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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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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). 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 exercise 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, 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’r, 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. Sufficient access to the courts, a right protected by the due process clause of the fourteenth amendment and the first amendment, guarantees to all persons use of the judicial process to redress alleged grievances. At the same time, the complex requirements of the summary judgment rule may frustrate the pro se litigant's access to the trial court. When presented with a motion for summary judgment, many pro se litigants are unaware of their obligation to submit a reply affidavit. Consequently, summary judgment is entered fre-

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.


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).


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] without legal 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.) (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.\textsuperscript{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.\textsuperscript{14} Despite the Supreme Court's admonition in the criminal context, courts have tolerated informalities from civil pro se litigants.\textsuperscript{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.\textsuperscript{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-

\textsuperscript{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).

\textsuperscript{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); Bird v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981), thus demonstrate a misplaced reliance on criminal pro se precedent.


\textsuperscript{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. 1984) (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.\textsuperscript{17} One court provides notification of the requirements of the summary judgment rule only to prisoner pro se litigants.\textsuperscript{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.\textsuperscript{19}

Part I of this Note discusses the summary judgment rule\textsuperscript{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

\textsuperscript{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).

\textsuperscript{18} See Jacobsen v. Filler, 790 F.2d 1362, 1364 (9th Cir. 1986).

\textsuperscript{19} This Note addresses the treatment of pro se litigants in the federal courts. A similar problem exists in the state courts. Compare Mnno 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).\textsuperscript{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).
The party moving for summary judgment has the burden of establishing the absence of an issue of material fact, and must give adequate notice of the motion to the opponent. A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a request to the court to review the sufficiency of a claim solely on the pleadings. 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. 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, with the attendant notice requirements of a summary judgment motion.


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[-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.


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, 636 (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. The opponent may not rely on his pleading to oppose the motion. This rule applies with equal force to pro se litigants. 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. When failure to inform the pro se litigant results in entry of judgment against him, several appellate courts require reversal.

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. 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. This practice, however, has been rejected entirely by other courts. Therefore, 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(e) 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) (Reinhart, 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).

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.

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).


See Jacobsen v. Filler, 790 F.2d 1362, 1368-69 (9th Cir. 1986) (Reinhart, 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).

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).

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).

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").
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).


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.\textsuperscript{41} Derived from the first amendment\textsuperscript{42} and the due process clause of the fourteenth amendment,\textsuperscript{43} the right protects a litigant's interest in using the judicial process to attain redress of grievances.\textsuperscript{44} For pro se litigants, the right guarantees all the means necessary to ensure an adequate hearing on all alleged grievances.\textsuperscript{45}

The early cases construing the right of access involved impermissible obstruction of access to the courts.\textsuperscript{46} A series of later cases, however, culminating in\textit{ Bounds v. Smith},\textsuperscript{47} imposed an affirmative obligation on

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\item \textsuperscript{46} The importance of the right of access has long been recognized by the Supreme Court. See, e.g.,\textit{ Chambers v. Baltimore & Ohio R.R.}, 207 U.S. 142, 148 (1907). In the prisoner context, however, this recognition emerged much more gradually. \textit{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\textit{ Potuto}, supra note 6, at 207; Note, \textit{A Federal Litigation Program: For Students, Inmates and the Legal Profession}, 4 Nova L.J. 377, 386 (1980); Comment, \textit{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.,\textit{ 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");\textit{ 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");\textit{ 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"). \textit{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, \textit{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 \textit{laiss\'e faire} approach to state regulation was put to rest by the Supreme Court in \textit{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.\textit{ 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\textit{ Johnson}, 393 U.S. at 485; Hull, 312 U.S. at 549; see also\textit{ Potuto}, supra note 6, at 209.
\item \textsuperscript{47} 430 U.S. 817 (1977).
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the state to assist pro se litigants in certain circumstances. In Bounds, the Supreme Court held that the right of access requires states to assist prisoners in filing legal papers in all cases. 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.

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.


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. Leeko, 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 witnesses 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).


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. Even the most intelligent, educated layman is unlikely to be able to properly construe procedural rules. Most pro se litigants are uneducated, 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. 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. Confinement often fatally hampers a prisoner’s ability to gather evidence to support a case against his keeper. Confinement also makes compliance with procedural deadlines

69 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 conclusion, claiming that Rule 56 is explicit. The force of this argument, however, is undercut by the presence of a local court rule that explicitly defines 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); Perise 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).


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.55

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.57 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

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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).
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).
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).
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. Affidavits and other evidentiary materials usually are needed to furnish sufficient facts to decide a pro se litigant’s case. 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.

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 into a general attitude of judicial paternalism toward pro se litigants. Several courts, however, 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).


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. Ker-
er, 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 failing 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.” Id. 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, finding it incongruous with the judge's role in the adversary process. 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. Under this system, justice is presumed to be attained through an

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. 166, 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 incompatibility 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 raises the broader issue of whether judges should assist any pro se litigants.

equal contest of contrary interests.82 The system essentially allows liti-
gants 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 assump-
tion 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 neces-
sity of assisting the pro se litigant in pursuing his claim through notifica-
tion 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 cli-
ent,90 but no obligation to seek the truth.91 This duty of zealous represen-
tation has tainted the adversary system because attorneys employ
strategies to impede the search for truth at trial.92 For example, attor-
neys 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

Adversary System: Dinosaur or Phoenix?, 69 Minn L. Rev. 1 (1984) (discussing the viabil-
ity 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
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. de-
nied, 106 S. Ct. 1475 (1986); accord Burks 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
86. See Merritt v. Faulkner, 697 F.2d 761, 764 n.3 (7th Cir.), cert. denied, 464 U.S.
(permitting litigants to hire superior counsel negates any expectations of approximate
equality); Friendly, The Courts and Social Policy: Substance and Procedure, 33 U. Miami
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,
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. 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. Judges also are afforded wide latitude in their conduct of a trial when their actions are geared towards ensuring a just result. Even where a judge's alleged advocacy for one party constitutes error, it will not be reversed unless the other party is prejudiced. 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.

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

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. House, 615 F.2d 316, 324 (10th Cir. 1979), cert. denied, 441 U.S. 913 (1979). 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.\textsuperscript{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.\textsuperscript{100} Both practices are permissible judicial interventions on behalf of pro se litigants.\textsuperscript{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.\textsuperscript{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.\textsuperscript{103} Rather, it merely ensures that the litigant will be heard on the merits. The jury remains completely unaware of the judge’s actions.\textsuperscript{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.\textsuperscript{105} If, however, opposing counsel fails to comply with the court’s request, the ultimate responsibility must rest with the judiciary.\textsuperscript{106} Imposition of an obligation to notify pro se liti-

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{101} See supra notes 99-100.

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{105} See Lewis v. Faulkner, 689 F.2d 100, 102 (7th Cir. 1982).

\textsuperscript{106} See id. at 103.
gants of the requirements of opposing a motion for summary judgment will not burden the federal judiciary's workload.\textsuperscript{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.\textsuperscript{108} The Supreme Court consistently has emphasized the significant role that habeas corpus petitions and civil rights claims play in advancing fundamental constitutional rights.\textsuperscript{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.\textsuperscript{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 \textit{Gideon v. Wainwright}.\textsuperscript{111} Pro se litigants have initiated suits that resulted in landmark holdings in tax,\textsuperscript{112} civil rights,\textsuperscript{113}

\textsuperscript{107} See Averhart v. Arrendondo, 773 F.2d 919, 920 (7th Cir. 1985).

\textsuperscript{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, \textit{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 \textit{id}. The relief in public law litigation is not only compensation for past harm, but a decree that will direct future behavior. See \textit{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." \textit{Id}. at 587.


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

\textsuperscript{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.

\textsuperscript{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 \textit{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 \textit{id}. at 181. See also Procurier 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. Pro se litigants also have substantially affected the conduct of prison management.

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, the courts have not embraced this suggestion. 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. 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, it is not surprising that most of the cases mandating judicial notification of summary judgment obligations involved prisoners. It is apparent, however, that few courts distinguish between the ordinary civil pro se litigant and his prisoner counterpart. 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.

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).


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

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

112. 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. Another court limits judicial notification of summary judgment obligations to prisoners and recently released prisoners, basing their holding on the handicaps of detention. 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. Federal classifica-
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 administrative130 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 right132 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 fund-

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damental to all persons, whether incarcerated or free.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{141} Judicial notification involves no financial expenditures by the judiciary.\textsuperscript{142} Finally, since most courts clearly acknowledge the right of prisoner pro se litigants to summary judgment notification,\textsuperscript{143} and ninety-five percent of pro se litigants are prisoners,\textsuperscript{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.


\textsuperscript{139} See Mathews v. Eldridge, 424 U.S. 319, 335 (1976).


\textsuperscript{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. \textit{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).

\textsuperscript{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).

\textsuperscript{144} \textit{See} Zeigler & Hermann, \textit{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. The Court of Appeals for the Seventh Circuit, the circuit court that hears the most prisoner civil rights petitions, 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]." 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. It is not surprising, then, that most pro se litigants represent themselves because of an economic inability to procure counsel. 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 surprising 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,\textsuperscript{150} straining the principle of equal justice under the law.\textsuperscript{151} The causes of this problem are numerous.

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

Furthermore, there is no mandate by the American Bar Association requiring attorneys to perform pro bono work.\textsuperscript{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.\textsuperscript{156} Thus, it is difficult for an indigent litigant to find an attorney willing to handle civil cases.\textsuperscript{157}

Forceful economic arguments have been directed at this contention, asserting that a meritorious claim always will find an attorney.\textsuperscript{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.”\textsuperscript{159} This argument contends that a litigant who is unable to retain counsel on a contingent fee does not have a meritorious case.\textsuperscript{160}

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

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{150} See M. Frankel, supra note 83, at 119-20.
\item \textsuperscript{151} See id. at 120.
\item \textsuperscript{152} See Ross v. Moffitt, 417 U.S. 600, 618 (1974); Hooks v. Wainwright, 775 F.2d 1433, 1437-38 (11th Cir. 1985), \textit{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).
\item \textsuperscript{153} See Hatfield v. Bailleaux, 290 F.2d 632, 635 (9th Cir.), \textit{cert. denied}, 368 U.S. 862 (1961).
\item \textsuperscript{154} See 1980 Aldisert Report, supra note 12, at 69.
\item \textsuperscript{155} See Caruth v. Pinkney, 683 F.2d 1044, 1049 (7th Cir. 1982), \textit{cert. denied}, 459 U.S. 1214 (1983).
\item \textsuperscript{157} See id.
\item \textsuperscript{159} See Merritt, 697 F.2d at 769 (Posner, J., concurring in part and dissenting in part).
\item \textsuperscript{156} See \textsuperscript{150} at id. at 770; accord Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978), \textit{cert. denied}, 442 U.S. 911 (1979); Elmore v. McCammon, 640 F. Supp. 905, 911 (S.D. Tex. 1986).
\item \textsuperscript{160} See id. at 1071; accord Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978), \textit{cert. denied}, 442 U.S. 911 (1979); Elmore v. McCammon, 640 F. Supp. 905, 911 (S.D. Tex. 1986).
\item \textsuperscript{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), \textit{cert. denied}, 454 U.S. 1141 (1982); Minns v. Paul,
majority 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

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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 § (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).


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.\textsuperscript{167} In civil cases, high discovery costs and legal fees render legal assistance beyond the financial reach of ninety percent of the nation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{171} Further, there is some question whether an attorney is likely to render his best efforts for a non-paying client.\textsuperscript{172}

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


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

\textsuperscript{169} See 1980 Aldisert Report, supra note 12, at 65; D. Manville, supra note 162, at 8.


\textsuperscript{172} See Note, Legal Services for Prison Inmates, 1967 Wis. L. Rev. 514, 526.


\textsuperscript{174} See id.


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

\textsuperscript{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.\textsuperscript{178} As a practical matter, prisoners also have far more time to devote to pursuing their claims than nonprisoners.\textsuperscript{179} Permission to proceed \textit{in forma pauperis} is extended more readily to prisoners\textsuperscript{180} and prisoners are given free drafting materials such as pens and paper.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-


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


\textsuperscript{181} See \textit{Procup v. Strickland}, 792 F.2d 1069, 1071 (11th Cir. 1986).

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


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.

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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).