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THE LAW LIBRARY'S INSTITUTIONAL RESPONSE TO THE *PRO SE* PATRON: A POST-*FARETTA* REVIEW

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I. INTRODUCTION

The United States Supreme Court decision in *Faretta v. California*[1] established legal self-representation as a constitutionally guaranteed right in both state and federal cases. Since the 1975 decision, concern has grown over the impact of *pro se* litigants on the legal system. This article focuses on one aspect of the *pro se* problem: the ways in which law libraries and law librarians can help *pro se* litigants who become law library patrons to achieve effective self-representation. After surveying the extent and nature of *pro se* use of law libraries, the article assesses the ways in which law librarians should respond to the needs of *pro se* patrons and the legal and ethical implications of the librarians' conduct. Con-

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1. 422 U.S. 806 (1975).

crete institutional responses will be suggested to the problem posed by *Faretta*: How to achieve fairness in litigation when one party is not represented by counsel.

II. LAW LIBRARIES AND *PRO SE* PATRONS

A. *The Magnitude of* Pro Se *Use and the Traditional Law Library Response*

The extent to which *pro se* patrons make use of law libraries is difficult to assess.[2] Although no systematic study has been undertaken, data indicate that many law libraries receive requests for assistance from *pro se* patrons.[3] Evidence of *pro se* library use is also available from the unsystematic impressions of law librarians who have occasionally reduced these impressions to writing.[4] Study of these sources allows one to conclude that *pro se* patronage, especially in urban areas,[5] constitutes significant library use. These patrons are either welcomed or permitted at a vast majority of law libraries[6] and form a noticeable fraction of the user population.

Measurements of the magnitude of *pro se* patronage must take into account the nature of library services required as well as the actual number of users. With few exceptions, *pro se* patrons have not received training in legal research.[7] As a result, their requests for librarian assistance are more frequent and are likely to be more time consuming than those of other patrons.[8] With virtually no data available detailing the nature of *pro se* requests, one can only

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2. A *pro se* patron for the purposes of this discussion includes any library patron, not at the time represented by counsel, who seeks information about a personal legal problem.

3. *See* Werner, *Law Library Service to Prisoners—The Responsibility of Non-prison Libraries*, 63 LAW LIB. J. 231, 236-37 (1970), and Allen, *Whom Shall We Serve: Secondary Patrons of the University Law School Library*, 66 LAW LIB. J. 160 (1973).

4. *See, e.g.*, Begg, *The Reference Librarian and the* Pro Se *Patron*, 69 LAW LIB. J. 26 (1976). One should note that these reports may frequently be understated, for only a *pro se* patron who actively communicates that status to the librarian will be noticed.

5. *See* Allen, *supra* note 3, at 160-61.

6. *Id.* at 165. Private libraries are the exception to the general practice of permitting *pro se* patronage.

7. In the prison library context, many inmates develop significant legal research skills. *Cf.* Johnson v. Avery, 393 U.S. 483 (1969) (a state may not prohibit prisoners from providing legal assistance to other prisoners in the absence of other alternatives).

8. One often detects a sense of librarian hostility to such demands on library services. *See* Begg, *supra* note 4, at 30-32.

evaluate the potential costs involved in providing the requested assistance. Recent figures indicate that law libraries spend roughly 55 per cent of their overall budgets on personnel costs.[9] Since the only other major variable items in most library budgets are serials and new acquisitions, the trade-offs can become quite dramatic. The time spent in aiding *pro se* patrons must either directly reduce the time available to serve others or possibly result in reduced acquisitions.[10] The need for the assistance of highly trained, nonclerical law library personnel further exacerbates the demands that *pro se* patronage places on strained library resources. In view of these costs, it is not surprising that only a fraction of the requests for help that librarians receive from *pro se* patrons are fulfilled.[11]

The qualitative nature of the services requested by the *pro se* patron bears on the issue of the appropriate law library response. Often, these requests extend beyond the mere procurement of physical materials to assistance with legal analysis and argument. Law libraries have heretofore avoided the burdens of providing analytical services.[12] This institutional decision is formally acknowledged in the American Association of Law Libraries Draft Code of Professional Responsibility and Ethics which states that:

> Law Librarians should refrain from unauthorized practice of law. This should be understood as: not to give legal advice or opinion, or interpretation of statutes or court decisions. On the other hand, if requested both the text of the law and the court interpretation of it, either in statutes or codes, or the decisions of the courts should be made available for everyone.[13]

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9. P. SWORDS & F. WALWER, THE COSTS AND RESOURCES OF LEGAL EDUCATION 218 (1974).

10. It is assumed that there is not idle patron service capacity. One should further note that to employ an additional staff member may involve a quantum leap in expense. *See* Allen, *supra* note 3, at 168, where he states:

> [E]very single bit of service extended to secondary patrons (to the bar, to students from other law schools, to taxpayers, etc.) is purchased at the expense of service to the primary patrons of the library, and that the law school student and faculty member at the host institution is the loser.

11. *See* Werner, *supra* note 3, at 237; Allen, *supra* note 3, at 170-71.

12. *See* text accompanying notes 13-40 *infra*.

13. AMERICAN ASSOCIATION OF LAW LIBRARIES DRAFT CODE OF ETHICS, art. III, § 2 (1974), [hereinafter cited as DRAFT CODE]. This draft code was voted upon at the 1975 Annual Convention of the American Association of Law Libraries. The draft, however, did not receive a majority endorsement and was withdrawn by the Ethics Committee for further re-working. A re-draft is to be ready in time for discussion and vote at the Annual Convention scheduled for late June, 1978. Some type of statement on unauthorized practice is expected to appear in this new draft.

Taken at face value, the Draft Code provides the basis upon which law libraries may seek to respond when the services requested by the *pro se* patron require legal analysis. Even before the promulgation of the Draft Code, many individual law libraries, fearing liability for unauthorized practice of law, had made policy decisions not to provide analytical assistance in most cases. These policies were drawn with explicit recognition that "[l]aw library employes [sic] are cloaked with knowledge, and unsuspecting inquirers will believe what they tell them. Thus, there is a serious obligation to guide employees on how to react in various situations, and to emphasize the importance of weighing their actions carefully."[14]

One cannot realistically presume, however, that the underlying problems are solved by the mere drafting of codes or policies. Initially, a line drawing problem appears. When should technical assistance in locating materials be denied so that the librarian need not fear slipping into the realm of analysis?[15] Before attempting to define this line, one must first examine the premises underlying the Draft Code's ethical position. This is particularly true in light of the recognition, in *Faretta*, of the *pro se* right.[16]

B. *Debunking the Perceived Dilemma Regarding Legal Liability for Analytical Advice*

In assisting the unskilled law library user, law librarians fear that advice which goes beyond the mere provision of materials will result in legal liability for the unauthorized practice of law. This deep-seated fear is expressly articulated at two points in the Draft

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14. Panel Discussion, *Ethical Problems of Law Librarianship*, 67 LAW LIB. J. 528, 531 (1974), [hereinafter cited as Panel Discussion]. This problem is of modern origin. A previous authority had said, "The problem of reference or research work in the law library is less troublesome than might be supposed, for such work is usually done by the patron himself. . . ." J. KAISER, LAW, LEGISLATIVE AND MUNICIPAL REFERENCE LIBRARIES 10 (1914).

15. In the question and answer period following the panel discussion, *supra* note 14, the following question was asked by Ms. Elaine Teigler:

> The group that most disturbs me is the layman. The phrase in the code, "The Code and the Decisions should be made available," troubles me with this group. I ask the question: How do you point out the United States Code, bring him to it, take the index, and at least, point to his subject and say, "Now this is the index to the laws now in force in the United States, and be sure and use the pocket parts," without practising law? I feel if one gives him the chapter and the verse, you are almost consciously interpreting the Code.

Panel Discussion, *supra* note 14, at 538.

16. *See* text accompanying notes 41-48 *infra*.

Code.[17] The perceived dilemma is also prominent in the literature.[18] One graphic account is as follows:

> A layman who appears in person to ask a question or who writes or telephones about one is a problem . . . . While he would hesitate to ask a medical library staff to diagnose a rash and fever, he does not hesitate to seek advice from the staff of a law library when the landlord threatens eviction. Such inquiries must be handled with tact and assistance in finding the desired information without actually interpreting the law. A reference librarian runs the danger of being accused of unlawful practice of the law or violation of professional ethics.[19]

A related fear, though less often expressed, is that liability may be imposed for negligent rendition of services.[20] Taken together, these fears give rise to the belief that the law librarian who gives more in-depth assistance than merely providing materials may be exposed to legal liability.

Although penal law and tort law may provide sanctions for egregious law librarian misbehavior, it is extremely unlikely that liability will flow from the types of assistance that are most often requested and occassionally given. In most cases, the perceived dilemma simply does not exist. Conduct by the librarian which exceeds the mere provision of legal materials does not become unauthorized practice of law simply because it includes elements of analysis of content and probative worth. Similarly, tort liability, which must be founded on a breach of duty, cannot be imposed unless the librarian fails to exercise due care. Recognition of these legal realities does not help answer the normative question of how much assistance should be provided for the *pro se* patron, but it does allow consideration of the problem without the hindrance of unfounded fears.

Many cases involving criminal prosecutions for unauthorized practice contain dicta which define "practice of law" very broadly. For example, the Georgia Supreme Court has said that practice of law is "not confined to practice in the courts of this state, but [is] of [a] larger scope, including . . . the giving of any legal advice, and any action taken for others in any matter connected with the

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17. DRAFT CODE, *supra* note 13, art. III, § 2; art. VII, § 1.

18. *See* note 15 *supra*; *cf.* Fiordalisi, *Law Library Services to the Community*, 46 LAW LIB. J. 448, 450-51 (1953) (indicating the need to avoid impinging on the prerogatives of the organized bar).

19. Heckel, *Service to Readers*, 11 LIB. TRENDS 271, 275-76 (1963).

20. *See* text accompanying notes 31-37 *infra*.

law."[21] Similarly, an earlier Illinois decision involving criminal prosecution for unauthorized practice, in dicta, found the practice of law to include "the giving of advice or rendering services requiring the use of legal skill or knowledge."[22] Standing alone, these dicta suggest that many acts undertaken by law librarians amount to the unauthorized practice of law. By providing the *pro se* patron with the relevant statutes and cases, the law librarian has rendered services requiring some degree of legal skill or knowledge. The same conduct amounts to action taken for others in a "matter connected with the law." But the absurdity of defining those acts as the practice of law is patent. Such services, while skilled and meaningful, are not the unauthorized practice of law.

Once one recognizes that these dicta sweep far too broadly, the search for a functional definition of unauthorized practice of law reveals two major elements. First, the relationship between the unauthorized practitioner and client usually has a remunerative aspect.[23] Second, the services rendered involve either preparation of a physical work product or representation in some sort of transaction or forum.[24] Measured against these more concrete functional tests, it becomes apparent that significant legal research assistance does not amount to the unauthorized practice of law. Activities such as explaining the commands contained in a summons, directing the patron to those rules of court which explain how the summons can be resisted, expressing opinions about the relevance of a particular source, or simply informing the patron that the position that he or she is seeking to adopt has been foreclosed by statute or case law do not involve remuneration, representation, or the preparation of a work product.[25] Although they constitute examples of

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21. Boykin v. Hopkins, 174 Ga. 511, 519, 162 S.E. 796, 800 (1932) (In a slightly atypical case, the state solicitor general sought to enjoin defendants from applying for authorization to practice law).

22. People v. People's Stock Yards State Bank, 344 Ill. 462, 474, 176 N.E. 901, 907 (1931).

23. *See* J. FISHER & D. LACHMANN, UNAUTHORIZED PRACTICE HANDBOOK 140 (1972) [hereinafter cited as HANDBOOK].

24. *Id.* at 132; *cf.* Note, *Legal Paraprofessionals and Unauthorized Practice*, 8 HARV. C.R.-C.L. REV. 104, 106-07 (1973) (a discussion of the applicability of unauthorized practice statutes to legal paraprofessional activities).

25. Those engaged in other professions perform similar functions. For example:

> Social workers in public assistance may already be *required* to practice law as substantially as if they were in a courtroom. In making an initial determination of an applicant's eligibility, the public assistance worker must complete the applicant's financial statement. "Every question, or nearly every question, on the financial statement, is a legal question. When the social

librarian conduct beyond the scope of the Draft Code, they do not constitute unauthorized practice of law. This view is confirmed by research efforts which failed to find a single reported case in which a law librarian has been prosecuted for unauthorized practice in the last thirty years.[26]

A more realistic fear is that the librarian who assists *pro se* patrons will be invading areas that lawyers regard as their exclusive domain, even though the assistance provided does not amount to the practice of law. Consider an encounter with a *pro se* patron who begins his use of the law library by relating his legal problem to the law librarian. Rather than blandly suggesting what materials are available and describing how they can be used, the librarian does some preliminary research and gives the patron citations to relevant statutes and common law precedents as well as the most recent survey of the topic in the jurisdiction. While reading the literature provided, the patron poses several questions concerning legal terminology. These terms are clarified by the librarian; thus simple legal concepts are indirectly explained. No remuneration is requested, no document is prepared, no intercession on behalf of the patron is performed, and no particular course of action is suggested. While unauthorized practice of law has not occurred, the librarian's conduct has been substituted for legal research services

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> worker advises, or even discusses the questions or answers, he may very likely be giving legal advice." The private social worker who advises an applicant that he should apply, how to apply, what to answer and how to appeal if the application is rejected is also giving "legal" advice. When he argues . . . on behalf of the applicant, he is giving representation. When and if he goes to a hearing on behalf of the applicant, he is surely engaging in advocacy.

Sparer, Thorkelson, & Weiss, *The Lay Advocate*, 43 U. DET. L.J. 493, 499-500 (1966) (footnote omitted) (quoting Downs, *Providing the Social Worker with Legal Understanding: Specific Need*, HEW CONFERENCE PROCEEDINGS, THE EXTENSION OF LEGAL SERVICES TO THE POOR 141 (1964)).

26. *See* HANDBOOK, *supra* note 23. No cases were found in which there was any indication that the basis for the charges related to activities of a law librarian. *See also* Letter from Professor J. Myron Jacobstein to the authors (December 19, 1977) (on file with *Western New England Law Review*). Professor Jacobstein, of Stanford Law School, confirms the position of the authors on the basis of his own independent research. Additional research techniques were employed which would not necessarily identify cases in which the charged individual was coincidentally a law librarian. No effort was made to extend the additional search beyond the most recent thirty years. It should be noted that legal research firms or paralegals now regularly do major research and analytical work. These firms and paralegals are employed by attorneys who in turn bill the expense (and then some) to clients. *See generally* Bailey, Kleeman, & Ring, *Paralegal Functions and Legal Constraints*, 9 CLEARINGHOUSE REV. 851 (1976).

traditionally performed by attorneys. Although these services are usually rendered in conjunction with providing advice, they do provide a segment of attorney income. Because law librarians view maintenance of good working relations with the bar as essential, they are inclined to avoid such potential conflicts with attorney services.

Attorneys are easily the most important patron class[27] and can strongly influence the tone of the working environment in the law library. More fundamentally, a significant number of law libraries are sponsored or funded by the organized bar.[28] In those libraries, job security might well be linked to a policy of noninterference with attorney prerogatives. To the argument that once an individual has elected to proceed *pro se* no attorney is deprived of a client, the bar can respond that, if left unaided, the *pro se* patron might quickly recognize the need for counsel. Similarly, the availability of significant law librarian aid may influence the original decision whether or not to proceed *pro se*.[29]

On balance, a pragmatic view counsels law librarians to avoid providing services to *pro se* patrons which significantly overlap those areas of assistance which frequently generate counsel fees. Although in most cases this means that the librarian should not supervise or direct the whole course of research to be undertaken, it does not rule out qualitative, analytical, or even interpretive advice. A librarian does not overstep externally erected[30] professional barriers by narrowing or redirecting research efforts, expressing views about the weight to be given to various authorities, or engaging in similar activities.

Fear of tort liability is advanced as the second major reason to limit assistance to patrons. Proceeding from a premise of "safety first," one may assume that the law librarian should give no services except those involved in keeping the collection up-to-date, the doors open, the floors nonslippery, and the reading room free

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27. *See* Allen, *supra* note 3, at 164.

28. *See generally*, McGuirl, *Summary of the Survey of Law Libraries Serving a Local Bar*, 65 LAW LIB. J. 244 (1972).

29. This is very speculative. It is doubtful that most potential consumers of legal services would be at all aware of the practices of law libraries. Compare with text accompanying notes 79-81 *infra*, and materials cited therein.

30. Internally imposed barriers may exist. The purpose of the present discussion is to explain that the existing barriers to expanded service to *pro se* patrons are those which law librarians impose upon themselves. Consequently, the barriers should be independently justified without reference to external pressures such as the fear of legal sanctions.

of pneumonia-inducing drafts. Tort law imposes liability for breach of duty; if no duty is owed, none can be breached. The law librarian owes duties regarding the maintenance of the collection, such as proper filing of looseleaf supplements, or warnings when such supplementation is incomplete. In addition, the law librarian's duties of due care[31] extend to the performance of all general library functions.[32] No legal duty is owed to assist the *pro se* patron. Thus, if no services are extended to such patrons beyond the traditional bibliographic ones set forth in Draft Code of Ethics, no tort liability can follow.[33]

Of course, if one does choose to act when there is no duty to do so, one must use due care.[34] The law librarian who attempts to aid the *pro se* patron must be reasonably careful, clear, and thorough. While all assistance given by law librarians theoretically involves some risk of tort liability if not done with due care, that risk of liability may be significantly greater dealing with *pro se* patrons than dealing with legally sophisticated patrons. What the law librarians perceive as a likelihood of *pro se* patron reliance[35] trans-

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31. Tort law has long debated whether duties of due care are owed generally, or whether they are only owed to those who might be foreseeably injured by the conduct involved. *Compare*, Chief Justice Cardozo's opinion in Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928), *with* the dissenting opinion of Justice Andrews, *id.* at 347, 162 N.E. at 101. The distinction is unimportant for purposes of the present discussion as the entire patron population is forseeably within the zone of danger created by negligent law librarianship.

32. There are also some foreseeable special functions which are to be performed by the law librarian. The reference interview of a patron may involve learning details of the patron's private life. *See* DRAFT CODE, *supra* note 13, art. III, § 4. In this regard, improper disclosure by the law librarian of the confidential material might result in tort liability. *See generally* W. PROSSER, THE LAW OF TORTS, 802-18 (4th ed. 1971).

33. Tort liability of law librarians is as unlikely as liability for unauthorized practice. *See* notes 19-24 *supra* and accompanying text. The only reported tort litigation involved a claim by a patron of a public law library who attacked its limited hours of operation as a civil rights violation. Wright v. Lane County Comm'rs, 459 F.2d 1021 (9th Cir. 1972). *See also*, Panel Discussion, *An Ethical Code for Law Librarianship?*, 62 LAW LIB. J. 409, 417 (1969), which contains a fleeting reference to the possible purchases of reference librarian malpractice insurance; Angoff, *Library Malpractice Suit, Could It Happen to You?*, 7 AM. LIB. 489 (1976) (hypothetical example); *cf.* Wade, *Tort Liability of Paralegals and Lawyers Who Utilize Their Services*, 24 VAND. L. REV. 1133, 1150 (1971) (potential liability of paralegals and the attorneys who employ them is "well defined," "controllable" and justified by the benefits to the legal profession and the public). For a discussion of due care in legal research by attorneys, see *Toward a Standard of Care in Legal Research*, 2 GLENDALE L. REV. 63 (1977).

34. *See generally* 57 AM. JUR. 2d *Negligence* §§ 45, 74 (1971); RESTATEMENT (SECOND) OF TORTS § 323 (1965).

35. *See* text accompanying notes 14-15 *supra*.

lates into an element of the tort inquiry.[36] The foreseeable reliance of the *pro se* patron upon law librarian advice opens the door to liability if poor advice results in loss of the *pro se* litigation which otherwise would have succeeded. In contrast, giving bad research advice to attorneys or others trained in legal research and legal principles is far less likely to bear a requisite link to any subsequent injury for the imposition of tort liability.[37]

The obvious and basic principle that should guide librarian action is the attentive exercise of due care in giving advice to *pro se* patrons regardless of the kind or amount of advice given. The more important precept is that librarians must recognize the limits of their skill and training. Not all law librarians possess law degrees[38] and not all law library staff are trained legal researchers.[39] For those who lack the expertise needed to provide even basic legal research assistance, the realistic fear of tort liability is a significant internal barrier to automatically giving broader aid to all *pro se* patrons. It does not follow, however, that such aid is to be refused in all or even most cases by the increasing number of law librarians who do possess significant legal skills.[40] In view of the social need for fairness in the administration of justice, a need which our system has heretofore addressed by attempting to secure access to competent legal counsel for all parties, those law librarians must consider on a clean slate the nature and type of aid to be given. While librarians should exercise due care, they should also stand ready to provide meaningful aid to *pro se* patrons.

III. THE ADEQUACY OF LEGAL REPRESENTATION

A. *The Societal Considerations*

In *Faretta*,[41] the right to proceed *pro se* received full judicial recognition for the first time. Prior to that decision, the unqualified

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36. *See* RESTATEMENT (SECOND) OF TORTS § 299A, comment C (1965); *See also* Wade, *supra* note 33, at 1135.

37. One notable exception may arise from the library practice of providing telephone reference service for attorneys or others. If, in responding to an attorney's request regarding the appropriate limitations period to be applied in a specific cause of action, a mere misstatement of the applicable statute is made, the misinformation might provide a basis for librarian liability.

38. *See* Price & Kitchen, *Degree-Oriented Study Among Law Librarians*, 64 LAW LIB. J. 29 (1971).

39. *Id.* at 30-32.

40. *Id.* at 29.

41. 422 U.S. 806 (1975).

right to self-representation had been criticized as a source of unfairness in our judicial system. For example, Professor Grano, referring to *pro se* representation in criminal cases, urged that:

> A strong and just government must supervise and restrict its own behavior to assure its continued strength and popular support, which depend, to some extent, on protecting the security of the rest of the members of the community. This security is maintained only if the community is convinced that the government will not deprive anyone of his rights except by methods objectively fair. Therefore, the government must have the right to demand that it not deviate from certain standards, even if the individual proceeded against would see no transgression.[42]

On the other side, the Supreme Court, in dicta, favored the cause of the would be *pro se* litigant on a number of occasions.[43] Despite these differences, all involved in the debate have always recognized that the government has a strong interest in achieving fairness in the administration of both criminal and civil justice. To the extent that *pro se* representation is less effective than representation by counsel, fairness is jeopardized. After the *Faretta* decision, the societal interest in fairness must either be ignored or protected by means other than the forced representation by counsel.

Effective assistance of counsel is a fundamental means by which American jurisprudence has traditionally protected the objective fairness of the criminal system. Commentators have often observed that adequate legal representation is a prerequisite to enjoyment of constitutional protections.[44] Indeed, the United States Supreme Court has deemed legal representation a fundamental right, requiring that assistance of counsel be available in all felony[45]

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42. *See* Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970):

> In the modern era it is not always fully understood that the adversary system performs a vital social function and is the product of long historical experience. The state trials in sixteenth- and seventeenth-century England demonstrated that a system of justice that provides inadequate opportunities to challenge official decisions is not only productive of injuries to individuals, but is itself a threat to the state's security and to the larger interests of the community.

Id. at 1196 n.114 (quoting REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE 10 (1963)).

43. *See, e.g.*, Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279-80 (1942) (dicta recognizing the "right to dispense with a lawyer's help").

44. *See generally* Kamisar, *The Right to Counsel*, 30 U. CHI. L. REV. 1 (1962).

45. Gideon v. Wainwright, 372 U.S. 335 (1963).

and misdemeanor cases.[46] Moreover, as the scope of collateral review of convictions in criminal cases is in a period of rapid contraction,[47] rigorous compliance with technical and procedural requirements is necessary to fully protect a defendant's constitutional rights. Viewed in this light, "*Faretta* presents the possibility of a pro se representation shockingly inferior to what may be expected of the prosecution."[48]

Although civil cases also rely on adversary presentation, the societal interest in insuring the relative equality of legal representation is not as strong. Unlike a criminal prosecution, the government is not the prime mover of the civil process; hence, there is less fear of institutional unfairness. The rights which may be eclipsed by poor representation and adverse judgments are, at least theoretically, not as significant as a deprivation of liberty. Despite these differences, it is important that all citizens have a fundamental right of access to civil courts which are procedurally fair. The appropriate use of those courts should be encouraged by a reputation for doing justice. In addition, judicial efficiency is furthered by the proficient preparation and presentation of civil cases by those trained in the law and rules of procedure. Therefore, in civil disputes as well as criminal cases, courts have traditionally relied on the skill and knowledge of lawyers to make the system work efficiently and fairly.

B. *Toward a Concept of Minimally Adequate Legal Representation*

The immediately preceding discussion summarized the societal interest in adequate representation which is endangered by the creation in *Faretta* of an absolute right to proceed *pro se*.[49] From the perspective of the accused who is handling his or her own case,

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46. Argersinger v. Hamlin, 407 U.S. 25 (1972).

47. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977); Stone v. Powell, 428 U.S. 465 (1976); Estelle v. Williams, 425 U.S. 501 (1976); Davis v. United States, 411 U.S. 233 (1973). For an excellent discussion of these cases, see Cover & Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1072-77, 1100-02 (1977).

48. Note, *The Jailed Pro Se Defendant and the Right to Prepare a Defense*, 86 YALE L.J. 292, 293 (1976) [hereinafter cited as YALE Note].

49. *But cf.* Robbins & Herman, Pro Se *Litigation, Litigating Without Counsel:* Faretta *or For Worse*, 42 BROOKLYN L. REV. 629, 631 (1976) (post conviction criminal defendants and civil litigants are not constitutionally entitled to free counsel; *Faretta*, however, should not be interpreted to prohibit the court from appointing counsel to such litigants when they request assistance).

society's responsibility is to provide conditions under which *pro se* representation will be constitutionally adequate. Just as access to transcripts became a part of adequate representation,[50] it seems clear that access to other types of materials may be essential to minimally adequate self-representation.[51]

Both the majority and dissenting opinions in *Faretta* recognized that inadequate *pro se* representation may frequently occur.[52] In his dissent, Chief Justice Burger contended that the paramount constitutional right to be protected is the right of the "fullest possible defense."[53] The majority reasoned that "assistance" in preparing a defense is the essence of due process and that unwanted counsel is not assistance.[54] At a minimum, both positions include the concept that the Constitution commands that some assistance be available to criminal defendants.[55] Since counsel can no longer be imposed on an unwilling party, possible alternative sources of this constitutionally mandated assistance must be examined.

Another recent decision of the United States Supreme Court, *Bounds v. Smith*,[56] provides a starting point from which to analyze the problem. In that case, state prison inmates successfully maintained a federal civil rights action under section 1983,[57] claiming that their constitutional right of access to the courts was denied by the state's failure to provide adequate prison law libraries. Proceeding from a premise that "[i]t is now established beyond doubt that

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50. *See* Griffin v. Illinois, 351 U.S. 12 (1956).

51. Bounds v. Smith, 430 U.S. 817 (1977).

52. The facts in *Faretta* indicate that the trial judge refused to allow Faretta to proceed *pro se* because he lacked the knowledge and skill necessary to achieve even arguably effective self-representation. 422 U.S. at 808 n.3.

53. 422 U.S. at 840.

54. *Id.* at 832-33.

55. *Cf.* Ross v. Moffitt, 417 U.S. 600 (1974) (holding that a state is not required by due process to provide free counsel for indigent criminal defendants seeking discretionary appeals). The arguments advanced in this section will address *pro se* criminal litigation. It is acknowledged that there is no analogous constitutional underpinning for similar arguments in civil cases. For a discussion of the civil litigant's interests *see* text accompanying notes 41-48 *supra*.

56. 430 U.S. 817 (1977).

57. 42 U.S.C. § 1983 (1970) which states:

> 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.

prisoners have a constitutional right of access to the courts,"[58] the majority noted that prior Supreme Court decisions had "required remedial measures to insure that inmate access to the courts is adequate, effective and meaningful."[59] The Court affirmed the ruling below which required establishment of "adequate law libraries or adequate assistance from persons trained in the law."[60] The analogy between meaningful inmate access to legal materials and the minimal level of assistance to be given *pro se* litigants, while imperfect, is still fruitful. The due process concern in *Bounds v. Smith* clearly suggests that a post-*Faretta* decision to forego the aid of counsel should not be interpreted as a waiver of all claims to effective participation in the litigation process.[61] To find that a nonincarcerated *pro se* defendant has a lesser right of access to legal reference materials than a person who has already suffered conviction and incarceration would be anomalous.

Several concrete steps have been taken which attempt to give substance to the access concept central to *Bounds v. Smith*. Even before that decision, the Supreme Court in *Johnson v. Avery*[62] had struck down a prison regulation that prohibited inmates from assisting one another with legal matters. The *Johnson* opinion was based on the recognition that many inmates were "unable themselves, with *reasonable adequacy*, to prepare their petitions."[63] More recently, the American Association of Law Libraries published a manual designed to help train prison library workers to give legal research assistance to inmates. This manual states that prison law librarians "can help inmates find the material they need and when necessary, show them how the books are used."[64] Most recently, in *Bounds v. Smith*, the Court cited with favor the provision of "professional or quasi-professional legal assistance to prisoners."[65] Taken

58. 430 U.S. at 821. *Cf.* Johnson v. Avery, 393 U.S. 483 (1969) (declaring invalid a Tennessee state prison regulation forbidding prisoners to assist one another in preparing writs).

59. 430 U.S. at 823.

60. *Id.* at 828 (footnote omitted).

61. *Cf.* YALE Note, *supra* note 48 at 307-08 (proposing a "standby counsel" be appointed for jailed *pro se* defendants who otherwise have little opportunity to prepare a defense).

62. 393 U.S. 483 (1969).

63. *Id.* at 489 (emphasis supplied). *But cf.* Hackin v. Arizona, 102 Ariz. 218, 220, 427 P.2d 910, 911-12, *appeal dismissed*, 389 U.S. 143 (1967) (although a prisoner may need the help of others to prepare a writ of habeas corpus, "[t]he matter is then in the hands of the court which is well acquainted with the law, and whose duty it is to determine the legality of the petitioner's detention").

64. O. WERNER, MANUAL FOR PRISON LAW LIBRARIES 1 (1976).

65. 430 U.S. at 830. *See* text accompanying notes 20-21 & 33 *supra*.

as a whole, these precedents and institutional developments signal a strong concern that legal self-representation should not be rendered ineffective by the *pro se* litigant's individual lack of knowledge or expertise.

C. *Alternatives to the Effective Assistance of Counsel*

There are many ways to help *pro se* litigants prepare and present their cases effectively. Primary among these are various forms of nonrepresentational assistance of counsel and differing types of paralegal services. Chief Justice Burger, dissenting in *Faretta*, took the position that unwanted counsel is more effective than no counsel at all.[66] Even in a noncooperative setting, counsel can guarantee that the judicial system take cognizance of the party's legal rights. Briefs can be filed, the admissibility of evidence can be challenged, and inadvertent waivers of legal rights by procedural default can be avoided.[67] One commentator, expanding on these suggestions, has urged the appointment of "standby counsel" whose role would be determined in accord with the wishes of the *pro se* defendant, especially the jailed *pro se* defendant: "[T]he defendant may request that standby counsel transmit to the court requests for investigative, expert, and other services, that he take part in the plea-bargaining process, or that he participate in pretrial hearings."[68] Another commentator has developed a comprehensive model of "hybrid representation" which includes the required appointment of counsel and encouragement to the *pro se* defendant to "make active use of counsel [while preserving] his [the litigant's] dignity and freedom of choice. . . ."[69] This type of model has received at least some judicial support[70] and arguably strikes a satisfying balance between the policies implicit in the right to counsel cases[71] and those underlying *Faretta*. Especially important is the

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66. 422 U.S. at 846 (Burger, C.J., dissenting).

67. *Cf.* Cover & Aleinikoff, *supra* note 47 (waivers of legal rights by default as a result of attorney error may unfairly penalize defendants who are powerless to prevent or to defend against such failures).

68. YALE Note, *supra* note 48, at 308 (footnotes omitted).

69. Note, *Assistance of Counsel: A Right to Hybrid Representation*, 57 B.U. L. REV. 570, 584 (1977) [hereinafter cited as *Hybrid* Note].

70. Haslam v. United States, 431 F.2d 362 (9th Cir. 1970), *cert. denied*, 402 U.S. 976, *aff'd on rehearing*, 437 F.2d 955 (9th Cir. 1971); United States v. Grow, 394 F.2d 182 (4th Cir.), *cert. denied*, 393 U.S. 840 (1968); Bayless v. United States, 381 F.2d 67 (9th Cir. 1967).

71. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

claimed ability of hybrid representation to protect the orderliness of the trial process and the impartial role of the trial judge.[72]

Any of the above plans can provide some legal assistance to the *pro se* litigant and thereby help to protect the interest of society in insuring at least minimally adequate representation. Yet neither these plans nor the systematic assistance of paralegal aid are widely available to *pro se* criminal defendants. In addition, systematic legal assistance is usually associated only with criminal cases. As noted before, society has a vital interest in fair and efficient civil litigation. Consequently, there is an institutional void; some criminal *pro se* litigants and virtually all civil *pro se* litigants receive no legal assistance at all. Law libraries and law librarians can help fill the void.

Although no reliable statistics are available, it is reasonable to assume that most *pro se* litigants will seek out a source of legal information and thus be referred to a library containing a significant collection of legal materials.[73] Previous writers on *pro se* library patrons have assumed that the *pro se* user is likely to solicit the aid of the library staff.[74] Further, since many law libraries are restricted access libraries, patron identification and reference interview procedures can alert the librarian to *pro se* library use. In this manner, a prerequisite for institutional response to the *pro se* litigant is met: the party in need of assistance has been identified to the party able to provide assistance.

Apart from being well situated to identify those in need of their assistance, law librarians are generally well equipped to provide specialized services. Virtually all law librarians are college educated, most have at least one advanced degree, and a growing number have law degrees.[75] More important, virtually all law librarians have experience in legal bibliography and research techniques. In many university settings, they are given responsibility for providing students with legal research instruction. The exercise of bibliographic and research skills on behalf of the *pro se* patron, while not a panacea, is a vital step beyond the bland provision of materials envisioned by the Draft Code and beyond the constraints imposed

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72. *See Hybrid* Note, *supra* note 69, at 584.

73. The obvious exception is the inmate population prior to the widespread implementation of Bounds v. Smith, 430 U.S. 817 (1977).

74. *See* Begg, *supra* note 4, at 26-27.

75. *See* Price & Kitchen, *supra* note 38, at 29. For an interesting historical sidelight see W. ROALFE, LIBRARIES OF THE LEGAL PROFESSION (1953).

by unfounded fears of legal liability.[76]

Librarians' bibliographic skills can be utilized to the advantage of the *pro se* patron by providing compilations of materials in the collection which bear on a particular genre of problems. These compilations may include annotations which indicate the techniques by which materials can be used to maximum advantage, or those which explain how kindred material is located. Although it is unrealistic to expect an uninitiated *pro se* patron to resort to Shepard's Citations to insure the continued vitality of precedents, it is quite realistic to suggest that law librarians can easily make this knowledge available. Similarly, indicating to a *pro se* patron the relative value as a research tool of annotated collections of statutes, as opposed to mere compilations of laws, is simple and yet invaluable. Finally, a law librarian can explain the role of legislative history in statutory interpretation to the *pro se* patron or tell the patron that there are other code sections relevant to solution of the particular problem.

These few examples were deliberately chosen for their want of sophistication. Once law librarians agree that such reference services are to be provided, they must decide where to draw the line. As the reference inquiry becomes more clearly focused, the distinction between search and solution, between provision of materials and substantive legal analysis, blurs.[77] Relieved of the unjustified fear that detailed reference help amounts to the unauthorized practice of law, the librarian should feel free to give as much aid as individual conscience and expertise dictate. Such a response contrasts markedly with the traditional law librarian solution which stopped well short of detailed aid, limiting service to provision of basic materials.[78]

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76. *Cf.* Ginger & Macleod, *The Rights of the People and the Role of Librarians*, 19 LIB. TRENDS 96 (1970) (Public, academic, and law librarians "can perform a valuable service for both their patrons and the democracy of our country by recognizing the importance of the people's need to know their rights, and by providing them with the necessary materials and information").

77. *See* note 15 *supra*.

78. "The advice given in some library schools and in the past (lead the patron with a legal problem to the Martindale-Hubbell Law Directory, then walk away fast before he can ask you for more help) is inadequate for today's society." Ginger & Macleod, *supra* note 76, at 96. At a recent conference designed to familiarize public and academic librarians with legal materials, the traditional solution was echoed. In response to the question "[a]re there any problems when a librarian answers legal questions?" one of the conference speakers answered "[d]on't give legal advice that could be dangerous. Just point them toward the tools." Norton, *LEX: Law Advice for Public & Academic Librarians*, 103 LIB. J. 313, 314 (1978).

One obvious drawback to a highly individualized response to the legal research needs of the *pro se* patron is time and expense. Service to *pro se* patrons can significantly interfere with service to attorneys, whom the law library defines as its primary clientele. Such responses, moreover, are no substitute for a broader institutional solution. Since law libraries are not equally equipped to provide legal research expertise, the burden of such services will fall disproportionately on those libraries located in population centers where *pro se* representation is more frequent[79] or on those libraries which hold themselves out[80] or come to be known for the research assistance provided.[81] To insure that most *pro se* patrons will receive meaningful assistance, more general solutions must be devised.

At a preliminary level, materials should be prepared which introduce the inexperienced legal researcher to the law library. For example, a videotape or audio-cassette tour of the law library, describing the location and use of fundamental segments of the collection, could be produced. Alternatively, or in addition, walking tours of the library can be publicized and provided at times found to be convenient to *pro se* litigants. Similar materials or presentations can be made available which delineate basic research techniques and search methodology. These programs would be economical: patrons would be introduced to the library and informed of the location of materials without the use of individualized librarian assistance.

At the next level, a law library can solicit outside assistance to expand its force of legally trained personnel willing to aid *pro se* litigants. The law librarian can ask the local bar association to provide volunteers to conduct seminars on substantive topics of recurring concern such as landlord-tenant law, effective use of small claims court, and the basics of local court procedure. Similarly, the organized bar and area law schools may be asked to provide volunteers to assist individual *pro se* patrons in legal research. Although these steps cannot guarantee adequate *pro se* representation in every case, they are fundamental. They would represent an institu-

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79. Allen, *supra* note 3, at 160-61.

80. *Cf.* Ginger & Macleod, *supra* note 76, at 102 (Legal collections for laypersons should be publicized through newsletters, newspaper articles, exhibits, bibliographies, and lectures; "The right to justice must be advertised . . . if there is to be justice in the land").

81. *But cf.* Begg, *supra* note 4, at 31 (ways to discourage requests for research assistance and minimize the problems presented by the *pro se* patron).

tional recognition of the need to serve a larger constituency. By taking the initiative, law libraries can tacitly acknowledge a new role for themselves in the post-*Faretta* era.[82]

An enlarged institutional response could encourage a correspondingly enlarged assumption of responsibility by librarians and staff members for giving the *pro se* patron extensive individual aid. One can imagine a law librarian delving deeply into the details of a problem and guiding the research to an informed conclusion. Such a course of action, however, in addition to being extremely burdensome on library personnel and jeopardizing service to attorneys, may raise the problem of discrimination among patrons. Although the potential for legal liability is not a constraint to providing individual assistance,[83] either temperament or conscience may be.

The Draft Code's tacit suggestion that there should be no discrimination in the services rendered to various patrons[84] is unrealistic when close working relationships are involved. A law librarian cannot respond with the same verve to all detailed requests for assistance. When providing access to library materials the librarian can treat all patrons equally with relative ease; but when the assistance requested involves close oversight of the research, personal interaction becomes important. In the same way that an attorney may refuse to become counsel for a party,[85] the law librarian's individual prerogatives to refuse analytical assistance to a patron must be respected.

Accepting this limitation on the librarian's obligation to aid *pro se* patrons and recalling the constraint that advice must not be given beyond the scope of expertise,[86] it becomes apparent that the assistance given to individual *pro se* patrons will vary widely from law library to law library and from patron to patron. This potential lack of uniformity is a serious problem which is only partially ameliorated by the institutional responses already advocated. Although the concern of law librarians has focused on the unequal burden on law libraries resulting from varied amounts of available

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82. For a statement from which the "old" role may be inferred, see Begg, *supra* note 4, at 31: "There are several ways to minimize the problems presented by the *pro se* patron. . . . By far the most effective method for eliminating such problems is to exclude these patrons from the library."

83. *See* text accompanying notes 18-40 *supra*.

84. *See* DRAFT CODE, *supra* note 13, art. III, § 1; art. VII, §§ 2(a) & 2(b) & 4.

85. A.B.A. CANONS OF PROFESSIONAL ETHICS No. 2.

86. *See* text accompanying notes 34-37 *supra*.

aid,[87] a more troublesome problem is the impact of this nonuniformity on *pro se* patrons. Since these potential law library users are in part defined by their general lack of legal sophistication, they should not be forced to ascertain and evaluate the policies and quality of assistance which may be found at various libraries.[88]

At least two solutions to the problem of nonuniformity exist. First, library policies and resources can be publicized to facilitate comparison. Second, a uniform library response to *pro se* patrons can be required. The latter is the approach advocated, at least in part, by the Draft Code.[89] As a long term solution, this approach is preferable provided it includes express recognition of the compelling need for meaningful *pro se* law library access[90] and simultaneously requires sufficiently high standards of competency and training for law librarians.[91] In the interim, law libraries can easily make known their policies regarding *pro se* patronage and provide the introductory materials on legal research as previously advocated.

IV. CONCLUSION

Faretta v. California indirectly forced a redefinition of our concept of adequate legal representation. Litigants who choose to exercise their *pro se* right have not forfeited all claims to adequate representation. Although providing *pro se* patrons with the assistance they need is a task that several sectors of the legal community must undertake, law librarians and law libraries must become more involved. They are particularly well situated and fairly well suited to deliver essential help to *pro se* litigants in the short run.

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87. Even if nonuniform response resulted in different levels of *pro se* patronage, the affected libraries could simply reduce the level of service if the burden was too great. User fees might be charged of all *pro se* patrons to help defray expense. This solution, however, creates a climate in which the previous fears of unauthorized practice of law and tort liability are most justified. Begg, *supra* note 4. *See* text accompanying notes 25 & 34 *supra*.

88. To expect a *pro se* patron to ascertain and meaningfully compare alternative sources of law library assistance is unrealistic. They are ill-suited to judge the comparative qualifications of the library staff even if such information were available.

89. DRAFT CODE, *supra* note 13, art. I, § 2.

90. *Cf.* Bounds v. Smith, 430 U.S. 817, 828 (1977) ("the fundamental right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law"). *See also* text accompanying notes 49-65 *supra*.

91. At a minimum, these standards should include course work in legal bibliography, legal research technique, and a substantive course in legal process.

If, at any Annual Convention of the American Association of Libraries,[92] a new Draft Code of Ethics is presented which warns against the unauthorized practice of law, a clear definition of research assistance which constitutes such practice should be included. More specific guidelines should be adopted to aid law librarians and their staff to determine the proper extent of their research efforts. These efforts need not be inhibited by legal doctrines forbidding the unauthorized practice of law or imposing tort liability for negligent acts. Further, immediate efforts must be made to increase the general level of service available to *pro se* patrons while viable long term solutions are developed. Law librarians should direct their efforts and use the considerable resources of their libraries to design and implement programs that will meet the needs of *pro se* litigants as a class. If this is done on a large scale, law librarians may help to achieve a long term solution to the problem of making *pro se* representation at least minimally adequate.

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92. *See* note 13 *supra*.