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PRO SE LITIGATION
LITIGATING WITHOUT COUNSEL:
FARETTA OR FOR WORSE

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I. Introduction

In this publication one year ago,¹ it was argued that, although the *pro se* litigant generally is derided by parties, courts, and counsel alike,² the procedures and general attitude of the United States Court of Appeals for the Second Circuit in dealing with such litigants effect, for the most part,³ considerable fairness in the treatment of *pro se* supplicants and their claims. One recent decision of the United States Supreme Court as well as the *pro se* proceedings in the Second Circuit during the 1974-75 term—a year in which more *pro se* litigants received relief than in any prior year in the history of the court—stimulates further examination of the plight and problems of the litigant who proceeds without counsel. Especially crucial in this inquiry is the ubiquitous frustration of the *pro se* litigant and the availability of counsel to alleviate some of this discontent.

The Supreme Court case of *Faretta v. California*⁴ involved the question of “whether a State may constitutionally hale a per-

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The views expressed in this article are solely those of the authors, and should not necessarily be attributed to any judge of the United States Court of Appeals for the Second Circuit.

¹ See Flannery & Robbins, *The Misunderstood Pro Se Litigant: More than a Pawn in the Game*, 41 BROOKLYN L. REV. 769 (1975) [hereinafter cited as *The Misunderstood Pro Se Litigant*].

² *Id.* at 770, 775, 776-77, 787-88; see *Lunz v. Preiser*, 524 F.2d 289 (2d Cir. 1975) (appeal from default judgment in petitioner's favor dismissed as moot; petitioner sought to be “protected from [his] own ignorance”).

³ See *The Misunderstood Pro Se Litigant*, *supra* note 1, at 787; note 216 *infra*.

⁴ 422 U.S. 806 (1975).

son into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense."⁵ The setting was a grand theft prosecution in the Superior Court of Los Angeles County, California, wherein the accused requested, well before trial, that he be permitted to represent himself. The trial judge warned the defendant that it would be a mistake to refuse the assistance of counsel⁶ and, further, that a *pro se* defendant would be required to follow all of the "ground rules" of criminal trial procedure.⁷ Nevertheless, in a preliminary ruling, the trial court accepted Faretta's waiver of counsel.

Subsequently, but still prior to trial, the court sua sponte reversed its ruling, stating, *inter alia*, that the defendant did not have "a constitutional right to represent himself."⁸ Throughout the trial, despite Faretta's objections,⁹ the judge required that the defense be conducted only through an attorney appointed by the court from the public defender's office.¹⁰ Faretta was found guilty after a jury trial and was sentenced to a prison term. The conviction was affirmed by the California Court of Appeal, which agreed that a defendant had no federal or State constitutional right to represent himself. The California Supreme Court denied review.¹¹

On a grant of certiorari,¹² the United States Supreme Court, after reviewing federal court precedent¹³ and the British¹⁴ and American¹⁵ jurisprudential evolution of self-representation, held that a defendant in a State criminal trial has the right to proceed without counsel when he voluntarily and intelligently elects to do so. The Court further held that the State may not force a lawyer upon a criminal defendant who insists upon *pro se* representation, regardless of the extent of the accused's technical legal knowledge.

⁵ *Id.* at 807.

⁶ *Id.* at 808.

⁷ *Id.* at 808 n.2.

⁸ *Id.* at 810 n.4; see *People v. Sharp*, 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972).

⁹ 422 U.S. at 810.

¹⁰ *Id.* at 810 n.5, 812 n.8; cf. *United States v. Wolfish*, 525 F.2d 457, 462-63 (2d Cir. 1975), cert. denied, 96 S. Ct. 794 (1976). See also Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73 (1974).

¹¹ See 422 U.S. at 812.

¹² 415 U.S. 975 (1974).

¹³ 422 U.S. at 812-17.

¹⁴ *Id.* at 821-26.

¹⁵ *Id.* at 818-21, 826-32.

While the implications and consequences of this determination are far from settled,¹⁶ arguably the policy considerations underlying *Faretta* would at least allow for increased use of the discretionary appointment of counsel¹⁷ for the *pro se* litigant, and perhaps for recognition of the right to such representation, at least in certain circumstances.¹⁸ Parts II and III of this article discuss, in the context of the Second Circuit's recent experiences with *pro se* litigation,¹⁹ many of the bafflements of counselless litigation. Part IV deals with the justification for the assignment of counsel for various types of litigation. The article concludes in Part V with the application of the *Faretta* analysis to post-conviction prisoner, and other civil, proceedings.

¹⁶ In his dissent, Justice Blackmun recognized the following questions which have yet to be answered with finality:

Must every defendant be advised of his right to proceed *pro se*? If so, when must that notice be given? Since the right to assistance of counsel and the right to self-representation are mutually exclusive, how is the waiver of each right to be measured? If a defendant has elected to exercise his right to proceed *pro se*, does he still have a constitutional right to assistance of standby counsel? How soon in the criminal proceeding must a defendant decide between proceeding by counsel or *pro se*? Must he be allowed to switch in mid-trial? May a violation of the right to self-representation ever be harmless error? Must the trial court treat the *pro se* defendant differently than it would professional counsel?

Id. at 852 (Blackmun, J., dissenting); see *United States ex rel. Konigsberg v. Vincent*, 526 F.2d 131 (2d Cir. 1975) (appellant claimed, *inter alia*, constitutional error by the State trial court in allowing him to represent himself; *held*, intelligent waiver); *United States v. Smith*, 525 F.2d 1017 (10th Cir. 1975) (*pro se* defendant plea bargained on his own behalf; *held, inter alia*, that admissibility of plea discussions follows same rules as bargaining with counsel); *United States v. Wolfish*, 525 F.2d 457 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 794 (1976) (*held, inter alia*, that so long as counsel was retained, the defendant could not appeal *pro se*); note 48 *infra* and accompanying text.

¹⁷ See 18 U.S.C. § 3006A(g) (1970); 28 U.S.C. § 1915(d) (1970). Section 3006A(g) states:

Any person subject to revocation of parole, in custody as a material witness, or seeking relief under section 2241, 2254, or 2255 of title 28 or section 4245 of title 18 may be furnished representation pursuant to the plan whenever the United States magistrate or the court determines that the interests of justice so require and such person is financially unable to obtain representation.

28 U.S.C. § 1915(d) (1970) states:

The court may request an attorney to represent any such [indigent] person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

See generally *The Misunderstood Pro Se Litigant*, *supra* note 1, *passim*; Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U.L. REV. 157, 193-95 (1972) [hereinafter cited as *The Invisible Litigant*].

¹⁸ See Parts IV and V *infra*.

¹⁹ For past *pro se* experiences in the Second Circuit, see generally *The Misunderstood Pro Se Litigant*, *supra* note 1. See also Breasted, *You Can Beat Dead Horse, If It's a Federal Court Case*, N.Y. Times, Oct. 15, 1974, at 41, col. 4.

II. The Problems of Litigating *Pro Se*

While it may be beneficial to have the right to proceed *pro se*, it is only in a rare case that the *pro se* criminal defendant is successful.²⁰ It is not difficult, however, to perceive why some individuals prefer to risk litigating without counsel. One reason is the source of the counsel which is appointed. Faretta, for instance, believed that, due to the oppressive caseload of the public defender's office, he would receive less than a satisfactory defense.²¹ An alternative explanation is mistrust of counsel, either because of the party's attitude toward attorneys generally,²² or because a particular attorney has served the client's interests in other than admirable fashion.²³ One recent criminal proceeding on point illustrates both the perseverance and patience of the *pro se* petitioner in seeking his fundamental rights, and the insensitivity and, perhaps, negligence of his assigned counsel in attempting to protect them. In June 1972, Morris Raymer, represented by court-appointed counsel, was convicted of various narcotics offenses²⁴ in the federal district

²⁰ See, e.g., *United States v. Artega-Alvarez*, Nos. 73 Cr. 950, 74 Cr. 18 (S.D.N.Y. Mar. 20, 1974) (unreported), discussed in *The Misunderstood Pro Se Litigant*, *supra* note 1, at 781.

²¹ 422 U.S. at 807 ("he did not want to be represented by the public defender because he believed that that office was 'very loaded down with . . . a heavy case load.'"). See *Wallace v. Kern*, 481 F.2d 621 (2d Cir. 1973), cert. denied, 414 U.S. 1135 (1974) (suit to enjoin Legal Aid Society from increasing its caseload; dismissed for want of jurisdiction). Parenthetically, according to an article in the *Criminal Law Reporter*, one study has concluded that "waiver of counsel remains common and is often openly encouraged by judges." 18 CR. L. RPTER. 2171 (Nov. 19, 1975). Query: does *Fuller v. Oregon*, 417 U.S. 40 (1974) (convicted indigent defendants must repay the costs of their legal defense if they subsequently acquire the financial means to do so) have the same effect? A related issue is that of the right to choose one's counsel. See note 10 *supra*. See also *United States v. Arredo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975) (right to counsel of one's choice overrides serious conflict potential); *United States v. Garcia*, 517 F.2d 1401 (5th Cir. 1975) (mem.) (defendant may insist on keeping attorney despite apparent conflict). But see *In re April 1965 Grand Jury*, 18 CR. L. RPTER. 2183 (D.D.C. 1975) (witnesses appearing before a grand jury may not be represented by the same attorney when such representation would stifle the criminal process), *rev'd*, 18 CR. L. RPTER. 2401 (D.C. Cir. 1976) (issues not ripe for adjudication).

²² See *The Misunderstood Pro Se Litigant*, *supra* note 1, at 773 & n.16.

²³ A third possibility is that the defendant is more experienced in trial matters than would be his novice counsel. See generally R. COHN, *A FOOL FOR A CLIENT* (1971); cf. *United States v. Artega-Alvarez*, Nos. 73 Cr. 950, 74 Cr. 18 (S.D.N.Y. Mar. 20, 1974) (unreported); *Verdict for Client, Cuffs for Counsel*, N.Y. Post, Dec. 11, 1974, at 2; note 20 *supra*.

²⁴ 18 U.S.C. § 1952 (1970) (racketeering); 21 U.S.C. § 174 (1964) (now 21 U.S.C. § 960 (1970)) (importation); 21 U.S.C. § 841 (1970) (miscellaneous drug offenses); INT. REV. CODE OF 1954 § 4705(a) (sale).

court of Connecticut and was sentenced to a seven-year term of imprisonment. In July of that year, Raymer's attorney, designated by the trial court to represent him on appeal,²⁵ duly filed a notice of appeal in the district court. In October, however, because the trial minutes had not been transcribed, the attorney moved the court of appeals for additional time in which to file the appellant's brief.²⁶ The court, on October 25, granted an extension to December 1.²⁷ The transcript was provided in the interim, but on December 19—nearly three weeks after the extended filing period had expired—counsel moved for a further extension of time.²⁸ The court denied the motion and dismissed the appeal²⁹ for failure to comply with its order of October 25.³⁰ Counsel allegedly moved the court on December 28 to vacate its order of dismissal,³¹ on the grounds that there was "a bona fide and substantial issue in need of appellate review,"³² and that he was not able to review the approximately four hundred pages of trial transcript in time to comply with the court's October order. Counsel's time problem, he claimed, arose from his other commitments, which included civil and

²⁵ The attorney would have been obligated to continue his representation even absent such a designation, unless the court expressly terminated the appointment. 18 U.S.C. § 3006A(c) (1970); 2D CIR. R. 4(b).

²⁶ The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time
FED. R. APP. P. 26(b).

²⁷ United States v. Raymer, No. 72-1920, Order (2d Cir. Oct. 25, 1972) (unreported) (per Friendly, J.).

²⁸ Application for Extension of Time, No. 72-1920 (2d Cir., filed Dec. 19, 1972). See note 26 *supra*.

²⁹ Arguably the court's standard practice of dismissing an appeal from a criminal conviction if the appellant's brief is not timely filed should not apply to cases in which counsel is court-appointed in the same manner as it does to those in which counsel is retained.

³⁰ United States v. Raymer, No. 72-1920, Order (2d Cir. Dec. 20, 1972) (unreported). FED. R. APP. P. 31(c) provides, in pertinent part, that:

If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. Although Raymer's adversary made no such motion, the court dismissed the appeal sua sponte. For a discussion of somewhat analogous sua sponte dismissals by district courts, see Part III *infra*. One wonders whether counsel would have succeeded in securing a further extension of time had he filed an application prior to the December 1 deadline.

³¹ We use the term "allegedly" because although counsel sent to Raymer a copy of a motion for a further extension of time, there is no indication on the Second Circuit's docket sheet that such a motion was ever filed, and no such papers are in the Second Circuit's files. Thus, there has never been a ruling on the "motion."

³² Application for Reinstatement of Appeal, No. 72-1920, Exhibit D (2d Cir., filed Aug. 21, 1974).

criminal trials, between five and ten title searches a week, real estate closings, preparation of all pleadings, "and miscellaneous other duties incidental to a general law practice,"³³ as well as his familial obligations³⁴—interests which seem trivial when compared with those of an incarcerated client seeking to have his conviction reviewed on appeal. The attorney took no further legal action.³⁵ He apparently did not even notify Raymer of the status of the case.

One year later, the court, in response to Raymer's inquiry on December 10, 1973, notified him of the order dismissing his appeal. Still having heard nothing from the attorney, however, Raymer wrote to him in February 1974, for the return of any papers pertaining to his case, so that he might proceed *pro se*,³⁶ declaring that "[b]y not answering and advising me of the circumstances, you may have caused me to lose any rights I may have had . . ."³⁷ A month later, and some fifteen months after dismissal of the appeal, counsel corresponded with Raymer, who had been incarcerated during the entire period. The attorney apologized for his long-overdue response, enclosing a volume of transcript which the indigent Raymer had requested,³⁸ *along with a bill for the same*.³⁹ He wrote:

As you know, I was not anxious to take the appeal in the first instance To my great shock, my [December 19, 1972] motion for enlargement of time was never granted. . . . I must frankly tell you that it was my considered opinion that no sustainable appeal existed, and that if we could miraculously prevail on appeal, a new trial would result in a conviction and in all probability, a more severe sentence. . . .⁴⁰ I

³³ *Id.*, Exhibit D-2.

³⁴ *Id.*

³⁵ See note 31 *supra* and accompanying text.

³⁶ Raymer apparently was not then aware that different counsel could be appointed by the court. See 18 U.S.C. § 3006A(c) (1970), which states: "The United States magistrate or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings." See text accompanying note 42 *infra*.

³⁷ Application for Reinstatement of Appeal, No. 72-1920, Exhibits K-K1 (2d Cir., filed Aug. 21, 1974).

³⁸ Counsel knew or should have known of Raymer's indigency. Indeed, if Raymer were not indigent, counsel would not have been appointed to represent him. See 18 U.S.C. § 3006A(b) (1970); 28 U.S.C. § 1915(d) (1970).

³⁹ Application for Reinstatement of Appeal, No. 72-1920, Exhibit L (2d Cir., filed Aug. 21, 1974).

⁴⁰ Compare counsel's assertion in his "alleged" application to vacate the court's order of dismissal, note 32 *supra* and accompanying text.

am as anxious as you are to conclude the matter, one way or the other.⁴¹

In August 1974, Raymer petitioned for reinstatement of his appeal. With little delay, the Second Circuit granted the application, removed the counsel, and assigned a different attorney to represent Raymer,⁴² relying upon unequivocal precedent mandating the protection of an indigent's appellate rights.⁴³

⁴¹ Application for Reinstatement of Appeal, No. 72-1920, Exhibits L-L1 (2d Cir., filed Aug. 21, 1974) (footnote added). Counsel continued:

By the way, you might be interested in that fact that last summer I defended a case (Heroin, 439 Bags) and obtained an acquittal, the first ever against [a particular prosecutor]. The point is, I don't feel you could have had better counsel at trial than you did—the die had been cast and a conviction was, as I indicated, a virtual certainty.

Id.

⁴² United States v. Raymer, No. 72-1920, Order (2d Cir. Sept. 6, 1974) (unreported). It should be noted that despite counsel's comments on the merits of the appeal, see notes 32 & 40 *supra* and accompanying text, the underlying merits of the case have no bearing on the question of restoring fundamental appellate rights where they wrongfully have been denied. United States *ex rel.* Randazzo v. Follette, 444 F.2d 625, 627-28 (2d Cir.), *cert. denied*, 404 U.S. 916 (1971); United States *ex rel.* Smith v. McMann, 417 F.2d 648, 654 (2d Cir. 1969) (en banc), *cert. denied*, 397 U.S. 925 (1970); see United States *ex rel.* Singleton v. Woods, 440 F.2d 835, 838 (7th Cir. 1971); Wilbur v. Maine, 421 F.2d 1327, 1330 (1st Cir. 1970). See also United States *ex rel.* Williams v. LaVallee, 487 F.2d 1006, 1010 (2d Cir. 1973), *cert. denied*, 416 U.S. 916 (1974); cf. Rodriguez v. United States, 395 U.S. 327 (1969).

⁴³ It is well settled that an indigent defendant is entitled to a review of his case on appeal as a matter of right if the same right is extended to non-indigents. Griffin v. Illinois, 351 U.S. 12 (1956); see Lane v. Brown, 372 U.S. 477 (1963); Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959); Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958); United States *ex rel.* Diblin v. Follette, 418 F.2d 403, 410 (2d Cir. 1969). And the indigent is entitled to have counsel assist him in his appeal. Douglas v. California, 372 U.S. 353 (1963); see Anders v. California, 386 U.S. 738, 741-43 (1967); Swenson v. Bosler, 386 U.S. 258 (1967); United States *ex rel.* Smith v. McMann, 417 F.2d at 654-55. The Criminal Justice Act explicitly provides for the appointment of counsel on appeal in federal cases. 18 U.S.C. § 3006A(c) (1970). See also Coppedge v. United States, 369 U.S. 438, 441 (1962).

Concomitant with this right of counsel on appeal, however, is the right to *effective* counsel. Thus, where, as here, an assigned appellate counsel perfected an appeal by filing a notice of appeal, but did not prosecute it, the United States Court of Appeals for the Fifth Circuit held that the petitioner was denied his constitutional right to effective appellate counsel, stating that "[p]erfection is half a loaf only, and here a half a loaf is no better than none." Foxworth v. Wainwright, 449 F.2d 319, 320 (5th Cir. 1971).

A standard recently adopted in other circuits is that a defendant (or appellant) is entitled to "counsel . . . rendering reasonably effective assistance." Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974); United States v. DeCoster, 457 F.2d 1197, 1201 (D.C. Cir. 1973) (the effectiveness of counsel is the most fundamental right, "for it affects [the client's] ability to assert any other right he may have"); West v. Louisiana, 478 F.2d 1026, 1032-34 (5th Cir. 1973); Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970) (en banc). There is no question that Raymer's attorney did not meet this standard of "normal competency" in this case. He simply did not prosecute the appeal,

Problems with one's counsel are not restricted to the criminal arena, nor to cases wherein counsel has been appointed by the court.⁴⁴ However, although an occasional *pro se* litigant is

thereby causing it to be dismissed. This inaction also would arguably qualify under the Second Circuit's stricter test for the ineffective assistance of counsel—the "shock the conscience" test. See *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950) ("shock the conscience of the Court and make the proceedings a farce and mockery of justice"). See also *United States v. Yanishefsky*, 500 F.2d 1327, 1333-34 (2d Cir. 1974); *United States ex rel. Walker v. Henderson*, 492 F.2d 1311, 1312 (2d Cir. 1974); *United States v. Sanchez*, 483 F.2d 1052, 1057 (2d Cir. 1973); *United States v. Currier*, 405 F.2d 1039, 1043 (2d Cir.), *cert. denied*, 395 U.S. 914 (1969). Of course, "[e]rrorless counsel is not required . . . [; rather,] there must be a 'total failure to present the cause of the [defendant or appellant] in any fundamental respect.'" *United States v. Garguilo*, 324 F.2d 795, 796 (2d Cir. 1963), quoting *Brubaker v. Dickson*, 310 F.2d 30, 39 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963). If ever there was a "total failure," this was it. This is not a case wherein counsel did such a poor job of appellate representation as to "shock the conscience"—he did no job at all.

The court might have instituted disciplinary proceedings against the attorney. See FED. R. APP. P. 46(c), which provides:

Disciplinary Power of the Court Over Attorneys.

A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

Among the provisions of the American Bar Association's CODE OF PROFESSIONAL RESPONSIBILITY (1970) that bear upon the present case are the following:

EC 2-31: Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved.

DR 2-110(A)(2): In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client

EC 6-4: Having undertaken representation, a lawyer should use proper care to safeguard the interests of his client.

DR 6-101(A): A lawyer shall not . . . neglect a legal matter entrusted to him.

EC 7-1: The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously

DR 7-101(A): A lawyer shall not intentionally . . . prejudice or damage his client during the course of the professional relationship

⁴⁴ See, e.g., *Hazzard v. Weinberger*, 519 F.2d 1397 (2d Cir. 1975) (mem.), *aff'd* 382 F. Supp. 225 (S.D.N.Y. 1974). Hazzard claimed that she had been wrongfully denied pension, social security, and other benefits, on the ground that when her husband died, city officials incorrectly indicated on his death certificate that he was widowed. Therefore the main issue on her appeal, noted Hazzard inartfully, was "[w]hether the appellant is dead or alive." Brief for Appellant at 3, *Hazzard v. Weinberger*, 519 F.2d 1373 (2d Cir. 1975). Probably recognizing that the issues were more complex than she had anticipated, Hazzard twice petitioned the Second Circuit for the appointment of counsel, pursuant to 28 U.S.C. § 1915(d) (1970). Both motions were denied, however, because the court was not convinced of the non-frivolousness of her claims. *Hazzard v. Weinberger*, No. 74-2426, Orders (2d Cir. Apr. 9, 1975, June 11, 1975) (unreported). Subsequently Hazzard allegedly retained counsel, paying him \$250 in advance, with another \$250 to be paid upon his filing a brief and arguing the appeal. But counsel filed no papers and did not appear at oral argument.

capable of arguing his cause well,⁴⁵ most—like Raymer and unlike Faretta⁴⁶—fear both the substantive complexities and procedural entanglements of federal litigation. This is true both at the trial level⁴⁷ and at the appellate level, where, for example, one inventive criminal appellant sought permission to proceed *pro se*, but with the assistance of stand-by counsel in the event that the litigant found such support desirable.⁴⁸ This is not, of course, to say that those who litigate without counsel are always unsuccessful.⁴⁹ Most of those who do succeed, however, have naïvely stumbled onto issues that are developed into triumphant campaigns through the generous procedures afforded by the Second Circuit,⁵⁰ which genuinely is concerned with the appearance of justice.⁵¹ Successful results are what the litigants think they were entitled to all along.

One case in which a disoriented litigant was aided by the court is *SEC v. Research Automation Corp.*,⁵² where the principal issue on the appeal was whether a district court judge had the power to enter a default judgment against a defendant who appeared for the taking of his pretrial deposition but refused to be sworn in or to testify, in a willful effort to disrupt and to impede discovery.⁵³ On August 17, 1972, the Securities and Exchange Commission [hereinafter referred to as the SEC] commenced an action to enjoin the defendants from violating various provisions of the Securities Act of 1933⁵⁴ and the Securities Exchange Act of 1934,⁵⁵ the alleged violations springing from an offer and sale of securities of the defendant corpo-

⁴⁵ See, e.g., *Lamb v. Globe Seaways, Inc.*, 516 F.2d 1352, 1357 (2d Cir. 1975) (Oakes, J., dissenting). Circuit Judge Oakes observed, "I cannot help but add that I was impressed by Mr. Lamb's manner, demeanor and obvious sincerity on oral argument of his appeal *pro se*." *Id.* See also *Jackson v. Statler Foundation*, 496 F.2d 623 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975), *discussed in The Misunderstood Pro Se Litigant*, *supra* note 1, at 774-77; *Widermann v. Richardson*, 451 F.2d 1228 (2d Cir. 1971), *noted in N.Y.L.J.*, Nov. 23, 1971, at 1, col. 7.

⁴⁶ See 422 U.S. at 803-10 & n.3.

⁴⁷ See Part III *infra*.

⁴⁸ *United States v. Rollins*, No. 74-2610, Order (2d Cir. Feb. 13, 1975) (unreported).

⁴⁹ See *The Misunderstood Pro Se Litigant*, *supra* note 1, *passim*.

⁵⁰ *Id.* See generally *The Invisible Litigant*, *supra* note 17.

⁵¹ *The Misunderstood Pro Se Litigant*, *supra* note 1, at 771-72, 787-88. *But see* text accompanying notes 162 and 183-90 *infra*.

⁵² 521 F.2d 585 (2d Cir. 1975).

⁵³ *Id.* at 586-87.

⁵⁴ 15 U.S.C. § 77e (1970) (prohibitions relating to interstate commerce and the mails); 15 U.S.C. § 77q(a) (1970) (fraudulent interstate transactions).

⁵⁵ 15 U.S.C. § 78j(b) (1970) (manipulative and deceptive devices).

ration.⁵⁶ After preliminary trial and appellate court proceedings,⁵⁷ the SEC noticed the taking of the deposition of *pro se* defendant Tserpes, president of the defendant corporation,⁵⁸ for May 20, 1974, at the SEC's New York Regional Office, and requested that he bring with him certain documents. Tserpes appeared at the designated time and place, but insisted upon delivering the documents to the Regional Director personally and

⁵⁶ Although most *pro se* actions involve prisoners, this is by no means always the case. See generally, e.g., *The Misunderstood Pro Se Litigant*, *supra* note 1, at 772-77.

⁵⁷ These proceedings are described in 521 F.2d at 587-88.

⁵⁸ In the course of its opinion, the court noted that "[i]t is settled law that a corporation may not appear in a lawsuit against it except through an attorney, Shapiro, Bernstein & Co. v. Continental Record Co., 386 F.2d 426 (2d Cir. 1967) . . ." 521 F.2d at 589. See also *Mercu-Ray Indus., Inc. v. Bristol-Meyers Co.*, 508 F.2d 837 (2d Cir. 1975) (mem.), *aff'g* 392 F. Supp. 16, 18 (S.D.N.Y. 1974) ("The law is absolutely clear that a corporation cannot appear *pro se* in federal court"). Cases, dating back to 1824, e.g., *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824), and earlier commentary, e.g., BROOKE, ABRIDGEMENT (1573) CORP. 28; 1 J. CHITTY, PLEADING (1809) *577; COMYNS' DIGEST (1780) PLEADER 2 B. 2; 2 KENT'S COMMENTARY *291; Y.B. 2 Edw. III. 10 (1327); Plac. Abb., 15 Edw. I., Rot. 35, f. 273 (1287), are legion to support this proposition. See also Note, *Appearance of Corporation Without Attorney*, 7 BROOKLYN L. REV. 371 (1938); 37 COLUM. L. REV. 313 (1937); 6 FORDHAM L. REV. 467 (1937); 22 MINN. L. REV. 278 (1938). See generally 37 HARV. L. REV. 384 (1923); 17 RUTGERS L. REV. 651 (1963); cf. Note, *May a Corporation Act as Its Own Attorney?*, 16 CLEV.-MAR. L. REV. 173 (1967).

Generally stated, the reasons given to support the rule are, first, that a corporation is an artificial entity created by law, and, as such, cannot act as a natural person in presenting its own case; second, that courts have no control over those who are not licensed to practice before them; and third, that corporate litigation, which often is complex, requires more than an artlessly prepared case. It might, however, be argued that the latter two reasons go too far—the second, because if courts are to have control over their practitioners, then no party should be permitted to appear other than through counsel; the third, because there are many types of complex litigation other than the corporate variety, without restriction on *pro se* appearances. As for the first reason, we submit that the corporation no longer is, in all instances, the same entity that it was in the times of Coke and Littleton. For example, corporations have been held to be "persons" for the purpose of the constitutional protections of due process and equal protection of the laws. See, e.g., N. LATTIN, *THE LAW OF CORPORATIONS* § 23, at 99 (2d ed. 1971). In fact, corporations may now even be coming within the ambit of "persons" for the purpose of the forma pauperis statute, 28 U.S.C. § 1915 (1970). See *S.O.U.P., Inc. v. FTC*, 449 F.2d 1142, 1143-45 (D.C. Cir. 1971) (Bazelon, C.J., dissenting); *Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc.*, No. 70 CIV. 4128, Order (S.D.N.Y. Feb. 15, 1974) (unreported) (treble damage antitrust suit; leave to proceed in forma pauperis granted only for appeal from order denying preliminary injunctive relief). See generally Note, *Proceeding In Forma Pauperis in Federal Court: Can Corporations Be Poor "Persons"?*, 62 CALIF. L. REV. 219 (1974). It readily could be argued from this that it would be inconsistent for a court to grant forma pauperis relief to a corporation which is too poor to litigate, and then dismiss the complaint of the plaintiff corporation because it is too poor to afford counsel. Perhaps it is time for the courts to re-examine the rule requiring counsel for all corporate litigation, rather than blindly to follow precedent that has its roots in doctrine that developed three-quarters of a millennium ago, when corporations largely were different from many of those that exist today.

receiving a receipt from him. Tserpes' mistrust of an intermediary caused a delay of nearly one and a half hours, until he succeeded in forcing the Director to leave his other business in order to comply with his request. Upon entering the room in which the SEC's staff attorney was waiting to depose him, Tserpes commenced "to engage in a course of obstructive conduct that made it impossible for [the staff attorney] to take the deposition."⁵⁹ Finding it futile to proceed in the face of Tserpes' disruptive acts and statements,⁶⁰ and Tserpes' refusal to be sworn in, the attorney adjourned the deposition, and then unsuccessfully attempted to depose defendants Martos and Hamos, also officers of the defendant corporation. In this effort, however, "he was frustrated by the further disruptive efforts of Tserpes who . . . proceeded to volunteer statements, interrupt the questioning, answer questions put to the deponents, and attack [the staff attorney] personally."⁶¹ The staff attorney finally adjourned the depositions entirely.

The SEC then moved in the district court, "purportedly"⁶² pursuant to Rule 37(d) of the Federal Rules of Civil Procedure,⁶³ for an order striking defendants' answer and granting a default judgment; the Commission contended that Tserpes' refusal to be sworn in constituted a non-appearance under Rule 37(d),⁶⁴ and was part of a general plan on his part to disrupt the proceedings. The court assigned the matter to a magis-

⁵⁹ 521 F.2d at 587.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See id.*

⁶³ Rule 37(d) provides in part:

Failure of party to attend at own deposition If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with proper notice, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

FED. R. CIV. P. 37(d).

⁶⁴ FED. R. CIV. P. 37(d)(1). See note 63 *supra*.

trate for a hearing. At the outset of that hearing, Tserpes asked that a Greek interpreter be provided, claiming that he would be unable to understand the proceeding. The magistrate informed him that, since he had made no showing of indigency, he had no right to a court-appointed interpreter. In an ungenial report to the judge, the magistrate stated that he thought that Tserpes was sufficiently fluent in English so as not to require an interpreter, adding that

the claimed inability of Mr. Tserpes to speak and understand the English language, was, and is, in my view, a ploy and a patent fraud upon the Court. . . . I found him to be completely articulate (albeit offensively so) in his utterances before me [At the prior proceedings] Tserpes was not only able to speak and understand English . . . but able to disrupt and abort the deposition by a tirade and a filibuster.⁶⁵

The magistrate thought that Tserpes was "obnoxious and obstreperous"⁶⁶ and concluded that the defendant's course of conduct was designed to harass and annoy the SEC. Accepting the magistrate's recommendations, the district court granted the SEC's motion, striking the answers of Tserpes and the defendant corporation and entering a default judgment against them. A "purported appeal"⁶⁷ followed.

Obviously discomforted with the defendants' conduct,⁶⁸ the Second Circuit nonetheless recognized the harshness of granting a default judgment for failure to cooperate in pretrial discovery proceedings,⁶⁹ noting that such a disposition "must be used cautiously . . . lest the resulting grant of relief amount to a deprivation of property without due process."⁷⁰ The court, without guidance from the defendant, considered the history of Rule 37(d) and concluded that, in all fairness, the proper procedure

⁶⁵ 521 F.2d at 588 n.1.

⁶⁶ Magistrate's Report, No. 72 Civ. 3513 (S.D.N.Y., filed Aug. 7, 1974).

⁶⁷ See 521 F.2d at 590.

⁶⁸ Although the district court's decision is reversed . . . , the SEC's motion for a default judgment and this appeal are attributable to the conduct of the appellants and particularly that of Tserpes in willfully seeking through various improper means to obstruct and impede the proceedings in the district court. Had Tserpes not attempted, as [the magistrate] found, "to make a farce out of the judicial process of [the] Court," no appeal would have been necessary.

Id. Compare United States v. Certain Land in the Town of New London, 492 F.2d 1381 (2d Cir. 1974) (*pro se*).

⁶⁹ 521 F.2d at 588.

⁷⁰ *Id.*; see *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958).

for the SEC to follow would be first to obtain a court order directing Tserpes to be sworn and to testify.⁷¹ This would serve "the purpose of impressing upon the defendant the seriousness of his actions and [avoid] a default judgment resulting from some misunderstanding on his part."⁷² Only if the defendant then refused to obey the court's order should the "drastic sanction of default" be imposed.⁷³ Hence, despite the defendants' acrimonious behavior and lack of incisive legal logic on appeal, the order granting a default judgment against Tserpes was reversed.⁷⁴

The issue posed by cases such as *Research Automation* is not only whether a *pro se* may have a legitimate claim of which he is unaware, but also whether the court considers its responsibilities to include the search for and analysis of such claims without the assistance of counsel. One alternative, of course, is to appoint counsel after an initial screening of the claim to determine whether there exists a nonfrivolous issue to be reviewed on the appeal,⁷⁵ whether or not the *pro se* appellant requests such aid. In one recent suit, after the appellant had filed his *pro se* brief, the court perceived the subtle issue of retroactivity⁷⁶ inherent in his contentions, and, one week before the hearing, assigned counsel to brief the point and argue it before the court.⁷⁷ The Second Circuit, however, is not reluctant to under-

⁷¹ See FED. R. CIV. P. 37 (a)(2). Rule 37(a)(2) provides, in pertinent part:

If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, . . . the discovering party may move for an order compelling an answer . . . in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

⁷² 521 F.2d at 589.

⁷³ *Id.*; see FED. R. CIV. P. 37(b)(2) (sanctions by court in which action is pending).

⁷⁴ Because it was unclear to the court whether the defendants were aware of the requirement of counsel for corporate litigation, see note 58 *supra*, the court affirmed the entry of a default judgment against the defendant corporation, but without prejudice to its right to reopen the judgment in the district court upon satisfying the court that its officers were unaware of the requirement, and that it would promptly appear through counsel. 521 F.2d at 589-90.

⁷⁵ See 28 U.S.C. § 1915(d) (1970), quoted in note 17 *supra*.

⁷⁶ See generally *Desist v. United States*, 394 U.S. 244 (1969); *Linkletter v. Walker*, 381 U.S. 618 (1965).

⁷⁷ *Ferguson v. United States*, 513 F.2d 1011 (2d Cir. 1975). The primary question in *Ferguson* was whether *Michel v. United States*, 507 F.2d 461 (2d Cir. 1974), which held that, pursuant to FED. R. CRIM. P. 11, the district court, at a guilty plea proceeding, is required to inform the defendant that as a consequence of his plea he might be subject to a mandatory special parole term, see 21 U.S.C. § 841(b)(1)(B) (1970), should be retroac-

take independently an exploration for meritorious claims—an attribute which reflects well on the integrity of both the court and the legal system. Thus in *Ferranto v. United States*,⁷⁸ the court exerted extraordinary effort in ferreting out a claim from four words in parentheses. The district court had dismissed without a hearing the petitioner's motion to vacate sentence,⁷⁹ on the ground that the same claims had been raised by him and had been rejected in a previous application for similar relief.⁸⁰ In each motion, the petitioner had alleged that the presentence report relied upon by the district judge in sentencing him contained inaccuracies and misstatements with respect to his record of prior criminal activity.⁸¹ In denying his initial motion without a hearing, the court had assumed that the

petitioner was correct in alleging inaccuracies with respect to three arrests recited in the presentence report, but nonetheless held the petition to be insufficient because the [sentencing] court . . . "did not rely to slightest [sic] degree on the charges referred to in the petition."⁸²

The district court had mentioned three other charges listed in the presentence report as "factors in determining the length of sentence imposed."⁸³ One of the three charges upon which the district court did rely in imposing sentence was an arrest, on October 26, 1957, for breaking and entering.

After meticulously perusing the papers on the appeal, the Second Circuit wrote:

tive. The court answered the question in the affirmative, adding that the information must appear on the record. See *McCarthy v. United States*, 394 U.S. 459 (1969). One of the Government's contentions was that the judge did advise Ferguson of the special parole term—indeed, the judge so stated in his opinion below—but that the court reporter somehow failed to set it down. The Second Circuit responded:

We recognize, of course, that a court reporter cannot be infallible; but the same must be said of a judge's memory, particularly when two years have passed since events hardly exceptional before a district judge.

513 F.2d at 1013. See also *Brewington v. United States*, 515 F.2d 504 (2d Cir. 1975) (mem.).

⁷⁸ 507 F.2d 408 (2d Cir. 1974) (per curiam).

⁷⁹ The motion was made pursuant to 28 U.S.C. § 2255 (1970).

⁸⁰ See *Sanders v. United States*, 373 U.S. 1 (1963); 28 U.S.C. § 2244 (1970) (finality of determination); 28 U.S.C. § 2255 (1970), providing in pertinent part that "[t]he sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner."

⁸¹ See *Tucker v. United States*, 404 U.S. 443 (1972).

⁸² 507 F.2d at 408-09.

⁸³ See *id.* at 409.

Petitioner's present motion, like many motions of this kind prepared by persons similarly situated, is not as clear as a mountain lake in springtime. Most of the allegations, as the court below recognized, are a mere repetition of the charges raised in the first motion. Petitioner again seeks relief because of the alleged errors in the presentence report with respect to the three arrests upon which [the district judge] expressly stated he had not relied in sentencing petitioner. However, *in addition to this*, petitioner does refer to the arrest for breaking and entering on which the court had relied and alleges that he pled guilty to this charge without the benefit of counsel. He claims that . . . the sentence imposed upon him on the . . . charge now in issue was illegally enhanced by the sentencing judge's reliance upon the prior breaking and entering conviction which had been obtained in violation of his right to counsel.

*[This] claim was not presented in his previous motion and has not yet been adjudicated.*⁸⁴

Petitioner's reference to the arrest for breaking and entering was embodied in the words "pled guilty without counsel" in parentheses placed after the citation of this conviction. There was no indication that petitioner realized that this fact presented a new and different claim. The Second Circuit nevertheless concluded that "the claim must be addressed"⁸⁵ and remanded the case to the district court.⁸⁶

⁸⁴ *Id.* (footnote omitted) (emphasis added).

⁸⁵ *Id.*

⁸⁶ *Id.* See also *United States ex rel. Irons v. Montanye*, 520 F.2d 646 (2d Cir. 1975) (commenced *pro se*). The problem of the similarity of claims and the Second Circuit's response thereto is not restricted to prisoner applications for collateral relief. The issue occasionally arises when the adversary or judge (who the *pro se* sometimes perceives as an adversary) becomes embittered with the imbroglio effected by the *pro se* party, and attempts to arrest adscitious actions. During the past term, one *pro se* litigant sought to relitigate issues that the Second Circuit previously had held to be barred by the doctrine of *res judicata*. See *Boruski v. United States*, 493 F.2d 301 (2d Cir.) (*per curiam*), *appeal dismissed and cert. denied*, 419 U.S. 803 (1974). The district judge, faced with several separate attempts to have Boruski's claims reconsidered, entered an order perpetually enjoining and restraining the plaintiff, Ernest F. Boruski, Jr., from instituting any further action against the defendants or any of them in any court in the United States based on any matters set forth in the complaint herein for actions taken by such defendants in the course of their official duties as judge, officer, attorney or employee.

Boruski v. Stewart, 381 F. Supp. 529, 535 (S.D.N.Y. 1974). Although there was some support—though perhaps distinguishable—for such an order, see, e.g., *Gambocz v. Yelencsics*, 468 F.2d 837, 842 (3d Cir. 1972) (enjoined litigant was represented by counsel); *Ruderer v. United States*, 462 F.2d 897, 899 (8th Cir. 1972) (*pro se* litigant enjoined only from filing similar claims in the court which issued the injunction); *Ward v. Penn-*

While those *pro se* litigants who succeed often do not know why, most of those who ultimately are unsuccessful and, not unexpectedly, dissatisfied with the Second Circuit's determination, are not cognizant of the consideration given their claims. In fact, in many cases the Second Circuit deliberated on and developed areas of the law of which the party was not aware—such as federal common law,⁸⁷ or first-impression extensions of Supreme Court doctrine—before ultimately ruling against the *pro se* litigant.⁸⁸

Because the vast majority of *pro se* litigants are juristic neophytes, a characteristic common to most such cases is frustration—from delay;⁸⁹ from distrust of opposing parties and counsel;⁹⁰ from lack of familiarity with the law, judicial pro-

sylvania N.Y. Cent. Transp. Co., 456 F.2d 1046, 1047-48 (2d Cir. 1972) (*pro se* litigant enjoined "from instituting any further action or actions against the defendants or any of them in any court in the United States based on any matter set forth in the complaint"); *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 441 F.2d 631, 637 (5th Cir. 1971) (enjoined litigant was represented by counsel); *Walter E. Heller & Co. v. Cox*, 379 F. Supp. 299, 310 (S.D.N.Y. 1974) (enjoined litigant was represented by counsel), the Second Circuit in *Boruski*, on its own motion, followed what it thought to be a better approach, *viz.*, modifying the lower court order by adding to it the phrase "without prior leave of this Court." *Boruski v. Stewart*, No. 74-2375, Order (2d Cir. Feb. 28, 1975) (unreported). See *Rudnicki v. McCormack*, 210 F. Supp. 905, 911 (D.R.I. 1962), *appeal dismissed*, 372 U.S. 226 (1963). This variation has the advantage of assuring that the litigant's papers pass the eyes of a judge, who may, as in *Ferranto v. United States*, 507 F.2d 408 (2d Cir. 1974), detect a different claim, rather than risking that the clerk of the court might summarily refuse to file the papers merely because they name the same adversary as in the prior action. Cf. *Mercu-Ray Indus., Inc. v. Bristol-Meyers Co.*, 508 F.2d 837 (2d Cir. 1975) (*pro se*) (mem.) (*inter alia*, denying adversary's application—presented to the Second Circuit in the first instance—to enjoin further litigation).

⁸⁷ *E.g.*, *Kaiser v. Cahn*, 510 F.2d 282 (2d Cir. 1974) (question of when the civil rights claim for relief accrued).

⁸⁸ *Compare* *Cardillo v. Doubleday & Co.*, 518 F.2d 638 (2d Cir. 1975) (unnecessary to reach question of extension of Supreme Court's defamation doctrines) *with* *Jackson v. Statler Foundation*, 496 F.2d 623 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975) (first impression question of application of state action doctrine to tax-exempt private foundations), *discussed in* *The Misunderstood Pro Se Litigant*, *supra* note 1, at 774-77.

⁸⁹ The summary judgment motion made by the adversary of one *pro se* plaintiff was granted, the district court construing the statute of limitations to have barred the action. The Second Circuit read the complaint more liberally, in accordance with the mandate of *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), but, because in personam jurisdiction was lacking, nevertheless affirmed the judgment below. *Merckens v. F.I. DuPont, Gloré Forgan & Co.*, 514 F.2d 20 (2d Cir. 1975). The decision, however, permitted the plaintiff "to frame a more explicit complaint and to make appropriate service if he so desires." *Id.* at 21. Obviously confused by the division of functions between the district and appellate courts, the plaintiff wondered why the Second Circuit did not hear the merits of his case. In his petition for rehearing, he recounted at length the delay of more than a year since the filing of his original complaint. Requesting relief, he stated in apparent frustration: "The plaintiff demands that this Court stop f_____ around with this case." *Petition for Rehearing*, No. 74-2663, at 3.

⁹⁰ Sometimes this distrust is well-founded. When one *pro se* prisoner, for example,

cesses, and even legal terminology;⁹¹ and from lack of confidence in a legal scheme that routinely refuses to afford amends where the *pro se* feels they are due.⁹² In some cases, the apprehension of entitlement to redress is derived from fundamental notions of common sense, as in cases where an indigent inmate seeks to have his trial or other minutes furnished at the expense of the Government, so that he may, on his own, comb the record for possible reversible error to be challenged on a collateral attack. The standard rule, however, has been that, in order to obtain a transcript, the petitioner first is required to make a showing of particularized need.⁹³ But, argues the prisoner using elemental acumen, how can he "properly present his contentions"⁹⁴ with particularity before he is able to review the rec-

complained of interference with mail from his attorney, who was a professor at the St. John's University School of Law, a prison official responded: "No one is abusing your right to legal mail, but it is difficult to assume that these Schools of Law are run by competent attorneys." *Morgan v. Montanye*, 516 F.2d 1367, 1369 (2d Cir. 1975), cert. denied, 96 S. Ct. 1476 (1976); see notes 24-44 *supra* and accompanying text.

⁹¹ In response to a federal district judge's denial of his application for leave to proceed in forma pauperis and the assignment of counsel, pursuant to 28 U.S.C. § 1915 (1970), on the ground that no non-frivolous issue was presented, Raymond Lasky, not fluent with legal terms of art, dramatically wrote:

Sir: you may call my efforts, awkward [*sic*], my grammatical constructions irregular, my dreams of freedom naive, but FRIVOLOUS? NEVER!

Letter of Raymond Lasky to Judge Inzer B. Wyatt, Oct. 29, 1974, *United States ex rel. Lasky v. LaVallee*, No. 74 Civ. 2407 (S.D.N.Y. 1975).

⁹² See note 162 *infra*.

⁹³ See, e.g., 28 U.S.C. § 753(f) (1970) (section 2255 applications); 28 U.S.C. § 2250 (1970) (habeas corpus applications). See generally *Ellis v. Maine*, 448 F.2d 1325, 1327 (1st Cir. 1971); *Jackson v. Turner*, 442 F.2d 1303, 1305 (10th Cir. 1971); *Chavez v. Sigler*, 438 F.2d 840, 894 (8th Cir. 1971); *United States v. Shoaf*, 341 F.2d 832 (4th Cir. 1964); and *United States v. Glass*, 317 F.2d 200, 202 (4th Cir. 1963), in which it was held that an indigent federal prisoner is not entitled to a transcript "merely for his examination in order to determine whether he wishes to engage in litigation," or "merely to comb the record in the hope of discovering some flaw" (footnote omitted). *But cf. Britt v. North Carolina*, 404 U.S. 226, 228 (1971); *Gardner v. California*, 393 U.S. 367, 369 (1969); *Roberts v. LaVallee*, 389 U.S. 40, 42 (1967); *Long v. District Court of Iowa*, 385 U.S. 192 (1966); *Hardy v. United States*, 375 U.S. 277, 279-80 (1964); *Lane v. Brown*, 372 U.S. 477, 482-84 (1963); *Griffin v. Illinois*, 351 U.S. 12, 19-21 (1956). The Supreme Court has left this question open. *Wade v. Wilson*, 396 U.S. 282, 286 (1970).

⁹⁴ Application, *Crossley v. United States*, No. 75-8081 (2d Cir., filed Jan. 25, 1975). The Second Circuit granted leave to proceed in forma pauperis and assigned counsel to brief and argue the issue of a particularized showing of need. Order (2d Cir. May 14, 1975). Compare *United States ex rel. Buford v. Henderson*, 524 F.2d 147 (2d Cir. 1975) (commenced *pro se*) (*inter alia*, State prisoner, who had been given and thereafter had misplaced the transcript, had sufficient knowledge of its contents) with *United States ex rel. Lasky v. LaVallee*, No. 75-8086, Order (2d Cir. June 3, 1975) (unreported) (*pro se*), wherein the court

remanded for an evidentiary hearing to determine whether Lasky or his attorney ever received a copy of the transcript, and, if it is found that his attorney

ord of the proceedings. Recognizing this "catch-2255,"⁹⁵ at least one court, in a *pro se* case, held that a federal prisoner has an absolute right to a copy of his trial transcript at Government expense for use in preparing a collateral attack, stating: "we do not read the Supreme Court's opinions nor the Constitution itself to require paupers to have better memories than the affluent."⁹⁶

In other cases, admixed with a common sense claim for relief from legal injury is tangible physical injury to the litigant—injury which cannot be denied, but for which courts often conclude that there is no legal remedy. Nathaniel Williams, for example, in a *pro se* handwritten civil rights complaint⁹⁷ filed against a prison superintendent, a prison guard,⁹⁸ and unnamed prison hospital officials, alleged that an assault had been committed upon him by a fellow inmate, during which that inmate had cut off a large portion of Williams' right ear with a broken jar.⁹⁹ Williams further contended that the prison guard had been standing next to him as a group of prisoners prepared to march to lunch from their work, and that the guard had seen the attacker approach Williams from behind with the broken jar. Rather than protecting or warning Williams, the guard allegedly had jumped back and out of the way. Upon being taken to the prison hospital, Williams had asked the hospital personnel to try to suture the severed portion of his ear back on. Instead, he claimed, they had told him that he did not need his ear, threw it away (in what he claimed was a basketball-style shot), and had sewn up the stump with ten stitches.¹⁰⁰ Before the filing of any answers to the complaint, the district court, upon defendants' motion, dismissed the complaint for failure to state a cause of

did and Lasky did not, whether Lasky made any effort to get a copy from his attorney.

Id.

⁹⁵ Cf. Tuttle, *Catch 2254: Federal Jurisdiction and Interstate Detainers*, 32 U. PITT. L. REV. 489 (1971).

⁹⁶ *MacCollom v. United States*, 511 F.2d 1116, 1122 (9th Cir. 1974) (commenced *pro se*), cert. granted, 96 S. Ct. 34 (1975). See generally Note, *The Indigent's Right to a Transcript of Record*, 20 KAN. L. REV. 746 (1972).

⁹⁷ The complaint was brought pursuant to 42 U.S.C. §§ 1981, 1983, 1985(3) (1970), and their jurisdictional counterpart, 28 U.S.C. § 1343 (1970).

⁹⁸ The term today might more properly be "correction officer." See, e.g., NEW YORK STATE SPECIAL COMMISSION ON ATTICA, ATTICA: THE OFFICIAL REPORT *passim* (1972).

⁹⁹ *Williams v. Vincent*, 508 F.2d 541 (2d Cir. 1974).

¹⁰⁰ Subsequently, Williams, on six different occasions, underwent plastic surgery on that ear in the prison hospital. *Id.* at 543.

action. Williams appealed.

In determining whether the complaint stated a cause of action for violation of his constitutional rights, the Second Circuit correctly acknowledged three principles that governed its evaluation of the complaint: that Williams' allegations must be accepted as true;¹⁰¹ that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief;¹⁰² and that "pro se complaints such as this must be liberally construed."¹⁰³ Employing these guidelines, the court ruled that a complaint under section 1983 of title 42¹⁰⁴ based upon inadequate medical treatment states a cause of action if it alleges conduct that "shocks the conscience,"¹⁰⁵ such as deliberate indifference by prison authorities to a prisoner's request for essential medical treatment.¹⁰⁶ Williams' allegations evidently did shock the conscience of the court. In the face of the State's argument that Williams' challenge to the doctor's decision to do no more than sew up the wound was based on merely a difference of opinion over a matter of medical judgment,¹⁰⁷ the court expounded:

With respect to the refusal of prison doctors to provide the medical care Williams requested when he was first brought to the prison hospital, the allegations support the claim that it was deliberate indifference toward Williams' medical needs, rather than an exercise of professional judgment, which led prison medical officials merely to stitch the stump of

¹⁰¹ *Id.*; see *Cooper v. Pate*, 378 U.S. 546 (1964).

¹⁰² 508 F.2d at 543; see *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

¹⁰³ 508 F.2d at 543; see *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). The court was especially aware of this standard. See 508 F.2d at 544 n.7, 545, 546.

¹⁰⁴ Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970).

¹⁰⁵ 508 F.2d at 544; see *Rochin v. California*, 342 U.S. 165, 172 (1952).

¹⁰⁶ *Bishop v. Stoneman*, 508 F.2d 1224, 1225, 1226 (2d Cir. 1974); *Corby v. Conboy*, 457 F.2d 251, 254 (2d Cir. 1972); *Martinez v. Mancusi*, 443 F.2d 921, 924 (2d Cir. 1971); see *United States ex rel. Hyde v. McGinnis*, 429 F.2d 864, 867 (2d Cir. 1970); *Church v. Hegstrom*, 416 F.2d 449, 451 (2d Cir. 1969); cf. *Haines v. Kerner*, 404 U.S. 519 (1972).

¹⁰⁷ See *United States ex rel. Hyde v. McGinnis*, 429 F.2d 864, 867 (2d Cir. 1970). See also *Corby v. Conboy*, 457 F.2d 251, 254 (2d Cir. 1972).

his ear. Such a claim is supported by the allegation that Williams was told simply that "he did not need his ear" by doctors who then threw the severed portion away in front of him, and also by the fact that if it was possible that Williams' ear could have been saved by sewing it back on immediately at the hospital, one would expect a concerned doctor to have tried.¹⁰⁸

The decision of the district court was reversed in part,¹⁰⁹ and the case was remanded, ironically, for a "hearing."¹¹⁰

¹⁰⁸ 508 F.2d at 544. The court continued:

Of course, it may turn out that the treatment Williams requested was impossible under the circumstances, or that there were other medical considerations which led the doctors, rightly or wrongly, merely to close the wound with ten stitches. But on the basis of the allegations in the complaint, and assuming that evidence might show that sewing the severed portion of the ear back on was practicable, the possibility that deliberate indifference caused an easier and less efficacious treatment to be consciously chosen by the doctors cannot be completely foreclosed.

Id.

¹⁰⁹ Dismissal of the complaint was affirmed as to the prison superintendent, on the ground that the doctrine of respondeat superior does not apply in actions such as this. 508 F.2d at 546; see *Johnson v. Glick*, 481 F.2d 1028, 1033-34 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973); *Martinez v. Mancusi*, 443 F.2d 921, 924 (2d Cir. 1970); *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967) (*pro se*). *But cf.* *Scheuer v. Rhodes*, 416 U.S. 232, 238-49 (1974).

¹¹⁰ For other successful medical cases of *pro se* prisoners decided by the Second Circuit in the 1974 term, see, e.g., *Ellington v. Warden*, No. 75-2082, Order (2d Cir. June 2, 1975) (unreported). In that case, the prisoner, claiming to have tuberculosis, alleged that his medication "seemed to disappear." The district court dismissal was vacated and the case was remanded with directions to appoint counsel to assist the petitioner in determining through discovery whether any of the medical personnel at the prison were callously indifferent to his known medical needs. See text accompanying notes 227-31 *infra*. In *Waltenberg v. Preiser*, No. 75-2055, Order (2d Cir. Apr. 4, 1975) (unreported), the prisoner, claiming that he had a history of tuberculosis, three ulcers, a hiatus hernia, and that he had lost fifty pounds in a short period of time, alleged that prison hospital personnel were indifferent to his medical needs. The dismissal of the complaint by the district court was reversed on the ground that a claim of deliberate indifference to petitioner's medical needs, as distinguished from negligence, was stated, which entitled petitioner to an evidentiary hearing to resolve the issues presented.

For some non-prisoner *pro se* medical cases which did not fare as well, see, e.g., *Edelman v. Weinberger*, No. 74-2136, Order (2d Cir. May 21, 1975) (unreported), which involved a challenge to the district court's decision upholding the respondent's denial of petitioner's application to establish a period of disability and for disability insurance benefits. The court of appeals denied relief on the ground that the findings and conclusions of the respondent, Secretary of H.E.W., are conclusive if supported by substantial evidence, as here. See 42 U.S.C. § 405(g) (1970). In a petition for rehearing, the frustrated petitioner sought a definition of the flexible concept of "substantial evidence," which she perceived as "bigger than a breadbox but smaller than an elephant." *Petition for Rehearing*, *Edelman v. Weinberger*, No. 74-2136, Order (2d Cir. May 21, 1975) (unreported). In *Pickens v. HEW*, No. 74-1974, Order (2d Cir. Feb. 21, 1975) (unreported), congeries of the Social Security Act, as amended, 42 U.S.C. § 423 (1970), were inter-

For the *pro se* litigant, some cases, of course, evoke more frustration than do others. That is to say, some cases contain more sources of frustration, to lesser or greater degrees. To be sure, the judicial system should strive to diminish such feelings whenever possible, if one of its goals is the appearance of concern for all litigants.¹¹¹ Especially disconcerting, therefore, for the litigant as well, apparently, as for the Second Circuit, is the case glutted with frustration, part of which could be averted without herculean labor, and is not. An unparalleled example is *United States ex rel. Schuster v. Vincent*,¹¹² a case for which the State of New York will earn no encomiums.

During the 1920's, Roy Schuster was a successful tap-dancer, performing in theaters across the nation and earning more than \$200 a week, considerable by the standards of the day.¹¹³ On one tour through Milwaukee, Schuster, then 22, met a girl, fell in love, and after a brief courtship agreed to marry her. At his wife's inducement, he abandoned the stage and settled down to raise a family. He became a dancing instructor at a substantially diminished salary, but, being industrious, was able to increase his income. During the depression, however, his income shriveled from \$150 to \$11 a week. As the creditors closed in, the romance evaporated, and when a formal separation action was commenced, Schuster became so distraught that he attempted suicide. Mrs. Schuster responded to his distress by securing a court order directing him to pay a fixed sum for the support of his family. She pressed for the payments, which Schuster found difficult to meet in those lean days, and demanded \$40 a week in alimony regardless of how little her husband earned. After Mrs. Schuster threatened to have her husband jailed for contempt of court if he did not pay, he again threatened to kill himself. Finally, during an unproductive meeting with his wife and her lawyer, Schuster repeated his suicide vow,¹¹⁴ drew a revolver

pretended to provide that Pickens was not entitled to disability insurance because he was not wholly disabled by a medically demonstrable physical or mental impairment from engaging in "any substantial gainful employment," even though the type of work which Pickens was capable of performing was not available in New York City, where he lived.

¹¹¹ See note 51 *supra*.

¹¹² 524 F.2d 153 (2d Cir. 1975).

¹¹³ The facts as described herein are taken almost verbatim from the Second Circuit's opinions in *United States ex rel. Schuster v. Vincent*, 524 F.2d 153 (2d Cir. 1975), and *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir.), *cert. denied*, 395 U.S. 847 (1969).

¹¹⁴ Schuster allegedly pleaded with his wife's lawyer:

Will you please give me a chance, let me explain the situation? Let me prove to

from his pocket, and—in the ensuing chaos—fired several shots, fatally wounding his wife and injuring her attorney.

After a trial which lasted one week, Schuster was convicted of second degree murder. During the trial, he claimed that he had been in a state of panic during the melee and had been unaware of what was happening. To rebut this defense, the State's psychiatric expert repeatedly denied that Schuster was suffering from any form of delusion or mental disease. On November 2, 1931, Schuster, then 27 years old, was sentenced to a term of imprisonment of from twenty-five years to life.

Initially, Schuster was sent to Sing Sing; in 1935 he was transferred to Clinton State Prison. There he made a good adjustment, becoming a model prisoner and teaching a "cell-study" course leading to a high school equivalency degree, for which he received a letter of commendation from the New York State Board of Education. In the normal course of events, Schuster might have expected to serve his time and to be eligible for parole in 1948, when he was still young enough to build a new life, and for unconditional discharge five years thereafter. But in 1941, Schuster became convinced of corruption at Clinton, particularly on the part of the official in charge of the prison education program. When he complained of this condition, the State responded by transferring him to Dannemora State Hospital for the Criminally Insane, without the formalities of a commitment hearing.¹¹⁵ After a succession of unsuccessful State habeas corpus proceedings in which he challenged his translocation, Schuster, in 1968—after having been allowed to languish at Dannemora for almost 30 years—finally sought relief in the federal courts. On April 24, 1969, the Second Circuit held that the State's failure to afford Schuster a sanity hearing with substantially all of the safeguards and procedures granted to those involuntarily committed as patients in civil mental hospitals constituted a violation of Schuster's rights under the Equal Protection Clause of the fourteenth amendment.¹¹⁶ The district court was ordered

you I have no money. If you put me in jail Monday, you will put me out of business. You will destroy my future, you will make me commit suicide.

United States *ex rel.* Schuster v. Herold, 410 F.2d at 1074.

¹¹⁵ The reader should recall that at Schuster's trial, expert witnesses for the State several times rejected the notion that he was suffering from some form of delusion or mental disease. *Id.*

¹¹⁶ 410 F.2d at 1081.

to hear and determine petitioner's application unless a hearing is held by the courts of the state determining under the standards set forth herein the issues Schuster raises within 60 days from the date of issuance of the mandate herein, or such further time as the District Court may for good cause allow.¹¹⁷

The court's mandate issued on May 26, 1969, but the State sanity hearing which the court ordered to be held within 60 days never took place. The hearing initially was delayed—for three years—because the State insisted on contesting Schuster's choice of venue.¹¹⁸ Although this venue question was never directly presented to the Second Circuit, the court did take the occasion on a related matter to express its "wonder why the State could not have waived this venue issue in view of the special circumstances here."¹¹⁹ Following continuing procrastination by the State,¹²⁰ and after many others had already received *Schuster*-type hearings as mandated by the 1969 decision,¹²¹ Schuster's own sanity hearing was finally scheduled for April 6, 1972—almost three years after the court's order requiring that a hearing be held within 60 days, and 31 years after Schuster's transfer to Dannemora. The State was still unable to bring itself to allow Schuster the satisfaction he had sought for nearly 25 years—a determination after a hearing that he had been sane and improperly transferred. Several days before the hearing date, according to Schuster's unrefuted testimony:

[T]hey called me up and said, "We are thinking about sending you back to prison, what prison would you like to go to?" I told him, "I have a hearing coming up, I would not want to be transferred until I have had the hearing with a jury trial," which I was entitled to there, and he said, "in that case I'll have to take out a retention action against you." I said, "Go ahead. I have no objection." He said, "You have no objection?" I said, "No, none whatsoever!" Then he thought a while and then he said, "No, I am determined to transfer you."¹²²

¹¹⁷ *Id.* at 1089. The State sought review by the United States Supreme Court, but certiorari was denied. 396 U.S. 847 (1969).

¹¹⁸ See United States *ex rel.* Schuster v. Herold, 440 F.2d 1334 (2d Cir. 1971) (commenced *pro se*).

¹¹⁹ *Id.*

¹²⁰ For a description of the course of events, see 524 F.2d at 156-58.

¹²¹ *Id.* at 156.

¹²² Transcript of July 28, 1972 Hearing, at 37-38, *People ex rel. Schuster v. Vincent*, 73 Misc. 2d 653, 342 N.Y.S.2d 18 (Sup. Ct. 1972), *rev'd*, 42 App. Div. 2d 596, 344

Schuster was summarily transferred from Dannemora to Green Haven Correctional Facility (not a mental institution) on March 29, 1972. This transfer provoked Schuster's motion to have the court enforce its 1969 order mandating a hearing. The request was denied, however, since the release from Dannemora had mooted the hearing.¹²³

This prolonged frustrating abuse was not without its effect on Schuster. A Parole Board hearing was held for him on May 16, 1972. This was the first point at which he was eligible for parole, since the practice of the Board had been to deny parole to anyone incarcerated in a mental institution; such persons were conclusively presumed to be mentally ill.¹²⁴ Yet, expressing his acrid discontent, Schuster initiated the hearing by stating that he, in good conscience, could not accept Parole Board supervision, because the Board had "cooperated with the corruptively motivated retention of me 24 years beyond the date of merit . . . [and because] the [P]arole [B]oard is not morally fit to supervise anyone, certainly not me."¹²⁵ He added that he "would not accept parole. Absolutely not. I am 25 years over my parole time. I would regard even an offer of parole, as a gratuitous insult."¹²⁶

Schuster subsequently filed a State habeas corpus petition, seeking unconditional release.¹²⁷ Although the court did not order his absolute discharge, it did direct the State Parole Board to promptly conduct another hearing and to "give due weight to the existing unusual and extraordinary facts which . . . appear to compel unencumbered parole."¹²⁸ Unable to accept this, the State—in what the Second Circuit described as "an act of Tartuff[ian] self-righteousness"¹²⁹—appealed, obtaining a reversal of the lower court order. The appellate division held that "[a]s long as the Parole Board violates no positive statutory requirement, its discretion is absolute and beyond review in the

N.Y.S.2d 735 (2d Dep't 1973), *leave to appeal denied*, 33 N.Y.2d 1009, 309 N.E.2d 430, 353 N.Y.S.2d 969 (1974).

¹²³ No. 32194, Order (2d Cir. June 15, 1972).

¹²⁴ See *United States ex rel. Schuster v. Herold*, 410 F.2d at 1076 n.3.

¹²⁵ Minutes of May 16, 1972 Parole Board Hearing, IIS-440467, GH.CF.-17722.

¹²⁶ *Id.*

¹²⁷ *People ex rel. Schuster v. Vincent*, 73 Misc. 2d 653, 342 N.Y.S.2d 18 (Sup. Ct. 1972), *rev'd*, 42 App. Div. 2d 596, 344 N.Y.S.2d 735 (2d Dep't 1973), *leave to appeal denied*, 33 N.Y.2d 1009, 309 N.E.2d 430, 353 N.Y.S.2d 969 (1974).

¹²⁸ 73 Misc. 2d at 655, 342 N.Y.S.2d at 21.

¹²⁹ 524 F.2d at 158.

courts”¹³⁰ Leave to appeal to the New York Court of Appeals was denied,¹³¹ and, having exhausted available State judicial remedies,¹³² Schuster returned anew to the federal courts.

After reviewing the papers, the district judge

was moved . . . and held a hearing on November 22, 1974 at which the petitioner and a representative of the Parole Board were present. At the urging of the Court, the representative of the Parole Board went so far as to consent to a Special “release agreement” which would relieve petitioner from most of the ordinary conditions of parole. The obligation to make periodic reports were [*sic*] waived, the [P]arole [B]oard was not to interfere with petitioner’s life, and petitioner was not to be returned to prison unless he should commit another crime. Petitioner rejected this, continuing to demand nothing less than unconditional discharge.¹³³

Recognizing his very limited power over the State Parole Board and his consequent inability to order Schuster’s release, the judge reluctantly dismissed the habeas petition. Schuster appealed.¹³⁴

The opening sentence of the Second Circuit decision on appeal—the decision was rendered only 18 days after oral argument, probably to avoid further delay in Schuster’s case—adumbrated the overall tone for the opinion:

Although we are reasonably certain that the shocking story revealed in *The Gulag Archipelago*¹³⁵ could not take place in this country, the facts of Roy Schuster’s case are reminiscent of Solzhenitsyn’s treatise.¹³⁶

Chief Judge Kaufman, who had written the 1969 *Schuster* opinion for the court, recalled with disbelief the “appalling sequence of events” which left Schuster “languishing” in prison for

¹³⁰ 42 App. Div. 2d at 597, 344 N.Y.S.2d at 737.

¹³¹ 33 N.Y.2d 1009, 309 N.E.2d 430, 353 N.Y.S.2d 969 (1974).

¹³² See 29 U.S.C. §§ 2254(b), (c) (1970).

¹³³ Memorandum and Order, No. 74 Civ. 1705, at 5 (S.D.N.Y. Mar. 27, 1975) (unreported).

¹³⁴ Pursuant to 28 U.S.C. § 2253 (1970), the district court granted a certificate of probable cause, Order, No. 74 Civ. 1705 (S.D.N.Y. Apr. 7, 1975), which is required in order to appeal from the denial of an application for a writ of habeas corpus.

¹³⁵ A. SOLZHENITSYN, *THE GULAG ARCHIPELAGO* (1973). See also A. SOLZHENITSYN, *THE GULAG ARCHIPELAGO II* (1975). See generally Robbins, Book Review, *Brothers of Gulag*, 62 Va. L. Rev. 462 (1976).

¹³⁶ 524 F.2d at 154 (footnote added).

44 years, when, for conviction of a similar crime, the typical term of imprisonment is some 29 years less.¹³⁷ The panel was deeply disturbed by the "continuing procrastination"¹³⁸ of the State. Unable to understand why the State did not attempt to secure a pardon to extricate the parties from this cul-de-sac¹³⁹—although in light of its "obdurate treatment"¹⁴⁰ of Schuster the State's inaction is not difficult to comprehend—the Second Circuit discerned the State's abnegation of Schuster's constitutional rights, and its "total callousness to the ordinary decency due every human."¹⁴¹ The court continued:

Not satisfied with the severe psychological pressures it had already imposed on Schuster during his three decades at Dannemora, the State has continued to employ every conceivable artifice and device to exacerbate the petitioner's understandable frustration and bitterness—and indeed to induce him to reject parole and its concomitant of five more years under state supervision. Although the State—after repeated prodding by [the State Court, the District Court], and this Court—has recently exhibited a slight, reluctant moderation of its attitude, this change has proved insufficient to heal the emotional scars 34 years in the making.¹⁴²

Adjudging finally that Schuster's continued imprisonment approached the threshold of cruel and unusual punishment¹⁴³ by violating "the most elementary standards of decency,"¹⁴⁴ the court concisely communicated precisely that which Schuster for so long had hoped to hear:

We can no longer sit by and permit the State to continue toying with Roy Schuster's freedom.¹⁴⁵

Relying on its equity jurisdiction, the court held that the State—by its "wholly unjustifiable" and "oppressive confine-

¹³⁷ *Id.*

¹³⁸ *Id.* at 156.

¹³⁹ *Id.* at 158 n.11. In fact, the district court expressly brought this alternative to the attention of the State. See Memorandum and Order, No. 74 Civ. 1705, at 5 (S.D.N.Y. Mar. 27, 1975) (unreported).

¹⁴⁰ 524 F.2d at 156.

¹⁴¹ *Id.* at 158.

¹⁴² *Id.* at 159 (footnote omitted).

¹⁴³ Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. amend. VIII.

¹⁴⁴ 524 F.2d at 160; see *Trop v. Dulles*, 356 U.S. 86, 99-101 (1958).

¹⁴⁵ 524 F.2d at 158. Compare *United States ex rel. Marcial v. Fay*, 247 F.2d 662, 669

ment"¹⁴⁶ of Schuster, which "grievously wronged"¹⁴⁷ him, and by other "inexcusable breaches of good faith"¹⁴⁸—had "egregiously"¹⁴⁹ and "flagrantly"¹⁵⁰ violated the spirit of its 1969 mandate. Ratiocinating therefrom, the court concluded that had the transfer from Dannemora been effected in 1969, as it should have been, Schuster would have been offered and would have accepted parole during that year. Thus, he was considered to have been "constructively paroled"¹⁵¹ in 1969. In addition, because "Schuster's prison behavior [had] satisfied conditions far more strenuous than any the State could or would have imposed in 1969,"¹⁵² the court deemed him to have completed by 1974 five years of unrevoked parole.¹⁵³ The judgment of the district court was reversed, the petition for a writ of habeas corpus was granted, and the State was ordered to absolutely discharge Schuster from its custody forthwith.¹⁵⁴

Roy Schuster's case assuredly is not unexceptional, nor does its analytical foundation necessarily rest on solid legal ground.¹⁵⁵ Many of his impressions and experiences, however, poignantly exemplify those of the more typical litigants without counsel in the Second Circuit, and, we dare say, in other courts—State and federal—as well. The *pro ses'* sensibilities are bruised, for example, by those aspects of our legal system that members of the bench and the bar take for granted, such as the normal dalliances of juridical operations, adversarial exaggeration and

(2d Cir. 1957): "We must not play fast and loose with basic constitutional rights in the interest of administrative efficiency."

¹⁴⁶ 524 F.2d at 161.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 160.

¹⁵⁰ *Id.* at 161.

¹⁵¹ *Id.*

¹⁵² *Id.* at 161 (footnote omitted).

¹⁵³ *Id.*

¹⁵⁴ *Id.* Ordinarily, the Second Circuit's mandate issues "21 days after the entry of judgment unless the time is shortened or enlarged by order." FED. R. APP. P. 41(a). Such a procedure was followed here.

¹⁵⁵ It may be that "hard cases make bad law," *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting), but the Second Circuit expressly restricted its ruling to the precise situation before it:

Our conclusion that Schuster was constructively paroled in 1969 and absolutely discharged in 1974 is based entirely upon facts conceded—explicitly or implicitly—by the State. . . . Thus, our holding is limited to the facts presented here, and we are not substituting our judgment or our appraisal of the facts for that of the Parole Board on matters properly left to its discretion.

524 F.2d at 161 n.21. See also note 191 *infra*.

elocution, and alternative explanations and interpretations of laws and rules. In short, *pro se* litigants want "justice,"¹⁵⁶ and they want it immediately. But this does not mean that once a *pro se* controversy reaches the Second Circuit, it is always decided either in a manner that alleviates negative sentiments or in accordance with the established principles that presumably should govern it. One *pro se* prisoner, for example, sought injunctive relief and damages pursuant to the Civil Rights Act,¹⁵⁷ based on the alleged unconstitutional interference by prison officials with mail sent by his attorney.¹⁵⁸ Recognizing that there may have been at least one instance of such meddling,¹⁵⁹ the court nevertheless declined to grant relief, one ground being that there was no indication that the plaintiff had suffered any actual damage as a result of the interference.¹⁶⁰ Yet, as one judge accurately elucidated in dissenting from the court's denial of en banc reconsideration, "[t]his is a civil rights claim. An allegation of damages purely nominal in nature, therefore, is entirely sufficient."¹⁶¹

Also particularly disappointing to the counselless litigant is to see what he considers to be, and often is, his legitimate claim effectively ignored by the court, occasionally due to the case's distasteful facts¹⁶²—such as an axe murder¹⁶³ or a killing of a

¹⁵⁶ See *The Misunderstood Pro Se Litigant*, *supra* note 1 *passim*.

¹⁵⁷ 42 U.S.C. § 1983 (1970).

¹⁵⁸ *Morgan v. Montanye*, 516 F.2d 1367 (2d Cir.), *cert. denied*, 96 S. Ct. 1479 (1976), *petition for rehearing en banc denied*, 521 F.2d 693 (2d Cir. 1975) (one judge dissenting).

¹⁵⁹ *Morgan* claimed that prison officials had unconstitutionally opened and inspected mail from his attorney out of his presence, and that in one instance the last two pages of a brief sent from his attorney were missing as a result of the package being opened out of *Morgan's* presence. *Id.* at 1370-71.

¹⁶⁰ *Id.* at 1371, 1372; *cf.* note 91 *supra*.

¹⁶¹ 521 F.2d at 694 (Oakes, J., dissenting). See, e.g., *Joseph v. Rowlen*, 425 F.2d 1010 (7th Cir. 1970); *Basista v. Weir*, 340 F.2d 74, 87 (3d Cir. 1965), and cases cited therein. See also *United States ex rel. Larkins v. Oswald*, 510 F.2d 583, 589 (2d Cir. 1975) (commenced *pro se*) (damages not found excessive); *cf.* *Washington v. Corbet*, No. 74-8112, Order (2d Cir. Dec. 10, 1974) (unreported) (*pro se*).

¹⁶² Alternatively, the law may simply have no remedy for an apparent wrong. See, e.g., *Pickens v. HEW*, No. 74-1974, Order (2d Cir. Feb. 21, 1975) (unreported), described in note 110 *supra*; *cf.* *Szyka v. Secretary of Defense*, 525 F.2d 62 (2d Cir. 1975) (*pro se*). See generally *The Misunderstood Pro Se Litigant*, *supra* note 1, at 773. Or, the court may be of the opinion that the time is not right for the consideration of a particular claim. One example is that of prisoners' personal property rights. Until recently, a claim of mere infringement of property rights, or theft or confiscation of property by prison officials, was not actionable under 42 U.S.C. § 1983 (1970). See *Eisen v. Eastman*, 421 F.2d 560 (2d Cir. 1969) (*pro se*), *cert. denied*, 400 U.S. 841 (1970). See also *Urbano v. Calissi*, 384 F.2d 909, 910 (3d Cir. 1967) (*pro se*), *cert. denied*, 391 U.S. 925 (1968); *Almond v. Kent*, 321 F. Supp. 1225, 1228 (W.D. Va. 1970) (*pro se*), *rev'd on other*

police officer.¹⁶⁴ Such facts are, of course, theoretically irrelevant to disposition of a collateral attack.¹⁶⁵ In one case involving the murder of a police officer, for example, William Stanbridge

grounds, 459 F.2d 200, 204 (4th Cir. 1972); *Howard v. Swenson*, 314 F. Supp. 883, 884 (W.D. Mo. 1969) (*pro se*), *aff'd*, 426 F.2d 277 (8th Cir. 1970); *Argentine v. McGinnis*, 311 F. Supp. 134, 138 (S.D.N.Y. 1969) (*pro se*). However, in light of the Supreme Court's decision in *Lynch v. Household Fin. Corp.*, 405 U.S. 538 (1972), which undercut the *Eisen* court's distinction between "constitutional rights" and "property rights," courts have begun to recognize that property rights of prisoners are entitled to section 1953 protection from abuse by prison officials. *See, e.g.*, *Weddle v. Director, Patuxent Institution*, 405 U.S. 1036 (1972); *Russell v. Bodner*, 489 F.2d 280, 281 (3d Cir. 1973) (*pro se*) (seven packs of cigarettes); *Schumate v. New York*, 373 F. Supp. 1166, 1170 (S.D.N.Y. 1974) (*pro se*) (clothing); *Lathan v. Oswald*, 359 F. Supp. 85, 88 (S.D.N.Y. 1973) (*pro se*) (cigarettes and groceries). Although the Second Circuit has yet to explicitly decide this issue, it has recognized the Supreme Court's rejection of the *Eisen* distinction. *See Tucker v. Maher*, 497 F.2d 1309, 1311 (2d Cir. 1974) (*pro se*). Thus, it was indeed surprising when, in a later case, the Second Circuit found the prisoners' property rights claim to be frivolous pursuant to 28 U.S.C. § 1915(d) (1970), which establishes a court's power to dismiss a frivolous claim pursued in forma pauperis. *Esser v. Knapp*, No. 74-8402, Order (2d Cir. Jan. 6, 1975) (unreported) (one judge dissenting) (eighteen carat gold wedding band). In *Hiney v. Wilson*, 520 F.2d 589, 590 (2d Cir. 1975) (*pro se*), the court took the drastic measure of summarily remanding the case, on a preliminary application, and in a full opinion, for the "guidance" of the district court; yet, although it expressly considered other claims of the petitioner, the court did not discuss the property claim. To the same effect, see *Morgan v. LaVallee*, 526 F.2d 221 (2d Cir. 1975) (*pro se*); *Ransom v. LaVallee*, No. 75-8153, Order (2d Cir. July 17, 1975) (unreported) (*pro se*) (clothing); *Coggins v. Preiser*, No. 73-8391, Order (2d Cir. Feb. 11, 1975) (unreported) (*pro se*) (photograph). For other issues similarly ignored, see *Bloeth v. Montanye*, 514 F.2d 1192 (2d Cir. 1975) (*pro se*) (rights of prisoners in protective confinement); *Stewart v. Preiser*, No. 75-8079, Order (2d Cir. Apr. 16, 1975) (unreported) (*pro se*) (rights of prisoners seeking temporary educational furloughs). *See also* text accompanying note 252 *infra*.

¹⁶³ *United States ex rel. LaBelle v. LaVallee*, 517 F.2d 750 (2d Cir. 1975), *cert. denied*, 96 S. Ct. 803 (1976).

¹⁶⁴ *United States ex rel. Stanbridge v. Zelker*, 514 F.2d 45 (2d Cir.), *cert. denied*, 96 S. Ct. 138 (1975). For another case wherein the facts may have dissuaded the Second Circuit from confronting the ultimate issue, see *Beshaw v. Moeykens*, No. 74-1837, Order (2d Cir. June 2, 1975) (unreported) (*pro se*) (the ultimate issue concerned the procedural due process rights of pretrial detainees, but the prisoner twice had escaped from State custody).

¹⁶⁵ *E.g.*, *Humphrey v. Smith*, 336 U.S. 695, 696 (1949) (guilt or innocence irrelevant to habeas corpus review); *United States ex rel. Gockley v. Myers*, 450 F.2d 232, 240 (3d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972); *Wagenknecht v. Crouse*, 344 F.2d 920, 921 (10th Cir. 1965), and cases cited therein; *Shaver v. Ellis*, 255 F.2d 509, 511 (5th Cir. 1958); *United States ex rel. Bongiorno v. Ragen*, 146 F.2d 349, 351 (7th Cir.), *cert. denied*, 325 U.S. 865 (1945). "[W]hat we have to deal with is not the petitioners' innocence or guilt, but solely the question whether their constitutional rights have been preserved." *Moore v. Dempsey*, 261 U.S. 86, 87-88 (1923) (Holmes, J.); *cf. Thompson v. Church*, 1 Root 312 (Conn. 1791) ("[T]he business of the court is to try the case, and not the man; . . . a very bad man may have a very righteous case."). *See generally* R. SOKOL, FEDERAL HABEAS CORPUS § 2 (1969); American Bar Association Project on Minimum Standards for Criminal Justice, STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *Post Conviction Remedies* 464-65 (1974).

filed a habeas corpus petition claiming, *inter alia*, that his confession, used against him at trial, had been coerced by a physical beating at the hands of Nassau County police and detectives. At his *Huntley* hearing,¹⁶⁶ Stanbridge testified that, from the moment of his apprehension until the time that he made his inculpatory statements, he had been subjected to constant and continuous beatings; that he had been thrown into an automobile by police officers and, while being transported to the precinct, he had been punched about the head and body; that in the station house he had been subjected to the same abuse and, in addition, had been pummelled, belted, thrown to the floor and kicked, and threatened with a cocked gun; that these beatings had continued in relays, with the participation of some ten officers and detectives; and that of the seven hours that he spent in the precinct prior to making his statement, he had been beaten during at least five. He further testified that his chest and the area around his ribs were black and blue, and that his legs, thighs, and calves were discolored.¹⁶⁷

The State trial judge chose, as was his prerogative,¹⁶⁸ to disbelieve evidence in Stanbridge's favor. He did not believe Stanbridge's testimony that he had been beaten by a particular detective with a leather device commonly known as a "slapper"—which is designed to facilitate beatings without leaving tell-tale marks—in the face of evidence that that detective owned such a device.¹⁶⁹ He did not believe the testimony of three experienced criminal lawyers that, on the day of arraignment, their respective clients—Stanbridge and his two co-defendants—had borne severe bruises and ecchymoses over their chests, arms, and legs. He did not believe the testimony of the co-defendants that they, too, had been similarly and severely beaten.¹⁷⁰ Finally, he did not credit the prison medical records made in the regular course of business by the jail physician, who had written of Stanbridge shortly after the alleged beatings:

¹⁶⁶ See *People v. Huntley*, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965). *Huntley* represents New York State's compliance with *Jackson v. Denno*, 378 U.S. 368 (1964), which held that a confession, claimed by a defendant to be involuntary, is not admissible at trial unless there has been a prior determination that the confession was given voluntarily.

¹⁶⁷ Minutes of *Huntley* Hearing at 55-174.

¹⁶⁸ *E.g.*, *Quinones v. Quinones*, 139 N.Y.S.2d 607, 611 (Sup. Ct. 1955).

¹⁶⁹ Trial Transcript at 494.

¹⁷⁰ Minutes of *Huntley* Hearing at 190-396.

Pain in the anterior chest. Claims he was beaten up by the police. Tenderness along the anterior chest and ecchymosis left chest anteriorly. Contusion and ecchymosis of the anterior chest.¹⁷¹

Instead, the judge found that Stanbridge's confession was voluntary beyond a reasonable doubt, stating that "[t]he testimony smacks of an exaggeration reminiscent of Shakespeare's statement in Hamlet, 'The lady doth protest too much, methinks.'"¹⁷² The judge based his disbelief of the testimony in the defendants' favor on four factors: first, that a photograph taken of the defendants the day after the killing showed no marks or injuries; second, that the defendants had not complained to the District Attorney about the beatings—indeed, Stanbridge had thanked the D.A. after the questioning was finished; third, that there was a picture of one co-defendant's bare chest, *not introduced into evidence*, which showed none of the signs of the injuries claimed by him; and fourth, that the testimony of the defense attorneys was suspect because the attorneys had failed to summon witnesses to view the alleged injuries on the defendants' bodies.¹⁷³

Regarding point one, it was true that the photograph of the three defendants¹⁷⁴ showed no signs of bruises other than a bandage on one co-defendant's hand. However, it was also true that, in the photograph, each of the defendants, including Stanbridge, *was fully clothed*, with only hands, face, and neck bare. The photograph revealed nothing about the condition of Stanbridge's chest, ribs, thighs, and legs—the places where he allegedly had been beaten and kicked. Regarding point two, it was true that Stanbridge had not complained of police brutality to the District Attorney, and that, in response to the D.A.'s statement, "All right, thank you very much, Mr. Stanbridge," Stanbridge had responded, "Thank you." However, Stanbridge

¹⁷¹ *Id.* at 795.

¹⁷² *Id.* at 12.

¹⁷³ Stanbridge stated, in his district court papers, that

[I]t goes without saying, of course, that [the State judge] chose to believe the testimony of the 12-15 policemen, detectives, and jailers, who swore that they did no evil, saw no evil, and spoke no evil toward or about Stanbridge and his co-defendants.

Petition for Writ of Habeas Corpus at 27, *United States ex rel. Stanbridge v. Zelker*, 72 Civ. 965 (E.D.N.Y. July 19, 1972).

¹⁷⁴ Trial Transcript, opposite p. 1748.

testified that he had been threatened repeatedly by the police, who had indicated that if he complained to the D.A. about the beating he would be beaten again, even more severely.¹⁷⁵ Moreover, the exchange of "thank you's" may have indicated nothing more than instinctive politeness, or, perhaps, relief that the sleepless, night-long ordeal was finally at an end.¹⁷⁶ Regarding point three, there was a strong probability that the photograph or condition of the bare chest of a co-defendant—whom Stanbridge had not seen all night, and who had arrived at the station house six hours later than Stanbridge—was neither material nor apposite to Stanbridge's assertion that he had been severely beaten. Moreover, the photograph was not properly considered by the court, since it had never been introduced into evidence. Finally, regarding point four, the record of the *Huntley* hearing established that, within hours after consulting with their attorneys for the first time, the defendants had filed a complaint of police beatings, along with a demand to see the ranking officer in the jail at the time.¹⁷⁷ At his first opportunity, Stanbridge himself had complained to the jail physician. Moreover, at arraignment, the defense attorneys had requested that the judge designate a physician not employed by the Nassau County police or jail system to examine the defendants for injuries.¹⁷⁸ The motion had been denied. Some fifteen to thirty minutes later, the attorneys had renewed the request before another judge of the same court.¹⁷⁹ That motion had been denied. They then had requested that the judge himself examine the defendants' bruises.¹⁸⁰ That motion, too, had been denied.

Thus, of the four sources advanced in support of the State court's finding of the voluntariness of Stanbridge's confession, one was irrelevant and immaterial (point three); one was unsupported by the record (point four); one was easily explained by the record (point two); and one was totally preposterous (point one).

Without any doubt, "[t]his [was] the sort of case where feelings run high—any case involving the vicious killing of a police

¹⁷⁵ Minutes of *Huntley* Hearing at 138.

¹⁷⁶ See *Spano v. New York*, 360 U.S. 315, 322 (1959): "The drama was not played out, with the final admissions obtained, until almost sunrise. In such circumstances slowly mounting fatigue does, and is calculated to, play its part."

¹⁷⁷ Minutes of *Huntley* Hearing at 884-85.

¹⁷⁸ Trial Transcript at 620.

¹⁷⁹ *Id.* at 626-27.

¹⁸⁰ *Id.* at 627.

officer is bound to produce such feelings."¹⁸¹ But this is precisely the type of case that demands scrupulous care not only on the part of police to prevent such claims as those made by Stanbridge from arising, but also on the part of judges to adequately resolve them once made. Unfortunately, it appears that no such care was taken in this case.¹⁸² When the issue reached the Second Circuit in 1975,¹⁸³ the court described and decided Stanbridge's contentions in the text of its opinion:

He contends that during [the seven and a half hour interval at police headquarters] he was deprived of sleep, food and advice of counsel. There is, however, no evidence that petitioner requested any of the three. Indeed, he at no time indicated a desire that the interrogation stop.¹⁸⁴

Nowhere in the text did the court mention the claim of brutality. Rather, in an innocuous footnote, it added:

Although Stanbridge also contended that physical violence was used by the interrogating officers, this allegation was rejected by the state judge who conducted the *Huntley* hearing.¹⁸⁵

Nothing further was mentioned of this claim. There was no discussion of the applicability to this claim of that section of the habeas corpus statute which allows for federal court redetermination of facts decided by a State court in certain cases, including those wherein the material facts were not adequately developed at the State court hearing;¹⁸⁶ wherein "the applicant did not receive a full, fair, and adequate hearing in the State court proceeding";¹⁸⁷ wherein the applicant was otherwise denied due process of law in the State court proceeding;¹⁸⁸ or wherein the State court determination "is not fairly supported

¹⁸¹ *People v. Moll*, 21 N.Y.2d 706, 709, 234 N.E.2d 698, 699, 237 N.Y.S.2d 675, 675-76 (1967) (Burke, J., dissenting).

¹⁸² *See id.* (dissenting opinion). It is settled law that a confession, no matter how true, cannot be admitted against a defendant if it is the product of beatings, torture, or lesser forms of physical coercion. *E.g.*, *Brown v. Mississippi*, 297 U.S. 278 (1936).

¹⁸³ *United States ex rel. Stanbridge v. Zelker*, 514 F.2d 45 (2d Cir.), *cert. denied*, 96 S. Ct. 138 (1975).

¹⁸⁴ *Id.* at 47 (footnote omitted).

¹⁸⁵ *Id.* at 47 n.4.

¹⁸⁶ 28 U.S.C. § 2254(d)(3) (1970).

¹⁸⁷ 28 U.S.C. § 2254(d)(6) (1970).

¹⁸⁸ 28 U.S.C. § 2254(d)(7) (1970).

by the record."¹⁸⁹ In brief, the court was blind to Stanbridge's principal claim.¹⁹⁰

Like *Schuster*, *Stanbridge* is not a typical case. But it is the cases which border on the extreme that test the fortitude of the legal system.¹⁹¹ These cases, to varying degrees, reflect the express or implicit frustrations of most *pro se* litigants. However, most of the cases discussed in this section mirror frustrations not necessarily caused by the litigant's counselless state. The court's reaction to Schuster's protracted fight for freedom, the avoidance of fact in *Stanbridge*, the answer to the legal question of whether complaints like that in *Williams* state a claim, presumably would be the same whether or not counsel entered an appearance. In fact, in the final stages of the litigation in each of these three cases, counsel was assigned by the court, and participated in the ultimate victory, or defeat, on appeal. The cases discussed earlier in this section¹⁹² demonstrate the Second Circuit's willingness to ensure this parity between the *pro se* and the litigant with counsel by helping a *pro se* litigant to achieve whatever measure of success he might have won with competent representation. To the extent that the court is willing to scrutinize *pro se* papers to find claims the litigant did not know existed, to forgive the *pro se* litigant certain procedural

¹⁸⁹ 28 U.S.C. § 2254(d)(8) (1970).

¹⁹⁰ Further, Stanbridge's petition to the Supreme Court for a writ of certiorari was unsuccessful. 96 S. Ct. 133 (1975). Compare *United States ex rel. Lewis v. Henderson*, 520 F.2d 896 (2d Cir. 1975) (commenced *pro se*). A less weighty claim made by Stanbridge was that there was no probable cause for stopping and searching his automobile. As the Second Circuit panel noted,

[p]etitioner's automobile may have been one of the most easily identifiable vehicles ever utilized in a criminal venture. It was a 1955 green Chevrolet with a raked body (the back end higher than the front), Buick tail lights, a Cadillac grill, a louvered hood and spotlights in place of rear view mirrors on each side of the car. The "For Sale" signs in each of the auto's back windows provided further recognizable and unique characteristics. [See trial transcript pp. 455-57].

United States ex rel. Stanbridge v. Zelker, 514 F.2d at 46 n.1.

¹⁹¹ See generally L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969). As Justice Oliver Wendell Holmes observed:

[G]reat cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).

¹⁹² See text accompanying notes 24-88 *supra*.

irregularities and, above all, to treat the *pro se* seriously and sympathetically, the disadvantages of proceeding without counsel on appeal are ameliorated. However, as the next section shows, the Second Circuit's avuncular attitude toward the *pro se* litigant does not provide a complete picture of the pitfalls of proceeding *pro se*.

III. The Procedural Obstacles to *Pro Se* Litigation

No rule of procedure within the Second Circuit explicitly discriminates against the individual who proceeds without counsel. Nevertheless, the *pro se* litigant suffers many setbacks and frustrations caused by his *pro se* status, and by the hallmark of the majority of *pro se* litigants—poverty.¹⁹³ The preceding section set forth some of the reasons why an individual might choose to proceed *pro se*.¹⁹⁴ However, for the civil litigant, who has no constitutional right to court-appointed counsel,¹⁹⁵ proceeding without a lawyer is often not a matter of choice, but rather, of economic necessity. Except in infrequent test cases, or cases susceptible to treatment on a contingency fee basis, indigency generally precludes legal representation. Under the provisions of section 1915 of title 28,¹⁹⁶ indigency does not also preclude access to the courts.¹⁹⁷ An individual who can no more

¹⁹³ A study of *pro se* complaints filed in the Southern District of New York for the years 1967-71 disclosed that 84% of the *pro se* plaintiffs surveyed had proceeded in forma pauperis, and that 93.3% of incarcerated *pro se* litigants had proceeded in forma pauperis. *The Invisible Litigant*, *supra* note 17, at 187 n.112.

¹⁹⁴ See text accompanying notes 21-23 *supra*.

¹⁹⁵ The sixth amendment, by its terms, guarantees a right to assistance of counsel only in "all criminal prosecutions." U.S. CONST. amend. VI. The Supreme Court's holding that this guarantee mandates appointing counsel at government expense to assist indigent criminal defendants, *Gideon v. Wainwright*, 372 U.S. 335 (1963), has never been extended to civil litigation.

¹⁹⁶ 28 U.S.C. § 1915 (1970), which provides in pertinent part:

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

¹⁹⁷ As one commentator put it, the forma pauperis statutes "open the court house door, albeit not very far." Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270, 1277 (1966) (footnote omitted). Judge Duniway, of the United States Court of Appeals for the Ninth Circuit, provides a discussion of indigents' access to the courts

afford to pay filing fees than attorneys' fees can seek leave to proceed in forma pauperis which, if granted, would entitle a litigant to eschew docketing fees, security charges, bonds and deposits, and would provide the court with authority to assign counsel to represent the litigant at government expense.¹⁹⁸ Thus, for most *pro se* litigants, who require relief from filing fees and/or desire court-appointed counsel, an application for leave to proceed in forma pauperis is a necessary preliminary to federal court litigation. However, this privilege is also the source of a notable difference in the treatment of papers received by the courts.

A two-pronged test is utilized to decide an application seeking leave to proceed in forma pauperis. First, the court must be satisfied that the applicant is in fact indigent.¹⁹⁹ This inquiry

before the passage of federal forma pauperis statutes, *id.* at 1271-77. *See also* Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 361 (1923).

While leave to proceed in forma pauperis is generally regarded as a statutorily granted "privilege," *see, e.g.*, Blackmun, *Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 345-46 (1967), there is some justification for regarding this procedure as a right. *See id.* at 359, where Justice (then Circuit Judge) Blackmun suggested that the forma pauperis designation has assumed "certain characteristics of a right." Further, many commentators have suggested that indigents have a constitutional right of access to the courts, grounded in the first amendment, the Due Process Clause, or the Equal Protection Clause. *See, e.g.*, 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 (1970); Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153 & 1974 DUKE L.J. 527; Silverstein, *Waiver of Court Costs and Appointment of Counsel for Poor Persons in Civil Cases*, 2 VAL. L. REV. 21 (1967); Note, *The Right of Access to Civil Courts by Indigents: A Prognosis*, 24 AMER. U.L. REV. 129 (1974); Note, *Aid for Indigent Litigants in the Federal Courts*, 58 COLUM. L. REV. 832 (1958); Note, *The Heirs of Boddie: Court Access for Indigents After Kras and Ortwein*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 571 (1973); Note, *Limited Access to the Courts: An Appraisal of Fcc Systems*, 41 U. CHI. L. REV. 841 (1974); Note, *Indigent Access to the Courts: The Tiger Is at the Gates*, 26 VAND. L. REV. 25, 37-65 (1973); Note, *A First Amendment Right of Access to the Courts for Indigents*, 82 YALE L.J. 1055 (1973).

¹⁹⁸ Leave to proceed in forma pauperis will relieve the indigent litigant of the burden of court filing fees, *see* 28 U.S.C. § 1914(a) (1970) (authorizing a \$15 filing fee for civil complaints, and a \$5 filing fee for a habeas corpus petition) as well as other incidental court charges such as payment for certification of copies of documents, typing abstracts of docket entries, and fees for filing depositions from another court; and possibly of security bonds, *see* *Gift Stars, Inc. v. Alexander*, 245 F. Supp. 697 (S.D.N.Y. 1965). Once a litigant has been granted leave to proceed in forma pauperis, he may also request that the court allow him to obtain transcripts of federal court hearings at government expense, *see* 28 U.S.C. §§ 753(f), 2250 (1970), or that the court assign him counsel at government expense, *see* 28 U.S.C. § 1915(d) (1970). These forms of relief are discretionary. For a discussion of the scope of section 1915 as it relates to other auxiliary expenses, *see* *The Invisible Litigant*, *supra* note 17, at 190-96.

¹⁹⁹ *See* 28 U.S.C. §§ 1915(a),(d) (1970). *See* *Adkins v. DuPont Co.*, 335 U.S. 331 (1948).

does not often pose any problems, as indigency is judged by a generous standard,²⁰⁰ and the application usually is granted without further scrutiny if the affidavit of poverty accompanying the application²⁰¹ is sufficient on its face.²⁰² The second prong of the test, at the district court or appellate level,²⁰³ involves an assessment of the merits of the case.²⁰⁴ To decide whether an appeal in forma pauperis should be allowed, the statute specifies that the reviewing court must determine the appellant's "good faith." The Supreme Court has defined this requirement as an objective standard, connoting the existence of some nonfrivolous issue for review on appeal.²⁰⁵ In the context of a criminal appeal, the Court also warned that the good faith test is not to be converted into a requirement of a preliminary showing of any degree of merit, stating that, unless the issues the criminal appellant wishes to raise are so frivolous that the appeal would be dismissed in the case of a nonindigent litigant, forma pauperis status should be granted and the appeal allowed to proceed.²⁰⁶

In light of this pronouncement, the indigent criminal appellant, at least, is not subjected to any more rigorous degree of pre-appeal review on the merits than a nonindigent litigant might be. Whether the same egalitarian standards apply in non-

²⁰⁰ See *Adkins v. DuPont Co.*, 335 U.S. 331, 339-40 (1948); Willging, *Financial Barriers and the Access of Indigents to the Courts*, 57 GEO. L.J. 253, 257 (1968); Note, *Aid for Indigent Litigants in the Federal Courts*, 53 COLUM. L. REV. 832, 839-42 (1958); Note, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 GEO. L.J. 516, 524-25 (1968).

²⁰¹ See Form 4, FED. R. APP. P.

²⁰² This is the practice in the Southern District of New York. See *The Invisible Litigant*, *supra* note 17, at 188 & n.117.

²⁰³ Forma pauperis applications are considered at both levels. Under 28 U.S.C. § 1915 (1970), the district court determines whether to authorize proceedings in forma pauperis in the district court. Under FED. R. APP. P. 24 (a), if a litigant is granted such leave in the district court, he will automatically be allowed to proceed in forma pauperis on appeal, unless the district judge certifies that his appeal "is not taken in good faith." If an individual has not sought leave to proceed in forma pauperis during the district court proceedings but wishes this relief on appeal, Rule 24 (a) requires that he present his application to the district court before seeking leave to proceed in forma pauperis on appeal from the circuit court of appeals. Thus, the circuit court of appeals will consider motions for leave to proceed in forma pauperis on appeal if the district court has certified that an appeal "is not taken in good faith," or if the district court has denied a motion for leave to proceed in forma pauperis on appeal.

²⁰⁴ *Kinney v. Plymouth Rock Squab Co.*, 236 U.S. 43 (1915).

²⁰⁵ *Coppedge v. United States*, 369 U.S. 438, 445 (1962).

²⁰⁶ *Ellis v. United States*, 356 U.S. 674 (1958) (per curiam). The other cases wherein the Supreme Court discussed the good faith standard were also direct criminal appeals. *Hardy v. United States*, 375 U.S. 277 (1964); *Coppedge v. United States*, 369 U.S. 438 (1962); *Farley v. United States*, 354 U.S. 521 (1957); *Johnson v. United States*, 352 U.S. 565 (1957).

criminal cases is an open question.²⁰⁷ The possible denial of equal protection inherent in allowing a more stringent pre-appellate review of cases brought by indigents is apparent.²⁰⁸ For this reason, several members of the Supreme Court have expressed the opinion that the same standards must apply in civil cases, allowing indigent civil appellants to appeal in forma pauperis unless their appeals are so utterly frivolous that they would be dismissed even if the appellant were not indigent. However, even if the "good faith" requirement is as easily satisfied in civil appeals as it is in criminal appeals,²⁰⁹ the fact remains that only the indigent litigant is required to surmount this hurdle at all. It is no answer to say that an identical appeal brought by a nonindigent litigant might have been dismissed prior to plenary consideration had the court discovered its lack of merit. There is generally no procedural stage in a non-indigent's appeal where the circuit court of appeals would undertake a review of the merits of the appeal before briefs are filed and argument is heard.²¹⁰ Justice Douglas has suggested that this disparate treatment of the indigent appellant, *i.e.*, substituting a summary pre-appellate review for plenary consideration, constitutes an invidious discrimination on the basis of wealth, and a denial of equal protection of the laws, no matter how leniently the term "merit" may be defined.²¹¹ As Justice Douglas points out, the "good faith" or frivolity standard is hopelessly elu-

²⁰⁷ *But see* Urbano v. News Syndicate Co., 358 F.2d 145, 147 (2d Cir.) (Lumbard, J., dissenting), cert. denied, 385 U.S. 831 (1966). Judge Lumbard suggested that a more rigid standard of review of indigents' appeals is justified by the fact that leave to proceed in forma pauperis is a privilege, and that the court is footing the bill.

²⁰⁸ Cruz v. Hauck, 404 U.S. 59, 63-64 (1971) (Douglas, J., concurring); Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 958 (1971) (Black, J., dissenting from denial of certiorari). See also Lawson v. Prasse, 411 F.2d 1203 (3d Cir. 1969); Ragan v. Cox, 305 F.2d 53, 60 (10th Cir. 1962).

²⁰⁹ The dissenting Justices in Coppedge v. United States, 369 U.S. 438, 458-59 (1962), complained that the flexible definition of "good faith" had, in effect, repealed the forma pauperis statute by eliminating the "good faith" requirement entirely.

²¹⁰ The court may consider the merits of an appeal on a motion to dismiss in a criminal appeal, FED. R. CRIM. P. 39(a), or in a civil appeal under FED. R. APP. P. 27 & 2D CIR. R. 27(a).

Proceeding upon the theory that the good faith requirement has, indeed, been eliminated, at least in criminal appeals, see note 209 *supra*, several members of the Court have suggested that the procedure of screening forma pauperis appeals should simply be abandoned. Hardy v. United States, 375 U.S. 277, 294-95 (1964) (Goldberg, J., concurring); Coppedge v. United States, 369 U.S. 438, 458 (1962) (Stewart & Brennan, JJ., concurring).

²¹¹ Cruz v. Hauck, 404 U.S. 59, 62-65 (1971) (Douglas, J., concurring).

sive,²¹² as shown by the number of cases in which the Supreme Court has reversed lower courts' determinations that only frivolous issues had been presented in particular cases.²¹³ Especially where the appellate court is confronted with *pro se* motion papers, which generally are no more informative than to say that the prospective appellant is poor and that he believes that the district court has erred, there is little assurance that the existence of a nonfrivolous issue will be discovered. Thus, Justice Douglas' suggestion that the second prong of the test be eliminated, and that an indigent appellant be allowed to proceed on a sufficient showing of indigency,²¹⁴ would eliminate an inequality built into *forma pauperis* review—an inequality that exists, no matter how lenient a standard is used to assess the merits of an indigent's appeal. However, this is another area where the willingness of the court of appeals to treat an indigent *pro se* litigant with "appropriate benevolence"²¹⁵ can do much to alleviate a potentially unfair system. In the 1974-75 term, the Second Circuit found nonfrivolous issues presented by *pro se* appellants and granted leave to proceed in *forma pauperis* in 42 cases which district judges had already found to be frivolous.²¹⁶ Generally, these meritorious issues were unearthed by the court's complete review of the district court record and by independent research—only infrequently were the nonfrivolous issues explicitly presented by the *pro se* motion papers, or by the district court opinion.²¹⁷

The more serious problems engendered by the disparity of treatment inspired by the *forma pauperis* statute—problems of equal protection, due process and efficient judicial administration—occur in the district court. Section 1915(d) provides that, in a case where the litigant seeks to proceed in *forma*

²¹² *Id.* at 65.

²¹³ See cases cited in *id.* at 61 n.8; *Coppedge v. United States*, 369 U.S. 433, 440-41 n.1 (1962).

²¹⁴ *Cruz v. Hauck*, 404 U.S. at 65-66.

²¹⁵ *Eisen v. Eastman*, 421 F.2d 560, 562 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970).

²¹⁶ Of these cases, 13 were habeas corpus petitions brought by State prisoners, where the Second Circuit granted a certificate of probable cause, see 28 U.S.C. § 2253 (1970), 7 were motions to vacate sentence by federal prisoners, pursuant to 28 U.S.C. § 2255 (1970), and 22 were civil rights cases, brought under 42 U.S.C. § 1983 (1970). These cases are on file in the Office of the *Pro Se* Clerk, United States Court of Appeals for the Second Circuit.

²¹⁷ For a discussion of the methods used by the court of appeals in reviewing *pro se* appeals, see *The Invisible Litigant*, *supra* note 17, at 219-46.

pauperis, "the court . . . may dismiss the case . . . if satisfied that the action is frivolous or malicious." Some courts have interpreted this provision as allowing a district judge broad discretion to screen on the merits any case wherein the plaintiff seeks to proceed in forma pauperis, and to dismiss cases found, on this preliminary review, to be "frivolous."²¹⁸ Because leave to proceed in forma pauperis is a necessary preliminary to the docketing of an action where the litigant cannot afford to pay the filing fee, interpreting section 1915(d) to allow such independent review often leads to sua sponte dismissals in *pro se* cases even before the complaint has been filed or served, and before any answer or any responsive pleading or motion has been required.²¹⁹

²¹⁸ 28 U.S.C. § 1915(d) (1970). For one of the earliest cases interpreting section 1915(d) to authorize this procedure, see *O'Connell v. Mason*, 132 F. 245 (1st Cir. 1904). The disparity in treatment engendered by the adoption of this procedure is aggravated by the fact that some courts review the denial of leave to proceed in forma pauperis and the concomitant summary dismissal of the indigent *pro se* complaint on an "abuse of discretion" standard, see *Jones v. United States*, 453 F.2d 351 (5th Cir. 1972); *Williams v. Field*, 394 F.2d 329 (9th Cir.), *cert. denied*, 393 U.S. 891 (1968), rather than applying the orthodox standard on review of the dismissal of a complaint, *i.e.*, that a complaint should not be dismissed for failure to state a claim "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." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). Some courts have further compounded this discriminatory treatment by ruling that the court's discretion to grant forma pauperis relief should be exercised sparingly in civil cases for damages, see, *e.g.*, *Flowers v. Turbine Support Div.*, 507 F.2d 1242, 1244 (6th Cir. 1975), and particularly avariciously in prisoners' suits against their keepers, see *Daye v. Bounds*, 509 F.2d 66, 68 (4th Cir.), *cert. denied*, 421 U.S. 1002 (1975); *Shobe v. California*, 362 F.2d 545, 546 (9th Cir.), *cert. denied*, 385 U.S. 887 (1966); *Weller v. Dickson*, 314 F.2d 598, 604 (9th Cir.) (Duniway, J., concurring), *cert. denied*, 375 U.S. 845 (1963) (stating that forma pauperis should be denied *even if a claim is stated*, if the court is of the opinion that the prisoner's chances of ultimate success are slight). This niggardly attitude toward allowing prisoners to proceed in forma pauperis has been carried to extremes, as shown by the following statement of standards to be applied:

A court therefore should be satisfied that there exists substantiality as to such a claim, of justiciable basis and of impressing reality before it permits a prisoner to maintain an action therefor on in-forma-pauperis privilege. . . .

Only in a rare and exceptional situation has there been or can there be made to appear such clear substantiality of justiciable basis and of impressing reality as to entitle a prisoner's claim on institutional treatment to be so asserted. . . . Such a situation will ordinarily involve regulation, discipline, or discrimination of such character or consequence as to shock general conscience or to be intolerable in fundamental fairness. . . .

Carey v. Settle, 351 F.2d 483, 484-85 (8th Cir. 1965). Since most prisoners require leave to proceed in forma pauperis, see note 203 *supra*, such insurmountable standards, requiring that the conscience of the court be shocked by the claim asserted before the suit may even be commenced, effectively closes the courthouse door to some prospective plaintiffs who have suffered a legally cognizable wrong. Fortunately, the Second Circuit has never adopted such a position.

²¹⁹ See FED. R. CIV. P. 4(a) (issuance and service of a summons are accomplished

Cases before the Second Circuit in the 1974-75 term have occasioned the court's consideration of the problems created by these *sua sponte* dismissals. Paramount is the question of whether such summary treatment constitutes a denial of due process or of equal protection of the laws. As one example, plaintiff Samuel Johnson brought a civil rights complaint in the Northern District of New York, alleging that he had been assaulted by seven prison guards whose names he did not know, and that he had been wrongfully transferred from a State prison to Matteawan State Hospital without a hearing.²²⁰ Johnson's complaint was poorly drafted—he named as defendant the warden of the prison where he allegedly had been assaulted, rather than the seven prison guards. Since the doctrine of respondeat superior has been held not to apply in civil rights actions,²²¹ and since Johnson had alleged no facts connecting the warden with the alleged assault, his complaint was formally inadequate because of his failure to join the prison guards as defendants. However, sufficient facts had been alleged to state a claim of assault against the prison guards and, since Johnson was proceeding *pro se*, precedent requiring liberal treatment of *pro se* complaints²²² would seem to have mandated allowing Johnson the opportunity to amend his caption by naming the prison guards as defendants, and to proceed to discovery in order to attempt to learn the names of these individuals. However, under the authority provided by section 1915(d), the district court dismissed the complaint *sua sponte* for failure to state a claim, even before an answer had been filed. On finding that a non-frivolous claim had been stated, the Second Circuit vacated the dismissal and remanded the matter to the district court "in order that the defendant may answer or make such motions addressed to the complaint as he deems advisable."²²³

In a similar case, Fred Putman, Jr., brought a *pro se* complaint in the Northern District of New York alleging that medical personnel at the prison where he was incarcerated had

"[u]pon the filing of the complaint"); FED. R. CIV. P. 12(a) (answer is to be served 20 days after service of the summons and the complaint).

²²⁰ Johnson v. LaVallee, No. 75 Civ. 168 (N.D.N.Y. 1975).

²²¹ See Johnson v. Glick, 481 F.2d 1028, 1033-34 (2d Cir.), cert. denied, 414 U.S. 1033 (1973); Martinez v. Mancusi, 443 F.2d 921, 924 (2d Cir. 1970); cf. Wright v. McMann, 387 F.2d 519 (2d Cir. 1967).

²²² See, e.g., Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Eisen v. Eastman, 421 F.2d 560, 562 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970); Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944).

²²³ Johnson v. LaVallee, No. 75-8179, Order (2d Cir. July 30, 1975).

refused to afford him adequate medical treatment for his tubercular condition.²²⁴ Since Putman alleged that he had had a serious medical problem, and that the named defendants had not only been aware of his problem, but had shown deliberate indifference in refusing to treat him, his complaint was sufficient under previous Second Circuit case law²²⁵ to make out a claim of denial of eighth amendment rights. Again, the district court, under the authority of section 1915(d), dismissed the complaint *sua sponte*, without requiring an answer, on the ground that the complaint failed to state a claim of constitutional magnitude. In this case, too, the dismissal was vacated and the case remanded in order that the defendant might answer or move against the complaint.²²⁶

In a third case, Irving Ellington brought a *pro se* complaint in the Eastern District of New York, alleging that, when he had been transferred from an upstate prison to the Brooklyn House of Detention, medication he was required to take for his tuberculosis had been sent as part of his personal effects, but that the medical personnel at the Brooklyn House had simply refused to locate the medicine and give it to him, despite his repeated requests.²²⁷ Ellington alleged that he had been ill throughout his stay at the Brooklyn House, and that he had not seen his medication until he had been transferred back to an upstate prison. Subsequently, he was again sent to the Brooklyn House of Detention, accompanied by his medicine. When the same sequence of events was repeated and the medicine again "seemed to disappear"²²⁸ Ellington decided to sue. As a temporary visitor to the institution, Ellington did not know the names of the persons who, by keeping his medicine from him, had caused him to suffer bouts of tuberculosis. He therefore brought his civil rights complaint against the warden of the institution and "Medical Personnel Known and Unknown." The district court properly dismissed the suit against the warden, due to the lack of any allegation that the warden had had any knowledge of or direct

²²⁴ Putman v. LaVallee, No. 75 Civ. 281 (N.D.N.Y. 1975).

²²⁵ Compare Williams v. Vincent, 508 F.2d 541 (2d Cir. 1974); Bishop v. Stoneman, 508 F.2d 1224 (2d Cir. 1974); Corby v. Conboy, 457 F.2d 251, 254 (2d Cir. 1972); Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970); United States *ex rel.* Hyde v. McGinnis, 429 F.2d 864 (2d Cir. 1970) (disagreement in medical judgment not enough to state claim); Church v. Hegstrom, 416 F.2d 449 (2d Cir. 1969).

²²⁶ Putman v. LaVallee, No. 75-8196, Order (2d Cir. July 30, 1975).

²²⁷ Ellington v. West, No. 74 Civ. 1443 (E.D.N.Y. 1974).

²²⁸ *Id.* (Complaint).

involvement in this asserted denial of medical attention.²²⁹ The court then went on to dismiss the entire complaint, *sua sponte*, for "failure to name the parties," since deleting the warden's name had left the caption with no specifically named individual.²³⁰ This case too was remanded by the Second Circuit, with specific instructions that the district court assign counsel to assist the plaintiff, so that the names of the prison medical personnel might be discovered.²³¹

The Second Circuit has long disfavored summary treatment of any case, particularly dismissals for failure to state a claim for "mere technical defects or ambiguities in pleading."²³² To dismiss a *pro se* complaint for a relatively technical defect that could be corrected easily, were the *pro se* plaintiff advised of the problem, compounds the potential due process violations posed by summary treatment. For this reason, many courts have held that before a complaint—particularly a *pro se* complaint—is dismissed *sua sponte* for failure to state a claim, the plaintiff should be given notice and an opportunity to supplement his papers in order to cure whatever defect the court has noted.²³³ In all three of the cases discussed above, a simple amendment of the caption was all that should have been necessary to prevent dismissal of the complaint. The Second Circuit's treatment of these cases indicates a general agreement with the principle that the *pro se* litigant should be given a fair opportunity to correct such flaws rather than have his complaint dismissed perfunctorily.

Pre-answer summary dismissals, moreover, often seem to be almost as unfair to the court as they are to the confused *pro se* plaintiff. When a case is dismissed *sua sponte* on review of the *forma pauperis* application, the record on appeal is comprised only of a *pro se* complaint and a brief order announcing that the complaint fails to state a claim, or a memorandum not-

²²⁹ *Accord*, authorities cited note 221 *supra*.

²³⁰ *See* FED. R. CIV. P. 10(a). *But see* *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971); *Miller v. Director, Middletown State Hosp.*, 146 F. Supp. 674, 676 (S.D.N.Y. 1956), *aff'd*, 243 F.2d 527 (2d Cir. 1957).

²³¹ *Ellington v. West*, No. 75-2082, Order (2d Cir. June 2, 1975).

²³² *Arfons v. E.I. DuPont De Nemours & Co.*, 261 F.2d 434, 435 (2d Cir. 1953).

²³³ *Literature, Inc. v. Quinn*, 482 F.2d 372, 374 (1st Cir. 1973); *Urbano v. Calissi*, 353 F.2d 196, 197 (3d Cir. 1965) (*pro se*); *Harmon v. Superior Court*, 307 F.2d 736, 793 (9th Cir. 1962) (*pro se*); *see* *Martin v. Johnson*, 471 F.2d 704, 705 (6th Cir. 1973) (*pro se*); 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1357, at 611-14 (1969).

ing some other defect. The question of whether a complaint states a claim is scarcely a litmus test of the legitimacy of the *pro se*'s grievance, and the court of appeals will often disagree with the district judge's evaluation of the merits of an asserted claim. Where the court determines on review of a summary dismissal that the complaint does state a claim, the case will undergo protracted treatment that might have been unnecessary had a fuller record been made. For example, had the defendants been required to file answers or to make motions in the cases discussed above, the existence of some dispositive defense might have been disclosed, thereby obviating the necessity of shuffling the case between the district court and the court of appeals while the merits of the claim itself were debated. For this reason, several other federal circuit courts of appeals have expressly advised their district courts that it is a better practice to allow a complaint to be filed in forma pauperis, if accompanied by a facially sufficient affidavit of poverty, so that a proper record can be made for review.²³⁴

At least one case in the Second Circuit last term showed the advisability of this procedure. The *pro se* litigant in the case had brought a civil rights action against both the former Governor of New York and one of the governor's assistants, seeking damages for what he alleged to have been an illegal extradition to another State. The district judge dismissed the complaint *sua sponte*, before responsive pleadings were filed, citing two grounds: first, that the complaint failed to state a cognizable claim under the civil rights statute, and second, that the claim was barred by the statute of limitations.²³⁵ Whether an illegal extradition can give rise to a claim for damages under section 1983 of title 42²³⁶ is an interesting question that has received varying answers in the courts.²³⁷ Because this would have been

²³⁴ *Forester v. California Adult Auth.*, 510 F.2d 58, 60 (8th Cir. 1975); *Duhart v. Carlson*, 469 F.2d 471, 473 (10th Cir. 1972), *cert. denied*, 410 U.S. 958 (1973); *Campbell v. Beto*, 460 F.2d 765, 768 (5th Cir. 1972); *Owens v. Brierly*, 452 F.2d 640, 642-43 (3d Cir. 1971); *Brown v. Schneekloth*, 421 F.2d 1402, 1403 (9th Cir.), *cert. denied*, 400 U.S. 847 (1970); *Foster v. United States*, 344 F.2d 698 (6th Cir. 1965); *Ragan v. Cox*, 305 F.2d 58, 60 (10th Cir. 1962). *But see* *Wartman v. Branch 7*, 510 F.2d 130, 132-34 (7th Cir. 1975), *overruling* *United States ex rel. Morris v. Radio Station WENR*, 209 F.2d 105 (7th Cir. 1953).

²³⁵ *Purdue v. Rockefeller*, No. 75 Civ. 193 (N.D.N.Y. 1975).

²³⁶ 42 U.S.C. § 1983 (1970). *See* note 104 *supra*.

²³⁷ *Compare Sanders v. Conine*, 506 F.2d 530 (10th Cir. 1974) and *Pierson v. Grant*, 357 F. Supp. 397 (N.D. Iowa 1973) (holding that a claim cognizable under § 1983 is stated) with *Hines v. Guthrey*, 342 F. Supp. 594 (W.D. Va. 1972) and *Johnson v. Buile*, 312 F. Supp. 1349 (W.D. Mo. 1970) (holding that no cognizable claim is stated).

a case of first impression for the Second Circuit, it was fairly evident that the district court had erred in finding that no claim had been stated. Thus, the court of appeals was left with the other ground for the district court's dismissal of the complaint—that the suit was time-barred. The statute of limitations is, of course, an affirmative defense that must be pleaded by the defendant; therefore, it is not a proper ground for a *sua sponte* dismissal.²³⁸ Because the complaint should not have been dismissed *sua sponte*, the court of appeals vacated the dismissal and remanded the case with instructions that the defendants be directed to answer the complaint.²³⁹ Doubtless the judges felt a sense of futility in this exercise of proper judicial administration, knowing that as soon as an answer was filed, the defendants in all likelihood would raise the statute of limitations, since they already had been advised by the district judge that this was a valid and conclusive defense, and the case would grind to a halt. Had an answer been filed initially, the number of proceedings this case generated probably would have been halved.²⁴⁰

In short, Justice Douglas' view that an indigent litigant, upon a showing of poverty, should be treated in the same manner as any other litigant has much to commend it at the district court level too. The uncertainty involved in applying the "frivolity" standard under section 1915(d),²⁴¹ the convolutions that *sua sponte* dismissals force many *pro se* actions to undergo, and the unsavory possibility that the indigent *pro se* litigant will be afforded only summary justice, are all factors that should outweigh the modest financial cost of allowing the indigent *pro se* his full day in court. The Second Circuit's treatment of *forma pauperis* cases seems to indicate an inclination toward this view. But until the Second Circuit speaks more explicitly on this issue, the indigent *pro se* seeks *forma pauperis* relief only at the peril

²³⁸ See FED. R. CIV. P. 8(c). The statute of limitations, as an affirmative defense, may be waived by defendant. See, e.g., *Bush v. Remington Rand*, 213 F.2d 456, 464 (2d Cir. 1954).

²³⁹ *Purdue v. Rockefeller*, No. 75-8102, Order (2d Cir. June 3, 1975).

²⁴⁰ This case is also exemplary of the amounts of time consumed when the district court reassumes jurisdiction of a complaint previously dismissed. Although, here, the cause was remanded on June 3, 1975, an inquiry in December 1975 disclosed that no answer had yet been filed. *Purdue v. Rockefeller*, No. 75 Civ. 193 (N.D.N.Y. 1975) (docket sheets); see note 89 *supra*.

²⁴¹ See *Cruz v. Hauck*, 404 U.S. 59, 65 (1971) (Douglas, J., concurring); *Williams v. Field*, 394 F.2d 329, 331 (9th Cir.), cert. denied, 393 U.S. 891 (1968); *Blackmun, Allowance of In Forma Pauperis Appeals in § 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 346-49, 359 (1967).

of having his case summarily dismissed. With the only alternative being not to litigate at all, the indigent *pro se* must bear that risk.

Apart from the barrier of the *forma pauperis* statute, *pro se* litigants suffer numerous other setbacks that may be attributed, at least in part, to their lack of legal representation. Several of the cases discussed previously were derailed, albeit not permanently, because the *pro se* plaintiffs were not familiar with the proposition that *respondeat superior* does not apply in civil rights cases.²⁴² Only through sheer persistence were these three *pro se* plaintiffs able to overcome the problems generated by their lack of legal knowledge. There is no way to know how many *pro se* plaintiffs suffered dismissal on the same ground and, despairing of success, did not appeal adverse decisions.

Another example of an abstruse legal doctrine that poses problems for the *pro se* litigant also inheres in civil rights cases. The Second Circuit's doctrine that State administrative remedies must be exhausted as a prerequisite to the filing of a civil rights complaint²⁴³ also has led to numerous dismissals of cases, many of which are promptly remanded as soon as they reach the court of appeals. Here, again, the problem is that the *pro se* litigant either does not understand this requirement well enough to show that it has, in fact, been satisfied, or he is not given an opportunity to address the question of exhaustion before the complaint is summarily dismissed. One case last term highlighted this problem in an appellate proceeding that would have been unnecessary had the district court given the *pro se* plaintiff a chance to respond before dismissing the complaint. Plaintiff attempted to bring a class action on behalf of the inmates of the protective custody unit at the Great Meadow Correctional Facility, alleging that such inmates were being deprived of the privileges afforded the general prison population solely because they were in need of special protection.²⁴⁴ The only administrative procedure available to prisoners to air such grievances,

²⁴² See text accompanying notes 220-31 *supra*.

²⁴³ *Eisen v. Eastman*, 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970).

²⁴⁴ *Flowers v. Casscles*, No. 74 Civ. 65 (N.D.N.Y. 1974). Among the deprivations alleged were denial of any opportunity to attend religious services, to use the prison law library, to take more than limited exercise, to participate in recreational and educational programs, or to receive adequate medical treatment. *Flowers* also alleged that protective-custody inmates received the same treatment as inmates in punitive segregation, being confined to their cells twenty-two hours a day, and required to eat meals in their cells.

under New York law, is to advise the Commissioner of Corrections of the existence of the problem and request that the Commissioner take action.²⁴⁵ Plaintiff Flowers had written to the Commissioner, and had received in reply a letter from a member of the Commissioner's staff, informing him that, if he was dissatisfied with the loss of privileges, he could yield his protective custody status and rejoin the general prison population. Thus, the plaintiff was left with a choice between the meager amenities of prison life and his physical safety; it was clear that all possible administrative remedies had been exhausted.

However, plaintiff Flowers evidently was unaware of the exhaustion requirement, or that the letter he had written could be viewed as a legally necessary step to satisfy that requirement. Thus, he did not mention his correspondence with the Commissioner in his district court complaint. The complaint was dismissed *sua sponte*, before any answer had been filed, on the ground that administrative remedies had not been exhausted.²⁴⁶ Flowers appealed this decision and, in response to the district court's announcement that he had not taken appropriate steps to bring his problem to the attention of prison officials, attached to his appellate papers copies of his letter and the Commissioner's reply. The Second Circuit remanded the case, specifying in its order that the letters disclosed that administrative remedies had been exhausted.²⁴⁷

Even a *pro se* plaintiff who is aware of the exhaustion requirement would not be likely to understand all of the ramifications of the doctrine so as to be able to protect his complaint against an undeserved dismissal. For example, several cases that had been summarily dismissed for nonexhaustion were remanded last term on the ground that exhaustion of administrative remedies is not required where the complaint seeks only damages.²⁴⁸ While the plaintiffs in these cases knew they were

²⁴⁵ See 7 N.Y.C.R.R. § 301.9 (1970).

²⁴⁶ Flowers v. Casscles, No. 74 Civ. 65, Memorandum-Decision and Order (N.D.N.Y. 1974).

²⁴⁷ Flowers v. Casscles, No. 74-8077, Order (2d Cir. Feb. 11, 1975).

²⁴⁸ See Ray v. Fritz, 468 F.2d 586 (2d Cir. 1972). See also Preiser v. Rodriguez, 411 U.S. 475, 494 (1973); Plano v. Baker, 504 F.2d 595, 599 (2d Cir. 1974). Cases remanded last term on this ground include Hiney v. Wilson, 520 F.2d 589, 590 (2d Cir. 1975) (*per curiam*); United States *ex rel.* Haymes v. Preiser, 508 F.2d 837 (2d Cir. 1975) (*mem.*); Ransom v. LaVallee, No. 75-8153, Order (2d Cir. July 17, 1975); Abdul Rabb v. Casscles, No. 74-8161, Order (2d Cir. May 14, 1975); Abdul Rabb v. Preiser, No. 74-8129, Order (2d Cir. May 14, 1975).

only seeking damages, they did not know that this fact had excused them from complying with a requirement whose existence was unknown to most of them. Another exception to the requirement that administrative remedies be exhausted is where exhaustion would be futile.²⁴⁹ The Second Circuit remanded several cases last term that had been dismissed for nonexhaustion, after determining that exhaustion would have been futile;²⁵⁰ but the *pro se* papers in those cases showed that it is unrealistic to expect a *pro se* litigant to successfully identify and argue the issue of futility of exhausting specific administrative remedies. Further, the Second Circuit has recognized that the viability of imposing an exhaustion requirement at all is somewhat doubtful in light of dicta in numerous recent Supreme Court cases stating that exhaustion of administrative remedies is no longer required in civil rights cases.²⁵¹ This issue has been raised in a number of recent cases, but scrupulously avoided by the court of appeals.²⁵² It is not likely that, without the aid of briefs and argument by persons with legal training, a *pro se* litigant could successfully frame the argument that the exhaustion requirement should be abolished in a way that would encourage the court to confront this issue.

Procedural mishaps also plague the *pro se* litigant. While the Second Circuit is generous in forgiving many procedural irregularities caused by a litigant's unfamiliarity with court rules, there are some defects that cannot be corrected by the circuit court. For example, failure to file a timely notice of appeal in the district court is a jurisdictional defect which must lead to dismissal of an attempted appeal, even in a *pro se* case.²⁵³ A

²⁴⁹ *Plano v. Baker*, 504 F.2d 595, 597 (2d Cir. 1974).

²⁵⁰ See, e.g., *Coggins v. Preiser*, No. 73-8391, Order (2d Cir. Feb. 11, 1975).

²⁵¹ See *Plano v. Baker*, 504 F.2d 595, 597 (2d Cir. 1974); *Goetz v. Ansell*, 477 F.2d 636, 639 (2d Cir. 1973) (concurring opinion). See generally Note, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201 (1968). The question of whether a prisoner must exhaust administrative remedies before commencing a suit under the Civil Rights Act is currently pending before the Supreme Court. *Burrell v. McCray*, 516 F.2d 357 (4th Cir. 1975) (exhaustion not required), cert. granted, 96 S. Ct. 264 (1975).

²⁵² See *United States ex rel. Haymes v. Preiser*, 508 F.2d 837 (2d Cir. 1975) (reversal without opinion); *Plano v. Baker*, 504 F.2d 595 (2d Cir. 1974). In the cases cited in notes 248 and 250 *supra*, the district court had dismissed the complaints for failure to exhaust administrative remedies. On appeal, the Second Circuit did not examine the viability of the exhaustion requirement; rather, the court fit those cases into previously declared exceptions to the exhaustion doctrine, and remanded to the district courts.

²⁵³ FED. R. APP. P. 3(a), 4; see *In re Orbitec Corp.*, 520 F.2d 358 (2d Cir. 1975) (*pro se*); *Vine v. Beneficial Fin. Co.*, 374 F.2d 627, 632 (2d Cir. 1967); *Guido v. Ball*, 367 F.2d 882 (2d Cir. 1966).

number of *pro se* appeals had to be dismissed last term because the litigants had not filed their notices of appeal within the allotted time.²⁵⁴ Also, the Second Circuit is helpless to reinstate a civil litigant's right to trial by jury where the litigant has failed to file a timely notice of demand for a jury trial.²⁵⁵ *Pro se* litigants, moreover, spend an abundant amount of time, energy and money attempting to appeal orders that any attorney could immediately identify as interlocutory.²⁵⁶ Even where the litigant needs the assistance of the Second Circuit to straighten out a procedural imbroglio, the court cannot extend its jurisdiction to offer its help.

The obstacle course comprised of esoteric legal doctrines, complex procedural requirements, and summary disposition, proves fatal to many *pro se* litigants each term. Some of the factors discussed above merely test the *pro se*'s persistence and patience by prolonging the amount of time and by multiplying the number of court proceedings necessary before a case reaches its resolution. But other mistakes made by the *pro se*, or decisions made by the district court, can permanently impair the litigant's chance of ultimate success. No matter how generous the Second Circuit is willing to be in minimizing the effects of the *pro se*'s lack of substantive or procedural knowledge, the fact remains that limitations on the court's jurisdiction can preclude, at times, assistance or forgiveness; that some litigants unknowingly relinquish their opportunity to bring their cases before the court of appeals; and that some litigants, perplexed by the proceedings below or failing to recognize that the district court has erred, simply give up.

IV. The Indigent Civil Litigant's Right to Counsel

The cases discussed in the previous sections demonstrate that the court of appeals can neither remove all the disadvantages nor soothe all the frustrations endemic to *pro se* litigation.

²⁵⁴ *E.g.*, Calhoun v. Riverside Research Inst. No. 75-7415, Order (2d Cir. Sept. 19, 1975); Torres v. United States, No. 75-8151, Order (2d Cir. July 7, 1975).

²⁵⁵ See FED. R. CIV. P. 38(b),(d) (jury trial is waived if not demanded within ten days after the service of the last pleading directed to such issue).

²⁵⁶ 28 U.S.C. § 1291 (1970) allows an appeal to be taken only from "final decisions"; 28 U.S.C. § 1292 (1970) allows appeals from interlocutory orders only in limited circumstances. For examples of *pro se* appeals that were dismissed for lack of jurisdiction, see, *e.g.*, Cooper v. Oglesby, No. 75-7054, Order (2d Cir. June 11, 1975) (appealing a nonappealable order which had not even been entered); Altman v. Nixon, No. 74-2429, Order (2d Cir. Jan. 7, 1975) (appealing denial of a motion to reinstate a previously dismissed complaint, after an amended complaint had been filed).

Most *pro se* litigants have reached the same conclusion and agree that a kindly attitude on the part of the court is no substitute for an attorney. It seems somewhat ironic to speak of a right to proceed *pro se* when most civil litigants approach the courts *pro se* only when they have no other choice. Indeed, the first step most *pro se* litigants take in any judicial proceeding is to request that the court assign them counsel.

However, indigent civil litigants have no sixth amendment right to court-appointed counsel, even in habeas corpus and other quasi-criminal proceedings.²⁵⁷ Whether to assign counsel is a question left to the discretion of the court.²⁵⁸ Generally, in deciding a motion for assignment of counsel, the court considers whether counsel would be "useful,"²⁵⁹ by examining the claim presented to see if it is substantial and complex, and by determining if complicated proceedings, such as an evidentiary hearing or a trial, will be necessary. However, some jurists believe that assignment of counsel in some circumstances may be a matter not only of the court's convenience, but also of due process. The Second Circuit has stated that it is "a better practice" to assign counsel where a case presents a triable issue of fact, and has suggested that it may be reversible error for a district court to fail to appoint counsel to assure that a litigant receives a fair and meaningful hearing when complex factual issues are involved.²⁶⁰ The United States Court of Appeals for Ninth Circuit expressed this point in even stronger terms:

[T]he appointment of counsel may sometimes be mandatory even in those areas in which the Sixth Amendment does not apply. This is true when the circumstances of a defendant or the difficulties involved in presenting a particular matter are such that a fair and meaningful hearing cannot be had without the aid of counsel. Compliance with the due process clause of the Fifth Amendment then requires that counsel be appointed.²⁶¹

²⁵⁷ See *Day v. United States*, 428 F.2d 1193, 1195 (8th Cir. 1970); *Desmond v. Board of Parole*, 397 F.2d 386, 391 (1st Cir.), *cert. denied*, 393 U.S. 919 (1968); *Queor v. Lee*, 382 F.2d 1017, 1018 (5th Cir. 1967); *LaClair v. United States*, 374 F.2d 486, 488 (7th Cir. 1967); *Brown v. Cameron*, 353 F.2d 835, 836 (D.C. Cir. 1965); *Crowe v. United States*, 175 F.2d 799, 801 (4th Cir. 1949), *cert. denied*, 338 U.S. 950 (1950); Note, *Prisoner Assistance on Federal Habeas Corpus Petitions*, 19 STAN. L. REV. 887, 889 (1967).

²⁵⁸ See 18 U.S.C. § 3006A(g) (1970); 28 U.S.C. § 1915(d) (1970); *Muhammad v. McGinnis*, 362 F.2d 587, 588 (2d Cir. 1966).

²⁵⁹ *Sanders v. United States*, 373 U.S. 1, 21 (1963).

²⁶⁰ *United States ex rel. Wissenfeld v. Wilkins*, 281 F.2d 707, 715-16 (2d Cir. 1960).

²⁶¹ *Dillon v. United States*, 307 F.2d 445, 446-47 (9th Cir. 1962) (footnotes omitted);

One of the "circumstances" the Ninth Circuit mentioned which may necessitate assignment of counsel as a matter of due process must undoubtedly be that the litigant is incarcerated. In a recent report on *pro se* litigation in the Southern and Eastern Districts of New York, the Committee on the Federal Courts of the Association of the Bar of the City of New York considered the handicaps suffered by incarcerated civil rights litigants:

While it is true that virtually all *pro se* litigants labor under serious disadvantages in conducting litigation, the prisoner-plaintiff is obviously under additional handicaps by reason of the fact of his confinement and the inadequacy of most prison libraries (assuming he even knows how to proceed with his lawsuit) and the low educational levels among prisoners. An incarcerated *pro se* Section 1983 litigant will be faced with the difficulties of formulating a proper pleading, in obtaining any necessary discovery, in preparing motion papers or briefs, and, of course, in presenting his case at trial.²⁶²

Unlike most of the problems discussed in the previous sections, some of these hurdles cannot be overcome by the incarcerated *pro se* litigant, no matter how great his legal knowledge or persistence, and no matter how willing the court is to render assistance. Incarceration may conclusively prevent a litigant from undertaking meaningful discovery, from doing thorough legal research, from attending pretrial conferences and hearings, and from overseeing the progress of his case. As the Committee found, "[t]he lack of any lawyer to represent the plaintiff normally means that the case will often lay dormant."²⁶³

The truth of this observation was dramatically demonstrated by one proceeding before the Second Circuit last term. Plaintiff Walter Johnson had filed a civil rights complaint in the Eastern District of New York on July 31, 1973, also seeking leave to proceed in forma pauperis and requesting assignment of counsel.²⁶⁴ The complaint alleged instances of police brutality and therefore stated a colorable claim under section 1983 of title 42,²⁶⁵ which could only be resolved by trial. The district court,

accord, *Roach v. Bennett*, 392 F.2d 743, 748 (8th Cir. 1968). See also *Shelby v. Phend*, 445 F.2d 1326, 1328 (7th Cir. 1971); *Hawkins v. Bennett*, 423 F.2d 948, 951 (8th Cir. 1970); *Proctor v. Harris*, 413 F.2d 383, 389 (D.C. Cir. 1969) (Bazelon, C.J. concurring).

²⁶² 30 RECORD OF N.Y.C.B.A. 107, 109 (1975) (footnote omitted).

²⁶³ *Id.*

²⁶⁴ *Johnson v. City of New York*, No. 73 Civ. 1142, Complaint (E.D.N.Y., filed July 31, 1973).

²⁶⁵ 42 U.S.C. § 1983 (1970). See, e.g., *Howell v. Cataldi*, 464 F.2d 272 (3d Cir. 1972) (civil rights claim stated); *MacDonald v. Musick*, 425 F.2d 373 (9th Cir.), *cert. denied*,

having decided that the complaint did state a claim, contacted an attorney to ask whether he would handle the case. After reviewing the court files, the attorney wrote to the district court on February 7, 1974, to say that he was unable to accept the assignment because of other commitments. No further attempts were made to find counsel to represent plaintiff Johnson, and no ruling was entered on Johnson's motion for assignment of counsel. Plaintiff Johnson did the only thing an incarcerated litigant can do to move his case along—he wrote letter after letter to the district court, inquiring about the progress of his case, requesting the court's assistance, and renewing his motion for assignment of counsel time and again. Only once did he receive any reply to his queries. Finally, almost a full two years after filing his complaint, Johnson, despairing of receiving attention from the district court, filed a petition for a writ of mandamus in the Second Circuit.²⁶⁶

The Second Circuit ordered an immediate answer from respondents.²⁶⁷ It seemed that the mandamus proceeding would furnish the court with a rare opportunity to consider and comment on the problem posed by nonfrivolous prisoners' civil rights complaints. However, the respondent's answer was to moot the mandamus by promptly assigning counsel to represent Johnson.²⁶⁸ Thus, Johnson's case finally saw some progress, but only because this particular plaintiff had sufficient legal knowledge to utilize the mandamus procedure. The Second Circuit addresses the problem of dormant cases only in the context of petitions for writs of mandamus;²⁶⁹ therefore, the court has never had occasion to write an opinion on the subject. The reason is that mandamus proceedings are analogous to the proverbial squeaky wheel. When a prisoner seeks a writ of mandamus because his case has been languishing for years in the district court, the district judge, reluctant to be the subject

400 U.S. 852 (1970); *Collum v. Butler*, 421 F.2d 1257 (7th Cir. 1970).

²⁶⁶ *Johnson v. Neaher*, No. 75-8140 (2d Cir. 1975).

²⁶⁷ *Id.*, Order of July 2, 1975 (unreported). See FED. R. APP. P. 21(b), which provides for the issuance of an order compelling a response from the respondent when the court is contemplating granting a writ of mandamus.

²⁶⁸ See *Johnson v. Neaher*, No. 75-3035, Order (2d Cir. Aug. 13, 1975) (unreported) (denying petition for mandamus as moot).

²⁶⁹ Because there is no final order within the meaning of 28 U.S.C. § 1291 (1970), appeal does not lie. Thus, a neglected litigant can reach the court of appeals only via the All Writs Act, 28 U.S.C. § 1651 (1970), which permits the court of appeals to issue extraordinary writs in aid of its appellate jurisdiction.

of a writ of mandamus, will take prompt action in that particular case. But it is only the squeaky wheel which is oiled; there is no way to estimate the number of prisoners' civil rights complaints that have been pending in the district courts for as many years as Johnson's, or even longer, where the plaintiffs have not sought relief by mandamus.

In fairness to the district judges, it must be noted that the problem of prisoners' civil rights cases is not susceptible of easy resolution. It is virtually impossible, for the reasons previously noted, to proceed efficiently with a case whose prosecutor is incarcerated. It is also difficult and time-consuming to find enough qualified attorneys to represent these litigants. The reason is simple: there is no statutory provision for compensating assigned attorneys in civil rights actions.²⁷⁰ Nor is there provision for reimbursement for expenses; an attorney who accepts such an assignment may find that, not only is he not being paid, but he also is financing the litigation.

Recognizing the dilemma confronting the district courts as well as the incarcerated litigants, the Committee on the Federal Courts recommended that attorneys be assigned in all prisoners' civil rights cases, and that statutory authority for compensation for fees and expenses in such cases be provided to make such representation feasible.²⁷¹

Especially where the litigant is incarcerated, the assignment of counsel is often a *sine qua non* of meaningful and fair adjudication. Numerous decisions have spoken eloquently of prisoners' constitutional right of access to the courts.²⁷² The right to submit papers to the courts is an empty one if the courts have no concomitant obligation to enable a prisoner to prosecute his suit. As suggested by the Committee, the courts are neither a well-qualified nor an appropriate source of assistance to one of two adversaries in an adversary system premised on the neutrality of the court.²⁷³ The conclusion is thus inescapable that assigning counsel, at least in nonfrivolous prisoners' civil rights cases, may

²⁷⁰ Compare the Criminal Justice Act, 18 U.S.C. § 3006A(b) (1970), which provides compensation for attorneys who undertake discretionary assignments.

²⁷¹ 30 RECORD OF N.Y.C.B.A. 107, 110-11 (1975).

²⁷² Johnson v. Avery, 393 U.S. 483 (1969); *Ex parte* Hull, 312 U.S. 546 (1941); Corby v. Conboy, 457 F.2d 251, 253 (2d Cir. 1972); Sostre v. McGinnis, 442 F.2d 178, 189 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 & 405 U.S. 978 (1972).

²⁷³ 30 RECORD OF N.Y.C.B.A. 107, 109-110; *see* Duniway, *The Poor Man in the Federal Courts*, 18 STAN. L. REV. 1270, 1284 (1966).

not be merely a matter of discretion, but of constitutional imperative.²⁷⁴

The same reasoning might well be extended to other, perhaps all, *pro se* cases. As a corollary to the constitutional right of access to the courts and the constitutional guarantees of due process and equal protection of the laws, there may be a right to the assistance of counsel even in nonprisoner civil cases. Justices Black and Douglas have expressed the belief that there is such a right.²⁷⁵ Extrapolating from the right of access to the courts declared in *Boddie v. Connecticut*,²⁷⁶ which struck down a State filing fee for divorce actions, Justice Black declared that "there cannot be meaningful access to the judicial process until every serious litigant is represented by competent counsel."²⁷⁷ Most *pro se* litigants would agree.

V. Conclusion

The issue in *Faretta v. California*²⁷⁸ concerned the judicial practice of forcing an attorney on an unwilling defendant. Rejecting a mechanistic interpretation of the Bill of Rights, the Supreme Court perceived that the "ability to waive a constitutional right does not ordinarily carry with it the right to insist on the opposite of that right."²⁷⁹ In Hohfeldian analytical jurisprudential terms this, of course, is correct.²⁸⁰ The Court

²⁷⁴ The Federal Courts Committee, in its report, noted that even where there is no compensation available, there are methods for finding attorneys to represent indigent litigants where such representation is believed to be necessary. The Committee cited the example of the Chief Justice of the Supreme Court of Nevada who, upon concluding that one county in the State was providing inadequate assistance of counsel to indigents, wrote to the members of the Bar of the county, directing them to accept assignments from the Legal Aid Society. The Justice cited Canon 2 of the ABA Code of Professional Responsibility: "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty To Make Legal Counsel Available." 30 RECORD OF N.Y.C.B.A 107, 114 n.21 (1975).

²⁷⁵ *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. 954-60 (1971) (Black, J., dissenting from denial of certiorari); *id.* at 960 (Douglas, J.).

²⁷⁶ 401 U.S. 371 (1971).

²⁷⁷ *Meltzer v. C. Buck LeCraw & Co.*, 402 U.S. at 959. In light of the fact that the Supreme Court has refused more logical extensions of *Boddie*, see *Ortwein v. Schwab*, 410 U.S. 656 (1973) (appellate court filing fee); *United States v. Kras*, 409 U.S. 434 (1973) (bankruptcy filing fee), Justice Black's optimism in believing that the Court might accept such an extension of the constitutional right of access to the courts may well be unwarranted. For a discussion of the status of the constitutional right of access to the courts after *Boddie* and *Kras*, see authorities cited note 197 *supra*.

²⁷⁸ 422 U.S. 806 (1975).

²⁷⁹ *Id.* at 819 n.15, quoting *Singer v. United States*, 380 U.S. 24, 34-35 (1965). See also 422 U.S. at 841 (Burger, C.J., dissenting).

²⁸⁰ See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial*

went on, however, to find an independent right of self-representation.²⁸¹ But the question now posed is not merely a syllogistic one; indeed, logic is only a single integrant in the framework of the legal system. The substance is constructed by making intelligent value judgments with respect to each alternative element.²⁸² Thus, when the question becomes whether counsel *should* be appointed to represent the *pro se* litigant who, as yet, is not entitled thereto, we must ask whether the structure will be strengthened by so doing.

The ultimate concerns of the members of the *Faretta* Court lay in three areas: fairness, efficiency, and justice. In the context of criminal litigation, the Court observed that "the help of a lawyer is essential to assure the defendant a fair trial."²⁸³ But is not fairness also a goal of non-criminal litigation? Several of the Justices added, absent opposition, that "[i]t hardly needs repeating that courts at all levels are already handicapped by the un-supplied demand for competent advocates, with the result that it often takes longer to complete a given case than experienced counsel would require."²⁸⁴ But would not the appointment of counsel in non-criminal cases also reduce the burdens on the judicial system? Finally, the dissenting Chief Justice stated that "[b]oth [the prosecutor and the trial judge] are charged with the duty of insuring that justice, in the broadest sense of that term,

Reasoning, 26 YALE L.J. 710 (1917) and 23 YALE L.J. 16 (1913). See also Cook, *Hohfeld's Contributions to the Science of Law*, 28 YALE L.J. 721 (1919).

²⁸¹ 422 U.S. at 819-20 n.15. See also *id.* at 837 (Burger, C.J., dissenting).

²⁸² Compare *id.* at 836 (Burger, C.J., dissenting) ("This case . . . is another example of the judicial tendency to constitutionalize what is thought 'good' ") with Robbins, *The Admissibility of Social Science Evidence in Person-Oriented Legal Adjudication*, 50 INDIANA L.J. 493, 508-09 & n.66 (1975).

²⁸³ 422 U.S. at 832-33 (footnote omitted).

²⁸⁴ *Id.* at 845 (Burger, C.J., dissenting, joined by Blackmun & Rehnquist, JJ.). See also *id.* at 846 (Burger, C.J., dissenting) (footnote omitted):

Unless, as may be the case, most persons accused of crime have more wit than to insist upon the dubious benefit that the Court confers today, we can expect that many expensive and good faith prosecutions will be nullified on appeal for reasons that trial courts are now deprived of the power to prevent.

On the need for competent counsel generally, see, e.g., Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973); Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A.J. 175 (1974). Compare Kaufman, *A Response to Objections to the Second Circuit's Proposed District Court Admission Rules*, 61 A.B.A.J. 1514 (1975) and Note, *New Admission Rules Proposed for Federal District Courts*, 61 A.B.A.J. 945 (1975) with Ehrlich, *A Critique of the Proposed New Admission Rule for District Courts in the Second Circuit*, 61 A.B.A.J. 1385 (1975).

is achieved in every criminal trial."²⁸⁵ But if justice is what we veritably seek, ought we not search for it in every case and cause, both criminal *and* civil?

Presumably, the Court unanimously would respond to each of the above questions in the affirmative. Why then, one might ask, must we confront the problem addressed by this article? The answer is that many courts narrowly adhere to the pre-scripts of the sixth amendment, without adequately recognizing and applying the Due Process Clauses of the fifth and fourteenth amendments.²⁸⁶ Thus, although many courts opine that one who acts as his own attorney "has a fool for a client,"²⁸⁷ most decline to legitimize the proverbial corollary: "He hath good judgment that relieth not wholly on his own."²⁸⁸ To the extent that the judgment of counsel will lead to fairer results and minimize the frustrations of any *pro se* litigant, we submit that courts are neglecting their responsibilities in compelling the civil *pro se* litigant to appear without counsel.

²⁸⁵ 422 U.S. at 839 (Burger, C.J., dissenting). See also *id.* at 849 (Blackmun, J., dissenting), quoting *Berger v. United States*, 295 U.S. 78, 88 (1935): It is an "established principle that the interest of the State in a criminal prosecution 'is not that it shall win a case, but that justice shall be done.' "

²⁸⁶ The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Powell v. Alabama, 237 U.S. 45, 68-69 (1932).

²⁸⁷ See, e.g., 422 U.S. at 852 (Blackmun, J., dissenting). The first recorded statement of this proverb, as such, probably was: "There is a popular impression, for which there is a good deal to be said, that a man who is his own lawyer has a fool for a client," *British Weekly*, Dec. 21, 1911, at 386. Earlier sayings, however, were of similar import. See, e.g., J. CLARKE, *PAROLMIOLOGIA ANGLO-LATINA* 22 (1639) ("He that will not be counselled cannot be helped"); G. HERBERT, *OUTLANDISH PROVERBS* 363 (1640) ("He that is his own counsellor knows nothing sure but what he has laid out"); accord, B. FRANKLIN, *POOR RICHARD'S ALMANACK* (Aug., 1747); J. RAY, *A COLLECTION OF ENGLISH PROVERBS* 6 (1670).

²⁸⁸ G. TORRIANO, *SELECTED ITALIAN PROVERBS* 57 (1642); accord, J. MAPLETOFT, *SELECTED PROVERBS* 1 (1707). We are not unmindful of the adage that "wise men make proverbs, and fools repeat them," S. PALMER, *MORAL ESSAYS ON PROVIDENCE* viii (1710), but even "a fool may give a wise man counsel," G. CHAUCER, *TROYLUS* i. 630 (1374) ("A fool may eek a wis-man ofte gyde"). See also MORIAE *ENCOMIUM* 160 (J. Wilson trans. 1668) ("Sometimes a fool may speak a word in season").