the pleadings, the motion is transformed into a motion for summary judgment,[27] with the attendant notice requirements of a summary judgment motion.[28]

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21. *See* Jensen v. Klecker, 648 F.2d 1179, 1182 (8th Cir. 1981); Cubbage v. Averett, 626 F.2d 1307, 1308 (5th Cir. 1980) (per curiam); Keiser v. Coliseum Properties, Inc., 614 F.2d 406, 410 (5th Cir. 1980); Jones v. Halekulani Hotel Inc., 557 F.2d 1308, 1310 (9th Cir. 1977); Reiver v. Murdoch & Walsh, P.A., 625 F. Supp. 998, 1003 (D. Del. 1985); Fed. R. Civ. P. 56 (c).

22. *See* Cedillo v. International Assoc. of Bridge & Structural Iron Workers, 603 F.2d 7, 10 (7th Cir. 1979); C. Wright, Law of Federal Courts § 99, at 668 (4th ed. 1983).

23. *See* J. Friedenthal, M. Kane & A. Miller, *supra* note 20, § 9.2, at 436.

24. *See* Fed. R. Civ. P. 12(b)(6).

25. *See* 5 C. Wright & A. Miller, Federal Practice and Procedure § 1356, at 592 (1969).

26. A complaint sought to be dismissed under Rule 12(b)(6) usually may be amended, *see* Foman v. Davis, 371 U.S. 178, 182 (1962); Griggs v. Hinds Junior College, 563 F.2d 179, 179-80 (5th Cir. 1977); Fed R. Civ. P. 15(d); 2A J. Moore & J. Lucas, Moore's Federal Practice ¶12.07[2.-5], at 12-72 (2d ed. 1985), so that a complaint will not be dismissed for failure to state a claim unless it is certain that the "plaintiff can prove no set of facts in support of his claim." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); , *accord* Cruz v. Beto, 405 U.S. 319, 322 (1972). A grant of summary judgment, however, is a final adjudication on the merits. *See* J. Friedenthal, M. Kane & A. Miller, *supra* note 20, § 9.1, at 434-35.

27. *See* Fed. R. Civ. P. 12(b).

28. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim . . . matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. 12(b); *see also* C. Wright, *supra* note 22, § 66, at 433. "Reasonable opportunity provided" has been construed to require the court to inform all parties of the transformation. *See* Sims v. Mercy Hospital of Monroe, 451 F.2d 171, 173 (6th Cir. 1971) (per curiam); Dale v. Hahn, 440 F.2d 633, 638 (2d Cir. 1971).

Federal Rule of Civil Procedure 56(c) mandates a hearing on a summary judgment motion and at least ten days notice of that hearing. *See* Fed. R. Civ. P. 56(c). A majority of the courts strictly enforce the notice provision, even when the motion for summary judgment derives from a motion to dismiss supplemented by materials outside the pleadings. *See, e.g.*, Herron v. Beck, 693 F.2d 125, 126-27 (11th Cir. 1982); Hickey v. Arkla Indus. Inc., 615 F.2d 239, 240 (5th Cir. 1980) (per curiam); Winfrey v. Brewer, 570 F.2d 761, 764 (8th Cir. 1978); Plante v. Shivar, 540 F.2d 1233, 1235 (4th Cir. 1976) (per curiam); Adams v. Campbell County School Dist., 483 F.2d 1351, 1352-53 (10th Cir. 1973); *see also* Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1533 (9th Cir.) (notice adequate for summary judgment requires that litigant be fairly apprised of review beyond pleadings); *cert. denied*, 106 S. Ct. 85 (1985). Several circuits, however, have

Federal Rule of Civil Procedure 56(e) provides that when a motion for summary judgment is supported by affidavits or other evidentiary materials, the opponent *"must"* respond with affidavits in opposition or evidentiary materials of his own.[29] The opponent may not rely on his pleading to oppose the motion.[30] This rule applies with equal force to pro se litigants.[31] Strict application of Rule 56 without the court's advising of the Rule's requirements, however, usually imposes an insuperable hardship on the pro se litigant.[32] When failure to inform the pro se litigant results in entry of judgment against him, several appellate courts require reversal.[33]

A rule mandating that judges inform pro se litigants of their obligations under Rule 56(e) is necessitated by a layman's inability to discern his obligations from reading the rule.[34] Some courts requiring federal judges to advise pro se litigants of their obligations under Rule 56(e) derive the mandate from the Federal Rules of Civil Procedure.[35] This practice, however, has been rejected entirely by other courts.[36] Therefore,

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restricted strict compliance with the ten day notice rule in favor of a harmless error approach. *See, e.g.*, Ikerd v. Lapworth, 435 F.2d 197, 203 (7th Cir. 1970); Oppenheimer v. Morton Hotel Corp., 324 F.2d 766, 767-68 (6th Cir. 1963) (per curiam). The hearing contemplated in Rule 56(c) does not have to be an oral hearing, *see* Griffith v. Wainwright, 772 F.2d 822, 825 (11th Cir.1985); Moore v. Florida, 703 F.2d 516, 519 (11th Cir. 1983), as most pro se litigants mistakenly believe. *See* Jacobsen v. Filler, 790 F.2d 1362, 1368-69 (9th Cir. 1986) (Reinhardt, J., dissenting). The court need only take the motion under advisement and the movant need only inform the opponent of the same. *See Griffith*, 772 F.2d at 825; Barker v. Norman, 651 F.2d 1107, 1119 (5th Cir. 1981).

29. In order to overrule a line of Third Circuit cases that permitted allegations in the pleadings always to be adduced to establish an issue of material fact, *see* Fed. R. Civ. P. 56(e) Advisory Committee's Notes, 1963 Amendment, the Rule was amended in 1963 to require that the nonmoving party establish by affidavits a triable issue of fact when the motion is supported by supplementary materials. *See* First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289 (1968); Fed R. Civ. P. 56(e); C. Wright, *supra* note 22, § 99, at 667.

30. *See* Jacobsen v. Filler, 790 F.2d 1362, 1366, n.11 (9th Cir. 1986); Hudson v. Hardy, 412 F.2d 1091, 1094 (D.C. Cir. 1968); *see also* Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2552 (1986) (nonmoving party must respond only when movant offers proof of absence of material fact).

31. *See* McKaskle v. Wiggins, 465 U.S. 168, 184 (1984); Faretta v. California, 422 U.S. 806, 835 n.46 (1975); United States v. Merrill, 746 F.2d 458, 465 (9th Cir. 1984), *cert. denied*, 469 U.S. 1165 (1985).

32. *See* Jacobsen v. Filler, 790 F.2d 1362, 1368-69 (9th Cir. 1986) (Reinhardt, J., dissenting); Ross v. Franzen, 777 F.2d 1216, 1219 (7th Cir. 1985); Curry v. Brown, 440 F.2d 259, 261 (D.C. Cir. 1971).

33. *See, e.g.*, Ross v. Franzen, 777 F.2d 1216, 1219-20 (7th Cir. 1985); Moore v. Florida, 703 F.2d 516, 520-21 (11th Cir. 1983); Ham v. Smith, 653 F.2d 628, 630-31 (D.C. Cir. 1981) (per curiam); Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam).

34. *See Ross*, 777 F.2d at 1219; Lewis v. Faulkner, 689 F.2d 100, 102 (7th Cir. 1982); Zeigler & Hermann, *supra* note 4, at 202. *But see* Jacobsen v. Filler, 790 F.2d 1362, 1366-67 (9th Cir. 1986) (pro se litigant expected to recognize summary judgment obligations without assistance from court).

35. *See, e.g.*, *Ross*, 777 F.2d at 1219 ("a gloss on the federal rules"); *Lewis*, 689 F.2d at 101 ("fair inference from the rules").

36. *See, e.g.*, *Jacobsen*, 790 F.2d at 1365-67; Dozier v. Ford Motor Co, 702 F.2d 1189,

there is a need to create a legal framework for the imposition of such a duty on federal judges. Such a framework can be premised on the constitutional right of access to the courts and the liberality traditionally accorded pro se pleadings.

II. THE RIGHT OF ACCESS, THE ADVERSARY SYSTEM AND JUDICIAL NOTIFICATION OF SUMMARY JUDGMENT OBLIGATIONS

Although advising pro se litigants of procedural obligations facilitates a fair hearing on the litigant's grievances, courts requiring judicial notification of the requirements of the summary judgment rule have not espoused any single rationale. Some courts adopt unwritten approaches and encourage flexibility to effectuate this pre-trial procedural safeguarding of pro se claims.[37] Other courts, without any detailed analysis, note that dismissal of pro se complaints absent a meaningful opportunity to be heard is inconsistent with due process.[38] Although ultimately the adequacy of a pro se litigant's access to the courts can be determined only on a case by case basis,[39] judicial advising of procedural requirements to pro se litigants provides an unburdensome method of alleviating forfeitures of claims before an adequate hearing.[40]

1194 (D.C. Cir 1983); Birl v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981); United States v. Pinkey, 548 F.2d 305, 311 (10th Cir. 1977).

37. *See* Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983) ("Implicit in the right to self-representation is an obligation . . . to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights . . . ."); Comment, *State Prisoners, Federal Courts, and Playing by the Rules: An Analysis of the Aldisert Committee's* Recommended Procedures for Handling Prisoner Civil Rights Cases, 5 U. of Puget Sound L. Rev. 131, 134 (courts frequently utilize local rules and unwritten practices to ensure meaningful consideration of pro se claims).

38. *See* Bonner v. City of Prichard, 661 F.2d 1206, 1212 (11th Cir. 1981); Madyun v. Thompson, 657 F.2d 868, 877-78 (7th Cir. 1981); Mitchum v. Purvis, 650 F.2d 647, 648 (5th Cir. 1981). Two courts specifically raised a due process issue only to avoid the "thorny question" of inconsistency of failing to notify with due process. *See* Lewis v. Faulkner, 689 F.2d 100, 101-02 (7th Cir. 1982); Camps v. C & P Tel. Co., 692 F.2d 120, 124 (D.C. Cir. 1981). *See also* Ross v. Franzen, 777 F.2d 1216, 1219 (7th Cir. 1985) (suggesting pro se litigant is deprived of opportunity to be heard when trial court declines to advise him of summary judgment obligations). One commentator has submitted that no judicial effort is too great if it tends toward just resolution of all pro se claims. *See* Flannery & Robbins, *The Misunderstood* Pro Se *Litigant: More than a Pawn in the Game*, 41 Bklyn. L. Rev. 769, 772 (1975). Another commentator noted that judges are permitted to react impromptu to promote adequate access to the courts at the pre-trial stage. *See* Turk, *Access to the Federal Courts by State Prisoners in Civil Rights Actions*, 64 Va. L. Rev. 1349, 1353 (1978).

39. *See* Caruth v. Pinkney, 683 F.2d 1044, 1050 (7th Cir. 1982), *cert. denied*, 459 U.S. 1214 (1983).

40. *See* Averhart v. Arrendondo, 773 F.2d 919, 920 (7th Cir. 1985).

A. *Right Of Access*

Meaningful access to the courts is a fundamental constitutional right.[41] Derived from the first amendment[42] and the due process clause of the fourteenth amendment,[43] the right protects a litigant's interest in using the judicial process to attain redress of grievances.[44] For pro se litigants, the right guarantees all the means necessary to ensure an adequate hearing on all alleged grievances.[45]

The early cases construing the right of access involved impermissible obstruction of access to the courts.[46] A series of later cases, however, culminating in *Bounds v. Smith*,[47] imposed an affirmative obligation on

41. *See* Bounds v. Smith, 430 U.S. 817, 828 (1977); Johnson v. Avery, 393 U.S. 483, 485 (1969).

42. *See* NAACP v. Button, 371 U.S. 415, 428-29 (1963); Harrison v. Springdale Water & Sewer Comm'n, 780 F.2d 1422, 1427-28 (8th Cir. 1986); Wilson v. Thompson, 593 F.2d 1375, 1387 (5th Cir. 1979).

43. *See* Wolff v. McDonnell, 418 U.S. 539, 579 (1974); Ryland v. Shapiro, 708 F.2d 967, 971-72 (5th Cir. 1983).

44. *See* Bounds v. Smith, 430 U.S. 817, 825 (1977); *Wolff*, 418 U.S. at 579; Johnson v. Avery, 393 U.S. 483, 485 (1969).

45. *See* Gilmore v. Lynch, 319 F. Supp. 105, 110 (N.D. Cal. 1970) (per curiam), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam).

46. The importance of the right of access has long been recognized by the Supreme Court. *See, e.g.*, Chambers v. Baltimore & Ohio R.R., 207 U.S. 142, 148 (1907). In the prisoner context, however, this recognition emerged much more gradually. *Ex parte* Hull, 312 U.S. 546, (1941) generally is considered the first case to recognize a right of access to the courts for prisoners. *See* Potuto, *supra* note 6, at 207; Note, *A Federal Litigation Program: For Students, Inmates and the Legal Profession*, 4 Nova L.J. 377, 386 (1980); Comment, *An Overview of Prisoners' Rights: Part I,Access to the Courts Under Section 1983*, 14 St. Mary's L.J. 957, 961 (1983). Before *Hull*, courts generally believed that it was not within their province to ensure that prison administrative policies did not obstruct the prisoner's path to the courthouse. *See, e.g.*, Banning v. Looney, 213 F.2d 771, 771 (10th Cir. 1954) (per curiam) ("Courts are without power to supervise prison administration. . . . No authorities are needed to support [this] statement"); Wright v. United States, 172 F.2d 310, 311 (9th Cir. 1949) ("[t]he court has no power to interfere with the conduct of the prison or its discipline"); Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 798 (1871) ("[the prisoner] is for the time being a slave, in a condition of penal servitude to the State, and is subject to such laws and regulations as the State may choose to prescribe"). *But see* Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) (per curiam) ("A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."). *See generally* Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. Pa. L. Rev. 985, 986 (1962) (discussing the attempts courts have made to reach middle ground between these two positions). This *laissez faire* approach to state regulation was put to rest by the Supreme Court in *Ex parte* Hull, 312 U.S. 546 (1941). The *Hull* Court ruled that a state may not require that a legal investigator from a parole board review a state prisoner's petition for habeas corpus before filing. *See id.* at 549. Johnson v. Avery, 393 U.S. 483 (1969), was the next landmark right of access case. Recognizing that prisoners' right of access to the courts is fundamental, *see id.* at 485, the Court held that unless a state provides a reasonable alternative, it may not prevent inmates from procuring assistance of prison writ-writers to pursue habeas corpus relief. *See id.* at 490. Both *Hull* and *Johnson* stand for the proposition that a state may not impede a pro se prisoner's access to the courts to pursue habeas corpus relief. *See Johnson*, 393 U.S. at 485; *Hull*, 312 U.S. at 549; *see also* Potuto, *supra* note 6, at 209.

47. 430 U.S. 817 (1977).

the state to assist pro se litigants in certain circumstances.[48] In *Bounds*, the Supreme Court held that the right of access requires states to assist prisoners in filing legal papers in all cases.[49] The Court decided that this could be effectuated only by providing prisoners with either an adequate law library or adequate assistance from persons trained in the law.[50]

48. In Gilmore v. Lynch, 319 F.Supp. 105 (N.D. Cal. 1970) (per curiam), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam), the scope of the right of access was broadened significantly. The *Gilmore* court ruled that a state has an affirmative obligation to provide prisoners seeking habeas corpus relief with either a law library or legal services to satisfy the right of access. *See id.* at 110-12. Although this holding is notable for shifting the states' burden from a negative one to an affirmative one, *see* Potuto, *supra* note 6, at 210, neither the district court nor the Supreme Court suggested the constitutional basis for this obligation. *See Younger*, 404 U.S. at 15; *Gilmore*, 319 F. Supp. at 109. The district court considered this new obligation to be constitutionally mandated, but did not furnish the constitutional source. *See Gilmore*, at 112.

In Wolff v. McDonnell, 418 U.S. 539 (1974), the Court extended the right of access beyond habeas corpus cases to actions brought under § 1983, *see id.* at 579-80, and asserted that the constitutional basis of the right is the due process clause of the fourteenth amendment. *See id.* at 579. "[N]o person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Id.* The Court concluded that safeguarding the ability to file a complaint satisfied the right. *See id.* at 576.

49. *See* Bounds v. Smith, 430 U.S. 817, 824-25 (1977).

50. *See id.* at 828. Unlike the *Wolff* Court, the *Bounds* Court did not specify the constitutional basis of the right of access. The *Bounds* Court simply stated that its decisions over the last 35 years recognized the right and then traced the right's development over those years. *See id.* at 821-23. Chief Justice Burger noted the majority's omission of a constitutional source. *See id.* at 833 (Burger, C.J., dissenting). Justice Rehnquist challenged the right's constitutional derivation. *See id.* at 837-39 (Rehnquist, J., dissenting).

Most circuit court cases construing *Bounds* have focused on the adequacy of the law libraries provided to prisoners who appear pro se. *See, e.g.*, Tyler v. Black, 811 F.2d 424, 429 (8th Cir. 1987); United States v. Chatman, 584 F.2d 1358, 1360 (4th Cir. 1978). Reasonable prison regulations limiting the time, *see, e.g.*, Twyman v. Crisp, 584 F.2d 352, 358 (10th Cir. 1978) (two hours a week of library time satisfies the right); Nadeau v. Helgemoe, 561 F.2d 411, 418 (1st Cir. 1977) (one hour a week insufficient), place, *see, e.g.*, Frazier v. Ward, 426 F. Supp. 1354, 1370-72 (N.D.N.Y. 1977) (dangerous prisoner's right of access satisfied by permission to check out two books every other night rather than research in library), and manner, *see, e.g.*, Caldwell v. Miller, 790 F.2d 589, 606 (7th Cir. 1986) (denial of access to prison's main law library does not offend right of access), in which prisoners may conduct legal research comport with the right. *See generally* Cepulonis v. Fair, 732 F.2d 1, 3-5 (1st Cir. 1984) (delineating minimum requirements for adequate law library); Spates v. Manson, 644 F.2d 80, 82-84 (2d Cir. 1981) (example of a prison law library found to satisfy *Bounds*).

If the state chooses to satisfy its *Bounds* obligations by providing legal assistance from persons trained in the law, it need only offer counsel to a prisoner. *See* United States v. Wilson, 690 F.2d 1267, 1272 (9th Cir. 1982), *cert. denied*, 464 U.S. 867 (1983); Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978), *cert denied*, 442 U.S. 911 (1979). *But see Wilson*, 690 F.2d at 1278 (Fletcher, J., dissenting) (counsel appointed to represent pro se litigant inconsistent with self-representation "and hence cannot afford a pro se litigant meaningful access."). If the offer for legal assistance is declined, there is no right to a law library. *See Wilson*, 690 F.2d at 1271; *Spates*, 644 F.2d at 84-85; United States v. Chatman, 584 F.2d 1358, 1360 (4th Cir. 1978). It is undisputed that provision of counsel with whom there is adequate contact satisfies the *Bounds* standard of individuals trained in the law. *See, e.g.*, United States v. West, 557 F.2d 151, 153 (8th Cir. 1977) (opportunity to interview winesses by telephone and availability of attorney to obtain legal materials satisfies right of access); Novak v. Beto, 453 F.2d 661, 664 (5th Cir. 1971) (services of two

Although *Bounds* is the latest and broadest expansion of the right of access, it does not represent the outer limits of the right. For all litigants—pro se prisoners, pro se non-prisoners, and those litigants represented by counsel—the scope of the right of access is indeterminate.[51] The *Bounds* Court stressed that the central issue in establishing what the right of access requires is to determine what is necessary to make access to the courts "adequate, effective, and meaningful."[52] Thus, although *Bounds* only applies to prisoner pro se litigants, it indicates that ensuring a fair hearing sometimes requires affirmative state action.[53] The *Bounds* Court concluded that the difficulties attendant to pro se representation warrant affirmative state assistance.[54]

Pro se litigants labor under the disadvantage of being unable to read procedural rules effectively.[55] Most pro se litigants think that a lawsuit proceeds neatly from complaint to answer to trial.[56] Thus when served with a motion for summary judgment supported by affidavits or other supplementary materials, pro se plaintiffs assume that they can contest the defendant's assertions at oral argument.[57] Several courts recognize that service of a motion for summary judgment does not adequately advise a pro se litigant of the duty to submit affidavits or other evidentiary materials in opposition to the motion because the requirement is not explicitly stated in Rule 56(e).[58] Although courts assume that attorneys are

attorneys inadequate for prison with 12,000 inmates), *cert. denied*, 409 U.S. 968 (1972). There is some dispute among the circuits, however, whether assistance from nonattorneys satisfies the right. *Compare* United States v. Blue Thunder, 604 F.2d 550, 556-57 (8th Cir.) (assistance from law students satisfies the right), *cert. denied*, 444 U.S. 902 (1979); French v. Owens, 538 F. Supp. 910, 924 (S.D. Ind. 1982) (inmate clerks sufficient) *and* Graham v. Hutto, 437 F. Supp. 118, 119 (E.D. Va. 1977) (same), *aff'd*, 571 F.2d 575 (4th Cir. 1978) *with* Canterino v. Wilson, 546 F. Supp. 174, 216 (W.D. Ky. 1982) (only attorney assistance satisfies the right) *and* Gibson v. Jackson, 443 F. Supp. 239, 250 (M.D. Ga. 1977) (same), *vacated and remanded*, 578 F.2d 1045 (5th Cir. 1978), *cert. denied*, 439 U.S. 1119 (1979).

51. *See* Caruth v. Pinkney, 683 F.2d 1044, 1050 (7th Cir. 1982) (acknowledging that extent to which courts should be required to assist pro se litigants is unclear), *cert. denied*, 459 U.S. 1214 (1983); Potuto, *supra* note 6, at 216; Turk, *supra* note 38, at 1351; 1977 Aldisert Report, *supra* note 12, at 3 (need for a proper definition of the role of the federal judiciary in prisoner pro se cases).

52. *See* Bounds v. Smith, 430 U.S. 817, 822 (1977); *accord* Hoppins v. Wallace, 751 F.2d 1161, 1162 (11th Cir. 1985) (per curiam); Twyman v. Crisp, 584 F.2d 352, 359 (10th Cir. 1978) (per curiam). Any plan to facilitate the right of access must be viewed as a whole to determine if it passes constitutional muster. *See Bounds*, 430 U.S. at 832; *see also* United States v. Wilkins, 281 F.2d 707, 716 (2d Cir. 1960) (any procedure adopted by a court in handling pro se cases should be calculated to effectuate meaningful access); Johnson v. Hubbard, 698 F.2d 286, 289 (6th Cir. 1983) (no constitutional requirement that court pay pro se litigant's witness fees), *cert. denied*, 464 U.S. 917 (1983).

53. *See* Bounds v. Smith, 430 U.S. 817, 828 (1977).

54. *See id.* at 823-26.

55. *See* 1980 Aldisert Report, *supra* note 12, at 64 (pro se litigants not expected to understand rules).

56. *See* Jacobsen v. Filler, 790 F.2d 1362, 1368 (9th Cir. 1986) (Reinhardt, J., dissenting); Lewis v. Faulkner, 689 F.2d 100, 102 (7th Cir. 1982).

57. *See Jacobsen*, 790 F.2d at 1368; *Lewis*, 689 F.2d at 102.

58. *See* Moore v. Florida, 703 F.2d 516, 520-21 (11th Cir. 1983); Lewis v. Faulkner,

able to discern the proper construction of the Rule, it is unreasonable to presume that pro se litigants possess comparable skills of statutory or rule construction.[59] Even the most intelligent, educated layman is unlikely to be able to properly construe procedural rules.[60] Most pro se litigants are uneducated,[61] augmenting the futility of expecting them to recognize complex procedural requirements without at least notification of those requirements.

The necessity of judicial notification to pro se litigants is more apparent when the summary judgment motion is derived from a 12(b)(6) motion supported by matters outside the pleadings. The motion papers often do not indicate that the motion indeed is one for summary judgment.[62] Thus, the pro se litigant is doubly handicapped by his inability to discern his obligations under Rule 56 and by his misunderstanding of the consequences of the conversion of a motion to dismiss into one for summary judgment.

For the prisoner pro se litigant, the fact of confinement further restricts the pursuit of relief and in most cases pits the prisoner against a formidable opponent—the state.[63] Confinement often fatally hampers a prisoner's ability to gather evidence to support a case against his keeper.[64] Confinement also makes compliance with procedural deadlines

689 F.2d 100, 101-02 (7th Cir. 1982); Ham v. Smith, 653 F.2d 628, 630-31 (D.C. Cir. 1981) (per curiam); Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam). The majority in Jacobsen v. Filler, 790 F.2d 1362, 1364 (9th Cir. 1986), draws the opposite conlusion, claiming that Rule 56 is explicit. The force of this argument, however, is undercut by the presence of a local court rule that explicitly defined the requirements to oppose a motion for summary judgment. *See id.* Thus, *Jacobsen*'s rationale is inapposite in districts without such a local rule.

59. *See Jacobsen*, 790 F.2d at 1368 (Reinhardt, J., dissenting). The Civil Rights Committee adds that "it must also be realized that prisoners proceeding *pro se* cannot be expected to know, understand, and follow the rules as required of attorneys. Therefore, it is important for the magistrate or judge to acquaint the prisoner with the relevant rules . . . ." 1980 Aldisert Report, *supra* note 12, at 64.

60. *See* Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983) (district court erred in allowing forfeiture of pro se litigant's claim caused by litigant's lack of legal skills); Parisie v. Greer, 705 F.2d 882, 898 (7th Cir.) (Swygert, J., concurring) (advocating duty on trial court to enlighten pro se litigants of procedural requirements when litigant is in state of "natural confusion"), *cert. denied*, 464 U.S. 918 (1983); Flannery & Robbins, *supra* note 38, at 778 (most pro se litigants are unable to properly construe procedural rules).

61. *See* Hooks v. Wainwright, 536 F. Supp. 1330, 1337-38 (M.D. Fla 1982), *rev'd on other grounds*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 107 S. Ct. 313 (1986); Zeigler & Hermann, *supra* note 4, at 181-82.

62. *See* Lewis v. Faulkner, 689 F.2d 100, 101 (7th Cir. 1982).

63. *See* Preiser v. Rodriguez, 411 U.S. 475, 492 (1973) ("[w]hat for a private citizen would be a dispute with his landlord . . . becomes, for the prisoner, a dispute with the State"). This scenario is common as 95% of pro se litigation involves prisoners seeking a writ of habeas corpus or alleging civil rights violations. *See* Zeigler & Hermann, *supra* note 4, at 159-60.

64. *See* Wiggins v. Sargent, 753 F.2d 663, 668 (8th Cir. 1985); Phillips v. United States Bd. of Parole, 352 F.2d 711, 713 (D.C. Cir. 1965) (per curiam); *cf.* Johnson v. RAC Corp., 491 F.2d 510, 514 (4th Cir. 1974) (court's duty to inform nonmoving party of right to file affidavits heightened where nonmoving party has superior access to facts).

and obligations difficult because of the prisoner's limited ability to contact the proper authorities concerning the progress of his lawsuit.[65]

B. *Liberal Treatment of Pro Se Pleadings*

Pro se pleadings generally are held to less stringent standards than those applied to members of the Bar.[66] Pro se complaints should not be dismissed for failure to state a claim unless it is apparent that they are unsupportable in law or fact.[67] If the complaint misapprehends the claim appropriate to its grievance, the trial court must recharacterize the claim.[68] Similarly, pro se complaints cannot be construed inflexibly so as to require dismissal if the complaint fails to request precise appropriate relief.[69]

Advising pro se litigants of summary judgment obligations is a logical extension of the liberality accorded pro se litigants in the federal courts.[70] The diminished requirements of pro se filings are an effort to afford a layman an opportunity to proceed in a legal system designed for individuals trained in the law.[71] This benefit, by its terms, seems to extend only to the pleading stage.[72] Such a limitation, however, thwarts the pro se litigant's access to the courts.[73] The murky, often conclusory allegations

65. *See* Note, *Fifth Circuit*, *supra* note 20, at 74.

66. For example, in reviewing a pro se litigant's complaint for dismissal, the court must read the complaint less stringently than it would an attorney's. *See* Hughes v. Rowe, 449 U.S. 5, 9-10 (1980) (per curiam); Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam); Madyun v. Thompson, 657 F.2d 868, 876 (7th Cir. 1981). Pro se prisoners are not prejudiced by the filing of handwritten materials. *See* Twyman v. Crisp, 584 F.2d 352, 358 (10th Cir. 1978) (per curiam); Tarlton v. Henderson, 467 F.2d 200, 201 (5th Cir. 1972) (per curiam).

67. *See* Brandon v. Dist. of Columbia Bd. of Parole, 734 F.2d 56, 62 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1127 (1985); Williams v. Kullman, 722 F.2d 1048, 1050 (2d Cir. 1983); Bayron v. Trudeau, 702 F.2d 43, 45 (2d Cir. 1983).

68. *See* Madison v. Tahash, 359 F.2d 60, 61 (8th Cir. 1966) (construing application for appointment of counsel as one for a certificate of probable cause); United States *ex rel.* Johnson v. Chairman, N.Y. State Bd. of Parole, 363 F. Supp. 416, 417 (E.D.N.Y. 1973) (application for order mandating parole board to state reasons for denying parole may be treated as habeas corpus petition), *aff'd*, 500 F.2d 925 (2d Cir.), *vacated and remanded*, 419 U.S. 1015 (1974). *But see* Mundy v. Winston, 457 F. Supp. 678, 680 (E.D. Va. 1978) (pro se litigant always must have ultimate decision to elect what claim he will pursue).

69. *See* DeWitt v. Pail, 366 F.2d 682, 684-85 (9th Cir. 1966); Downing v. New Mexico Supreme Court, 339 F.2d 435, 436 (10th Cir. 1964) (per curiam); Holsey v. Bass, 519 F. Supp. 395, 402-03 (D. Md. 1981), *aff'd*, 712 F.2d 70 (4th Cir. 1983). *See generally* Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam) (pro se pleadings held to less stringent standards than those applied to attorneys).

70. This appears to be the view of several courts that require notification of summary judgment obligations to pro se litigants. *See* Moore v. Florida, 703 F.2d 516, 520-21 (11th Cir. 1983); Lewis v. Faulkner, 689 F.2d 100, 101-02 (7th Cir. 1982).

71. *See* Hughes v. Rowe, 449 U.S. 5, 9 (1980) (per curiam); Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam).

72. *See Haines*, 404 U.S. at 520-21.

73. *See* Ross v. Franzen, 777 F.2d 1216, 1219 (7th Cir. 1985) (analogizing *Haines* ruling to diminished summary judgment rigor for pro se litigants). Although a pro se litigant should not obtain any advantages in a lawsuit from his self-representation, he should not incur any disabilities from his lack of legal training that easily could be

of a pro se complaint are inappropriate bases for disposition of a case on the merits.[74] Affidavits and other evidentiary materials usually are needed to furnish sufficient facts to decide a pro se litigant's case.[75] Without guidance regarding summary judgment motion practice, the underlying rationale for liberal treatment of pro se pleadings is thwarted. To liberalize pleading requirements for pro se litigants to ensure entry into the courthouse and then demand rigorous compliance with pretrial procedural rules fosters a tenuous access to the courts.[76]

In response to the difficulty pro se litigants have in recognizing summary judgment obligations, some courts have expanded the liberality traditionally demonstrated toward pro se pleadings[77] into a general attitude of judicial paternalism toward pro se litigants.[78] Several courts, however,

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averted by judicial solicitude for his claim. *See* Camps v. C & P Tel. Co., 692 F.2d 120, 124 (D.C. Cir. 1981); *cf.* Gordon v. Leeke, 574 F.2d 1147, 1152-53 (4th Cir.) ("[a] district court is not required to act as an advocate for a pro se litigant; but . . . should afford him a *reasonable opportunity* to determine the correct person . . . against whom the claim is asserted, [and] *advise him how to proceed*. . . .") (emphasis added), *cert. denied*, 439 U.S. 970 (1978).

74. *See* Estelle v. Gamble, 429 U.S. 97, 112 (1976) (Stevens, J., dissenting); 1980 Aldisert Report, *supra* note 12, at 12, 46. *But see* Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 617 n.46 (1979) (noting that most pro se complaints Turner encountered were typed, legible, and concise).

75. *See* Estelle v. Gamble, 429 U.S. 97, 112 (1976) (Stevens, J., dissenting).

76. *See* Zeigler & Hermann, *supra* note 4, at 202. This rationale seems to underlie the Fourth Circuit cases requiring that judges apprise pro se litigants of summary judgment obligations. In Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975) (per curiam), the Fourth Circuit Court of Appeals established the broad rule that "a pro se plaintiff" must be apprised of his obligations under the summary judgment rule before summary judgment may be entered against him. *See id.* at 310. The court cites Hudson v. Hardy, 412 F.2d 1091 (D.C. Cir. 1968), as a precursor of its decision, yet does not refer to that case's reliance on the handicaps imposed on a litigant by detention in formulating a similar rule. *See Roseboro*, 528 F.2d at 310. Instead, the *Roseboro* court justifies its procedural leniency on the ground that a litigant is unrepresented. *See id.*; *accord Jacobsen*, 790 F.2d at 1368 (Reinhardt, J., dissenting); *see also* Wright v. Collins, 766 F.2d 841, 846 (4th Cir. 1985) (to protect pro se litigant from forfeiture of rights because of ignorance); Davis v. Zahradnick, 600 F.2d 458, 460 (4th Cir. 1979) (same).

77. *See, e.g.*, Hughes v. Rowe, 449 U.S. 5, 9-10 (1980) (per curiam); Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam).

78. Phillips v. United States Bd. of Parole, 352 F.2d 711 (D.C. Cir. 1965) (per curiam), was the first case to accord less stringent procedural requirements on pro se litigants. In *Phillips*, the district court entered summary judgment against an inmate seeking release from detention when he failed to respond to a motion for summary judgment supported by affidavits. *See id.* at 713. The court of appeals reversed, holding that although the government had complied with Rule 56, application of that rule "with strict literalness" was inappropriate. *See id.* at 714. The difficulties in obtaining counsel and gathering evidence resulting from incarceration convinced the court that the requirements of Rule 56 should not be applied rigidly to litigants so burdened. *See id.* at 713-14. Precisely how they should be applied was not articulated by the same court until the seminal case of Hudson v. Hardy, 412 F.2d 1091 (D.C. Cir. 1968).

In *Hudson*, a prisoner alleging violations of constitutional rights appeared pro se when his request for appointment of counsel was denied. *See id.* at 1093. In vacating an order of summary judgment against the inmate, the court held that a prisoner who had not been apprised of his obligation to submit counter-affidavits, in response to a motion for summary judgment supported by affidavits had not been afforded an opportunity to com-

ply with Rule 56(e). *See id.* at 1094. This rationale has been echoed by most courts requiring judges to inform pro se litigants of obligations under Rule 56. *See* Maggette v. Dalsheim, 709 F.2d 800, 802 (2d Cir. 1983); Moore v. Florida, 703 F.2d 516, 520 (11th Cir. 1983); Madyun v. Thompson, 657 F.2d 868, 877 (7th Cir. 1981); Ham v. Smith, 653 F.2d 628, 630 (D.C. Cir. 1981) (per curiam); Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam). The notice provided by the court must be sufficiently clear to impress the consequences of failure to submit counter-affidavits or other responsive materials. *See Hudson*, 412 F.2d at 1094; *accord* Lewis v. Faulkner, 689 F.2d 100, 102 (7th Cir. 1982); Davis v. Zahradnick, 600 F.2d 458, 460 (4th Cir. 1979); *Roseboro*, 528 F.2d at 310.

Most of the cases following *Hudson* seemed to base their decisions on an attempt to redress the significant disparity in legal abilities existing between represented and unrepresented litigants. *See, e.g.*, Garaux v. Pulley, 739 F.2d 437, 439 (9th Cir. 1984) (because pro se litigants are unable to comprehend procedural requirements, court must ensure this ignorance does not cause loss of claim); Moore v. Florida, 703 F.2d 516, 520 (11th Cir. 1983) (inmates' limited access to legal materials increases inequality with represented litigants); Ham v. Smith, 653 F.2d 628, 630 (D.C. Cir. 1981) (per curiam) (recently released prisoner likely to labor under same handicaps as inmate in complying with summary judgment rule); Davis v. Zahradnick, 600 F.2d 458, 460 (4th Cir. 1979) (pro se plaintiffs require safeguarding from summary disposition claims); Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam) (same). An emerging body of caselaw from the Fourth and Seventh Circuits, however, suggests that this extension of the right of access is a legitimate inference from the reduced pleading requirements for pro se litigants espoused in Haines v. Kerner, 404 U.S. 519, 520-21 (1972),. In Craig v. Garrison, 549 F.2d 306 (4th Cir. 1977), *rev'd on other grounds*, Shah v. Hutto, 722 F.2d 1167 (4th Cir. 1983), the Fourth Circuit cited *Haines* for the broad proposition "that a pro se petitioner untrained in the law is not to be held to the same standards as a member of the bar." *See id.* at 307; *cf.* Borzeka v. Heckler, 739 F.2d 444, 447-48 n.2 (9th Cir. 1984) (noting leniency towards pro se litigants in jurisdictional matters); Canty v. City of Richmond, 383 F. Supp. 1396, 1399-1400 (E.D. Va. 1974) (stating heightened solicitude required for pro se plaintiffs to ensure allegations of constitutional deprivations are not defeated because of inartful presentation), *aff'd sub nom.* Canty v. Brown, 526 F.2d 587 (4th Cir. 1975), *cert. denied*, 423 U.S. 1062 (1976). This is unmistakably an extension of the Court's ruling in *Haines*. The *Craig* court, however, makes no reference to its broadening of *Haines*.

In Muhammad v. Rowe, 638 F.2d 693 (7th Cir. 1981), the Seventh Circuit reversed an order of summary judgment against a pro se civil rights litigant who had not been informed of his obligation to file affidavits to oppose the motion. *See id.* at 695-96. The court united two sentences from *Haines* to conclude that a pro se "plaintiff 'is entitled to an opportunity to offer proof' unless 'it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." ' " *See id.* at 695 (quoting Haines v. Kerner, 404 U.S. 519, 520-21 1972, quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

One year later, in Lewis v. Faulkner, 689 F.2d 100 (7th Cir. 1982), the court promulgated a general rule that prisoner pro se litigants are entitled to be informed of their obligations under Rule 56(e), whether the motion is labelled as such or is derived from a motion to dismiss. *See id.* at 102. Although the Lewis court did not cite *Haines*, it spoke in terms of an "*opportunity*" to offer proof in response to a motion for summary judgment. *See id.* (emphasis in original). The court posited that given a layman's inadequate legal acumen, mere time to respond does not constitute an opportunity to oppose the motion. *See id.* Only notice of the motion's requirements can afford the layman an opportunity to respond. *See id.* In so holding, the Lewis court imported the Rule 12(b) notion of "reasonable opportunity" into what constitutes sufficient notice of the requirements of Rule 56. *See id.* at 101-02. The court reasoned that the mandate of notice required by Rule 12(b) when a motion to dismiss is converted into one for summary judgment commands trial courts to inform pro se litigants of summary judgment obligations. *See id.* at 101. Fed. R. Civ. P. 12(b) provides in pertinent part: "all parties shall

refuse to adopt such a flexible approach,[79] finding it incongruous with the judge's role in the adversary process.[80] An analysis of the adversary system and the judge's role therein, however, reveals that this concern is unjustified.

C. *The Adversary System*

American courts operate under the adversary system of dispute resolution.[81] Under this system, justice is presumed to be attained through an

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be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." The notice provision raises an inference that before summary judgment can be entered against a pro se prisoner, explicit notice of the requirements of responding to such a motion must be given. *See Lewis*, 689 F.2d at 101-02.

In Ross v. Franzen, 777 F.2d 1216 (7th Cir. 1985), the Seventh Circuit reaffirmed its reliance on *Haines* in fashioning this "prophylactic rule" for pro se prisoners. *See id.* at 1219; *cf.* Schilling v. Walworth County Park & Planning Comm'n, 805 F.2d 272, 277 n.9 (7th Cir. 1986) (pro se litigants entitled to "fair and meaningful consideration on the merits"). The *Ross* court strengthened the notice requirement's bond to *Haines'* rule of liberal construction of pro se filings by invoking its reasoning to address the inappropriateness of requiring procedural stringency of pro se litigants. *See Ross*, 777 F.2d at 1219. Like the Fourth Circuit in *Craig*, the Seventh Circuit made no attempt in *Ross* or *Muhammad* to justify its significant extension of the *Haines* ruling.

79. A number of courts expressly hold that pro se status confers no incidental rights on a litigant and that he must comply with all applicable rules without any assistance from the judiciary. *See, e.g.*, Dozier v. Ford Motor Co., 702 F.2d 1189, 1194 (D.C. Cir. 1983); Birl v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981); United States v. Fowler, 605 F.2d 181, 183 (5th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980); United States v. Pinkey, 548 F.2d 305, 311 (10th Cir. 1977); Mazique v. Mazique, 356 F.2d 801, 805 (D.C. Cir.), *cert. denied*, 384 U. S. 981 (1966); Larkin v. United Ass'n of Journeymen, 338 F.2d 335, 336 (1st Cir), *cert. denied*, 380 U.S. 975 (1965); Springer v. Best, 264 F.2d 24, 26 (9th Cir. 1959); *see also* Wilborn v. Escalderon, 789 F.2d 1328, 1332 (9th Cir. 1986) (judge may not become an advocate for pro se litigant); Barnes v. United States, 241 F.2d 252, 253-55 (9th Cir. 1956) (pro se litigant's misapprehensions of pleadings, pre-trial conferences, jurisdiction, and legal ethics not to be dispelled by court). The Supreme Court has issued the broad admonition that pro se litigants must comply with all procedural rules without any assistance from the judiciary. *See* McKaskle v. Wiggins, 465 U.S. 168, 183-84 (1984); Faretta v. California, 422 U.S. 806, 835 n.46 (1975). At least one commentator has suggested that judicial assistance of pro se litigants in the procedural area does not comport with the purposes of the Federal Rules of Civil Procedure. *See Comment, supra* note 37, at 158.

80. *See, e.g.*, Jacobsen v. Filler, 790 F.2d 1362, 1365-66 (9th Cir. 1986). The curious aspect of the *Jacobsen* court's rationale is that the court undercuts its own essential premise. The essence of the court's objection to judicial advisement of summary judgment obligations to pro se litigants is the incompatibiltiy of the practice with the judge's role as impartial arbiter in the adversary system. *See id.*; *see also* Committee on the Federal Courts, Recommendations for the Improvement of the Administration of *Pro Se* Civil Rights Litigation in the Federal District Courts in the Southern and Eastern Districts of New York, 30 Rec. A.B. City N.Y. 107, 110 (1975) [hereinafter Committee] (arguing that nature of judge's role in adversary system precludes judicial assistance of pro se litigants); Robbins & Herman, Pro Se *Litigation: Litigating Without Counsel*: Faretta *Or For Worse*, 42 Bklyn L. Rev. 629, 681 (1976) (same). Analytically, this objection must apply with equal force regardless of the pro se litigant's freedom or economic status. Yet, the court unceremoniously concedes that the practice is permissible when the pro se litigant is a prisoner. *See Jacobsen*, 790 F.2d at 1364. Nevertheless, *Jacobsen* rasises the broader issue of whether judges should assist any pro se litigants.

81. *See* Morrissey v. Brewer, 408 U.S. 471, 490 (1972). *See generally* Miller, *The*

equal contest of contrary interests.[82] The system essentially allows litigants to argue their dispute before a neutral observer whose duty is to decide the outcome.[83] The traditional roles in the adversary system are familiar to all. The lawyers are expected to frame the issues and propel the contest while the judge passively receives the information presented to him for his evaluation.[84]

In the area of judicial involvement in pro se litigation, as elsewhere, there is a line between a "legitimate advisory role" and "the improper role of an advocate."[85] Nevertheless, judicial paternalism for the pro se litigant in procedural areas is justified and necessary for several reasons.

The effective operation of the adversary system relies on the assumption that the parties to a lawsuit are approximately equal in their legal representation.[86] This rough balance, however, is entirely upset when one side appears pro se.[87] The pro se prisoner and the nonprisoner pro se litigant are at a serious disadvantage when seeking relief in the courts against represented parties.[88] These disadvantages underscore the necessity of assisting the pro se litigant in pursuing his claim through notification of summary judgment requirements as they arise.

Attorneys frequently subordinate truth and fairness to the quest for victory.[89] The ethical standards require zealous representation of the client,[90] but no obligation to seek the truth.[91] This duty of zealous representation has tainted the adversary system because attorneys employ strategies to impede the search for truth at trial.[92] For example, attorneys opposing pro se litigants often try to delay the case knowing of the limited patience and resources of pro se litigants.[93] By failing to notify the pro se litigant that a motion for summary judgment supported by

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Adversary System: Dinosaur or Phoenix?, 69 Minn L. Rev. 1 (1984) (discussing the viability of adversary system in modern litigation); Model Code of Professional Responsibility EC 7-19 to -39 (outlining duties attorneys have to adversary system).

82. *See* Lassiter v. Dep't of Social Servs., 452 U.S. 18, 28 (1981).

83. *See* M. Frankel, Partisan Justice 68 (1980); Rehnquist, *The Adversary Society*, 33 U. Miami L. Rev. 1, 2 (1978).

84. *See* M. Frankel, *supra* note 83, at 43.

85. *See* Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 1475 (1986); *accord* Burgs v. Sissel, 745 F.2d 526, 528 (8th Cir. 1984); Gordon v. Leeke, 574 F.2d 1147, 1153 (4th Cir.) (Hall, J., dissenting), *cert. denied*, 439 U.S. 970 (1978).

86. *See* Merritt v. Faulkner, 697 F.2d 761, 764 n.3 (7th Cir.), *cert. denied*, 464 U.S. 986 (1983). *But see id.*, at 771 (Posner, J., concurring in part and dissenting in part) (permitting litigants to hire superior counsel negates any expectations of approximate equality); Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. Miami L. Rev. 21, 23-24 (1978) (same).

87. *See* Bounds v. Smith, 430 U.S. 817, 826 (1977); *Merritt*, 697 F.2d at 764 n.3.

88. See *infra* notes 89-94, 148-49, & 182-85 and accompanying text.

89. *See* Frankel, *The Search for Truth: An Umpireal View*, 123 U. Penn. L. Rev. 1031, 1038-39 (1975).

90. *See* Model Code of Professional Responsibility Canon 7 (1978).

91. *See* Frankel, *supra* note 83, at 1038-39.

92. *See* M. Frankel, *supra* note 83, at 14-18, 26-34; Friendly, *supra* note 86, at 23-24.

93. *See* Zeigler & Hermann, *supra* note 4, at 181.

affidavits must be responded to, attorneys expedite the swift dismissal of many pro se suits.

The ascertainment of the truth is the fundamental purpose of any trial.[94] To further this goal, the trial judge has an obligation to inject certain matters into the trial that he believes crucial to the determination of the truth.[95] Judges also are afforded wide latitude in their conduct of a trial when their actions are geared towards ensuring a just result.[96] Even where a judge's alleged advocacy for one party constitutes error, it will not be reversed unless the other party is prejudiced.[97] In the exercise of this legitimate supervisory role, the courts allow judges to assume a far more active role in shaping lawsuits and influencing results than mere notification of procedural requirements.[98]

In the context of pro se litigation, some courts permit more substantial intrusions into the adversary process. For example, courts assist pro se

94. *See* Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966).

95. *See* Geders v. United States, 425 U.S. 80, 86-87 (1976) (judge must assert substantial control over trial procedures and witness testimony); United States v. Pinkey, 548 F.2d 305, 308 (10th Cir. 1977) (court's suggestion to prosecution concerning what need be elicited from expert witness not prejudicial); Ayash v. United States, 352 F.2d 1009, 1010 (10th Cir. 1965) (trial court may examine witnesses).

96. *See* Gardner v. United States, 283 F.2d 580, 581 (10th Cir. 1960) (trial court may disallow questions to witness even before objection is made by opponent).

97. *See Pinkney*, 548 F.2d at 310; Chase v. Crisp, 523 F.2d 595, 600 (10th Cir. 1975), *cert. denied*, 424 U.S. 947 (1976).

98. For example, a growing body of caselaw from the Third Circuit asserts that inherent judicial powers allow a court to grant a defense witness immunity in certain circumstances. *See, e.g.*, Government of V.I. v. Smith, 615 F.2d 964, 973-74 (3d Cir. 1980); United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979). The judiciary traditionally defers to prosecutorial discretion as to whom to immunize. *See* United States v. Nixon, 418 U.S. 683, 693 (1974); United States v. Herman, 589 F.2d 1191, 1203 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979). The federal immunity statute does not confer on federal courts the power to grant immunity to trial witnesses. *See* 18 U.S.C. §§ 6001-05 (1982); *see also* United States v. Bacheler, 611 F.2d 443, 449-50 (3d Cir. 1979); United States v. Housand, 550 F.2d 818, 824 (2d Cir.), *cert. denied*, 431 U.S. 970 (1977). Thus the compatibility of this practice with the traditional role of the judiciary in the adversary system is questionable. *See* Government of Virgin Islands v. Smith, 615 F.2d 964, 968 (3d Cir. 1980). The position the Third Circuit advances significantly alters the judge's role in an adversary proceeding and disregards an unequivocal congressional intent only to allow prosecutors to grant immunity. *See* 18 U.S.C. § 6003(b) (1982); H.R. Rep. No. 1549, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 4007, 4018 ("The court's role in granting the [immunity] order is merely to find the facts on which the order is predicated."). Federal judges are authorized to call witnesses they believe crucial to a fair adjudication of a controversy. *See* Fed. R. Evid. 614(a). They may also examine witnesses to clarify their testimony for themselves and for the jury. *See* Fed. R. Evid. 614(b); *see also* United States v. Cheatwood, 575 F.2d 821, 826 (10th Cir.), *cert. denied*, 439 U.S. 853 (1978). Finally, *sua sponte* dismissal of pro se complaints prior to service of process, and without notice to the pro se litigant, has been questioned as placing the judge in the role of defense counsel, yet is permissible in the adversary system. *See* Nash v. Black, 781 F.2d 665, 668 (8th Cir. 1986); Tingler v. Marshall, 716 F.2d 1109, 1111 (6th Cir. 1983); Franklin v. Oregon, 662 F.2d 1337, 1342 (9th Cir. 1981), *on remand*, 563 F. Supp. 1310 (D. Or. 1983), *aff'd in part and rev'd in part*, 745 F.2d 1221 (9th Cir. 1984); *see also* Holloway v. Gunnell, 685 F.2d 150, 152 n.2 (5th Cir. 1982) (defendant may want to reach the merits).

litigants in their presentation to the jury by reviewing the litigants' proposed questions to witnesses for admissibility problems so as to avoid interruptions from objecting counsel during trial.[99] Courts also articulate the appropriate legal theory on which a pro se litigant's claim should rest when the litigant misunderstands the nature of his claim.[100] Both practices are permissible judicial interventions on behalf of pro se litigants.[101]

The cases discussing allegations of judicial "advocacy" consistently express the concern that the judge's actions should not become a controlling influence on the jury.[102] Unlike reviewing proposed questions or articulating a legal theory, informing a pro se litigant of summary judgment obligations does not increase the litigant's chance of prevailing on the merits.[103] Rather, it merely ensures that the litigant will be heard on the merits. The jury remains completely unaware of the judge's actions.[104]

To ensure adequate access, the courts, in the first instance, may request that opposing counsel assume the responsibility of providing adequate notice to pro se litigants.[105] If, however, opposing counsel fails to comply with the court's request, the ultimate responsibility must rest with the judiciary.[106] Imposition of an obligation to notify pro se liti-

99. For example, in Miller v. Los Angeles County Bd. of Educ., 799 F.2d 486 (9th Cir. 1986), the trial court, in a pretrial order, required a nonprisoner pro se litigant to submit to the court and opposing counsel the questions he wished to ask witnesses at trial. *See id.* at 487. The trial judge then deleted objectionable questions from the list to enable the pro se litigant to present his case to the jury with a minimum of interruptions from objecting counsel. *See id.* at 488. *But cf.* United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975) (pro se litigant has no right to have judge examine witnesses for him).

100. *See* Myers v. United States, 636 F.2d 166, 168-69 (6th Cir. 1981); Watson v. Ault, 525 F.2d 886, 891, 896 (5th Cir. 1976).

101. *See supra* notes 99-100.

102. *See* Quercia v. United States, 289 U.S. 466, 472 (1933); Starr v. United States, 153 U.S. 614, 624-28 (1894); Ayash v. United States, 352 F.2d 1009, 1010 (10th Cir. 1965).

103. *See* Jacobsen v. Filler, 790 F.2d 1362, 1369-70 (9th Cir. 1986) (Reinhardt, J., dissenting); Griffith v. Wainwright, 772 F.2d 822, 825 (11th Cir. 1985).

104. The practice of calling and examining witnesses, *see supra* note 98, approaches judicial advocacy far more than apprising pro se litigants of their summary judgment obligations. By assuming an active role at *trial*, the judge inevitably will be perceived by the jury as sponsoring one cause. Informing pro se litigants of summary judgment obligations merely helps to ensure that the litigant is heard at trial. The crucial issue in reviewing a judge's decision to question or call a witness is whether the judge maintained an appearance of impartiality at trial. *See* United States v. Cornfeld, 563 F.2d 967, 971 (9th Cir. 1977), *cert. denied*, 435 U.S. 922 (1978). When a judge informs a pro se litigant of a procedural obligation, the issue of impartiality does not even arise. The informing judge is not advocating the pro se litigant's claim before the jury. *See* Jacobsen v. Filler, 790 F.2d 1362, 1369 (9th Cir. 1986) (Reinhardt, J., dissenting). The notification of the obligation is not mentioned at trial. The judge only is furthering the goal of eliciting the truth, *see* Geders v. United States, 425 U.S. 80, 86-87 (1976), by bringing the pro se litigant up to the approximate level of a represented litigant. *See Jacobsen*, 790 F.2d at 1369 (Reinhardt, J., dissenting); *see also* Camps v. C & P Tel. Co., 692 F.2d 120, 124 (D.C. Cir. 1981) (pro se litigants "should fare no worse" than those represented by errant lawyers).

105. *See* Lewis v. Faulkner, 689 F.2d 100, 102 (7th Cir. 1982).

106. *See id.* at 103.

gants of the requirements of opposing a motion for summary judgment will not burden the federal judiciary's workload.[107]

D. *The Public's Interest in Providing an Adequate Hearing on Significant Constitutional Issues*

Requiring trial judges to advise pro se litigants of summary judgment obligations advances the public's interest in according public law issues a complete hearing.[108] The Supreme Court consistently has emphasized the significant role that habeas corpus petitions and civil rights claims play in advancing fundamental constitutional rights.[109] Prisoner civil rights claims in particular often present novel questions of constitutional import and provide the judiciary with an opportunity to address these questions.[110]

Pro se litigants have made notable contributions to the basic structure of American law. A pro se petition filed by Clarence Gideon resulted in the landmark holding of *Gideon v. Wainwright*.[111] Pro se litigants have initiated suits that resulted in landmark holdings in tax,[112] civil rights,[113]

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107. *See* Averhart v. Arrendondo, 773 F.2d 919, 920 (7th Cir. 1985).

108. The salient feature of public law litigation is that it seeks more than the resolution of a dispute between two private parties. *See* Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1284 (1976). It involves issues of constitutional and statutory significance. *See id.* The relief in public law litigation is not only compensation for past harm, but a decree that will direct future behavior. *See id.* The Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573 (1972), concluded that "it is of the greatest importance to society as well as to the individual that each meritorious [prisoner] petition be identified and dealt with." *Id.* at 587.

109. *See, e.g.*, Bounds v. Smith, 430 U.S. 817, 827 (1977); Wolff v. McDonnell, 418 U.S. 539, 579 (1974); Johnson v. Avery, 393 U.S. 483, 485 (1969); Brown v. Allen, 344 U.S. 443, 502 (Frankfurter, J., concurring) (1953); *see also* Ballard v. Spradley, 557 F.2d 476, 481 (5th Cir. 1977) (importance to society and the courts of encouraging citizens to aid in prosecuting violators of the law). *But see* United States v. Wilkins, 281 F.2d 707, 715 (2d Cir. 1960) (large number of habeas corpus petitions are frivolous).

110. *See* Bounds v. Smith, 430 U.S. 817, 827 (1977); Wolff v. McDonnell, 418 U.S. 539, 579 (1974); Johnson v. Avery, 393 U.S. 483, 485 (1969); 1980 Aldisert Report, *supra* note 12, at 11; Turk, *supra* note 38, at 1349.

111. 372 U.S. 335 (1963) (right to counsel in all felony cases).

112. *See, e.g.*, Jackson v. Statler Found., 496 F.2d 623, 625-26 (2d Cir. 1974) (non-prisoner pro se raised the issue of first impression whether a tax exemption to a private foundation may constitute state action). This case was termed "the most significant contest determined by the Second Circuit in the 1973-74 term." Flannery & Robbins, *supra* note 38, at 774.

113. *See, e.g.*, Sostre v. McGinnis, 442 F.2d 178, 181-82 (2d Cir. 1971) (pro se prisoner challenged a one year imposition of solitary confinement and seizure of all his personal belongings), *cert. denied*, 404 U.S. 1049 (1972). Judge Kaufman characterized *Sostre* as presenting "important questions concerning the federal constitutional rights of state prisoners which neither Supreme Court precedent nor our own past decisions have answered." *See id.* at 181. *See also* Procunier v. Martinez, 416 U.S. 396, 418 (1974) (broad censorship of prisoner's mail violates the first amendment); Johnson v. Avery, 393 U.S. 483, 490 (1969) (right to assistance of jailhouse lawyers to pursue habeas corpus relief); Jackson v. Bishop, 404 F.2d 571, 572-75 (8th Cir. 1968) (requiring reforms at the Tucker Prison Farm in Arkansas).

and habeas corpus law.[114] Pro se litigants also have substantially affected the conduct of prison management.[115]

Although the significance of the civil rights claims brought by pro se litigants has prompted commentators to urge appointment of counsel in every section 1983 case,[116] the courts have not embraced this suggestion.[117] Nevertheless, the importance of these suits should preclude the courts from relying solely on opposing counsel to provide adequate notice to the pro se litigant of the requirements of the summary judgment rule.[118] It rests with the judiciary to ensure that pro se claims of constitutional significance be afforded an adequate hearing.

III. PRISONER AND NONPRISONER PRO SE LITIGANTS ARE ENTITLED TO JUDICIAL NOTIFICATION OF SUMMARY JUDGMENT OBLIGATIONS

Because the vast majority of pro se litigants are prisoners challenging the fact, duration, or conditions of their confinement,[119] it is not surprising that most of the cases mandating judicial notification of summary judgment obligations involved prisoners.[120] It is apparent, however, that few courts distinguish between the ordinary civil pro se litigant and his prisoner counterpart.[121] Courts either do not perceive any material difference between the two types of litigants, or fail to attach any significance to the ambiguity of their imprecise labels.[122]

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114. *See, e.g.*, United States *ex rel.* Johnson v. Chairman of New York State Bd. of Parole, 500 F.2d 925, 926 (2d Cir. 1974) (pro se prisoner's habeas corpus petition raised the issue of whether a parole board must include a statement of its reasons when it denies a prisoner parole).

115. *See* 1980 Aldisert Report, *supra* note 12, at 11; Turner, *supra* note 74, at 639-40.

116. *See* Turner, *supra* note 74, at 624-25; Comment, *supra* note 37, at 155.

117. *See, e.g.*, Wiggins v. Sargent, 753 F.2d 663, 668 (8th Cir. 1985) (reluctantly appointing counsel).

118. *See* M. Frankel, *supra* note 83, at 23-26 (attorneys' pursuit of victory for client precludes any expectation of a duty to ensure a fair result on their part).

119. *See* Zeigler & Hermann, *supra* note 4, at 159-60.

120. *See, e.g.*, Griffith v. Wainwright, 772 F.2d 822, 823 (11th Cir. 1986); Garaux v. Pulley, 739 F.2d 437, 437 (9th Cir. 1984); Moore v. Florida, 703 F.2d 516, 517 (11th Cir. 1983); Madyun v. Thompson, 657 F.2d 868, 870 (7th Cir. 1981); Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam); Hudson v. Hardy, 412 F.2d 1091, 1092 (D.C. Cir. 1968).

121. Most of the courts addressing a prisoner pro se litigant's right to procedural assistance indiscriminately referred in turn to "pro se litigants" and "prisoner pro se litigants." *See infra* notes 122 & 125 and accompanying text.

122. The incongruity of the caselaw in this area is no more evident than in the Seventh Circuit. The Seventh Circuit's caselaw expounding the pro se litigant's right to receive notice of the requirements of the summary judgment rule arose in the prisoner context. Nevertheless, the caselaw developing this right evinces an unawareness of possible distinctions between prisoner and nonprisoner pro se litigants. In Madyun v. Thompson, 657 F.2d 868 (7th Cir. 1981), the court noted "its desire to see that pro se plaintiffs have a meaningful opportunity to defend against summary judgment motions." *Id.* at 876. Two paragraphs later, the court held that procedural leniency is appropriate "where unrepresented and uninformed prisoners are involved." *Id.* at 877. In Lewis v. Faulkner, 689 F.2d 100 (7th Cir. 1982), the court increases the confusion by ruling consistently in pris-

One court, however, holds that nonprisoner pro se litigants are not entitled to notice of summary judgment obligations as prisoners are because nonprisoners voluntarily appear pro se.[123] Another court limits judicial notification of summary judgment obligations to prisoners and recently released prisoners,[124] basing their holding on the handicaps of detention.[125] These distinctions violate the equal protection clause of the fourteenth amendment and ignore the reality that the handicaps of pro se representation are shared by prisoners and nonprisoners alike.

A. *The Equal Protection Clause Requires Courts to Advise All Pro Se Litigants of Summary Judgment Obligations*

The equal protection clause of the fourteenth amendment does not explicitly apply to actions of the federal government.[126] Federal classifica-

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oner-oriented language while reasoning in terms of laymen. The *Lewis* court explicitly limited its holding to prisoner pro se civil rights litigation and stated that they left "for another day the possible extension of our new rule to other classes of *pro se* civil rights litigants . . . ." *See id.* at 102. Yet the court supports its ruling not on the handicaps detention imposes on a litigant, but on the inability of the "layman" to understand federal motion practice. *See id.*; *see also* Ross v. Franzen, 777 F.2d 1216, 1219-20 (7th Cir. 1985) (reversible error to enter summary judgment against prisoner pro se until litigant is notified of obligations under Rule 56). In Averhart v. Arrendondo, 773 F.2d 919 (7th Cir. 1985), without expressly extending the *Lewis* ruling to nonprisoner pro se litigants, the Seventh Circuit characterized its procedural benevolence as extended to "persons without legal knowledge or representation." *See id.* at 920. In reference to *Lewis*, the court characterizes that decision as applicable to "pro se litigants." *See id.* The court's disregard of the *Lewis* limitation on the class of pro se litigants to benefit from the notification requirement, *see* Lewis v. Faulkner, 689 F.2d 100, 102 (7th Cir. 1982), suggests that the Seventh Circuit now mandates district court advisement of summary judgment obligations to all pro se litigants.

123. *See* Jacobsen v. Filler, 790 F.2d 1362, 1364-65 (9th Cir. 1986).

124. *See* Ham v. Smith, 653 F.2d 628, 629-31 (D.C. Cir. 1981) (per curiam).

125. The District of Columbia Court of Appeals cases requiring procedural leniency toward pro se litigants in the summary judgment area emphasize the burdens of restricted movement as necessitating judicial assistance. In the 1960's and 1970's the court repeatedly stressed the handicaps that incarceration imposes on a pro se litigant. *See, e.g.*, Curry v. Brown, 440 F.2d 259, 262 n.8 (D.C. Cir. 1971); Hudson v. Hardy, 412 F.2d 1091, 1094-95 (D.C. Cir. 1968); Phillips v. United States Bd. of Parole, 352 F.2d 711, 713 (D.C. Cir. 1965) (per curiam). In the 1980's, however, the court appears to have extended its procedural protection to all pro se litigants. *See* Ham v. Smith, 653 F.2d 628, 629-30 (D.C. Cir. 1981) (per curiam) ("This court has recognized that district judges should accord special attention to pro se litigants faced with summary judgment motions."). The court maintains that the handicaps of detention necessitate judicial advisement of the summary judgment rule to prisoner pro se litigants. *See id.* at 630. The court asserts, however, that judges also must assist pro se litigants recently released from prison because they are likely to shoulder similar disadvantages as prisoners. *See id.* The handicap linking the prisoner pro se litigant to his nonprisoner counterpart would seem to be indigency. Although statistics are not available demonstrating why pro se litigants appear as such, it has been suggested that an inability to obtain counsel spawns most prisoner, *see* Merritt v. Faulkner, 697 F.2d 761, 769 (7th Cir.) (Cudahy, J., concurring), *cert. denied*, 464 U.S. 986 (1983), and nonprisoner, *see* Jacobsen v. Filler, 790 F.2d 1362, 1367-68 (9th Cir. 1986) (Reinhardt, J., dissenting) pro se appearances.

126. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *See* U. S. Const. amend. XIV, § 1.

tions, however, that would contravene the equal protection clause if they were state classifications, violate the due process clause of the fifth amendment.[127] Equal protection does not require absolute equality or precisely equal advantages:[128] it requires only that people who are similarly situated be treated similarly.[129] The equal protection clause applies to administrative[130] as well as legislative classifications.[131] Therefore, the classification of nonprisoner pro se litigants as nonbeneficiaries of summary judgment notification accorded prisoner pro se litigants is subject to equal protection analysis.

Under traditional equal protection analysis, unless the classification infringes on a fundamental right[132] or involves a suspect classification,[133] it need only be rationally related to a legitimate end.[134] If the classification does infringe a fundamental right or involve a suspect classification, it must be necessary to effectuate a compelling state interest.[135] It is well established that the right of access to the courts is fundamental.[136] Although the right is particularly crucial to prisoners,[137] the right is fun-

127. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975); Richardson v. Belcher, 404 U.S. 78, 81 (1971); Bolling v. Sharpe, 347 U.S. 497, 499 (1954). *See generally* Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. Rev. 540 (1977) (discussing the legitimacy of applying the mandates of equal protection to the federal government).

128. *See* Ross v. Moffitt, 417 U.S. 600, 612 (1974); Ruby v. Massey, 452 F. Supp. 361, 367 (D. Conn. 1978); J. Nowak, R. Rotunda & J. Young, Constitutional Law § 14.2, at 525 (3d ed. 1986).

129. *See* Trimble v. Gordon, 430 U.S. 762, 780 (Rehnquist, J., dissenting) (1977); Hagans v. Lavine, 415 U.S. 528, 538-39 (1974); Silva v. Vowell, 621 F.2d 640, 647 (5th Cir. 1980), *cert. denied*, 449 U.S. 1125 (1981).

130. *See, e.g.*, Buckley v. Coyle Pub. School Sys., 476 F.2d 92, 96 (10th Cir. 1973) (administrative policy of dismissal of school teachers at sixth month of pregnancy).

131. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 434 (1982); Jones v. Helms, 452 U.S. 412, 423-24 (1981); United States Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973).

132. A right is fundamental when the Constitution explicitly or implicitly guarantees the right. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). Various implicit fundamental rights have been acknowledged by the Supreme Court. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 338 (1972) (voting and interstate travel); Bullock v. Carter, 405 U.S. 134, 140-44 (1972) (right to vote); Shapiro v. Thompson, 394 U.S. 618, 630-31 (1969) (same); Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage); Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (right to use contraceptives).

133. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976) (race); Hernandez v. Texas, 347 U.S. 475, 478 (1954) (national origin).

134. *See* Williams v. Vermont, 472 U.S. 14, 22-23 (1985); Dandridge v. Williams, 397 U.S. 471, 485 (1970).

135. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973); Bullock v. Carter, 405 U.S. 134, 144 (1972).

136. *See* Bounds v. Smith, 430 U.S. 817, 828 (1977); Bonner v. City of Prichard, 661 F.2d 1206, 1212 (11th Cir. 1981); Cruz v. Hauck, 475 F.2d 475, 476 (5th Cir. 1973).

137. *See* Wolff v. McDonnell, 418 U.S. 539, 555 (1974); Johnson v. Avery, 393 U.S. 483, 485 (1969); Fay v. Noia, 372 U.S. 391, 402 (1963); *see also* Brown v. Allen, 344 U.S. 443, 502 (1953) (Frankfurter, J., concurring) ("lack of technical competence of prisoners should not strangle consideration of a valid constitutional claim that is bunglingly presented"); Griffith v. Wainwright, 772 F.2d 822, 825 (11th Cir. 1985) ("especial care . . . must be exercised when an action is brought alleging denial of basic constitutional liberties by an indigent prisoner lacking formal legal training"); Merritt v. Faulkner, 697

damental to all persons, whether incarcerated or free.[138] Thus, classifications impinging on the right must be closely related to the promotion of a compelling state interest.

1. The Interests

The judiciary has two possible interests in imposing restrictions on the right of access: fiscal objectives and administrative objectives.[139] When evaluating economic barriers to the right of access in civil cases, the courts are reluctant to impose the costs of litigation on the government.[140] The government's interest in preserving judicial funds, however, is not implicated by extending certain procedural assistance to all pro se litigants. Moreover, most pro se litigants already are accorded significant financial assistance from the judiciary.[141] Judicial notification involves no financial expenditures by the judiciary.[142] Finally, since most courts clearly acknowledge the right of prisoner pro se litigants to summary judgment notification,[143] and ninety-five percent of pro se litigants are prisoners,[144] it is absurd to contend that advising the remaining five percent of pro se litigants unduly drains government resources.

The administrative objectives to be furthered by limiting judicial notification of summary judgment obligations to prisoner pro se litigants similarly are incapable of rising to the level of a compelling interest.

F.2d 761, 763 (7th Cir.) ("when rights of a constitutional dimension are at stake, a poor person's access to the federal courts must not be turned into an exercise in futility"), *cert. denied*, 464 U.S. 986 (1983); United States *ex rel.* Marcial v. Fay, 247 F.2d 662, 669 (2d Cir. 1957) (en banc) "([w]e must not play fast and loose with basic constitutional rights in the interest of administrative efficiency"), *cert. denied*, 355 U.S. 915 (1958).

138. *See Wolff*, 418 U.S. at 579; Cruz v. Beto, 405 U.S. 319, 321 (1972); Johnson v. Anderson, 370 F. Supp. 1373, 1383 (D. Del. 1974).

139. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

140. *See, e.g.*, Ortwein v. Schwab, 410 U.S. 656, 660 (1973) (per curiam) (indigents have no right to waiver of $25 filing fee necessary for judicial review of administrative denial of welfare payments); United States v. Kras, 409 U.S. 434, 449 (1973) (indigent has no right to waiver of $50 filing fee in voluntary bankruptcy proceedings); Johnson v. Hubbard, 698 F.2d 286, 289 (6th Cir. 1983) (indigent has no right to have state pay witness fees). *But see* Boddie v. Connecticut, 401 U.S. 371, 382 (1971) (indigents entitled to waiver of filing fees in divorce actions).

141. Eighty-four percent of pro se litigants commence civil actions without prepayment of fees under 28 U.S.C. § 1915(a) (1982). *See* Zeigler & Hermann, *supra* note 4, at 187 n.112. *See generally* Note, *Aid for Indigent Litigants in the Federal Courts*, 58 Colum. L. Rev. 832 (1958) (discussing the value of permitting indigents to file suits without prepayment of fees); Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 Geo. L.J. 516 (1968) (same).

142. *See* Averhart v. Arrendondo, 773 F.2d 919, 920 (7th Cir. 1985). The notification may involve cost of postage when the judge or his clerks are not in direct contact with the pro se litigant. Postage expenditures of indigent pro se litigants, however, are already provided for by the government. *See* Bounds v. Smith, 430 U.S. 817, 824-25 (1977); King v. Atiyeh, No. 85-4174, slip op. at 5-6 (9th Cir. April 8, 1987).

143. *See, e.g.*, Jacobsen v. Filler, 790 F.2d 1362, 1364 (9th Cir. 1986); Moore v. Florida, 703 F.2d 516, 520 (11th Cir. 1983); Hudson v. Hardy, 412 F.2d 1091, 1094-95 (D.C. Cir. 1968).

144. *See* Zeigler & Hermann, *supra* note 4, at 159-60.

Nonprisoner pro se litigants comprise such a small part of all pro se litigation that many judges believe these cases do not present a burden on the judiciary at all.[145] The Court of Appeals for the Seventh Circuit, the circuit court that hears the most prisoner civil rights petitions,[146] recently noted that judicial notification of summary judgment obligations to pro se litigants "should alleviate an injustice, without adding to the workload of the . . . court[s]."[147] The exclusion of five percent of pro se litigants from the heightened procedural solicitude accorded prisoner pro se litigants bears little relation to the judiciary's administrative objective of lessening the workload of the courts. The rationale of courts that limit notification of the requirements of the summary judgment rule to prisoner pro se litigants are invalid given the circumstances attendant most pro se appearances.

B. *The Difficulties of Pro Se Representation Are Shared by Prisoners and Nonprisoners*

1. Most Pro Se Appearances Are Not Voluntary

Aware of the disparity in legal skills between attorneys and laymen, few individuals able to afford assistance of counsel choose to proceed pro se.[148] It is not suprising, then, that most pro se litigants represent themselves because of an economic inability to procure counsel.[149] The inability of a substantial portion of American society to gain access to attorney

145. *See* Committee, *supra* note 80, at 109.

146. *See* Annual Report of the Director of the Administrative Office of the United States Courts, Twelve Month Period Ended June 30, 1986, at 14. The Seventh Circuit entertained 73 prisoner civil rights appeals. The next highest was the Third Circuit with 41. *See id.*

147. *See* Averhart v. Arrendondo, 773 F.2d 919, 920 (7th Cir. 1985).

148. *See Jacobsen*, 790 F.2d at 1367-68 (Reinhardt, J., dissenting); Zeigler & Hermann, *supra* note 4, at 187 (almost all pro se litigants appear as such because of inability to afford counsel).

149. *See* Zeigler & Hermann, *supra* note 4, at 165. This economic disadvantage further hampers the pro se litigant's ability to comply with the affidavit requirement under Rule 56(e). Testimony crucial to presenting an issue of material fact often is unobtainable because the pro se litigant cannot afford to pay for a deposition before trial. *See* Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 56 Iowa L. Rev. 223, 233 (1970). Expenses of discovery are the primary costs of litigation after attorney fees. *See* Zeigler & Hermann, *supra* note 4, at 192. 28 U.S.C. § 1915(d) (1982), the federal *in forma pauperis* statute, does not provide discovery costs for pro se litigants. *See* Beard v. Stephens, 372 F.2d 685, 690 (5th Cir. 1967); Ebenhart v. Power, 309 F. Supp. 660, 661 (S.D.N.Y. 1969); *see also* United States v. Wilson, 690 F.2d 1267, 1271 (9th Cir. 1982) (right to appear pro se does not include right to research claims at state's expense), *cert. denied*, 464 U.S. 867 (1983). Thus, it is not suprising that only 6.5% of pro se plaintiffs attempt to obtain discovery. *See* Zeigler & Hermann, *supra* note 4, at 204. Even when aware of the responding affidavit requirement, the pro se litigant could become exasperated easily at his inability to gather facts supporting the affidavit and fail to respond. Merely informing a pro se litigant of his obligations under Rule 56(e), therefore, may not safeguard his claim sufficiently. *See* Hudson v. Hardy, 412 F.2d 1091, 1094-95 (D.C. Cir. 1968).

assistance has been deemed one of the glaring failures of our system,[150] straining the principle of equal justice under the law.[151] The causes of this problem are numerous.

Indigents have no constitutional or statutory right to counsel in a civil case,[152] and no such right in habeas corpus proceedings unless absence of counsel would render the proceeding fundamentally unfair.[153] The Federal Judicial Center has concluded that currently it is not feasible to provide counsel to indigents in civil rights cases.[154]

Furthermore, there is no mandate by the American Bar Association requiring attorneys to perform *pro bono* work.[155] The increase in billable hours expected by law firms from their attorneys has dampened the incentive of many attorneys to pursue *pro bono* work.[156] Thus, it is difficult for an indigent litigant to find an attorney willing to handle civil cases.[157]

Forceful economic arguments have been directed at this contention, asserting that a meritorious claim always will find an attorney.[158] Judge Posner asserts that rather than presume that counsel should be appointed in civil cases, courts should "subject the probable merit of [the] case to the test of the market."[159] This argument contends that a litigant who is unable to retain counsel on a contingent fee does not have a meritorious case.[160]

This argument is problematic, as pro se litigants face serious difficulties in retaining counsel, even on a contingent fee basis.[161] The vast ma-

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150. *See* M. Frankel, *supra* note 83, at 119-20.

151. *See id.* at 120.

152. *See* Ross v. Moffitt, 417 U.S. 600, 618 (1974); Hooks v. Wainwright, 775 F.2d 1433, 1437-38 (11th Cir. 1985), *cert. denied*, 107 S. Ct. 313 (1986); Wiggins v. Sargent, 753 F.2d 663, 668 (8th Cir. 1985); Storseth v. Spellman, 654 F.2d 1349, 1353 (9th Cir.1981); Watson v. Moss, 619 F.2d 775, 776 (8th Cir. 1980) (per curiam).

153. *See* Hatfield v. Bailleaux, 290 F.2d 632, 635 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961).

154. *See* 1980 Aldisert Report, *supra* note 12, at 69.

155. *See* Caruth v. Pinkney, 683 F.2d 1044, 1049 (7th Cir. 1982), *cert. denied*, 459 U.S. 1214 (1983).

156. *See* Adams, *Pro Bono Work: A Question of Time, Money*, Nat'l L.J., July 21, 1986 at 6, col. 1.

157. *See id.*

158. Merritt v. Faulkner, 697 F.2d 761, 769 (7th Cir.) (Posner, J., concurring in part and dissenting in part), *cert. denied*, 464 U.S. 986 (1983); *see also* Duniway, *The Poor Man in the Federal Courts*, 18 Stan. L. Rev. 1270, 1285 (1966).

159. *See Merritt*, 697 F.2d at 769 (Posner, J., concurring in part and dissenting in part).

160. *See id.* at 770; *accord* Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978), *cert. denied*, 442 U.S. 911 (1979); Elmore v. McCammon, 640 F. Supp. 905, 911 (S.D. Tex. 1986).

161. In Procup v. Strickland, 792 F.2d 1069 (11th Cir. 1986), the court vacated an injunction requiring that a pro se litigant bring a lawsuit only if assisted by counsel. *See id.* at 1071. The court found that this litigant could not retain counsel because of his reputation for meritless suits and attorneys' fear of appearing in his complaints. *See id.* Such attorney fear of sanction is perhaps unnecessary in § 1983 actions. *See* Hall v. Quillen, 631 F.2d 1154, 1156 (4th Cir. 1980) (court-appointed attorneys do not act under color of state law for § 1983 purposes), *cert. denied*, 454 U.S. 1141 (1982); Minns v. Paul,

jority of cases brought under section 1983 are dismissed prior to trial.[162] Thus, only a somewhat adventurous attorney would be willing to accept a prisoner's civil rights case on a contingent fee basis.[163] Moreover, even if an attorney believes he could obtain a contingent fee, it is unlikely that the award of damages will be sufficiently high to attract him.[164] Because there is no minimum amount in controversy in section 1983 cases,[165] an attractive award hardly is guaranteed in successful civil rights cases. Indeed, a recent two-year survey revealed that only a small percentage of civil rights plaintiffs over the last two years obtained damages or settlements.[166]

Pro se litigants unable to secure an attorney on a contingent fee basis

542 F.2d 899, 901 (4th Cir. 1976) (court-appointed attorneys acting within the scope of their duties possess absolute immunity from damage actions brought pursuant to § 1983), *cert. denied*, 429 U.S. 1102 (1977).

162. In 1979, 96.5% of prisoner § 1983 cases were dismissed prior to trial. *See* 1980 Aldisert Report, *supra* note 12, at 9-10. *See generally* D. Manville, Prisoners' Self-Help Litigation Manual 8 (2d ed. 1986) (warning prisoners of difficulty they are likely to have in obtaining counsel because of low rate of successful prisoner litigation).

163. An attorney seeking a contingent fee in a civil rights case would have to trust that he has found one of the claims in the 3.5% that either get to trial or are settled. *See supra* note 162 and accompanying text. The scarcity of successful civil rights suits is largely a result of the stringent standards courts have established to which such claims are held. For example, courts consistently have afforded wide latitude to prison officials in matters of prison administration. *See* Hewitt v. Helms, 459 U.S. 460, 474 (1983); Bell v. Wolfish, 441 U.S. 520, 547-48 (1979); Cruz v. Beto, 405 U.S. 319, 321 (1972); Wiggins v. Sargent, 753 F.2d 663, 668 (8th Cir. 1985). *But see* Madyun v. Franzen, 704 F.2d 954, 959 (7th Cir.) (courts will vigorously police prisoners' constitutional rights), *cert. denied*, 464 U.S. 996 (1983). For a good summary of the arguments advanced on behalf of judicial deference to prison administrative discretion, see Campbell v. Miller, 787 F.2d 217, 224-25 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 673 (1987). Further, the Supreme Court has narrowed significantly the availability of constitutionally-based claims. *See* Whitely v. Albers, 106 S. Ct. 1078, 1085 (1986) (no eighth amendment violation absent deliberate indifference to prisoner); Daniels v. Williams, 106 S. Ct. 662, 669 (1986) (negligent deprivation of property does not constitute a constitutional violation); Hudson v. Palmer, 468 U.S. 517, 525-26 (1984) (prisoners have no expectation of privacy); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (prison officials liable to prisoners under § 1983 only if their conduct violates clearly established rights); Allen v. McCurry, 449 U.S. 90, 103-04 (1980) (collateral estoppel applicable to § 1983 suit subsequent to unsuccessful habeas corpus claim); Procunier v. Navarette, 434 U.S. 555, 565 (1978) (prison officials' good faith belief in legality of their actions precludes § 1983 liability); Estelle v. Gamble, 429 U.S. 97, 105-06 (1976) (medical malpractice not actionable under § 1983).

164. *See* M. Frankel, *supra* note 83, at 115; *see also* Merritt v. Faulkner, 697 F.2d 761, 769 (7th Cir.) (Cudahy, J., concurring), *cert. denied*, 464 U.S. 986 (1983) (noting lack of economic incentives for lawyers to represent prisoners).

165. *See* 28 U.S.C. § 1343 (3), (4) (1982); *see also* Monroe v. Pape, 365 U.S. 167, 179-80 (1961); Stone v. City of Wichita Falls, 646 F.2d 1085, 1086 n.6 (5th Cir.), *cert. denied*, 454 U.S. 1082 (1981); Appling County v. Municipal Elec. Author. of Ga., 621 F.2d 1301, 1308 (5th Cir.), *cert. denied*, 449 U.S. 1015 (1980). This provision has been questioned because it provides a federal forum for *de minimis* deprivations. *See* Russell v. Bodner, 489 F.2d 280, 281-82 (3d Cir. 1973) (Adams, J., concurring) (confiscation of seven packs of cigarettes).

166. *See* Agins, *Jailhouse Lawyers*, Wall St. J., Sept. 24, 1986, at 1, col. 3. The survey revealed that inmates were awarded damages in only 87 cases and attained settlements in 161. *See id.* In that same period, over 37,500 petitions for damages were filed. *See id.*

probably are unable to afford attorney fees.[167] In civil cases, high discovery costs and legal fees render legal assistance beyond the financial reach of ninety percent of the nation.[168] Attorneys also are reluctant to represent poor clients because there is currently no way of guaranteeing compensation of a lawyer representing an indigent litigant.[169]

Courts have found it extremely difficult to attract counsel to serve without compensation. Aside from the obvious monetary reasons, attorneys believe they have nothing to gain and much to lose through possible malpractice actions.[170] Many court-appointed attorneys also believe that their close ties to the state preclude their rendering effective legal services to indigents suing the state or a state agent.[171] Further, there is some question whether an attorney is likely to render his best efforts for a nonpaying client.[172]

The Civil Rights Attorney's Fees Awards Act[173] permits appointed attorneys to apply for attorney's fees if they substantially prevail on the merits in section 1983 actions.[174] Judge Posner contends that this provision supplies adequate incentive to attorneys to seek out meritorious civil rights cases.[175] The soundness of this contention has been challenged on the ground that attorneys know that few civil rights plaintiffs prevail on the merits.[176] Indeed, the Federal Judicial Center reports that the Act has not had any discernible impact in persuading attorneys to consider civil rights cases.[177]

2. The Handicaps of Detention Are Not a Proper Basis for Limiting Notification to Prisoners

Although incarceration hampers prisoner pro se litigants' ability to pursue claims, emphasizing the handicaps of incarceration in limiting

167. For example, during 1980-81, about three-quarters of Florida's inmates earn fewer than six hundred dollars a month. *See* Hooks v. Wainwright, 536 F.Supp. 1330, 1338 (M.D. Fla. 1982), *rev'd on other grounds*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 107 S. Ct. 313 (1986). For further discussions of the financial resources of prisoners, see ABA Resource Center on Correctional Law and Legal Services, *Providing Legal Services to Prisoners, reprinted in* 8 Ga. L. Rev. 363, 368 (1974); *Delaware Prisoners Finding Careers at Fifty Cents a Day*, N.Y. Times, Mar. 1, 1987, at 50, col. 1. Nonprisoner pro se litigants are hampered by similar economic disadvantages. *See* Zeigler & Hermann, *supra* note 4, at 187.

168. *See* A. Strick, Injustice for All 103 (1977); *see also* Flannery & Robbins, *supra* note 38, at 773.

169. *See* 1980 Aldisert Report, *supra* note 12, at 65; D. Manville, *supra* note 162, at 8.

170. *See* 1980 Aldisert Report, *supra* note 12, at 13.

171. *See* Hooks v. Wainwright, 536 F. Supp. 1330, 1348 (M.D. Fla. 1982), *rev'd on other grounds*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 107 S. Ct. 313 (1986).

172. *See* Note, *Legal Services for Prison Inmates*, 1967 Wis. L. Rev. 514, 526.

173. 42 U.S.C. § 1988 (1982).

174. *See id.*

175. *See* Merritt v. Faulkner, 697 F.2d 761, 770 (7th Cir.) (Posner, J., concurring in part and dissenting in part), *cert. denied*, 464 U.S. 986 (1983).

176. *See* Turk, *supra* note 38, at 1355; *see also supra* notes 161-63 and accompanying text.

177. *See* 1980 Aldisert Report, *supra* note 12, at 12.

procedural benefits to prisoners is unjustified. Prisoners in fact enjoy several benefits over nonprisoners in their pro se appearances. The decided advantage prisoner pro se litigants enjoy over nonprisoner pro se litigants in ready access to a law library has troubled members of the legal community.[178] As a practical matter, prisoners also have far more time to devote to pursuing their claims than nonprisoners.[179] Permission to proceed *in forma pauperis* is extended more readily to prisoners[180] and prisoners are given free drafting materials such as pens and paper.[181]

Several courts have reasoned that pro se litigants are entitled to notification of summary judgment obligations because of their inability to discern those obligations unassisted.[182] This analysis properly emphasizes the handicap common to all pro se litigants. The deficiency in most prisoner pro se litigants' educations is well-documented.[183] To suggest, however, that the relatively higher level of education of nonprisoner pro se litigants elevates them to a full appreciation of procedural rules is erroneous. Studies indicate that college level reading ability is necessary to conduct effective legal research.[184] Thus, it is doubtful whether laymen, prisoners and nonprisoners alike are able to perceive their responsive obligations when served with a "Motion To Dismiss, Or, In The Alterna-

178. *See* Flaherty, *Law, Books, and Prisoners*, Nat'l Law J., Oct. 1, 1984, at 6, col. 1. The primary concern of *Bounds* was providing access to the courts for prisoners with valid constitutional claims. *See* Bounds v. Smith, 430 U.S. 817, 825-28 (1977). Prisoners, however, often use the law library for legal matters unrelated to the fact or circumstances of their confinement. *See* Flaherty, *supra* note 178, at 6, col. 1.

179. *See* Procup v. Strickland, 792 F.2d 1069, 1071 (11th Cir. 1986); Resource Center, *supra* note 167, at 368; Potuto, *supra* note 6 at 236.

180. *See, e.g.*, *Procup*, 792 F.2d at 1071; *In re* Smith, 600 F.2d 714, 716 (8th Cir. 1979); Souder v. McGuire, 516 F.2d 820, 823-24 (3d Cir. 1975); United States *ex rel.* Irons v. Pennsylvania, 407 F. Supp. 746, 746-47 (M.D. Pa. 1976); Turner, *supra* note 74 at 617. *But see* Shimabuku v. Britton, 357 F. Supp. 825, 826 (D. Kan. 1973) (leave to proceed *in forma pauperis* denied to prisoner with $45 in account), *aff'd*, 503 F.2d 38 (10th Cir. 1974); Carroll v. United States, 320 F. Supp. 581, 582 (S.D. Tex. 1970) (leave denied to prisoner with $204 in account).

181. *See* Procup v. Strickland, 792 F.2d 1069, 1071 (11th Cir. 1986).

182. *See, e.g.*, Jacobsen v. Filler, 790 F.2d 1362, 1368 (9th Cir. 1986) (Reinhardt, J., dissenting); Ross v. Franzen, 777 F.2d 1216, 1219 (7th Cir. 1985); Griffith v. Wainwright, 772 F.2d 822, 825 (11th Cir. 1985); Parisie v. Greer, 705 F.2d 882, 898 (7th Cir.) (Swygert, J., concurring), *cert. denied*, 464 U.S. 918 (1983); Lewis v. Faulkner, 689 F.2d 100, 102 (7th Cir. 1982); Davis v. Zahradnick, 600 F.2d 458, 460 (4th Cir. 1979); Zeigler & Hermann, *supra* note 9, at 181, 202. *See also* Johnson v. Avery, 393 U.S. 483, 487 (1969) (illiteracy of most prisoners precludes them from effectively handling their own causes); Falzerano v. Collier, 535 F. Supp. 800, 803 (D.N.J. 1982) (providing inmates with a law library amounts to a "useless and meaningless gesture . . . mak[ing] about as much sense as furnishing medical services through books like: 'Brain Surgery Self-Taught' "); Resource Center, *supra* note 167, at 368 (questioning ability of prisoners to use law library).

183. *See, e.g.*, Larsen, *A Prisoner Looks at Writ-Writing*, 56 Calif. L. Rev. 343, 352 (1968); Zeigler & Hermann, *supra* note 4, at 181-82; Note, *A Prisoner's Constitutional Right to Attorney Assistance*, 83 Colum. L. Rev. 1279, 1281 (1983).

184. *See* Hooks v. Wainwright, 536 F. Supp. 1330, 1337-38 (M.D. Fla. 1982), *rev'd on other grounds*, 775 F.2d 1433 (11th Cir. 1985), *cert. denied*, 107 S. Ct. 313 (1986).

tive, For Summary Judgment."[185]

CONCLUSION

Failure to inform pro se litigants of a potentially fatal procedural requirement such as the reply affidavit requirement of the summary judgment rule dissipates the right of access and works to discourage a full hearing on the merits. Judicial notification of the requirements of the summary judgment rule provides an unburdensome method of ensuring a pro se litigant an adequate hearing on the merits and does not compromise the judge's role in the adversary system. Because pro se litigants cannot discern their summary judgment obligations adequately from Rule 56, the pro se litigant's right of access to the courts can be safeguarded only by imposition of a notification rule as a constitutional minimum.

Joseph M. McLaughlin

185. *See* Lewis v. Faulkner, 689 F.2d 100, 102 (7th Cir. 1982); *see also* Jacobsen v. Filler, 790 F.2d 1362, 1368 (9th Cir. 1986) (Reinhardt, J., dissenting) (laymen lack skills of statutory construction); Zeigler & Hermann, *supra* note 4, at 202-03 (same).