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Awarding Attorneys' Fees to Prevailing *Pro Se* Litigants

Prevailing litigants in American courts have traditionally been unable to recover attorneys' fees from their opponents.¹ This tradition animates the rules that govern awards of attorneys' fees in federal courts today. Unless reimbursement is specifically authorized by statute, federal courts will not order losing litigants to pay reasonable attorneys' fees.² Although over seventy federal statutes contain such authorization,³ the statutes do not expressly answer the ques-

1. See *Alyeska Pipeline Serv. Co. v. Wilderness Socy.*, 421 U.S. 240, 247 (1975).

2. This is the so-called American rule. The rule was recently reaffirmed in *Alyeska Pipeline Serv. Co. v. Wilderness Socy.*, 421 U.S. 240 (1975). Courts make exceptions to this rule when the losing party is adjudged to have sued in bad faith or for harassment purposes, 421 U.S. at 258-59, and when the prevailing party wins an award that will also benefit a group, in which case he may take his fees from the award. 421 U.S. at 257-58. Shareholder derivative suits are a good example. The American rule has been criticized because it fails to make a litigant whole following the successful completion of his lawsuit. It also is said to favor the wealthy over the poor because the former always have access to legal counsel while the latter have access only when the case promises a large enough award to justify taking the case on a contingent fee basis. See Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75 (1963).

3. For a listing of federal attorneys' fees statutes, see *Public Participation in Federal Agency Proceedings Act of 1977: Hearings on S. 270 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 677, 707-19 (1977) (article by Henry Cohen, *Awards of Attorneys' Fees in Federal Courts and by Federal Agencies*). Most of these statutes have been enacted in the past two decades. The proliferation of attorneys' fees statutes may reflect growing congressional disenchantment with the American rule. Congress' recent enactment of the Equal Access to Justice Act, § 204, 94 Stat. 2325 (1980) (codified at 28 U.S.C.A. § 2412(a)-(d)), may reflect this disenchantment. The Act allows prevailing parties to recover attorneys' fees in *any* civil action against the federal government, unless the government can show that its position in the case was "substantially justified or that special circumstances make an award unjust." 28 U.S.C.A. § 2412(d)(1)(A) (West Supp. 1981). The Congressional Budget Office's best estimate is that this provision will result in the government paying attorneys' fees in 25% of its losing cases. H.R. REP. NO. 1418, 96th Cong., 2d Sess. 22, reprinted in [1980] U.S. CODE CONG. & AD. NEWS 4984, 5001. No one can know, of course, how the courts will apply this language. For this reason, perhaps, Congress provided that the new law will expire on October 1, 1984, unless it is reenacted. Equal Access to Justice Act, Pub. L. No. 96-481, § 204(c), 94 Stat. 2325 (1980). The Act became effective October 1, 1981. Equal Access to Justice Act, Pub. L. No. 96-481, § 208, 94 Stat. 2325 (1980). Despite its revolutionary potential, the Act should not affect the attorneys' fees statutes discussed in this Note. The Act states that none of its provisions is intended to modify any prior statute authorizing attorneys' fees awards against the United States. Equal Access to Justice Act, Pub. L. No. 96-481, § 206, 94 Stat. 2325 (1980).

Although some statutes make attorneys' fees awards mandatory, see, e.g., Clayton Act § 4, 15 U.S.C. § 15 (1976); Truth in Lending Act § 130(a)(3), 15 U.S.C. § 1640(a)(3) (1976), most statutes give the courts discretion in deciding whether to reimburse prevailing parties. In response, the courts have used elaborate tests for determining both if an attorney's fee is allowable, and, if allowable, in what amount. See, e.g., *Blue v. Bureau of Prisons*, 570 F.2d 529 (5th Cir. 1978) (specifying four criteria for deciding whether attorneys' fees should be awarded in a Freedom of Information Act case); *Palmigiano v. Garrahy*, 616 F.2d 598 (1st Cir.), cert. denied, 449 U.S. 839 (1981) (enumerating 12 factors for determining the size of an attorney's fee award in civil rights cases).

tion whether a successful *pro se* litigant⁴ may recover a fee as compensation for the legal work that he has performed. It is not surprising, therefore, that the courts of appeals have reached conflicting conclusions on this issue. Most of the circuit courts have refused to allow attorneys' fees for *pro se* litigants.⁵ The District of Columbia Circuit, in contrast, has consistently sanctioned such awards.⁶ And several circuits have given different answers depending on the *pro se* party's status — recovery has turned on whether he was an attorney, an average citizen, or a prisoner.⁷

4. "*Pro se*" is the phrase usually used to describe parties who represent themselves in legal matters. It means "for himself." BLACK'S LAW DICTIONARY 1364 (4th ed. 1951). Another phrase that is sometimes used is "*in propria persona*," which means "in one's own proper person." *Id.* at 899.

A federal right to self-representation was first statutorily granted in § 35 of the Judiciary Act of 1789, 1 Stat. 92. It is currently codified as follows: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel . . ." 28 U.S.C. § 1654 (1976).

Federal enactment of this provision reflected the colonial-era hostility toward paid counsel. In the seventeenth century, Massachusetts, Connecticut, Virginia, and the Carolinas all outlawed the practice of law for hire. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 81 (1973). As commercial enterprise grew in the colonies, the need for lawyers gradually began to overcome this hostility. *Id.* at 84. Following the Revolutionary War, however, there was a resurgence of animosity toward the bar, in part because most of the leading lawyers of the day were Tories, and in part because most of the lawyers were spending their time collecting debts in a depressed postwar economy. C. WARREN, A HISTORY OF THE AMERICAN BAR 212-24 (1911). There was also concern about lawyers forming a postwar aristocracy — the Constitution, for example, was largely the work of lawyers. *Id.* at 218. This distrust of the legal profession was made manifest first in laws passed by the states (Massachusetts enacted statutes in 1785 and 1786 that guaranteed citizens the right to argue their own causes in court), and later in § 35 of the Judiciary Act.

In recent years, the major disputes in federal courts over the right to self-representation have involved the defendant's right to refuse state-appointed counsel and argue his own case. In *Faretta v. California*, 422 U.S. 806 (1975), the Supreme Court held that a defendant had a constitutionally protected right under the sixth amendment to refuse appointed counsel and appear in his own defense, even if that meant he would receive a less effective defense.

5. The First, Third, Fourth, Fifth, Eighth, and Tenth Circuits have refused to award attorneys' fees to *pro se* litigants. See *Lovell v. Snow*, 637 F.2d 170-71 (1st Cir. 1981) (Civil Rights Attorney's Fees Awards Act) (CRAFAA); *Crooker v. United States Dept. of Justice*, 632 F.2d 916, 920-22 (1st Cir. 1980) (Freedom of Information Act (FOIA)); *Cunningham v. FBI*, 664 F.2d 383 (3d Cir. 1981) (FOIA); *White v. Arlen Realty & Dev. Corp.*, 614 F.2d 387, 389 (4th Cir.), *cert. denied*, 447 U.S. 923 (1980) (Truth in Lending Act (TILA)); *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1090 (5th Cir. 1981) (Privacy Act); *Cofield v. City of Atlanta*, 648 F.2d 986, 987-88 (5th Cir. 1981) (CRAFAA); *Davis v. Parratt*, 608 F.2d 717, 718 (8th Cir. 1979) (CRAFAA); *Burke v. United States Dept. of Justice*, 432 F. Supp. 251, 253 (D. Kan. 1976), *affid.*, 559 F.2d 1182 (10th Cir. 1977) (FOIA).

6. See *Crooker v. United States Dept. of the Treasury*, No. 80-1412 (D.C. Cir. Oct. 23, 1980) (FOIA); *Cox v. United States Dept. of Justice*, 601 F.2d 1, 5-6 (D.C. Cir. 1979) (*per curiam*) (FOIA); *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1366 (D.C. Cir. 1977); *Parker v. Lewis*, [1981] *Empl. Prac. Guide (CCH)* ¶ 32,153 (D.D.C. June 30, 1981) (Title VII of Civil Rights Act of 1964); *Quinto v. Legal Times of Washington, Inc.*, 511 F. Supp. 579, 581 (D.D.C. 1981) (Copyright Act).

7. The Ninth Circuit has awarded attorneys' fees to a *pro se* attorney. See *Ellis v. Cassidy*, 625 F.2d 227, 230 (9th Cir. 1980) (CRAFAA). But it has denied them to a nonattorney *pro se* litigant. See *Hannon v. Security Natl. Bank*, 537 F.2d 327, 328 (9th Cir. 1976) (TILA). The Second Circuit has denied attorneys' fees to a *pro se* prisoner, but left open the possibility that they may be available for other classes of *pro se* litigants. See *Crooker v. United States Dept.*

This Note examines the propriety of awarding attorneys' fees to prevailing *pro se* litigants⁸ in the federal courts.⁹ It focuses on the four major statutes under which almost all *pro se* cases have been filed:¹⁰ the Freedom of Information Act of 1974¹¹ (FOIA), the Privacy Act of 1974¹² (Privacy Act), the Civil Rights Attorney's Fees Awards Act of 1976¹³ (CRAFAA), and the Truth in Lending Act¹⁴ (TILA). In so doing, it will attempt to devise common principles that can be applied to most requests for *pro se* attorneys' fees. Part I looks first to the statutes' language and legislative histories to determine whether Congress authorized awards of attorneys' fees to prevailing *pro se* litigants. Part II discusses the policy arguments for and against awarding attorneys' fees in this context. The Note concludes that awarding fees to *pro se* litigants is not only statutorily authorized, but also desirable as a matter of policy.

I. STATUTORY CONSTRUCTION

Any attempt to determine a statute's meaning must begin with an examination of its language.¹⁵ All four of the relevant statutes authorize the court to require a losing party to pay "reasonable attorney fees" to the prevailing litigant.¹⁶ Some courts have read these

of the Treasury, 634 F.2d 48, 49 (2d Cir. 1980) (FOIA). And the Fifth Circuit, while refusing to grant *pro se* attorneys' fees on two separate occasions, has recently held open the possibility that *pro se* attorneys may be eligible for reimbursement for their legal expenses. See Barrett v. Bureau of Customs, 651 F.2d 1087, 1089 (5th Cir. 1981).

8. For purposes of this Note, it is assumed that if the *pro se* party had hired a lawyer, he would have been reimbursed for his attorneys' fees.

9. The issue of *pro se* attorneys' fees has arisen at the state level as well. There, however, the debate has centered around whether attorneys who represent themselves are entitled to receive legal fees. Compare Winer v. Jonal Corp., 169 Mont. 247, 545 P.2d 1094 (1976), and Wells v. Whinery, 34 Mich. App. 626, 192 N.W.2d 81 (1971) (attorneys' fees awarded), with O'Connell v. Zimmerman, 157 Cal. App. 2d 330, 321 P.2d 161 (1958) (fees denied, although in a footnote to a recent decision, the California Supreme Court noted that it failed to understand the logic of previous court decisions disallowing attorneys' fees for *pro se* attorneys; see Consumers Lobby Against Monopolies v. Public Util. Commn., 25 Cal. 3d 891, 915 n.13, 603 P.2d 41, 55 n.13, 160 Cal. Rptr. 124 n.13 (1979)). Because of the dearth of decisions at the state level on whether nonattorney *pro se* litigants may recover attorneys' fees, this Note will focus on the federal courts.

10. This natural concentration of cases will simplify the analysis. Moreover, the courts' tendency to look for guidance in decisions made under the various statutes justifies such an approach. See, e.g., Barrett v. Bureau of Customs, 651 F.2d 1087, 1088-89 (5th Cir. 1981) (wherein the court cites almost every *pro se* attorneys' fees case decided to date); Crooker v. United States Dept. of the Treasury, 634 F.2d 48, 49 (2d Cir. 1980); Ellis v. Cassidy, 625 F.2d 227, 230 (9th Cir. 1980).

11. 5 U.S.C. § 552(a)(4)(E) (1976).

12. 5 U.S.C. § 552a(g)(3)(B) (1976).

13. 42 U.S.C. § 1988 (1976).

14. 15 U.S.C. § 1640(a) (1976).

15. "And as with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself." Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979).

16. FOIA: "The court may assess against the United States reasonable attorney fees and

words narrowly to preclude the award of *pro se* attorneys' fees.¹⁷ Under their interpretations, the word "fee" means that money must be owed by one person to another for services rendered by the latter to the former. The word "attorney" means that the person owed the money must be a licensed member of the bar. Since the language "presupposes a relationship of attorney and client"¹⁸ that is lacking in the case of *pro se* litigants, and because *pro se* litigants are not usually attorneys, they may not be compensated.

Although this argument is facially appealing, it is not compelling because it assumes that attorneys' fees must be actually incurred before they can be reimbursed. This assumption is not mandated by the statutes' language. The laws say nothing about actually incurring the expense; they merely authorize courts to award reasonable attorneys' fees to prevailing parties. Their language is not contradicted if fees are awarded without regard to whether a lawyer has been hired or is owed any money. The phrase "attorney fee" can reasonably be interpreted as simply a generic description of compensation to a person who performs legal services. Under this interpretation, prevailing parties would still collect attorneys' fees in compliance with the language. If the litigant hires an attorney, the fee goes from the litigant's pocket to his attorney's; if the litigant represents himself, he retains the money.

The argument for a narrow reading of the statutes' language is further undercut because the reading has not been consistently applied by its advocates. The courts that oppose awards to *pro se* litigants have refused to interpret "attorney fee" narrowly in other fact situations. For example, a number of courts have held that attorneys' fees can be awarded to a prevailing plaintiff even when his legal services have been provided free of charge by a legal services organization.¹⁹ In these cases, the plaintiff owed no fees and had

other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E) (1976). Privacy Act: same as FOIA. 5 U.S.C. § 552a(g)(3)(B) (1976). CRAFAA: "In any action or proceeding to enforce a provision of section 1981, 1982, 1983, 1985, and 1986 of this title . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1976). TILA: "[A]ny creditor who fails to comply with any requirement . . . is liable . . . in the case of any successful action [for] a reasonable attorney's fee as determined by the court." 15 U.S.C. § 1640(a) (1976).

17. See *Cunningham v. FBI*, 664 F.2d 383, 384 (3d Cir. 1981); *Davis v. Parratt*, 608 F.2d 717, 718 (8th Cir. 1979) (per curiam).

18. *Davis v. Parratt*, 608 F.2d 717, 718 (8th Cir. 1979) (per curiam); see *Cunningham v. FBI*, 664 F.2d 383, 384 (3d Cir. 1981) ("As an initial matter this statutory provision for 'attorney fees' would appear on its own terms to be predicated on the presence of an attorney.").

19. The First, Third, Fifth, and Ninth Circuits have taken this position. See *Kessler v. Associates Fin. Serv. Co.*, 639 F.2d 498, 499 (9th Cir. 1981); *Palmigiano v. Garrahy*, 616 F.2d 598 (1st Cir.), cert. denied, 449 U.S. 839 (1980); *Rodriguez v. Taylor*, 569 F.2d 1231, 1244-46 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978); *Sellers v. Wollman*, 510 F.2d 119, 128 (5th Cir. 1975). Of course, the monies do not stay with the plaintiff but go directly to the legal services organization. But that is as it should be. The organization, not the plaintiff, performed the

incurred no costs. Similarly, courts have allowed reimbursement for work performed by nonattorneys: Paralegal expenses have frequently been awarded as part of a larger award of attorneys' fees.²⁰ Compensation, therefore, need not only be for an attorney's work.

A second argument against awarding fees to *pro se* litigants is peculiar to the language of the FOIA and the Privacy Act. Both statutes allow recovery of "reasonable attorney fees and other litigation costs reasonably incurred in any case . . . in which the complainant has substantially prevailed."²¹ In *Cunningham v. FBI*,²² the Third Circuit held that the phrase "reasonably incurred" modified "reasonable attorney fees" as well as "other litigation costs."²³ The court reasoned that the word "reasonable" before "attorney fees" means only that the *rate* of compensation must not be excessive. The "reasonably incurred" language is thus a necessary modifier for "attorney fee" because it ensures that the *amount of time* for which the lawyer is compensated will not be excessive.²⁴ This interpretation reads in a requirement that attorneys' fees be incurred before they can be reimbursed. Under this interpretation, *pro se* litigants cannot be awarded attorneys' fees because they have not actually incurred any legal expenses. The First and Fifth Circuits have reached similar conclusions.²⁵

There are several problems with this analysis. First, there are indications that the "incurred" requirement will be applied inconsistently in this context as well. The *Cunningham* opinion, for example, suggested that if an FOIA plaintiff is represented by a legal services

legal work. Awards of this kind can be justified on the ground that they further the purposes of the attorneys' fees statutes. They encourage litigation by providing legal aid organizations with an incentive to take these kinds of cases. Also, in times of budget cutbacks, these kinds of awards can help provide the resources to guarantee a minimum level of free legal aid to the poor.

20. See, e.g., *Jones v. Armstrong Cork Co.*, 630 F.2d 324, 325 n.1 (5th Cir. 1980) ("Had Ms. Smith been a paralegal, then to the extent that she performed work that has traditionally been done by an attorney, Ms. Turner would have been entitled to have compensation for that work separately assessed and included in her award."); *Northcross v. Board of Educ.*, 611 F.2d 624, 639 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Lamphere v. Brown Univ.*, 610 F.2d 46, 48 (1st Cir. 1979); *McNeil v. Ogburn*, 507 F. Supp. 96, 96-99 (N.D. Fla. 1981); *Selzer v. Berkowitz*, 477 F. Supp. 686, 690-91 & nn.3-4 (E.D.N.Y. 1979); *Falcon v. General Tel. Co.*, 463 F. Supp. 315, 321 (N.D. Tex. 1978), *affid. in part and remanded in part*, 626 F.2d 369 (5th Cir. 1980), *vacated and remanded*, 450 U.S. 1036 (1981); *Aumiller v. University of Del.*, 455 F. Supp. 676, 682 & n.13 (D. Del. 1978), *affid. mem.*, 594 F.2d 854 (3d Cir. 1979); Comment, *Pro Se Litigant's Eligibility for Attorney Fees Under FOIA: Crooker v. United States Department of Justice*, 55 ST. JOHN'S L. REV. 520, 533 (1981).

21. 5 U.S.C. § 552(a)(4)(E) (1976) (FOIA) (emphasis added); 5 U.S.C. § 552a(g)(3)(B) (1976) (Privacy Act) (emphasis added).

22. 664 F.2d 383 (3d Cir. 1981).

23. 664 F.2d at 385.

24. 664 F.2d at 385.

25. See *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1089 (5th Cir. 1981); *Crooker v. United States Dept. of Justice*, 632 F.2d 916, 921 n.7 (1st Cir. 1980).

organization, then he can be awarded attorneys' fees, even though his legal services are provided free of charge and he does not actually incur any legal expenses.²⁶

Second, the Third Circuit's approach seems a tortured reading of straightforward language. As the District of Columbia Circuit has pointed out, it makes more sense grammatically to hold that "reasonably incurred" modifies only "other litigation costs" and not "attorney fees" because "attorney fees" already has its own "reasonable" modifier.²⁷ More to the point, had Congress intended to require that attorneys' fees cover only the services of retained attorneys, it could have said so clearly.²⁸

Third, one can reasonably infer that Congress used the phrase "other litigation costs reasonably incurred" to direct that the courts be more liberal in awarding costs. Costs are ordinarily taxed to the losing party in a lawsuit²⁹ under Federal Rule of Civil Procedure 54(d). The courts, however, have interpreted the rule and other relevant statutes to preclude reimbursement of some costs incurred by prevailing parties in litigation.³⁰ Major items such as investigation expenses, travel expenses, and expert witness fees, along with minor items like telephone calls and taxi fares, are often excluded from cost recoveries.³¹ Since these judicial interpretations are well known, it is plausible that Congress authorized payment of "other litigation costs reasonably incurred" to broaden the category of costs that could be

26. *Cunningham v. FBI*, 664 F.2d 383, 385 n.1 (3d Cir. 1981).

27. *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1366 (D.C. Cir. 1977).

28. See text at note 19 *supra*.

29. While the original rule excluded an award of costs against the United States, 28 U.S.C. § 2412(a) (Supp. IV 1980) now provides that costs may be taxed against the government. The courts have interpreted the statute as giving them the same discretion as they have in taxing costs against private litigants. See *Natural Resources Defense Council, Inc. v. EPA*, 512 F.2d 1351, 1353 (D.C. Cir. 1975); *Puerto Rico v. S.S. Zoe Colotroni*, 456 F. Supp. 1327, 1351 (D.P.R. 1978); 10 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2672, at 170 (1973). This interpretation is supported by the statute's legislative history. See H.R. REP. No. 1535, 89th Cong., 2d Sess. 3 (1966).

30. The courts look to 28 U.S.C. § 1920 (1976) for guidelines regarding what costs are allowable. C. WRIGHT & A. MILLER, *supra* note 29, § 2670, at 157-58. Section 1920 allows taxing the following costs:

(1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920 (Supp. IV 1980).

In addition, the courts have discretion to award a few other costs, such as the costs of depositions. See C. WRIGHT & A. MILLER, *supra* note 29, § 2676 and cases cited therein. This discretion, however, is to be used sparingly. *Farmer v. Arabian Am. Oil Co.*, 319 U.S. 227, 235 (1964).

31. See C. WRIGHT & A. MILLER, *supra* note 29, § 2677, at 223-25 and cases cited therein; *id.* § 2678, at 236-37 and cases cited therein.

recovered. If so, every cost that was reasonably incurred in pursuing either a Privacy Act or FOIA claim would be eligible for recovery, not just those expenses that have traditionally been considered reimbursable.³² Under this reading, the words "reasonably incurred" impose no restrictions on awards of attorneys' fees.

The preceding discussion makes clear that the meaning of these statutes is open to various interpretations. Since "the statutory language is not dispositive of the issue,"³³ it is necessary to examine the legislative history to ascertain whether the Congress intended to authorize recovery of legal fees by *pro se* litigants.³⁴

Unfortunately, the committee reports and congressional debates on these four statutes do not mention *pro se* parties.³⁵ Congress, evidently, did not anticipate the problem. In this situation, the appropriate next step is predicting what Congress would have done if it *had* considered the question, "starting from the areas where the legislative intent is readily discernible, and projecting to fair and reasonable corollaries of that intent for the specific issue before us."³⁶ This analysis yields a conclusion that Congress' intent can best be

32. This reading of the clause is also consistent with advancing the major congressional purpose for enacting these attorneys' fees statutes, namely, to encourage litigation. See text at notes 37-44 *infra*. Another possible approach would be to classify the *pro se* litigant's time spent preparing the case as an "other litigation cost" and pay the litigant accordingly.

33. Crooker v. United States Dept. of the Treasury, 634 F.2d 48, 49 (2d Cir. 1980).

34. There are two circumstances in which this court may look beyond the express language of a statute in order to give force to Congressional intent: where the statutory language is ambiguous; and where a literal interpretation would thwart the purpose of the over-all statutory scheme or lead to an absurd result.

United States v. Tex-Tow, Inc., 589 F.2d 1310, 1313 (7th Cir. 1978) (quoting International Tel. & Tel. Corp. v. General Tel. & Elec. Corp., 518 F.2d 913, 917-18 (9th Cir. 1975)). In this case, the phrases "attorney fee" and "other litigation costs reasonably incurred" are ambiguous as they apply to *pro se* litigants.

35. See S. REP. NO. 1011, 94th Cong., 2d Sess. 1, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5908 (CRAFAA) [hereinafter cited as CRAFAA REPORT]; H.R. REP. NO. 1558, 94th Cong., 2d Sess. 1 (1976) (CRAFAA); H.R. REP. NO. 876, 93d Cong., 2d Sess. 6, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6267, 6272 (FOIA); S. REP. NO. 854, 93d Cong., 2d Sess. 17-19 (1974) (FOIA); S. REP. NO. 1183, 93d Cong., 2d Sess. 83, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6916, 6997 (Privacy Act); H.R. REP. NO. 1416, 93d Cong., 2d Sess. 17 (1974) (Privacy Act); H.R. CONF. REP. NO. 1429, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 6148 (TILA); S. REP. NO. 902, 93d Cong., 2d Sess. (1974) (TILA).

36. Montana Power Co. v. Federal Power Commn., 445 F.2d 739, 746 (D.C. Cir. 1970) (footnote omitted), cert. denied, 400 U.S. 1013 (1971). See United States v. Sisson, 399 U.S. 267, 297-98 (1976) ("The axiom that courts should endeavor to give statutory language that meaning that nurtures the policies underlying legislation is one that guides us when circumstances not plainly covered by the terms of a statute are subsumed by the underlying policies to which Congress was committed."); Portland Cement Assn. v. Ruckelshaus, 486 F.2d 375 (D.C. Cir.), cert. denied, 417 U.S. 921 (1973); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 16 (1921) ("You may call this process legislation, if you will. In any event, no system of *ius scriptum* has been able to escape the need of it."); J. GRAY, THE NATURE AND SOURCES OF THE LAW 173 (2d ed. 1938). See generally 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 45.09 (4th ed. C. Sands ed. 1973).

effectuated by allowing prevailing *pro se* litigants to recover attorneys' fees.

Congress had two basic reasons for carving exceptions from the general rule that parties must pay their own attorneys' fees. The first, and most important, was to encourage the vindication of legal rights through the judicial process.³⁷ The statutes authorize awards of attorneys' fees in areas where Congress has established important national policies whose success depends on significant private enforcement efforts.³⁸ Awarding attorneys' fees encourages parties whose rights have been violated to seek vindication in the courtroom³⁹ since it reduces the plaintiff's expected cost of going to trial.⁴⁰

The importance placed on judicial protection of individual rights

37. See CRAFAA REPORT, *supra* note 35, at 2, [1976] U.S. CODE CONG. & AD. NEWS at 5910 ("All of these civil rights laws depend heavily upon private enforcement, and fee awards have proven an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.")

In *Cunningham v. FBI*, 664 F.2d 383 (3d Cir. 1981), the Third Circuit suggested that Congress did not intend the FOIA as an incentive to litigation. "But the legislative history to the 1974 FOIA amendments, which authorized attorney fee awards, suggests that Congress did not mean to create positive incentives to litigation. Rather, Congress' expressed concern was to remove obstacles to legitimate claims . . ." 664 F.2d at 387. The court seems to be attempting a semantic sleight-of-hand. All legitimate claims, absent an attorneys' fees statute, face the obstacle of attorneys' fees. Removing that obstacle will encourage a number of people to file claims who otherwise would not have filed.

38. See S. REP. NO. 854, 93d Cong., 2d Sess. 18 (1974) ("Congress has established in the FOIA a national policy of disclosure of government information, and the committee finds it appropriate and desirable, *in order to effectuate that policy*, to provide for the assessment of attorneys' fees against the government where the plaintiff prevails in FOIA litigation." (emphasis added)); note 37 *supra*.

39. See CRAFAA REPORT, *supra* note 35, at 2, [1976] U.S. CODE CONG. & AD. NEWS at 5910 ("If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate their rights in court."); S. REP. NO. 854, 93d Cong., 2d Sess. 18 (1974). Implicit in this argument is the belief that those whose rights have been violated will win at trial.

40. The expected cost of an event is the weighted average of costs associated with every possible outcome of the event; weights are given by the respective probabilities of each possible outcome. This is more commonly referred to as the "expected value" of an event. See J. KMENTA, ELEMENTS OF ECONOMETRICS 57-59 (1971). For example, a lawsuit is an "event" having two possible "outcomes": a win or a loss. A litigant's expected cost of the lawsuit is determined by the following calculation: [(litigant's chance of winning) × (cost if win)] + [(litigant's chance of losing) × (cost if lose)]. See *id.* at 58. Suppose that a person's rights have been violated and that he wishes to sue the government. Assume, first, that the violation is blatant and that the litigant will quite likely win, *i.e.*, that the probability of the person winning is 90%. Assume further that each side will incur attorneys' costs of \$500, and (for simplicity) that this is the only cost that each side will incur. Without an attorneys' fees award provision, the plaintiff's expected lawsuit cost is: [(0.90) × (\$500)] + [(0.10) × (\$500)] = \$450 + \$50 = \$500. With an attorneys' fees award provision allowing both sides to recover, the plaintiff's expected lawsuit cost is: [(0.90) × (\$0)] + [(0.10) × (\$1000)] = \$0 + \$100 = \$100. The plaintiff's cost of vindicating his right is, therefore, reduced by the attorney's fees provision. Note, however, that this will be true *only* for the plaintiff who has better than a 50% chance of winning; this is because the losing plaintiff will be saddled with the government's attorneys' fees. Congress has mitigated this effect by precluding the award of attorneys' fees to prevailing defendants. See notes 41-44 *infra* and accompanying text.

is evinced by the unbalanced standard that Congress adopted for awarding attorneys' fees. If, for example, a statute allowed all prevailing parties to collect attorneys' fees, individuals arguably might be discouraged from initiating lawsuits by the fear of having to pay the defendant's attorneys' fees. Recognizing and wishing to prevent this disincentive to individual suits, Congress expressly created a double standard: In most cases, attorneys' fees can be granted only to prevailing plaintiffs and not to prevailing defendants. Under this approach, people who sue need not fear a double penalty if they lose. Three of the statutes — the FOIA, Privacy Act, and TILA⁴¹ — absolutely prohibit recovery by defendants. And while the language of the CRAFAA appears to make legal expenses equally available to both plaintiffs and defendants,⁴² the committee report accompanying the bill outlined a double standard: Plaintiffs "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust,"⁴³ but prevailing defendants should recover only if they can show that the plaintiff's suit was "clearly frivolous, vexatious, or brought for harassment purposes."⁴⁴

Attorneys' fees statutes also seek to induce potential defendants to comply with the law. When a defendant is forced to pay the plaintiff's attorneys' fees, he incurs a cost over and above that normally encountered in civil litigation. This additional cost can help to deter violations of the law, especially in cases where the actual damages are small or nonexistent.⁴⁵ As the Senate committee report on

41. The Freedom of Information and Privacy Acts both provide that "The court may assess against the United States reasonable attorney fees . . ." 5 U.S.C. §§ 552(a)(4)(E), 552a(g)(3)(B) (1976). The government is always the defendant and always the only party liable for attorneys' fees. The TILA provides that "[A]ny creditor who fails [to comply] . . . is liable . . . [for] a reasonable attorney's fee." 15 U.S.C. § 1640(a) (1976). The creditor is always the defendant and always the only one liable.

42. "[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1976).

43. CRAFAA REPORT, *supra* note 35, at 4, [1976] U.S. CODE CONG. & AD. NEWS at 5912. The committee drew its standard from *Newman v. Figgie Park Enterprises*, 390 U.S. 400, 402 (1968), a case interpreting a similar attorneys' fees statute in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b) (1976).

44. CRAFAA REPORT, *supra* note 35, at 5, [1976] U.S. CODE CONG. & AD. NEWS at 5912. This is basically the same standard adopted by the Supreme Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), a case interpreting the attorneys' fees provision in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1976). Not all attorneys' fees statutes are as generous to plaintiffs as are these four. *See, e.g.*, Consumer Product Safety Act, 15 U.S.C. § 2060(c) (1976); Copyrights Act, 17 U.S.C. § 505 (1976) (allowing the court to award attorneys' fees to either party). Perhaps the reason for this dichotomy is simple congressional oversight. The same thing may have happened with the civil rights attorneys' fees statutes — Congress erred by allowing either party to collect, the courts corrected the mistake, and Congress followed the courts' lead in subsequent legislation. *See also* Federal Contested Election Act, 2 U.S.C. § 396 (1976) (allows fees for either party payable from a special congressional fund for that purpose).

45. Actions brought under the FOIA, for example, involve no claim for damages at all; the plaintiff is merely seeking release of government-held information.

the FOIA explained it, "If the government had to pay legal fees each time it lost a case, . . . it would be much more careful to oppose only those [cases] it had a strong chance of winning."⁴⁶ Several courts have also noted this deterrent purpose behind the attorneys' fees statutes.⁴⁷

Both of these purposes will be inadequately served if awards of attorneys' fees are confined to litigants who actually hire a lawyer. First, contrary to some courts' contentions, allowing litigants to recover the reasonable fees of retained attorneys will not, by itself, ensure judicial vindication of individual rights.⁴⁸ There are many potential litigants of modest means who may not hire a lawyer to represent them even when awards of attorneys' fees are available. These people realize that legal fees are only given to litigants who win their cases. They may be unwilling to risk employing a lawyer and gambling on winning the case because if they lose they will owe their lawyer a significant amount of money.⁴⁹ For these people, the only choices are either litigating *pro se* or not litigating at all.⁵⁰ If potential *pro se* parties cannot expect compensation for the time spent on their cases even if they win, they face an additional disincentive to filing suit.

Awarding attorneys' fees to *pro se* litigants thus furthers Congress' intent to facilitate the vindication of individual rights through litigation. It is important to remember that the purpose of these attorneys' fees statutes is to encourage citizens to seek justice in the

46. S. REP. NO. 854, 93d Cong., 2d Sess. 17 (1974). Sen. Cranston, in his remarks on the floor in support of the FOIA, noted the same deterrent effect: "This provision will discourage unreasonable litigation by the Government undertaken for no good reason except to make as burdensome as possible the effort of a citizen to acquire information from this Government." 120 CONG. REC. 17,022 (1974).

47. See *Lovell v. Alderete*, 630 F.2d 428, 437 (5th Cir. 1980) (Clark, J., dissenting); *Quinto v. Legal Times of Washington, Inc.*, 511 F. Supp. 579, 581 (D.D.C. 1981).

48. See *Crooker v. United States Dept. of Justice*, 632 F.2d 916, 920 (1st Cir. 1980) ("By eliminating the obstacle of attorney fees, it ensures that all litigants have 'access to the courts to vindicate their statutory rights.'") (quoting *Nationwide Bldg. Maintenance, Inc. v. Sampson*, 559 F.2d 704, 715 (D.C. Cir. 1977)); *Davis v. Parratt*, 608 F.2d 717, 718 (8th Cir. 1979) (*per curiam*) ("The legislative history of Section 1988 reveals that its purpose is not to compensate *pro se* litigants, but to provide counsel fees to prevailing parties in order to give private citizens a meaningful opportunity to vindicate their rights . . .").

49. See S. REP. NO. 854, 93d Cong., 2d Sess. 18 (1974). ("Even the simplest FOIA case, according to testimony, involves legal expenses of over \$1,000 . . .").

50. In *Cunningham v. FBI*, 664 F.2d 383 (3d Cir. 1981), the Third Circuit suggested that contingent fees are the answer to this problem. 664 F.2d at 387 n.3. They are not. Contingent fee arrangements are difficult to make when the plaintiff cannot offer his attorney the prospect of a percentage of a large damage claim at the end of the lawsuit. Without such a claim, all the plaintiff can offer is his attorneys' fees award. Since the lawyer can only count on winning a certain percentage of his cases, this means that sometimes he will get paid for his work, sometimes he will not. Over the long run, the attorney's total earnings from these suits will fall short of fully compensating him for his work. Thus, the attorney faces an economic disincentive to taking these cases on a contingent basis.

courtroom.⁵¹ They were not designed to ensure that large numbers of citizens could obtain legal representation; hiring an attorney is merely a means of accomplishing the statutes' ultimate goal.⁵² To the extent that awarding attorneys' fees to *pro se* litigants helps to achieve that end, therefore, it should be considered authorized by the statutes.

Denying awards to *pro se* litigants also fails to implement the second congressional purpose underlying attorneys' fees statutes — encouraging compliance with the law. This negative effect is most obvious when a violation has already occurred, a lawsuit has been filed, and the defendant is debating whether to settle the claim or continue resisting. If the defendant knows that his *pro se* opponent cannot collect legal fees, he may delay in the hope that his opponent will become discouraged and drop the lawsuit.⁵³ If the *pro se* party could collect attorneys' fees, the potential costs to the defendant of resisting the claim would rise dramatically, and these costs might discourage delaying tactics by the violator. By increasing the costs of statutory violations,⁵⁴ moreover, the awards would provide a disincentive for violating the law in the first instance.

Neither the statutes' language nor their legislative histories, then, mandates an interpretation that precludes the award of attorneys' fees to prevailing *pro se* litigants. To the contrary, the purposes for which Congress authorized awards of attorneys' fees are not served by limiting the class of plaintiffs eligible for the awards. Congress' intent can be effected, therefore, by interpreting "attorney fees" to allow prevailing *pro se* litigants compensation for the legal work that they have performed.

II. POLICY CONSIDERATIONS

This Part of the Note considers the policies implicated by awarding attorneys' fees to *pro se* litigants. The debate over the propriety of such awards centers around two major issues: first, whether attorneys' fees represent justifiable compensation or an unearned windfall for *pro se* litigants; and second, whether the *pro se* litigant's status

51. See notes 37-39 *supra* and accompanying text.

52. Neither are these statutes "attorney relief" statutes. During the debates on CRAFAA, however, Sen. Allen tried to characterize the bill as an attorney relief statute. He even introduced a bill which would have renamed it "The Tunney-Kennedy Civil Rights Attorneys Relief Act." 122 CONG. REC. 31,850 (1976).

53. See *Lovell v. Alderete*, 630 F.2d 428, 437 (5th Cir. 1980) (Clark, J., dissenting) ("Second, faced with only a *pro se* complainant, the Government can resist disclosure right up to the point of losing and still escape the penalty of attorney fees.")

54. The defendant's expected cost of litigating suits will rise in the same way that the plaintiff's will fall. The defendant will continue paying his own attorneys' fees win or lose, and will pay the plaintiff's fees whenever the plaintiff prevails. Thus, the defendant has an economic incentive for avoiding lawsuits. See generally note 40 *supra*.

provides a principled basis for distinguishing parties deserving fee awards from those not deserving awards. Part II demonstrates that nothing in these arguments persuasively rebuts Part I's conclusion that congressional intent can best be furthered by awarding fees to prevailing *pro se* litigants.

Opponents of *pro se* attorneys' fees begin by arguing that *pro se* litigants do not deserve compensation. Since *pro se* litigants spend no money on and incur no debts for legal advice, it follows that awarding them a fee is simply an unjustifiable windfall.⁵⁵ Any out-of-pocket expenses incurred, such as printing and court fees, are recoverable as part of a costs award.⁵⁶ Furthermore, they argue, even assuming that *pro se* parties should receive attorneys' fees, there is no "meaningful standard for calculating the amount of such an award."⁵⁷

These arguments are unpersuasive because they adopt an artificially narrow definition of the *pro se* litigant's expenses. *Pro se* parties invest time instead of money in preparing their cases. Their time has a recognized value, which is measured by the cost of foregoing other opportunities in order to pursue the lawsuit.⁵⁸ This "opportunity cost" is defined by economists as the value of goods that must be given up to produce something.⁵⁹ In this case, the good given up is time, either from work or leisure. Since the value of leisure is generally thought of as the value of what is being given up for it, namely work,⁶⁰ the value of the time that a *pro se* litigant spends on his case equals the value of the same number of hours worked at his normal job. A *pro se* party should, therefore, normally receive that amount as an attorney's fee.⁶¹

Opponents of *pro se* fees also argue that awarding fees results in

55. See *Crooker v. United States Dept. of Justice*, 632 F.2d 916, 920-21 (1st Cir. 1980); *Hannon v. Security Natl. Bank*, 537 F.2d 327, 328 n.1 (9th Cir. 1976).

56. See *Crooker v. United States Dept. of Justice*, 632 F.2d 916, 922 (1st Cir. 1980).

57. See *Crooker v. United States Dept. of Justice*, 632 F.2d 916, 921 (1st Cir. 1980) ("The impropriety of allowing the layperson litigant an attorney fee award is further underscored by the lack of any meaningful standard for calculating the amount of such an award.")

58. See P. SAMUELSON, *ECONOMICS* 448 (11th ed. 1980). See also *Lovell v. Alderete*, 630 F.2d 428, 437 (5th Cir. 1980) (Clark, J., dissenting); *Quinto v. Legal Times of Washington, Inc.*, 511 F. Supp. 579, 581 (D.D.C. 1981) ("To deny such a litigant attorney's fees solely on the grounds that he did not incur any liability to pay attorney's fees ignores the fact that a *pro se* litigant must forego other activities in order to prepare and pursue his case.")

59. R. WAUD, *ECONOMICS* 24-25 (1980).

60. R. LIPSEY, *POSITIVE ECONOMICS* 477 (4th ed. 1976).

61. The Second Circuit has implied in dicta that opportunity cost may be the crucial determinant in *pro se* cases. See *Crooker v. United States Dept. of the Treasury*, 634 F.2d 48, 49 (2d Cir. 1980). There is no easy reference for determining salaries in the case of the unemployed or the retired. It may be necessary, therefore, to establish some arbitrary floor for compensation, perhaps related to the minimum wage. Such an approach acknowledges the value of these persons' time and provides at least a minimal incentive for bringing legitimate grievances to court. For further discussions of possible adjustments to compensation, see note 71 *infra* and accompanying text.

dissimilar treatment of *pro se* and counsel-represented litigants. After all, litigants who hire an attorney must still expend time and energy to help prepare their own cases, and they are not compensated for this time.⁶² Compensating *pro se* parties for the time that they invest in their cases, opponents assert, would be discriminatory and unfair.⁶³

One could logically respond that parties hiring a lawyer should likewise be entitled to compensation for the time that they spent helping their lawyers prepare their case.⁶⁴ But it is not necessary to go that far. Distinguishing between *pro se* litigants and other parties is rational because there are both quantitative and qualitative differences between the effort expended by the two types of litigant. First, the *pro se* litigant spends much more time working on the lawsuit. He does the work normally done by hired counsel plus whatever he would have had to do as a client. Not granting attorneys' fees to the *pro se* plaintiff, therefore, would effect a much greater injustice because much more time would be left uncompensated. Second, the time that the *pro se* litigant invests in the case is much more demanding. He does legal research, plans strategy, writes briefs, and argues his case. His counterpart who hired an attorney need only answer his lawyer's questions and appear in court at the proper times. Because of these differences, the dissimilar treatment afforded to *pro se* litigants and those who hire attorneys does not seem unfair.

The second major line of argument would restrict awards of attorneys' fees by making recovery dependent upon the *pro se* litigant's status. One branch of this argument distinguishes attorneys representing themselves *pro se* from lay *pro se* litigants. The Ninth Circuit, for example, has allowed attorneys' fees for lawyers who represent themselves, but not for laymen.⁶⁵ The Fifth Circuit, while denying counsel fees to *pro se* lay litigants under both the Privacy Act⁶⁶ and the CRAFAA⁶⁷ has specifically left open the question

62. Parties to a lawsuit cannot even be awarded their expenses as witnesses in their own case, even though witness expenses are normally recoverable under 28 U.S.C. § 1920(3) (1976); see C. WRIGHT & A. MILLER, *supra* note 29, § 2678.

63. See *Cunningham v. FBI*, 664 F.2d 383, 386 (3d Cir. 1981); *Crooker v. United States Dept. of Justice*, 632 F.2d 916, 921 (1st Cir. 1980).

64. See *Parker v. Lewis*, [1981] 4 EMPL. PRAC. GUIDE (CCH) (27 Empl. Prac. Dec.) ¶ 32,153 (D.D.C. June 30, 1981), where the court allowed the plaintiff, herself an attorney, to collect attorneys' fees for the work she had done on her own case even though she had hired several other lawyers to represent her. The case was brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16 (1976).

65. See *Ellis v. Cassidy*, 625 F.2d 227, 230-31 (9th Cir. 1980) (attorney allowed to collect *pro se* fees); *Hannon v. Security Natl. Bank*, 537 F.2d 327, 329 (9th Cir. 1976) (refused to grant *pro se* fees to a law school graduate). The Fourth Circuit, on the other hand, has gone on record denying attorneys' fees for all *pro se* litigants, including lawyers, at least in TILA cases. See *White v. Arlen Realty Dev. Corp.*, 614 F.2d 387, 389 (4th Cir.), *cert. denied*, 447 U.S. 923 (1980).

66. *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1090 (5th Cir. 1981).

67. *Cofield v. City of Atlanta*, 648 F.2d 986, 987 (5th Cir. 1981).

whether attorneys acting *pro se* can collect attorneys' fees.⁶⁸ The courts have not fully spelled out the reasons underlying this distinction; presumably it rests in part on attorneys' acknowledged expertise in the practice of law.

The distinction between attorneys and nonattorneys, however, is not well-founded. A nonlawyer appearing *pro se* performs the same functions as a lawyer even though he does not have the same level of training. "[W]hen persons exercise their right to represent themselves before the bar of justice they are in every sense functioning as attorneys: they do research, file pleadings and advocate their cause."⁶⁹ The only difference between lawyers and nonlawyers lies in the skill and efficiency with which they perform their work. The lawyer's superior training presumably will result in more effective performance. It is not clear, however, why this difference should be a basis for denying fees to the *pro se* litigant since it will be reflected in the frequency with which the parties are compensated — they only collect a fee when they win a case. It can also be reflected in the rate at which the parties are compensated if a *pro se* party's rate of compensation is tied to his regular salary.⁷⁰ Since most nonattorney *pro se* parties will have lower incomes than lawyers, they will receive proportionately less in attorneys' fees.⁷¹

68. *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1089 (5th Cir. 1981). The Third Circuit, while denying *pro se* fees to nonlawyers, has also deferred decision on *pro se* attorneys. *See Cunningham v. FBI*, 664 F.2d 383, 385 n.1 (3d Cir. 1981). The Second Circuit apparently has made incarceration the dividing line on eligibility for *pro se* attorneys' fees. In *Crooker v. United States Dept. of the Treasury*, 634 F.2d 48 (2d Cir. 1980), the Second Circuit refused to award attorneys' fees in an FOIA case to a successful *pro se* litigant who was also a prisoner. In so doing, the court implied that *pro se* fees might be acceptable for nonprisoner *pro se* litigants. The court seemed concerned that the prisoner, unlike his counterparts in the outside world, would not be able to demonstrate that the time spent preparing his case was time diverted from any gainful employment. 634 F.2d at 49. The court opined that the FOIA was not intended to be "a cottage industry for prisoners." 634 F.2d at 49. The court is at least acknowledging the opportunity cost approach's validity. *See text at notes 58-61 supra*. The plaintiff in *Crooker* was also the plaintiff in two other important FOIA *pro se* attorneys' fees cases, brought in different circuits. *See Crooker v. United States Dept. of Justice*, 632 F.2d 916 (1st Cir. 1980); *Crooker v. United States Dept. of the Treasury*, No. 80-1412 (D.C. Cir. Oct. 23, 1980). A different prisoner has been involved in two other important *pro se* cases. *See Lovell v. Snow*, 637 F.2d 170 (1st Cir. 1981); *Lovell v. Alderete*, 630 F.2d 428 (5th Cir. 1980).

69. *Holly v. Acree*, 72 F.R.D. 115, 116 (D.D.C. 1976), *affd. sub nom. Holly v. Chasen*, 569 F.2d 160 (D.C. Cir. 1977).

70. *See text at notes 60-61 supra*.

71. As the income of the potential *pro se* litigant approaches that of the average lawyer, the litigant is more likely to hire his own lawyer because he can better afford to assume the risk of suing and losing. There is, of course, a possibility that some *pro se* litigants may have incomes equal to or greater than the average lawyer. To protect the defendant in these cases from being unfairly burdened because his opponent happened to proceed *pro se*, it will be necessary to place a ceiling on the *pro se* award. For example, the court might award only an amount equal to what an average lawyer would have charged had he been hired for the case. This limitation can be justified on the grounds that all of the statutes require that awards of attorneys' fees be "reasonable." *See note 16 supra*. There is also some suggestion that the reasonableness requirement can be used as a tool for limiting large *pro se* awards on the basis of

The straightforward nature of the proceedings under the four statutes being examined, moreover, may make attorneys' greater expertise irrelevant. *Pro se* cases tend to be self-selecting. If the case is complicated, a prospective plaintiff will either hire a lawyer or not bother to proceed. But cases arising under these four statutes often involve simple issues and few factual questions. In a typical FOIA case, for example, there is a request for information from a government agency, a denial of some or all of that information based on one or more statutory exceptions, a suit in federal court to force the release of the requested information, and a decision by the court as to who is entitled to have the information. Because little legal expertise is required, the distinction between attorneys and nonattorneys tends to evaporate in this context.

A second branch of the status-based argument against fee awards asserts that all *pro se* litigants are a burden to the judicial system and hence should not be encouraged. In *White v. Arlen Realty and Development Corp.*,⁷² for example, the Fourth Circuit refused to allow *pro se* attorneys to collect legal fees because it felt that they lacked the necessary "detached and objective perspective"⁷³ to conduct an effective case. They become too involved with their own problem, argue with the judge, and frequently lose their cases because of bad tactical decisions.⁷⁴ Similar complaints have been raised against nonattorneys: They are inexperienced, overly involved, and a hindrance to the efficient administration of justice.⁷⁵ For these reasons, it is argued, the courts should not encourage *pro se* parties to participate in the legal system by awarding them attorneys' fees.⁷⁶

This argument's logic leaves much to be desired. It condemns *pro se* attorneys' fees because they encourage litigation — the very pur-

excessive hours worked. In *Jones v. United States Secret Service*, 81 F.R.D. 700 (D.D.C. 1979), the court cut the hours claimed by the plaintiff in half on grounds of the plaintiff's inexperience. 81 F.R.D. at 702. This approach is somewhat arbitrary, and perhaps unnecessary in light of this Note's proposed "average attorney" limitation discussed above. Nonetheless, reducing the hours claimed does offer an alternative to courts concerned about excessive *pro se* awards.

72. 614 F.2d 387 (4th Cir.), *cert. denied*, 447 U.S. 923 (1980).

73. 614 F.2d at 388.

74. 614 F.2d at 388.

75. *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1089-90 (5th Cir. 1981) ("Persons contemplating legal action should be encouraged to consult with attorneys. Litigation may not be necessary. Frustrations and misunderstandings or failures of understanding by the intended complainant may be quickly soothed and resolved by counsel."); *Crooker v. United States Dept. of Justice*, 632 F.2d 916, 920 (1st Cir. 1980) ("[T]he complainant [who] represents himself, sometimes [is] a hinderance instead of an aid to the judicial process . . .").

76. *See White v. Arlen Realty & Dev. Corp.*, 614 F.2d 387, 389 (4th Cir.), *cert. denied*, 447 U.S. 923 (1980) ("The goals of the Act are not fostered by self-representation or fee generation, but rather by independent professional advocacy. Therefore, we adopt a simple rule for Truth-in-Lending actions: plaintiffs who are not represented by attorneys may not be awarded attorney fees.").

pose for which Congress enacted the attorneys' fees statutes.⁷⁷ If granting legal fees to *pro se* plaintiffs will induce more of them to pursue their claims in court, that is reason to be pleased, not distressed. It is not altogether apparent, moreover, that *pro se* attorneys do an unsatisfactory job of pleading their causes.⁷⁸ In addition, many nonattorney *pro se* parties, such as law students and paralegals, have had sufficient legal training to make them reasonably well-qualified to conduct a lawsuit.⁷⁹

The real objection underlying the claims of efficiency and burdens may be a fear that awarding attorneys' fees to *pro se* parties will generate a flood of litigants in the federal courts who are more interested in collecting legal fees than in vindicating any substantive right. If so, there are several reasons not to be overly concerned. Attorneys' fees can be recovered only if the plaintiff wins his case, and people without a legitimate claim and a reasonable chance of victory are not likely to file suit. In addition, judicial screening mechanisms already exist for weeding out frivolous claims before substantial judicial resources have been expended: Since many *pro se* parties are indigent, they file their claims *in forma pauperis*,⁸⁰ a form of pleading that allows the court to waive filing fees.⁸¹ The statute allowing the waiver of fees also allows the judge to dismiss the complaint without even a preliminary hearing if he thinks it is frivolous.⁸² For those parties who do not proceed *in forma pauperis*, the filing fees represent a significant out-of-pocket expense and should discourage plaintiffs from filing long-shot claims. Claims surviving these hurdles that prove meritless can always be dismissed at the demurrer or summary judgment stages. If the claims are meritorious, on the other hand, they deserve a hearing in court.⁸³ That hearing should not be discouraged by arbitrary denials of legal expenses when such expenses are authorized by law and when Congress has indicated its desire to encourage judicial vindication of the rights protected by these statutes.

77. See text at notes 37-40 *supra*.

78. See *Ellis v. Cassidy*, 625 F.2d 227 (9th Cir. 1980); *Cuneo v. Rumsfeld*, 553 F.2d 1360 (D.C. Cir. 1977). See generally R. COHN, *A FOOL FOR A CLIENT* (1971) (being Cohn's description of his successful *pro se* defenses against a number of criminal charges).

79. Several important *pro se* attorneys' fees cases have been brought by law students. See *Hannon v. Security Natl. Bank*, 537 F.2d 327 (9th Cir. 1976); *Quinto v. Legal Times of Washington, Inc.*, 511 F. Supp. 579 (D.D.C. 1981).

80. "In the character or manner of a pauper." BLACK'S LAW DICTIONARY 701 (5th ed. 1979).

81. 28 U.S.C. § 1915(a) (1976).

82. 28 U.S.C. § 1915(d) (1976).

83. *Pro se* litigants frequently make important contributions to the system of justice in this country. For a discussion of the Second Circuit's experience with *pro se* litigants, see Flannery & Robbins, *The Misunderstood Pro Se Litigant: More Than A Pawn In The Game*, 41 BROOKLYN L. REV. 769 (1975).

CONCLUSION

Federal courts should adopt the practice of awarding attorneys' fees to prevailing *pro se* litigants who bring claims under attorneys' fees statutes. Analysis of four major statutes and their respective legislative histories shows that awarding fees to parties who represent themselves in the courtroom furthers the purposes for which these statutes were enacted and, therefore, would probably have been favored by Congress had it expressly considered the issue. An opportunity cost approach to valuation provides the court with a reasonable method for determining the amount of compensation that a nonlawyer *pro se* litigant should receive, namely, an amount equal to what he would earn working the same number of hours at his normal job.

Since self-representation may be the only reasonable option for many who seek to protect their rights, courts should remove any unnecessary barriers to the exercise of that option. Litigants have a statutorily guaranteed right, dating from the founding of the Republic, to represent themselves in federal court.⁸⁴ This right deserves some protection. We are a nation that prides itself on providing equal justice for all. If some citizens feel compelled, for whatever reason, to seek their justice in person, we should not discourage them from doing so.

84. See note 4 *supra*.