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Prisoners' Access to the Courts: Legal Requirements and Practical Realities*

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and
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I. INTRODUCTION

Criminologists, lawyers, and judges no longer adhere to the nineteenth century view that a prisoner is a mere "slave of the state"[1] without legal rights or access to legal remedies. Incarceration does not justify surrender of all personal liberty, nor does it justify denial of fundamental human rights. While prisoners retain some constitutional rights during incarceration, their rights are limited both by confinement and by the legitimate needs of penal administration, including the maintenance and preservation of order, security, and discipline.[2]

As a result, constitutional rights such as travel,[3] and freedom from unreasonable searches and seizures[4] are severely restricted. The rights of religion,[5] speech,[6] association,[7] and procedural due

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1. Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

2. *See* Hudson v. Palmer, 104 S. Ct. 3194, 3198-200 (1984) and cases cited therein. *See generally* J. GOBERT & N. COHEN, RIGHTS OF PRISONERS (1981 & Supp. 1983); Gochnauer, *Necessity and Prisoner Rights*, 10 N. ENG. J. CRIM. & CIV. CONF. 27 (1984); Comment, *An Overview of Prisoners' Rights: Part II, Conditions of Confinement Under the First and Eighth Amendments*, 14 ST. MARY'S L.J. 991 (1983) [hereinafter cited as *Prisoners' Rights, Part II*].

3. *See, e.g.*, Lockert v. Faulkner, 574 F. Supp. 606, 608 (N.D. Ind. 1983) (state's need to maintain security includes control over ingress and egress at prison); *cf.* J. GOBERT & N. COHEN, *supra* note 2, at § 10.01.

4. Hudson v. Palmer, 104 S. Ct. 3194, 3200 (1984) (prisoner has no reasonable expectation of privacy in jail cell).

5. Cruz v. Beto, 405 U.S. 319, 322 (1972) (per curiam) (prisoners must be given "reasonable opportunity" to exercise their first amendment religious freedom).

6. Pell v. Procunier, 417 U.S. 817, 822 (1974) (prisoners retain first amendment rights of speech not inconsistent with legitimate penological objectives or their status as prisoners).

process[8] are preserved to some extent. The rights to be free from racial discrimination[9] and cruel and unusual punishment[10] are retained to a significant degree.

Access to the courts is fundamental to the protection and definition of these rights. Prisoners are virtually devoid of political power. Because of this, and because prison administration occurs wholly outside the watchful eye of the public, litigation remains an inevitable necessity for creating and enforcing prisoners' basic rights.[11] Litigation implies access to the court as a forum for resolving the underlying dispute.

Federal courts historically maintained a "hands-off" attitude toward the prisons.[12] Until the mid-twentieth century, prisoners had little if any access to the courts for redress of human rights violations. In a 1941 landmark case, however, the Supreme Court struck down a prison regulation requiring prisoners to have their habeas corpus petitions approved by prison officials before they could be submitted to the court.[13] The Court held that prisoners have a right of access to the courts after imprisonment and, crossing over the well-established demarcation between the courts and the prisons, noted that whether a habeas petition is properly drawn

7. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125-28 (1977) (prisons can restrict inmates' formation of union groups).

8. Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974) (requirement of a hearing applies in certain circumstances in a prison setting).

9. Lee v. Washington, 390 U.S. 333, 334 (1968) (per curiam) (differential treatment in prisons on the basis of race held unconstitutional).

10. Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (eighth amendment prohibits conditions involving wanton infliction of pain that are "grossly disproportionate to the severity of the crime," and which deprive inmates of the "minimal civilized measure of life's necessities"); Estelle v. Gamble, 429 U.S. 97, 104 (1976) ("deliberate indifference to medical needs violates eighth amendment"), *reh'g denied*, 429 U.S. 1066 (1977).

11. *See generally* Ducey, *Survey of Prisoner Access to the Courts: Local Experimentation a' Bounds*, 9 N. ENG. J. CRIM. & CIV. CONF. 47 (1983); *see also* Harris v. Young, 718 F.2d 620, 622 (4th Cir. 1983):

> Because an inmate is unable to discover his rights . . . when . . . access to the law is denied him, any complaint rightly alleging a present denial of access . . . states a valid claim for equitable relief. It is unfair to force an inmate to prove that he has a meritorious claim which will require access until after he has had an opportunity to see just what his rights are.

12. The federal judiciary's reluctance to become involved in the internal operation of the prisons was because of (1) its lack of expertise in prison management; (2) its adherence to separation of powers doctrines which gave ultimate authority for control of prisons to the executive and legislative branches; and (3) its deference to the principles of federalism and its resulting belief that state prisoners should seek relief in state courts. *See generally* J. GOBERT & N. COHEN, *supra* note 2, at § 1.02.

13. *Ex parte* Hull, 312 U.S. 546, 548-49 (1941). The regulation struck down required submission to the state parole board's legal investigator for his determination as to whether they were "properly drawn." *Id.*

is a matter for the courts, not for the prison officials.[14]

Prisoner rights litigation proliferated during the 1960's and 1970's.[15] As a result of this litigation, prison systems that used brutal and arbitrary treatment were enjoined from continuing to violate their inmates' constitutional rights.[16] The number of prisoner civil rights actions filed in the federal court by state prisoners has steadily increased since then and now comprises over seven percent of the federal judicial civil workload.[17]

While the number of civil rights actions filed has grown, the number of claims that are found to have merit is very small, both numerically and proportionately.[18] As prisoners continue to increase their attempts at access, the judiciary is faced with the dilemma of sorting through a tidal wave of alleged violations to discover the few valid claims. Because some cases raise constitutional questions of great significance to the prisoner, the correctional system, and society at large, however, courts have a duty to ensure that meritorious complaints are recognized.

So long as prisoners continue to seek access to the federal judicial process for vindication of their civil rights, courts will spend a

14. *Id.* at 549. The following year, in Cochran v. Kansas, 316 U.S. 255, 257 (1942), the Supreme Court held that prison officials cannot interfere with a prisoner's attempts to perfect an appeal.

15. Prisoner filings rose 689% between 1962 and 1980. Weinstein, *The Poor's Right to Equal Access to the Courts*, 13 CONN. L. REV. 651, 659 (1981). *See also* Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits In The Federal Courts*, 92 HARV. L. REV. 610, 612-13 nn.19-21 (1979).

16. Turner, *supra* note 15, at 639-40; *see also* Rhodes v. Chapman, 452 U.S. 337, 344-45 (1981). For an indication of the courts' activism in this area, see Kendrick v. Bland, 586 F. Supp. 1536 (W.D. Ky. 1984) (finding state prison in violation of earlier consent decree); Newman v. State of Alabama, 466 F. Supp. 628 (M.D. Ala. 1979) (court appointed Alabama's governor receiver of the state prisons because the State Board of Corrections had failed in previous six years to meet constitutional standards of confinement). *See generally* Comment, *Cruel But Not So Unusual Reform*, 7 CUM. L. REV. 31 (1976); *Prisoners' Rights, Part II, supra* note 2.

17. The number of prisoner civil rights actions comprises 16,922 of the 231,920 civil cases pending as of June 20, 1983. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1983 ANNUAL REPORT 144 (1983). Three thousand three hundred forty-eight prisoner civil rights actions were filed in the United States District Courts in the fiscal year ending 1972; 5,236 in 1974; 6,958 in 1976; 9,730 in 1978; 12,397 in 1980; 16,741 in 1982; 17,687 in 1983. *Id.* at 127, 248, 249. Prisoner petitions of all types made up 12.7% of all civil filings in federal court for the fiscal year ending in 1983. *Id.* at 125. See also graph of increase in all categories. *Id.* at 125.

18. Of the 16,741 claims filed in the fiscal year ending 1982, 12,539 were terminated before or during the pretrial stage. *Id.* at 243; *see also* I. SENSINICH, COMPENDIUM OF THE LAW ON PRISONERS' RIGHTS 10 (1979 & Supp. 1981); FEDERAL JUDICIAL CENTER, PRISONER CIVIL RIGHTS COMMITTEE, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 9 (1980) [hereinafter cited as REPORT].

good deal of their time and energy delineating the scope of that access and determining which claims warrant judicial attention. This article examines the meaning of access to the courts by taking a close look at both the legal requirements and the practical barriers to that access. First, the development of the Supreme Court's recognition of this constitutional right will be addressed. Next, the article discusses the scope of the right to access and the duty of the state to protect it. Finally, the article details and analyzes the practical barriers confronting a prisoner who attempts to vindicate his constitutional rights in court.

II. LITIGATION TO ENFORCE PRISONER RIGHTS: 42 U.S.C. § 1983

Most prisoner civil rights actions are brought under section 1983 of the Civil Rights Act of 1871.[19] Under this statute, a state prisoner may challenge violations to first amendment freedoms of speech, religion, and association.[20] Most section 1983 litigation, however, focuses on allegedly unconstitutional conditions of con-

19. 42 U.S.C. § 1983 (1982). This statute provides:

> 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.

Because the statutes refer only to deprivations "under color" of state law, federal prisoners cannot use § 1983 to vindicate their constitutional claims. Civil rights actions brought by federal prisoners are under the authority of Bivens v. Six Unknown Named Agents of the F.B.I., 403 U.S. 388 (1971), and 28 U.S.C. § 1331 (1982). For purposes of this article, discussion will focus on state prisoners' civil rights actions. The important area of habeas corpus is not covered directly in this article. *See infra* note 35 and accompanying text; *see also* Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997c (1982) (authorizing Attorney General to institute lawsuits on behalf of prisoners deprived of constitutional rights).

20. For a thorough discussion of the application of § 1983 to specific first amendment causes of action, see I. SENSINICH, *supra* note 18, at 123-61.

Prior to 1984, a prisoner could also allege fourth amendment violations as a basis for a § 1983 suit. In a recent decision, however, the United States Supreme Court foreclosed the prisoners' ability to maintain a § 1983 suit predicated on the fourth amendment. In *Hudson* v. *Palmer*, 104 S. Ct. 3194, 3198-202 (1984), the Court held that a prisoner has no "reasonable expectation of privacy" in his prison cell entitling him to fourth amendment protection. Prior to this decision, most of the Courts of Appeals had held that the fourth amendment accords a prisoner a minimal degree of protection in his cell. *Id.* at 3198 n.5 and cases cited therein. The *Hudson* Court noted that its decison:

> does not mean that [a prisoner] is without a remedy for calculated harassment unrelated to prison needs. Nor does it mean that prison attendants can ride roughshod over inmates' property rights with impunity. The Eighth Amendment always stands as a protection against "cruel and unusual punishment."

finement[21] and covers a diverse range of subject matter including unsanitary conditions, privacy, inadequate meals, lack of sufficient exercise, isolation and segregation, medical and dental care, overcrowding, physical attacks by prison officials and other prisoners, punishment, rehabilitation, and prison work.[22] Due process deprivations also constitute a cause of action under section 1983.[23] These include prisoners' rights in disciplinary hearings and procedures, interinstitutional transfers, parole releases, confiscation of prisoners' property by prison officials, and prison regulations regarding dress, grooming, telephone and other related privileges.[24]

Most fundamentally, however, section 1983 creates a judicially-cognizable action for denial or restriction of the prisoners' right of access to the courts.[25] Without such access, it is impossible to vindicate underlying constitutional rights.

III. Types of Access

It is now clearly established that prisoners have a constitutional right of access to the courts[26] and that such access must be "adequate, effective, and meaningful."[27] Although the right of access to the courts was traditionally discussed in the context of habeas corpus actions,[28] it is now settled that the right extends to prisoners' civil rights cases as well.[29]

The right of access involves many issues: the right to legal

. . . [T]here are adequate state tort and common-law remedies available . . . to redress the alleged destruction of . . . personal property.

Id. at 3202.

21. I. SENSINICH, *supra* note 18, at 188-260.

22. *See generally Prisoners' Rights, Part II, supra* note 2.

23. Wolff v. McDonnell, 418 U.S. 539 (1974); Haines v. Kerner, 404 U.S. 519 (1972) (per curiam).

24. I. SENSINICH, *supra* note 18, at 261-339.

25. *See infra* notes 36-39 and accompanying text.

26. Bounds v. Smith, 430 U.S. 817, 821 (1977).

27. *Id.* at 822. In dissent, Justices Burger and Rehnquist concluded that the only duty owed to a prisoner by the state is the duty not to obstruct access. *Id.* at 837-41 (Burger, C.J., dissenting).

The Supreme Court has cited at least three sources of the right of access: the equal protection clause of the fourteenth amendment, see Griffin v. Illinois, 351 U.S. 12, 18-19 (1956) (state which provides a right of appeal for criminal convictions must also provide indigent criminals with free transcripts when necessary for appeal); the due process clause of the fourteenth amendment, see Wolff v. McDonnell, 418 U.S. 539, 556-57 (1974); and the first amendment, see Cruz v. Beto, 405 U.S. 319, 321 (1972) (right to petition the government for redress of grievances is part of the right of access).

28. *See, e.g.*, Johnson v. Avery, 393 U.S. 483 (1969); *Ex parte* Hull, 312 U.S. 546 (1941).

29. Wolff v. McDonnell, 418 U.S. 539 (1974).

assistance provided by other prisoners or the state, the right of access to a law library, the right to confidential communication with the courts and attorneys, and the right to exercise the right of access to the courts without retaliation or punishment by prison personnel.[30] The process of delineating the precise scope of the right of access has been an extensive one, with a great number of cases brought and decided in the past fifteen years. This section of the article traces the development of those legal requirements for prisoners' access to the courts.

A. History

During the late 1960's and throughout the 1970's, the Supreme Court carved out the basic parameters of the prisoners' right of access to the courts. In the 1969 case of *Johnson v. Avery,*[31] the Court struck down a Tennessee prison rule prohibiting prisoners from assisting each other in preparing legal documents. The Court held that where there is no reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, the state may not enforce a regulation barring inmates from furnishing such assistance to each other.[32]

Two years later, in *Younger v. Gilmore,*[33] the Supreme Court upheld a district court ruling that a California prison regulation excluding state and federal reporters and annotated codes from the prison library was an unconstitutional denial of the prisoners' right of access. *Gilmore* was the first case in which the Court stated that prisons have an affirmative duty to devise another system whereby indigent prisoners are given sufficient means of obtaining the legal expertise critical to obtaining judicial consideration of their alleged grievances.[34] In 1974, the Court extended the right to some form of legal assistance to prisoners bringing civil rights actions against their incarcerators.[35]

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30. *See infra* notes 62-67 and accompanying text. *See generally* Comment, *An Overview of Prisoners' Rights: Part I, Access to the Courts Under Section 1983,* 14 ST. MARY'S L.J. 957 (1983) [hereinafter cited as *Prisoners' Rights, Part I*].

31. 393 U.S. 483 (1969).

32. *Id.* at 490.

33. 404 U.S. 15 (1971) (per curiam), *aff'g* Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970).

34. Gilmore v. Lynch, 319 F. Supp. 105, 112 (N.D. Cal. 1970), *aff'd,* 404 U.S. 15 (1971) (per curiam).

35. Wolff v. McDonnell, 418 U.S. 539 (1974). In *Wolff,* the Court noted that the dividing line between habeas petitions and civil rights actions is not always clearly discernable. It reasoned that the right of access already recognized for habeas petitions is equally applicable to civil rights actions:

Most recently, in *Bounds v. Smith,*[36] the Supreme Court held that a constitutional right of access to the courts requires that states aid inmates filing legal papers by providing access to adequate law libraries or assistance from persons with legal training.[37] Emphasizing that a state cannot justify denial of the right solely because of economic considerations, the Court required states to "shoulder affirmative obligations"[38] to ensure that all prisoners have a reasonably adequate opportunity to present allegations of constitutional violations to the courts.[39]

B. Access to Inmate Assistance

Johnson v. Avery held that prison regulations may not bar inmates from seeking legal assistance from jailhouse lawyers.[40] The holding was qualified, however, in two ways. First, the prison administrators may validly regulate the time and place where legal assistance is dispensed.[41] Second, jailhouse lawyers may be banned entirely if a reasonable alternative to inmate assistance is provided by the state.[42]

> [B]oth actions serve to protect basic constitutional rights. The right of access to the courts, upon which *Avery* [393 U.S. 483 (1969)] was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. It is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ.

Wolff, 418 U.S. at 579.

36. 430 U.S. 817 (1977).

37. *Id.* at 828. In *Bounds*, the district court had held that the existing prison library in North Carolina was "severely inadequate," and ordered the state Department of Corrections to devise a prison library system consistent with the Constitution. *Id.* at 818-19. The state proposed a plan which included a list of legal reference materials consistent with the minimum collection recommended by the American Correctional Association and the American Bar Association. *Id.* at 819 n.4.

38. *Id.* at 824. The court held that these "affirmative obligations" could be fulfilled either by the establishment of an adequate law library or the creation of a legal services plan to assist inmates in the filing of their lawsuits. *Id.* at 830-31.

39. *Id.* at 825.

40. 393 U.S. 483 (1969). Inmate assistance is usually rendered by "jailhouse lawyers." Since all petitions, complaints, and other legal papers are referred to by the prison population as "writs," jailhouse lawyers are frequently referred to as "writ-writers." Vaughn v. Trotter, 516 F. Supp. 886, 891 n.2 (M.D. Tenn. 1980). *See generally A Jailhouse Lawyer's Manual*, 9 COLUM. HUM. RTS. L. REV. 3 (1978). This manual details the rights of jailhouse lawyers and offers important practical information to inmates acting as writ-writers.

41. Johnson v. Avery, 393 U.S. 483, 490 (1969).

42. *Id.* at 489-90. *See generally* Fousekis, *Prisoner Mutual Legal Assistance and Access to the Courts: Recent Developments and Emerging Problems*, 23 HASTINGS L.J. 1089 (1972); Jacob & Sharma, *Justice After Trial: Prisoners' Need for Legal Services in the Criminal-Correctional Process*, 18 U. KAN. L. REV. 493 (1970).

1. Time, Place, and Manner Restrictions

The potential for bribery, favoritism, or physical abuse is evident in a system where certain prisoners are empowered to be writ-writers for other prisoners who require assistance.[43] The courts, therefore, have authorized prison rules regulating the time, place, and manner of rendering legal assistance.[44] Many prison institutions responded to *Avery* by requiring that writ-writing activities be confined to a particular room during set hours.[45] This type of restriction has been upheld by the courts so long as sufficient time is provided for meaningful assistance.[46] Other restrictions that have met court approval are regulations that require writ-writers to obtain official authorization to give legal assistance,[47] that prohibit inmates from giving legal assistance to inmates in other prisons,[48]

43. *See* Battle v. Anderson, 614 F.2d 251, 255 (10th Cir. 1980); Boulies v. Ricketts, 518 F. Supp. 687, 688 (D. Colo. 1981).

44. Johnson v. Avery, 393 U.S. 483, 490 (1969).

The California Supreme Court suggested a method of analyzing the validity of regulations restricting inmate assistance activities in *In re* Harrell, 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970), *cert. denied,* 401 U.S. 914 (1971). The *Harrell* court articulated a balancing test wherein courts would balance the extent of the restriction against the need for the restriction. The factual inquiries which would be made include: the extent to which the restriction impedes or discourages mutual prisoner assistance; the undesirability of the conduct that the prison is attempting to control; and whether there are less drastic means of accomplishing the prison's legitimate management objectives. *Id.* at 686, 470 P.2d at 646, 87 Cal. Rptr. at 510. This test was used by the Northern District of California to invalidate a prison regulation restricting communication between a prisoner and his attorney's investigators. Martinez v. Procunier, 354 F. Supp. 1092, 1098 (N.D. Cal. 1973); *aff'd*, 416 U.S. 396 (1974).

Few federal cases subsequent to *Martinez* have used the *Harrell* test to analyze the validity of prison regulations. The *Harrell* decision was rendered shortly after the Supreme Court's decision in Johnson v. Avery, 393 U.S. 483 (1969). Its recent disuse in the federal courts may be explained by the development of the prisoners' right of access during the 1970's. The Supreme Court's subsequent decisions in Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam), *aff'g* 319 F. Supp. 105 (1970) and especially Bounds v. Smith, 430 U.S. 817 (1977), provided clearer guidance to the lower courts regarding the duty of the states to assist inmates in this area, and may indicate that the *Harrell* test is not the most appropriate to insure the prisoners' right of access to the courts.

45. *See generally* J. GOBERT & N. COHEN, *supra* note 2, at § 2.03.

46. Bellamy v. Bradley, 729 F.2d 416, 421 (6th Cir. 1984) (prison could prevent jailhouse lawyers from visiting blind prisoner in his cell where prisoner was allowed to visit with them in the law library); Corpus v. Estelle, 409 F. Supp. 1090, 1097 (S.D. Tex. 1975) (prison could promulgate reasonable rule governing time and place of legal assistance among inmates), *aff'd,* 551 F.2d 68 (5th Cir. 1977).

47. Sostre v. McGinnis, 442 F.2d 178, 201 (2d Cir. 1971) (warden cannot, however, deny or grant permission based on unreasonable conditions), *cert. denied*, 405 U.S. 978.

48. Wilkerson v. Warden of United States Reformatory, 465 F.2d 956, 957 (10th Cir. 1972); Sostre v. McGinnis, 442 F.2d 178, 201 n.45 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972); *In re* Harrell, 2 Cal. 3d 675, 690, 470 P.2d 640, 649, 87 Cal. Rptr. 504, 513 (1970), *cert. denied*, 401 U.S. 914 (1971).

and that prohibit writ-writing for profit.[49] Prison officials may designate specific persons as writ-writers,[50] but no prisoner can be compelled to give legal assistance.[51]

Prison officials may validly regulate inmate groups offering assistance to fellow prisoners. Courts have upheld prison regulations requiring official recognition of an incorporated jailhouse lawyer organization before it is allowed to conduct business in the prison.[52] These courts reason that the requirement of official recognition is a reasonable attempt to protect the security of the institution.[53] Additionally, prisons may prohibit jailhouse lawyers from acting as third party lay cousel in another prisoner's trial[54] or appeal,[55] or from carrying out their assistance duties when isolated in a segregation unit because of rule violations.[56] Restrictions of writ-writing activity may also be justified where the writ-writer is not acting in the best interests of the other prisoners or if he is

49. Johnson v. Avery, 393 U.S. 483, 490 (1969); Green v. Wyrick, 428 F. Supp. 732, 737 (1976), *aff'd sub nom. In re* Green, 586 F.2d 1247 (8th Cir. 1978) (prison policy forbids any inmate paid by the institution from charging other inmates for the performance of those services), *cert. denied*, 440 U.S. 922 (1979); McKinney v. DeBord, 324 F. Supp. 928, 933 (E.D. Cal. 1970) (same), *modified*, 507 F.2d 501 (9th Cir. 1974).

50. Vaughn v. Trotter, 516 F. Supp. 886, 891 n.3, 893 n.8 (M.D. Tenn. 1980) (plaintiff was one of only two prisoners designated "law clerks" for a prison population of 2500; the second position remained unfilled for most of the year). *But cf.* Hahn v. McLey, 737 F.2d 771, 774 (8th Cir. 1984) (district court erred when it permitted an inmate assistant to accompany the prisoner- plaintiff to his trial and act as trial counsel in the preparation and presentation of his case).

51. Craig v. Hocker, 405 F. Supp. 656, 668 (D. Nev. 1975).

52. Preast v. Cox, 628 F.2d 292, 294 (4th Cir. 1980) (prisons can limit associational rights and require official recognition of a prisoner group in order to maintain the legitimate security objectives of the prison facility); Stringer v. DeRobertis, 541 F. Supp. 605, 607 (N.D. Ill. 1982) ("Jailhouse Lawyers and Prisoners' Defense Foundation, Inc." deprived of $900 worth of printed materials because the organization was not officially recognized), *aff'd*, 738 F.2d 442 (7th Cir. 1984). These limitations are not as easily justified, however, when the assistance group is from outside the prison. See Abel v. Miller, No. 82-5280, slip op. (S.D. Ill. 1984), where three attorneys and a paralegal from the Marion Prisoner's Rights Project sued the Warden of the Marion Federal Penitentiary for damages resulting from his refusal to allow them to represent prisoners housed in the penitentiary. A jury awarded the plaintiffs damages for violations of their constitutional rights to free speech and to practice law without unreasonable interference.

53. *See* Preast v. Cox, 628 F.2d 292 (4th Cir. 1980); Stringer v. DeRobertis, 541 F. Supp 605 (N.D. Ill. 1982), *aff'd*, 738 F.2d 442 (7th Cir. 1984); *cf.* Jones v. North Carolina Prisoners' Union, 433 U.S. 119, 125-28 (1977) (prisons can restrict inmates' formation of union groups).

54. State *ex rel.* Stephan v. O'Keefe, 686 P.2d 171, 181-82 (Kan. 1984) (allowing inmate to represent fellow prisoner in court would be tantamount to unauthorized practice of law); Hahn v. McLey, 737 F.2d 771, 774 (8th Cir. 1984) (allowing inmate to represent fellow inmate in court creates a serious security hazard).

55. Herrera-Venegas v. Sanchez-Rivera, 681 F.2d 41, 42 (1st Cir. 1982).

56. Simmons v. Russell, 352 F. Supp. 572, 579 n.7 (M.D. Pa. 1972).

abusing the judicial process.[57]

The Supreme Court has generally given a free hand to prison administrators in effecting interinstitutional transfers of prisoners.[58] One court has held, however, that the transfer of the sole jailhouse lawyer from the state prison farm violates the remaining prisoners' constitutional rights[59] where no alternative means of legal assistance is available.[60] Of course, a prisoner may not be transferred for exercising his right of access to the courts or for requesting a law library or the establishment of a writ department.[61]

Courts have refused to condone the harrassment of a writ writer by prison officials for his law related activities.[62] It is fundamental that prison officials may never retaliate against any prisoner for exercising the right of access to the courts. Prisoners may not be penalized for filing a civil rights complaint,[63] by confinement to

57. *See, e.g.*, Green v. Wyrick, 428 F. Supp. 732, 736-38 (W.D. Mo. 1976) (plaintiff filed 226 lawsuits on his own behalf and "hundreds" on behalf of others), *aff'd sub nom. In re* Green, 586 F.2d 1247, 1251 (8th Cir. 1978), *cert. denied*, 440 U.S. 922 (1979). For more information on "Reverend" Clovis Carl Green, see *infra* notes 166-72 and accompanying text. *See also* Buise v. Hudkins, 584 F.2d 223, 231 (7th Cir. 1978) (prison officials may curb jailhouse lawyer's writ-writing if they can show that the regulation was imposed as a valid objective of prison administration), *cert. denied*, 440 U.S. 916 (1979).

58. Meachum v. Fano, 427 U.S. 215, *reh'g denied*, 429 U.S. 873 (1976); *see also* J. GOBERT & N. COHEN, *supra* note 2, at § 2.03.

59. Some commentators urge that the right of access embodies both the right to *receive* assistance and the right to *give* it. *See Prisoners' Rights, Part I*, *supra* note 30, at 977; *see also* Vaughn v. Trotter, 516 F. Supp. 886, 893 (M.D. Tenn. 1980) ("[t]he clear right to receive assistance necessarily creates the concomitant right to provide it"). *Contra* Smith v. Halford, 570 F. Supp. 1187, 1194 (D. Kan. 1983) (no constitutional right to be writ-writer); *In re* Harrell, 2 Cal. 3d 675, 690, 470 P.2d 640, 649, 87 Cal. Rptr. 504, 513 (1970), *cert. denied*, 401 U.S. 914 (1971).

60. Buise v. Hudkins, 584 F.2d 223, 229 (7th Cir. 1978), *cert. denied*, 440 U.S. 916 (1979).

61. *Id.* at 231; *cf.* Respress v. Coughlin, 585 F. Supp 854, 857-58 (S.D.N.Y. 1984) (prisoner cannot be transferred in retaliation for exercise of first amendment rights). *But see* Laaman v. Perrin, 435 F. Supp. 319 (D.N.H. 1977) (although transfer was due in part to prisoner's writ-writing, court upheld it because other evidence indicated a legitimate penal interest in transfer).

62. Milhouse v. Carlson, 652 F.2d 371, 373-74 (3d Cir. 1981) (prisoner subjected to "conspiratorially planned" disciplinary actions in retaliation for filing civil rights suit); Ferranti v. Moran, 618 F.2d 888, 892 (1st Cir. 1980) (prisoner denied access to outside attorney in response to filing of lawsuit); Russell v. Oliver, 552 F.2d 115, 116 (4th Cir. 1977) (prisoner told he would receive no privileges until he stopped filing suit in federal court); Vaughn v. Trotter, 516 F. Supp. 886, 901 (M.D. Tenn. 1980) (prisoner was subjected to many indignities such as excessive strip and cell searches, verbal abuse, frequent cellmate changes, and institutional transfers); *see also* Sanders v. St. Louis County, 724 F.2d 665 (8th Cir. 1983). *See generally* Fleming, *An Alternative Approach to Protecting Jailhouse Lawyers*, 8 N. ENG. J. PRISON LAW 39 (1982).

63. Smartt v. Avery, 370 F.2d 788 (6th Cir. 1967); *cf.* Procunier v. Martinez, 416

solitary,[64] by loss of privilege,[65] by threat of physical punishment,[66] or by sanction through the parole board.[67] Denial of or retaliation against exercise of the constitutional right of access creates a cause of action under section 1983.

2. Alternative Legal Assistance Programs

In the final analysis, inmate assistance may be totally prohibited only if the prison provides some meaningful alternative such as trained legal assistance[68] or a law library.[69] Two types of legal assistance programs offered as a reasonable alternative to jailhouse lawyers are access to the services of a licensed attorney, and access to "counsel substitutes" such as paralegals or law students. The alternative programs must, in any event, be shown to be adequate to provide meaningful assistance.[70] The determination of adequacy is flexible, however, and depends upon many factors, including the possible alternative programs.

The touchstone of any alternative assistance program is the practical significance that the program has on a prisoner's ability to petition a court for grievances.[71] Courts will closely scrutinize the program of alternative assistance provided by a prison system,

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U.S. 396, 420 (1974). *See generally* 42 U.S.C. § 1997(d) (1982) (prohibiting retaliation against anyone reporting certain violations for which a § 1983 suit can be maintained).

64. *See, e.g.*, Sostre v. McGinnis, 442 F.2d 178, 189 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972); United States v. Pate, 229 F. Supp. 818, 822 (N.D. Ill. 1964) (prisoner segregated for one year); *see also* STANDARDS RELATING TO THE LEGAL STATUS OF PRISONERS Standard 2.1(b)(vi) [hereinafter cited as ABA STANDARDS].

65. *See* Wren v. Carlson, 506 F.2d 131, 133 (D.C. Cir. 1974) (unconstitutional barring of conjugal visitation privileges); Hooks v. Kelley, 463 F.2d 1210, 1211 (5th Cir. 1972) (unconstitutional transfer); *see also* ABA STANDARDS, *supra* note 64, Standard 2.1 (b)(vi).

66. *See, e.g.*, Hudspeth v. Figgins, 584 F.2d 1345, 1348 (4th Cir. 1978) (prison guard threatened that, before courts would rule in prisoner's favor in § 1983 action, an officer would shoot prisoner and make it appear to be an accident) *cert. denied*, 441 U.S. 913 (1979).

67. J. GOBERT & N. COHEN, *supra* note 2, at § 2.14; ABA STANDARDS, *supra* note 64, Standard 2.1(b)(v).

68. Johnson v. Avery, 393 U.S. 483, 489-90 (1969).

69. Bounds v. Smith, 430 U.S. 817, 826 (1977) (rejecting state's argument that prisoners are ill-equipped to use sophisticated law libraries). But consider Ruiz v. Estelle, 503 F. Supp. 1265, 1371 (S.D. Tex. 1980) (prison cannot foreclose prisoner's right to assistance from other prisoners *and* to a library where the legal assistance program does not serve all prisoners), *aff'd in relevant part and rev'd in part*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *see also* Hooks v. Wainwright, 536 F. Supp 1330 (M.D. Fla. 1982); Note, *A Prisoner's Constitutional Right to Attorney Assistance*, 83 COLUM. L. REV. 1279 (1983).

70. ABA STANDARDS, *supra* note 64, Standard 2.2(d). Standard 2.2(d) provides that "counsel substitute[s]" should be trained by an attorney or educational institution.

71. *See generally* Bounds v. Smith, 430 U.S. 817 (1977).

placing strong emphasis on the quality and quantity of the assistance as compared to the needs of the prison population.[72] Important factors considered include the actual demand for legal services, the average time required to handle each case, and the availability of alternative sources of legal information.[73] Periodic assistance by a legal services program has been held inadequate to satisfy the state's affirmative obligations.[74] It has also been held that assistance programs utilizing inmates or untrained personnel are inadequate for the preparation of pleadings requesting vindication of federal constitutional rights.[75] The federal courts have encouraged prison officials to devise "access" programs that meet the peculiar needs of their prison populations.[76] These programs often entail a combination of alternative service in order to accommodate illiteracy, lack of legal knowledge, or other handicaps which may impede a prisoner from pursuing his constitutional rights in court.[77] Before upholding a challenged system of inmate access, courts generally conduct a dual inquiry that involves an examination of the practical adequacy of the system as well as the manner in which it is administered.[78]

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72. Ducey, *supra* note 11, at 60-62. For instance, in Hooks v. Wainwright, 536 F. Supp. 1330, 1355 (M.D. Fla. 1982), the court held that prisons must provide indigent inmates with *both* an adequate law library *and* assistance of attorneys in order to protect the prisoners' right of access to the court. *See* Note, *Indigent State Prisoners Must Be Provided With The Assistance of Attorneys in Preparing and Filing Legal Papers,* 10 FLA. ST. U.L. REV. 497 (1982); Note, *supra* note 69; *see also* Falzerano v. Collier, 535 F. Supp. 800, 803 (D.N.J. 1983) (upholding New Jersey's comprehensive system of providing public defenders and public advocates instead of prison law libraries); Novak v. Beto, 453 F.2d 661, 663-64 (5th Cir. 1971) (Texas regulation barring writ-writers held unconstitutional because the only alternative assistance provided was the services of two attorneys and three summer law clerks to be distributed among 12,000 inmates), *cert. denied,* 409 U.S. 968 (1972).

73. *See, e.g.,* Novak v. Beto, 453 F.2d 661, 663-64 (5th Cir. 1971), *cert. denied*, 409 U.S. 968 (1972).

74. Leeds v. Watson, 630 F.2d 674, 676-77 (9th Cir. 1980). In *Leeds*, the court indicated that if the periodic representation had been coupled with prisoners' access to a law library, however, the combination would be constitutionally sufficient. *Id.* at 677.

75. *Compare* Cross v. Powers, 328 F. Supp. 899, 900-01, 904 (W.D. Wis. 1971) (combination of law student assistance for postconviction matters and a legal services program for civil cases was inadequate, since neither program assisted in the preparation of petitions requesting relief for violations of federal constitutional rights) *with* Falzerano v. Collier, 535 F. Supp. 800, 803 (D.N.J. 1982) (state-wide program providing extensive legal assistance without law libraries upheld).

76. Battle v. Anderson, 614 F.2d 251, 259 (10th Cir. 1980) (Doyle, J., concurring); *see supra* notes 72, 73.

77. *See, e.g.*, Hooks v. Wainwright, 536 F. Supp 1330 (M.D. Fla. 1982); Kendrick v. Bland, 541 F. Supp. 21 (W.D. Ky. 1981), *rev'd in part*, 740 F.2d 432 (6th Cir. 1984).

78. For example, a wide ranging program proposed by the Kentucky prison system was affirmed in a consent decree in 1981. Kendrick v. Bland, 541 F. Supp. 21, 34-35

C. *Access to Law Libraries*

If legal assistance provided by the state or fellow inmates is either unavailable or inadequate, the prison may satisfy its burden of implementing prisoners' right of access to the courts by providing a law library.[79] There are two ingredients to adequate inmate access to a law library. First is the existence of an adequate library itself. Second is sufficient inmate access to the library. Both are necessary for a prison to satisfy its duty of access.[80]

Minimally, the library should contain: state and federal constitutions, state statutes and decisions, procedural rules and decisions and related commentaries, federal case law materials, court rules and practice treatises, legal periodicals, and indexes.[81] Other

(W.D. Ky. 1981), *rev'd in part*, 740 F.2d 432 (6th Cir. 1984). However, the court recently found the state system in violation of the proposal. 586 F. Supp. 1536, 1547-55 (W.D. Ky. 1984).

79. Bounds v. Smith, 430 U.S. 817, 828 (1977). The Ninth Circuit has held that the dictates of *Johnson* and *Bounds* are also applicable to local jail inmates. Leeds v. Watson, 630 F.2d 674, 676-77 (9th Cir. 1980); *see also* Noren v. Straw, 578 F. Supp. 1, 5 (D. Mont. 1982).

80. *See supra* note 79. But see Falzerano v. Collier, 535 F. Supp. 800, 803 (D.N.J. 1982), for one judge's viewpoint regarding the practical assistance a law library provides to prisoners:

> In this court's view, access to the fullest law library anywhere is a useless and meaningless gesture in terms of the great mass of prisoners. The bulk and complexity have grown to such an extent that even experienced lawyers cannot function efficiently today without the support of special tools, such as the computer research systems of . . . LEXIS and WESTLAW. To expect untrained laymen to work with entirely unfamiliar books, whose content they cannot understand, may be worthy of Lewis Carroll, but hardly satisfies the substance of the constitutional duty.
>
> Access to full law libraries makes about as much sense as furnishing medical services through books like "Brain Surgery Self-Taught," or "How to Remove Your Own Appendix," along with scalpels, drills, hemostats, sponges and sutures.

One court has held that an adequate law library does not necessarily satisfy a state's constitutional duty of protecting the prisoners' right of access to the courts. *See* Hooks v. Wainwright, 536 F. Supp. 1330 (M.D. Fla. 1982); Note, *supra* note 69, at 1280-83.

81. In Bounds v. Smith, 430 U.S. 817, 819 n.4 (1977), the Supreme Court upheld North Carolina's prison law library proposal, which contained the following volumes:

> North Carolina General Statutes
> North Carolina Reports (1960-present)
> North Carolina Court of Appeals Reports
> Strong's North Carolina Index
> North Carolina Rules of Court
> United States Code Annotated:
> Title 18
> Title 28 §§ 2241-2254
> Title 28 Rules of Appellate Procedure
> Title 28 Rules of Civil Procedure
> Title 42 §§ 1891-2010

courts have gone further, however, and require Supreme Court decisions, the complete federal law reporter system, the complete regional reporter system for the region in which the prison is located, Shepard's Citators, and state and federal digests.[82]

When evaluating the adequacy of a prison library, most courts will look at what is actually available to the prisoner, rather than rely on what is listed in the library's holding catalog.[83] Often when a court holds that a prison law library is deficient, it will leave to the prison administration the responsibility for determining how to rectify the deficiency.[84]

If the prison population contains illiterate or non-English speaking prisoners, an otherwise adequately stocked law library will not satisfy the state's duty to provide meaningful access to the courts.[85]

Supreme Court Reporter (1960-present)
Federal 2d Reporter (1960-present)
Federal Supplement (1960-present)
Black's Law Dictionary
Sokol: Federal Habeas Corpus
LaFave and Scott: Criminal Law Hornbook (2 copies)
Cohen: Legal Research
Criminal Law Reporter
Palmer: Constitutional Rights of Prisoners

See also COMM'N. ON ACCREDITATION FOR CORRECTIONS, MANUAL OF STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS, Standard 4283 (1977); Kelly & Davis, *Prison Law Library Service: Questions and Models*, 72 LAW LIB. J. 598 (1979). Suggesting a more expansive list, see the Association of American Law Libraries, Recommended Collections for Prison Law Libraries (1972), *reprinted in relevant part in* 14 AM. CRIM. L. REV. 439 (1977).

82. Craig v. Hocker, 405 F. Supp. 656, 669 (D. Nev. 1975). See also Kendrick v. Bland, 541 F. Supp 21 (W.D. Ky. 1981), *rev'd in part*, 740 F.2d 432 (6th Cir. 1984), where the parties entered into a consent decree providing an extensive listing of state and federal resource materials. The state also agreed to implement an inmate assistance program which trained inmates as legal aides for their fellow prisoners. The court subsequently found the state to be acting in violation of several provisions of this consent decree. 586 F. Supp. 1536, 1547-55 (W.D. Ky. 1984). For a description of the consent decree regarding law library facilities recently entered in the Seventh Circuit, see 4 PRISON LAW & ADVOCACY, Mar.-Apr. 1983 No. 2, at 13.

83. Ramos v. Lamm, 639 F.2d 559, 582 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Kendrick v. Bland, 586 F. Supp. 1536, 1551 (W.D. Ky. 1984); Aikens v. Lash, 371 F. Supp. 482, 498 (N.D. Ind. 1974), *modified on other grounds*, 514 F.2d 55 (7th Cir. 1975), *aff'd*, 534 F.2d 751 (7th Cir.), *vacated and remanded another grounds*, 425 U.S. 947 (1976).

84. *See, e.g.*, Kendrick v. Bland, 586 F. Supp. 1536, 1555 (W.D. Ky. 1984); Hooks v. Wainwright, 352 F. Supp. 163, 168-69 (M.D. Fla.), *vacated and remanded*, 457 F.2d 502 (5th Cir. 1972) (per curiam); Gilmore v. Lynch, 319 F. Supp. 105, 112 (1970), *aff'd*, 404 U.S. 15 (1971) (per curiam).

85. Ducey, *supra* note 11, at 80-82; FEDERAL STANDARDS FOR PRISONS AND JAILS Standard 18.03 (United States Dep't. of Justice, 1980) (foreign language material should be available for non-English speaking prisoners); *see also* Battle v. Anderson, 614 F.2d 251, 255-56 (10th Cir. 1980); Cruz v. Hauck, 627 F.2d 710, 721 (5th Cir. 1980); Wetmore

The state must provide some additional form of assistance to inmates under these circumstances.[86] This additional assistance may be in the form of paralegals or trained inmates; however, the ultimate responsibility for alleviating this impediment to the prisoners' right of access is placed on the prison officials.[87]

Prison authorities may not impose unreasonable restrictions on the amount of time prisoners are allowed to use the library.[88] A court's assessment of the prison's time restrictions will depend upon several factors. Limited access to a law library may be deemed constitutionally permissible if it is combined with a realistic assistance program;[89] conversely, if the prison places strict time limitations on prisoners who consequently have no realistic means to use the library's facilities, then the court will scrutinize the program more closely.[90] Because the standard under *Bounds* is

v. Fields, 458 F. Supp. 1131, 1143 (W.D. Wis. 1978); Wade v. Kane, 448 F. Supp. 678, 684-85 (E.D. Pa. 1978), *aff'd mem.*, 591 F.2d 1338 (3rd Cir. 1979). *See generally* Haft, *The Problems of Spanish-Speaking Prisoners*, in PRISONERS' RIGHTS SOURCEBOOK 385 (M. G. Hermann & M. G. Haft eds. 1973).

86. For instance, in Canterino v. Wilson, 562 F. Supp. 106, 111 (W.D. Ky. 1983), the court noted that the plaintiffs' inability to utilize the legal resources in the library was aggravated by the fact that many of the inmates at the facility were illiterate or otherwise unable to do legal research. Sixty-nine percent of the prison population had less than a high school education, and half of the total population had only completed the eighth, ninth or tenth grades. *Id.* at 110. These conditions led the court to conclude that "even if unlimited physical access to the law library could be provided, it would be unavailing to one who lacks sufficient opportunity or intellectual ability to utilize the facility." *Id.* Additionally, the court held that the assistance of untrained inmates did not eradicate the inherent problems in the prison's library system. *Id.*

87. Usually, the court will dictate the constitutional minimum, suggesting several means by which the prison officials may comply. The ultimate task of formulating the guidelines is usually left to the parties involved. *See, e.g.*, Kendrick v. Bland, 586 F. Supp 1536, 1548-55 (W.D. Ky. 1984); Canterino v. Wilson, 562 F. Supp 106, 112 (W.D. Ky. 1983).

88. Ramos v. Lamm, 639 F.2d 559, 583 (10th Cir. 1980) (restrictions limiting access to library or time, place and manner allotted to inmates for legal research and preparation of petitions may undercut satisfaction of state's duty to provide adequate library), *cert. denied*, 450 U.S. 1041 (1981); Nadeau v. Helgemoe, 561 F.2d 411, 413, 418 (1st Cir. 1977) (restrictions on library use by protective custody inmates which are greater than those imposed on general prisoner population held unconstitutional).

89. Jordan v. Johnson, 381 F. Supp. 600, 601-02 (E.D. Mich. 1974) (regulation allowing each prisoner 11-1/2 hours per week held adequate where additional time granted upon showing of necessity), *aff'd mem.*, 513 F.2d 631 (6th Cir.), *cert. denied*, 423 U.S. 851 (1975); Wetmore v. Fields, 458 F. Supp. 1131, 1143 (W.D. Wis. 1978) (access to library four hours per day is sufficient where extra library time is permitted to jailhouse lawyer inmates); *see also* consent decree entered in Kendrick v. Bland, 541 F. Supp. 21 (W.D. Ky. 1981), *rev'd in part*, 740 F.2d 432 (6th Cir. 1984).

90. Ramos v. Lamm, 639 F.2d 559, 582 (10th Cir. 1980) (access to library limited to three hours every 13 weeks clearly unconstitutional), *cert. denied*, 450 U.S. 1041 (1981); Nadeau v. Helgemoe, 561 F.2d 411, 413, 418 (1st Cir. 1977) (access to library limited to one hour per week held unconstitutional); McDonnell v. Wolff, 483 F.2d 1059 (8th Cir.

"meaningful access," the prisons are accorded some flexibility in devising programs that satisfy the constitutional access rights of the prisoners without unduly disrupting the prisons' goals of order and security.[91] Frequently, more severe restrictions will be upheld if a trained research assistant is available in the library to help the inmate.[92] The ultimate burden of establishing the adequacy of a prison's program, however, rests with the state.[93]

Some courts require a prisoner complaining of a prison official's interference with his right of access to the law library to allege actual prejudice in order to avoid a dismissal of his claim.[94] For

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1973) (seven hour per week restriction held unreasonable where defendants gave no justification for the restricton), *aff'd in relevant part and rev'd in part sub nom.* Wolff v. McDonnell, 418 U.S. 539 (1974); Canterino v. Wilson, 562 F. Supp. 106, 110 (W.D. Ky. 1983) (15 hours per week combined with inexperienced inmate assistance held unconstitutional); Jones v. Wittenburg, 509 F. Supp. 653, 683-84 (N.D. Ohio 1980) (80 minutes weekly, combined with law student assistance, found to be in contravention of rules adopted by state court).

91. Direct access to the library is not necessarily required if some alternative access to the materials is provided. For example, the practice of having inmates submit book requests to a "runner" who then retrieves the volumes from the library has been found to satisfy the inmate's right of access to law materials. Stewart v. Gates, 450 F. Supp. 583, 589 (C.D. Cal. 1978); *see also* Tubwell v. Griffith, 742 F.2d 250, 252 (5th Cir. 1984) (permitting shackling of security risk prisoners in law library where shackled prisoners were accompanied by a "clerk" who would retrieve books for them).

92. Williams v. Leeke, 584 F.2d 1336, 1340 (4th Cir. 1978) (access in 45-minute intervals three days per week is inadequate without trained research assistants available), *cert. denied*, 442 U.S. 911 (1979); *see also* Cruz v. Hauck, 627 F.2d 710, 720 n.20, 721 n.21 (5th Cir. 1980) (trained research librarian may be necessary to assure meaningful access, especially where many inmates are illiterate or non-English speaking); Hooks v. Wainwright, 536 F. Supp. 1330 (M.D. Fla. 1982); FEDERAL STANDARDS FOR PRISONS AND JAILS Standard 1.05 (United States Dep't of Justice 1980) (facility should provide assistance necessary for effective access to library for inmates unable to make meaningful use of the library on their own). *Contra* Cepulonis v. Fair, 732 F.2d 1, 4 (1st Cir. 1984). In *Cepulonis*, the court held that maximum security inmates were denied meaningful access by the prison's regulation that permitted only three hours of library time monthly, and required inmates to identify the specific volumes they wished to use prior to entering the library. The district court had ordered the prison officials to establish a satellite library with specific named volumes for maximum security prisoners, an increase in library time, and law student assistance. The appellate court upheld the order regarding the library, but reversed the requirement of law student assistance, holding *Bounds* requires only "adequate law libraries *or* adequate assistance from persons trained in the law, not both." *Id.* at 6.

93. Bounds v. Smith, 430 U.S. 817, 824 (1977); Rich v. Zitnay, 644 F.2d 41, 43 (1st Cir. 1981).

94. Garza v. Miller, 688 F.2d 480, 487 (7th Cir. 1982), *cert. denied*, 459 U.S. 1150 (1983); Bach v. Coughlin, 508 F.2d 303, 308 (7th Cir. 1974); Salahuddin v. Coughlin, 591 F. Supp. 353, 360 (S.D.N.Y. 1984); Isaac v. Jones, 529 F. Supp. 175, 179 (N.D. Ill. 1981). If the inmate's challenge concerns the adequacy of the library itself, however, courts will not usually require a showing of prejudice, as "plaintiff may never ascertain his best legal arguments if the library is inadequate." Boulies v. Ricketts, 518 F. Supp. 687, 689 n.2 (D. Colo. 1981); *see also* Corby v. Conboy, 457 F.2d 251, 253 (2d Cir. 1972).

instance, a temporary closing of the law library was held not to violate the inmate's right of access where the inmate was still able to timely file his brief in a pending matter.[95]

Additionally, prison regulations on library usage may be upheld if the prison can show legitimate penal policies for the restriction.[96] For instance, restrictions may be valid if the prisoner involved is a known security risk.[97] Similarly, a perceived prison emergency during an inmates' strike was sufficient justification for temporary suspension of access to the library.[98] Limitations on the number of prisoners who can occupy the library at any one time have also withstood the challenge.[99]

In addition to access to a law library or to legal assistance, the state must provide indigent inmates paper and pens to draft legal documents, notarial services to authenticate them, and stamps to mail them.[100] It is generally agreed, however, that there is no constitutional right to unlimited postage and that prison administrators may impose reasonable limits.[101] The right of access to the

95. Isaac v. Jones, 529 F. Supp. 175, 179 (N.D. Ill. 1981).

96. Tubwell v. Griffith, 742 F.2d 250, 252 (5th Cir. 1984); Jordan v. Johnson, 381 F. Supp. 600, 602 (E.D. Mich. 1974), *aff'd mem.*, 513 F.2d 631 (6th Cir.), *cert. denied*, 423 U.S. 851 (1975); Kendrick v. Bland, 586 F. Supp. 1536, 1549-52 (W.D. Ky. 1984).

97. Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978), *cert. denied*, 442 U.S. 911 (1979); Wojtczak v. Cuyler, 480 F. Supp. 1288, 1301 (E.D. Pa. 1979). See also Tubwell v. Griffith, 742 F.2d 250, 252 (5th Cir. 1984), where the court upheld the use of leg and wrist restraints on "close custody" prisoners when using the prison law library. The court allowed this restriction because the prisoner was a known security risk and the library was located in a less secure area of the prison facility. *But see* Nadeau v. Helgemoe, 561 F.2d 411, 418 (1st Cir. 1977) (providing library access to special security status prisoners).

98. Collins v. Ward, 544 F. Supp. 408, 414 (S.D.N.Y. 1982) (court noted that while library access was suspended, law clerks from the law library supplied inmates with information and materials, and representatives from Prisoners' Legal Services presented prison authorities with inmates' grievances); *see also* Walker v. Johnson, 544 F. Supp. 345, 361 (E.D. Mich. 1982) (holding post-riot cutback on library access infringes prisoners' right of access; therefore, library privileges must be restored to pre-riot level).

99. Harrell v. Keohane, 621 F.2d 1059, 1060-61 (10th Cir. 1980) (per curiam) (five-prisoner limit valid); Kendrick v. Bland, 586 F. Supp. 1536, 1549-50 (W.D. Ky. 1984) (15-prisoner limit upheld).

100. Bounds v. Smith, 430 U.S. 817, 824-25 (1977). Failure to provide notarial services is not necessarily a denial of the right of access to the courts, however, because 28 U.S.C. § 1746 (1982) allows unsworn documents to be submitted to the court. Hudson v. Robinson, 678 F.2d 462, 466 n.5 (3rd Cir. 1982).

101. *See, e.g.*, Hoppins v. Wallace, No. 84-7392, slip. op. (11th Cir. Jan. 28, 1985) (available on LEXIS, Genfed library, Cases file) (prisoner regulation providing two 20-cent stamps per week upheld); Kershner v. Mazurkiewicz, 670 F.2d 440, 444 (3rd Cir. 1982) (10 stamps per month); Twyman v. Crisp, 584 F.2d 352, 358-59 (10th Cir. 1978) (eight stamps per month for prisoner with $5 or less in prison account, more for legal mail if no balance in account); O'Bryan v. County of Saginaw, 437 F. Supp. 582, 601 (E.D. Mich. 1977) (two free letters per week for inmates with two-week balance in prison

courts does not usually include a right to a typewriter[102] or free access to photocopying machines.[103]

D. Right to Communicate with Courts and Attorneys

Finally, the right of access includes the right to communicate with attorneys, courts, and other legal personnel. Generally, an inmate's mail to or from an attorney or the courts is privileged, and prison officials may not read or censor it. The Supreme Court has held, however, that prison regulations may validly provide that incoming mail from an attorney or court can be opened in the prisoner's presence to check for contraband.[104] Prisons may not unreasonably restrict inmates' right to unmonitored communication with attorneys[105] and are generally required to provide an area sufficient to allow private consultations.[106] The rights inherent in communication with attorneys also extend in large part to trained

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account of less than two dollars), *aff'd*, 741 F.2d 283 (6th Cir. 1984); Williams v. Ward, 404 F. Supp. 170, 171-72 (S.D.N.Y. 1975) (a prisoner has no more right to free postal service than an ordinary citizen).

102. *See, e.g.*, Twyman v. Crisp, 584 F.2d 352, 358 (10th Cir. 1978); Wolfish v. Levi, 573 F.2d 118, 132 (2d Cir. 1978), *rev'd and remanded on other grounds sub nom.*, Bell v. Wolfish, 441 U.S. 520 (1979); *see also* Tarlton v. Henderson, 467 F.2d 200, 201 (5th Cir. 1972) (per curiam) (court found that since prisoners suffered no prejudice by filing handwritten briefs, they were not denied access to the courts by a prison regulation which prohibited the purchase of typewriters). Consider Hawthorne v. Froehlich, 575 F. Supp. 314, 315 (D. Mont. 1983), where the court dismissed a county jail prisoner's claim that his right of access to the courts should include a "law office, complete with typewriters, photocopying machines, notary services, furnishings, and a library."

103. Harrell v. Keohane, 621 F.2d 1059, 1061 (10th Cir. 1980) (per curiam); *cf.* Johnson v. Parke, 642 F.2d 377, 380 (10th Cir. 1981) (per curiam) (inmates not entitled to free or unlimited copying privileges, but where courts require copies of petitions and other legal documents for filing purposes, right of access requires that prisoners should be allowed to make such copies); *see also* Kendrick v. Bland, 586 F. Supp. 1536, 1553 n.7 (W.D. Ky. 1984), and cases cited therein. *But see* Harrington v. Holshouser, 741 F.2d 66, 69 (4th Cir. 1984) (state must provide indigent inmate some free access to photocopying machines).

104. *See* Wolff v. McDonnell, 418 U.S. 539, 575-77 (1974); *see also* Mahler v. Slattery, 489 F. Supp. 798, 802 (E.D. Va. 1980) (upholding prison's regulation barring a particularly litigious prisoner from keeping 23 cartons of legal correspondence in his jail cell).

105. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 425 (1974) (Marshall, J., concurring); Smith v. Coughlin, 577 F. Supp. 1055, 1063 (S.D.N.Y. 1983) (prison can limit nonlawyers' visits to condemned prisoner, but must allow paralegals and attorneys working on his appeal to confer with him). *See generally* Annot., 47 A.L.R.3d 1165 (1972).

106. *See* Dreher v. Sielaff, 636 F.2d 1141, 1144-45 (7th Cir. 1980); Dawson v. Kendrick, 527 F. Supp. 1252, 1314 (S.D. W.Va. 1981) (the right to assistance is denied when interviews are performed in an area which also serves as a television room and a washroom); *see also* Abel v. Miller, No. 82-5280 (S.D. Ill. 1984) (granting damages to attorneys for violation of their rights to free speech and to practice law without interference); *supra* note 52.

legal assistants such as law students and paralegals.[107]

Because the prisoner is incarcerated, and recognizing the obstacles inherent in the legal system, prisoners seeking to redress violations of their fundamental rights have a tedious trek indeed. The next section of this article examines the practical barriers to a prisoner's lawsuit challenging the conditions of his or her incarceration.

IV. ACCESS TO THE COURT: PRACTICAL BARRIERS

A. In Forma Pauperis Applications

Most prisoners bringing civil rights actions are indigents.[108] Under 28 U.S.C. § 1915,[109] a plaintiff who cannot afford to pay court fees can seek leave to proceed in forma pauperis which, if

107. *See, e.g.*, Smartt v. Avery, 370 F.2d 788, 790 (6th Cir. 1967); Giarratano v. Bass, 596 F. Supp. 818, 819 (E.D. Va. 1984); *see also* ABA STANDARDS, *supra* note 64, Standard 2.1(b)(vi). Courts have allowed prisons to exclude paralegals from the facility, however, where the prison has shown that the paralegal poses a threat to prison order and security. *See* Crusoe v. DeRobertis, 714 F.2d 752, 756 (7th Cir. 1983); Phillips v. Bureau of Prisons, 591 F.2d 966, 972 (D.C. Cir. 1979).

108. In 1979, one study found that between 80% and 95% of inmate filings with the court surveyed were brought in forma pauperis. *See* Turner, *supra* note 15, at 617.

109. 28 U.S.C. § 1915 (1982) provides:

> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without the prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress. . . .
>
> . . . .
>
> . . . (b) Upon the filing of an affidavit in accordance with subsection (a) of this section, the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States.
>
> (c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.
>
> (d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.
>
> (e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic

granted, entitles the litigant to file an action without prepayment of "costs."[110] Section 1915 gives the court a great deal of authority over the outcome of a prisoner's lawsuit. Under this statute, a trial court may allow a prisoner to file and proceed with his suit without prepayments for court costs or service of process.[111] The court may also request the appointment of an attorney to ensure adequate presentation of the prisoner's claim.[112] Conversely, the denial of an in forma pauperis petition drastically undermines a prisoner's ability to present his grievance to the court. Section 1915 not only authorizes a court to deny paupers' petitions, it also empowers the court to dismiss claims the court considers "frivolous."[113] Moreover, the decision whether to grant or deny leave to proceed in forma pauperis lies within the discretion of the district courts,[114] and denial will be reversed on appeal only if there has been an abuse of discretion.[115] Although the district courts have been given especially broad latitude in ruling on section 1915 petitions filed by prisoners,[116] it has been held that denial of an in

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transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

See generally Catz & Guyer, *Federal In Forma Pauperis Litigation: In Search of Judicial Standards*, 31 RUTGERS L. REV. 655 (1978).

110. In addition to the usual filing fee for a civil complaint, other required costs of litigation include marshal's fees for service of process and subpoenas, witness fees, docket fees, judgment and execution fees, costs for production of transcripts, and security bonds. All of these kinds of fees and costs may be waived under the pauper statute. Catz & Guyer, *supra* note 109, at 660. For discussion of the distinction between fees and costs, see Marks v. Calendine, 80 F.R.D. 24, 28 (N.D. W. Va. 1978), *aff'd sub nom.* Flint v. Haynes, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982).

111. 28 U.S.C. § 1915(a)(1982).

112. 28 U.S.C. § 1915(d)(1982); *see infra* notes 185-97 and accompanying text.

113. 28 U.S.C. § 1915(d)(1982); *see infra* notes 141-59, 174-80 and accompanying text.

114. Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 337 (1948).

115. Weller v. Dickson, 314 F.2d 598, 600-01 (9th Cir.) (an abuse of discretion may be found where there is "arbitrary action not justified in view of the situation and circumstances"), *cert. denied*, 375 U.S. 845 (1963). For cases where the federal courts of appeals found an abuse of discretion, see Carter v. United States, 733 F.2d 735 (10th Cir. 1984); Harmon v. Berry, 728 F.2d 1407, 1408 (11th Cir. 1984) (per curiam); Whisenant v. Yuam, 739 F.2d 160, 163-64 (4th Cir. 1984); Cameron v. Fogarty, 705 F.2d 676, 678 (2d Cir. 1983); Caldwell v. Hatchette, 682 F.2d 142, 143 (7th Cir. 1982); Hogan v. Midland County Commissioners Court, 680 F.2d 1101, 1103-04 (5th Cir. 1982) (per curiam).

116. At least two appellate circuits have noted that pauper status should be granted "sparingly" in prisoner actions. Flowers v. Turbine Support Division, 507 F.2d 1242, 1244 n.2 (5th Cir. 1975) (dictum); Weller v. Dickson, 314 F.2d 598, 601 (9th Cir.), *cert. denied*, 375 U.S. 845 (1963); *see also* Daye v. Bounds, 509 F.2d 66, 68 (4th Cir.), *cert. denied*, 421 U.S. 1002 (1975); Shobe v. California, 362 F.2d 545, 546 (9th Cir.) (court's discretion whether to permit the privilege of waiver of fees under § 1915 is "especially broad" in civil actions brought by prisoners against their incarcerators), *cert. denied*, 385 U.S. 887 (1966); Smart v. Heinze, 347 F.2d 114, 116 (9th Cir.), *cert. denied*, 382 U.S. 896

forma pauperis petition based solely on the plaintiff's status as a prisoner constitutes an abuse of discretion.[117]

Because many prisoners are indigents, the judicial resolution of their section 1915 petitions is a critical determinant of their ability to present alleged grievances to the courts. The courts apply a two-prong test to determine whether to grant an indigent's application for pauper status. First, the court determines the extent of the indigency. Next, the court assesses the merits of the claim.

1. Indigency Requirements

a. Determination of Poverty

The court first determines whether the prisoner who has filed an affidavit of indigency[118] is in fact unable to pay such costs. The standards for making this determination are flexible and each case is judged individually, with due consideration for circumstances peculiar to the plaintiff.[119] The court considers the prisoner's entire financial status, including assets, liabilities, dependents, and ability to earn.[120] Sometimes a court may require the prisoner to produce additional information[121] or may order the prison records officers to submit a certificate stating the balance in the plaintiff's prison account.[122]

(1965); Carey v. Settle, 351 F.2d 483, 485 (8th Cir. 1965). The United States Supreme Court expressly declined to address this interpretation of the pauper statute in Boag v. MacDougall, 454 U.S. 364, 365 (1982) (per curiam).

Consider, however, the court's sentiments in Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1212 (11th Cir. 1981):

> [T]he line is not drawn as precisely at the courthouse door . . . . Inmate access to the courts must be "adequate, effective and meaningful." . . . It is none of these if it embraces no more than being permitted to file a paper that, without determination of whether it states a claim legally sufficient and within the court's jurisdiction, is subject to dismissal on grounds of convenience to courts and litigants.

See also Mitchum v. Purvis, 650 F.2d 647 (5th Cir. 1981) (per curiam).

117. Collins v. Pitchess, 641 F.2d 740, 743 (9th Cir. 1981); Wimberly v. Rogers, 557 F.2d 671, 673 (9th Cir. 1977); Cancino v. Sanchez, 379 F.2d 808, 809 (9th Cir. 1967).

118. The federal courts use a form entitled "Declaration in Support of Request to Proceed in Forma Pauperis" which enables them to obtain basic information regarding the plaintiff's financial condition. A copy of the form is reprinted in REPORT, *supra* note 18, at 93.

119. For a thorough discussion of the factors a court will consider, see United States v. Scharf, 354 F. Supp. 450, 451-53 (E.D. Pa.), *aff'd mem.*, 480 F.2d 919 (3rd Cir. 1973).

120. The court may also consider recent withdrawals from a prisoner's account in its decision whether to grant pauper status. Collier v. Tatum, 722 F.2d 653, 655 (11th Cir. 1983). Likewise, the court may deny the petition if the prisoner has filed falsified information. Atwell v. Reese, 530 F. Supp. 314, 315 (M.D. Ala. 1981).

121. REPORT, *supra* note 18, at 54.

122. I. SENSENICH, *supra* note 18, at 52.

In *Adkins v. E.I. DuPont de Nemours & Co.*,[123] the United States Supreme Court interpreted section 1915 liberally, defining indigents as persons who cannot pay court costs without depriving themselves or their dependents of necessities.[124] The federal court interpretations of *Adkins* have been less than uniform, however, especially in the prisoner context. Some courts follow the spirit of *Adkins* by refusing to require virtual destitution before granting a petition.[125] These courts reason that a prisoner should not have to forego the minimal amenities of life available in a prison in order to pursue his claim in court.[126] Other courts, however, tend to apply a harsher standard. For instance, one case held that fifty dollars in a prison account was sufficient to warrant denial of the petitioner's application for pauper status.[127]

b. Partial Payment Plans

The purpose of section 1915 is to allow indigents the same opportunity to present their claims in court as individuals able to pay

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123. 335 U.S. 331 (1948).

124. Writing for a unanimous court, Justice Black emphasized:

> To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. . . . [T]he effect of this statutory interpretation is to force a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution. . . . [A] construction of the statute achieving such consequences is an inadmissable one.

Id. at 339-40; *see also* United States v. Scharf, 354 F. Supp. 450, 452-53 (E.D. Pa.) (no need to mortgage family home or look for aid from relatives having no legal duty to support petitioner), *aff'd mem.*, 480 F.2d 919 (3rd Cir. 1973).

125. *See, e.g.*, Souder v. McGuire, 516 F.2d 820 (3rd Cir. 1975).

> In *Souder*, the court discussed the standards for determining whether to grant pauper status. It stated:
>
> [W]e do not think that prisoners must totally deprive themselves of those small amenities of life which they are permitted to acquire in a prison . . . beyond the food, clothing, and lodging already furnished by the state. An account of $50.07 would not purchase many such amenities; perhaps cigarettes and some occasional reading material. These need not be surrendered in order for a prisoner . . . to litigate in forma pauperis in the district court.

Id. at 824. Although this case is in the habeas corpus context, the standards are relevant to civil rights actions. *See also* Bullock v. Suomela, 710 F.2d 102, 103 (3d Cir. 1983) (abuse of discretion to require $4.00 payment where prisoner had only $4.76 in account).

126. *See, e.g.*, *Bullock*, 710 F.2d at 103; *Souder*, 516 F.2d at 824.

127. Ward v. Werner, 61 F.R.D. 639, 640 (M.D. Pa. 1974); *see also* Shimabuku v. Britton, 357 F. Supp. 825, 826 (D. Kan. 1973) ($45 sufficient assets to deny pauper status), *aff'd*, 503 F.2d 38 (10th Cir. 1974); Twyman v. Crisp, 584 F.2d 352, 358 (10th Cir. 1978) (prisoner with more than $75 in prison account required to pay filing fee).

the fees.[128] Faced with a mounting number of prisoner claims, however, several federal courts have initiated partial payment plans that require prisoners to pay a reduced fee before their claims will be filed.[129] These partial payment plans are designed to curb frivolous prisoner litigation and ease the strain prisoner suits place on the federal courts.[130]

In *Braden v. Estelle*,[131] the Federal District Court for the Southern District of Texas upheld a scheme whereby prisoner plaintiffs proceeding in forma pauperis were obliged to make partial payment of the filing fees. The court bluntly acknowledged that the purpose of the partial payment requirement was to force inmates to "confront the initial dilemma which faces most other potential civil litigants: 'is the merit of the claim worth the cost of pursuing it?' "[132] Other courts have upheld similar plans as within the district court's discretion under section 1915(a).[133]

Under these partial payment plans, there are few guidelines for determining what percentage of the filing fee should be paid. Courts have taken varied approaches to determining a fair amount to require from prisoners prior to allowing the lawsuit. Some courts have articulated a flat fee for all prisoners,[134] while others

128. Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 339-40 (1948). *See generally* Catz & Guyer, *supra* note 109.

129. *See, e.g.*, Temple v. Ellerthorpe, 586 F. Supp. 848, 851 (D.R.I. 1984); Bullock v. Suomela, 710 F.2d 102, 103 (3d Cir. 1983); Smith v. Martinez, 706 F.2d 572, 574 (5th Cir. 1983); *see also Paying to Sue*, 71 A.B.A. J. 31 (Jan. 1985).

130. *Paying to Sue*, 71 A.B.A. J. 31 (Jan. 1985); *cf. Gast v. Daily*, 577 F. Supp. 14 (E.D. Wis. 1984) (judge adopted procedure whereby all inmates with pending in forma pauperis cases before him would not be able to file a second case without his prior approval); *see also* Catz & Guyer, *supra* note 109, at 664 n.52.

131. 428 F. Supp. 595 (S.D. Tex. 1977).

132. *Id.* at 596 (quoting in part Carroll v. United States, 320 F. Supp. 581, 582 (S.D. Tex. 1970)). The court continued:

> [I]ndigents, unlike other litigants, approach the courts in a context where they have nothing to lose and everything to gain. The temptation to file complaints that contain facts which cannot be proved is obviously stronger in such a situation. For convicted prisoners with much idle time and free paper, ink, law books, and mailing privileges, the temptation is especially strong.

Id. at 598.

133. Evans v. Croom, 650 F.2d 521 (4th Cir. 1981) (partial fee may not exceed 15% of sums received in prisoner's trust fund for preceeding six months), *cert. denied*, 454 U.S. 1153 (1982); *see also* Smith v. Martinez, 706 F.2d 572 (5th Cir. 1983); Williams v. Estelle, 681 F.2d 946 (5th Cir. 1982), *cert. denied*, 105 S. Ct. 571 (1984); Green v. Estelle, 649 F.2d 298 (5th Cir. 1981); Zaun v. Dobbin, 628 F.2d 990 (7th Cir. 1980); *In re* Stump, 449 F.2d 1297 (1st Cir. 1971).

134. *See, e.g., Paying to Sue*, 71 A.B.A. J. 31 (Jan. 1985). *Contra* Jones v. Zimmerman, No. 84-5175, slip op. (3d Cir. Jan. 16, 1985) (Available on LEXIS, Genfed library, Cases file) (inflexible application of partial filing fee requirement to prisoners with no assets will entail a greater expenditure of judicial time and effort than it will save).

assess fees in accordance with the actual financial condition of the prisoner.[135] Regardless of the payment plan initiated by the district court, it should still adhere to the basic principles underlying the creation of a pauperis petition.[136]

Courts which have implemented partial payment systems report a significant decrease in prisoner civil rights litigation.[137] While a sliding scale approach to assessing filing fees is an attractive idea, there are inherent problems underlying such schemes. For instance, at least with respect to prosecution of civil rights actions, prisoners should not be treated differently than other indigent plaintiffs. Therefore, if a partial payment plan applies only to prisoners, there are troubling equal protection implications.[138] Next, there is a certain illogic in requiring a plaintiff to pay fees after the court has already determined that the person is indigent. Attempts to ease the court's caseload by imposing what may to some be burdensome costs carry with them the potential chilling of access to the courts to bring otherwise valid civil rights complaints.[139] The

135. For example, in the Northern District of Ohio, an inmate may not be required to pay an amount which exceeds 10% of his income during the six-month period preceding the filing of the complaint. In no event, under this plan, may the filing fee required of prisoners ever exceed the fee required of other civil plaintiffs. Total waiver of fee may be granted if the prisoner can reasonably state that he does not expect to receive the same amount of money in the future. *In re* Applications for Leave to Proceed in Forma Pauperis, General Order No. 2 (N.D. Ohio Dec. 8, 1981). The Fifth Circuit has declined to establish any general rule as to the propriety of a partial payment plan, but in one case the lower court was found to have abused its discretion by requiring payment of court costs equaling 40% of the prisoner's assets. Green v. Estelle, 649 F.2d 298 (5th Cir. 1981). Recently, however, this circuit upheld a plan whereby the prisoner was forced to pay nearly 30% of his assets. Smith v. Martinez, 706 F.2d 572, 574 (5th Cir. 1983). *But see* Bullock v. Suomela, 710 F.2d 102, 103 (3d Cir. 1983) (abuse of discretion to require $4.00 pre-payment when prisoner had only $4.76 in account). The Seventh Circuit has struck down a scheme whereby leave to proceed in forma pauperis is conditioned upon the petitioner's agreement to pay the fees in monthly installments. Caldwell v. United States, 682 F.2d 142, 143 (7th Cir. 1982) (per curiam) (there is no authority in 28 U.S.C. § 1915 for imposition of this "novel installment plan").

136. *See supra* notes 108-17 and accompanying text.

137. See generally the discussion in Braden v. Estelle, 428 F. Supp. 595, 597-98 (S.D. Tex. 1977). A federal judge in Danville, Illinois recently instituted a requirement that prisoners pay a minimum of $4 to $5 prior to filing cases alleging civil rights violations. The judge reported that this requirement has resulted in a "substantial drop" in suits filed by inmates of the prison in Pontiac, Illinois. *Paying to Sue*, 71 A.B.A. J. 31 (Jan. 1985).

138. Cf. Smith v. Bennett, 365 U.S. 708, 711-14 (1961), where the Court held that an Iowa law requiring indigent prisoners to pay the filing fee before application for writ of habeas corpus violates equal protection clause of the fourteenth amendment. The Court stated: "the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale . . . . In failing to extend the privilege of the Great Writ to its indigent prisoners, Iowa denies them equal protection of the laws." *Id.* at 714.

139. The payment plan should be narrowly drawn to prevent litigants from being faced with the "Hobson's Choice" between a potentially meritorious claim and foregoing

pauper statute was enacted to cure the possible chill. It should not be undermined by payment plans designed to discourage frivolous lawsuits, especially when the court has alternative statutory authority under which it may dismiss frivolous claims filed pursuant to an in forma pauperis petition.[140]

2. Dismissal of the Complaint Under Section 1915

28 U.S.C. § 1915(a) provides that costs may be waived upon a sufficient showing of indigency. Although section 1915(a) does not address the merits of a prisoner's claim, courts are authorized under section 1915(d) to dismiss "frivolous" or malicious claims.[141] Most courts urge that in forma pauperis determinations be based solely on financial considerations.[142] Under this approach, once leave to proceed in forma pauperis has been granted, the complaint is filed. Only then should the court consider whether to dismiss under section 1915(d).[143] In assessing the legal sufficiency of a complaint under section 1915, courts should not dismiss a complaint for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[144] In pro se prisoner suits, where the prisoner is not represented by an attorney, the standard is even less stringent.[145]

Once the court decides to allow the plaintiff to proceed as a pau-

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the basic necessities of life. Temple v. Ellerthorpe, 586 F. Supp. 848, 851 (D.R.I. 1984); *see also* Adkins v. E. I. DuPont de Nemours & Co., 335 U.S. 331, 340 (1948).

140. 28 U.S.C. § 1915(d)(1982); *see infra* notes 146-73 and accompanying text.

141. 28 U.S.C. § 1915(d)(1982). For the text of this subsection, see *supra* note 109.

142. *See, e.g.*, Boyce v. Alizaduh, 595 F.2d 948, 950 (4th Cir. 1979); Collins v. Hladky, 603 F.2d 824, 825 (10th Cir. 1979) (per curiam); Collins v. Cundy, 603 F.2d 825, 827 (10th Cir. 1979) (per curiam); Brown v. Schneckloth, 421 F.2d 1402, 1403 (9th Cir.) (per curiam), *cert. denied*, 400 U.S. 847 (1970); Sinwell v. Shapp, 536 F.2d 15, 19 (3d Cir. 1975); Tosta v. Hooks, 568 F. Supp. 616, 622 (E.D. Pa. 1983); *see also* Cole v. Smith, 344 F.2d 721, 723 (8th Cir. 1965) (courts allow the filing of a complaint upon a sufficient showing of poverty alone so that a complete record can be made for the benefit of the courts in protecting petitioner's legal rights).

143. *See* REPORT, *supra* note 18, at 58 n.97; *see also* Turner, *supra* note 15, at 619.

144. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). This is the standard used to judge dismissals in non-pauper cases under FED. R. CIV. P. 12(b)(6). Cf. Ellis v. United States, 356 U.S. 674, 675 (1958) (per curiam), where the Court held that leave to appeal in forma pauperis should not be denied "unless the issues raised are so frivolous that the appeal would be dismissed in the case of nonindigent litigant." *See also* Coppedge v. United States, 369 U.S. 438, 446-48 (1962).

145. Haines v. Kerner, 404 U.S. 519, 520 (1972). *See infra* notes 198-210 and accompanying text. *But see* Gale v. Moore, 587 F. Supp. 1491, 1493 (W.D. Mo. 1984) ("even though pleading leniency is necessary to counteract the [pro se litigant's] lack of legal expertise, the same degree of predisposition in favor of the pro se plaintiff is not called for when a [later] determination is made under § 1915(d)") (citations omitted).

per, the issue of whether the claim is malicious or frivolous under section 1915(d) may be addressed. Some courts, however, have obscured the distinction between section 1915(a) and section 1915(d) by approving the practice of denying leave to proceed in forma pauperis on the grounds that the complaint was frivolous or malicious.[146] A section 1983 action brought by an indigent cannot be docketed until leave to proceed in forma pauperis is granted. Therefore, an interpretation allowing such preliminary review on the merits can often lead to summary dismissal in pro se cases even before the case has been filed.[147]

Under section 1915(d) issues arise as to whether the marshal should be directed to make service upon the defendants, whether the plaintiff should be afforded an opportunity to amend the complaint, or whether to dismiss the case immediately as frivolous. A Federal Judicial Center Report ("the Report") recommends that decisions to dismiss be made prior to service of process so as to spare the defendant the expense and inconvenience of answering a potentially frivolous complaint.[148] If the complaint is "irreparably frivolous or malicious," the Report recommends immediate dismissal with no opportunity to amend.[149] If the defect can be reme-

146. *See, e.g.*, Wartman v. Wisconsin, 510 F.2d 130, 130-33 (7th Cir. 1975); Wright v. Rhay, 310 F.2d 687 (9th Cir. 1962), *cert. denied,* 373 U.S. 918 (1963); Taylor v. Burke, 278 F. Supp. 868 (E.D. Wis. 1968).

In the Central District of California, leave to proceed in forma pauperis is denied if the complaint is unintelligible or filled with obscenities or if the claim is substantially the same as one that the plaintiff has pending in court. *See* REPORT, *supra* note 18, at 57 n.95.

147. The problem with using the statute to screen and dismiss cases ex parte is that the screening practices are neither uniform nor generally published for the future reference of pro se litigants requesting pauper status. Cameron v. Fogarty, 705 F.2d 676, 678 n.2 (2d Cir. 1983); *see also* Turner, *supra* note 15, at 618.

148. *See* REPORT, *supra* note 18, at 59; Franklin v. Murphy, 745 F.2d 1221 (9th Cir. 1984).

The Second Circuit, however, has emphasized:

> It is the well established law of this circuit that *sua sponte* dismissal of a *pro se* complaint prior to service of process on defendant is strongly disfavored. . . . Such untimely dismissal deprives us of the benefit of defendant's answering papers, . . . and results in the "wasteful . . . shuttling of the lawsuit between the district court and the appellate courts." . . . To warrant dismissial, the complaint, considering all its allegations as true, . . . must be frivolous on its face or wholly insubstantial.

Robles v. Coughlin, 725 F.2d 12, 15 (2d Cir. 1983) (per curiam) (citations omitted); *see also* Harmon v. Berry, 728 F.2d 1407, 1408 (11th Cir. 1984) (per curiam) (reversing district court's dismissal of suit before service of process).

149. REPORT, *supra* note 18, at 60; *see also* Worley v. California Dep't of Corrections, 432 F.2d 769, 770 (9th Cir. 1970) (per curiam) (where plaintiff alleged revocation of parole without due process hearing and where law is well settled that no hearing is required, no opportunity to amend complaint need be given).

died, however, plaintiff should be given the opportunity to do so.[150] Where the case is "borderline," the Report recommends letting the case proceed.[151] Several federal circuits have followed these guidelines when considering whether to dismiss under section 1915(d).[152]

a. Frivolity

It is generally believed that most prison civil rights complaints are frivolous.[153] The term "frivolous" is ambiguous at best, and two views have emerged as to its meaning in the context of pauper applications and dismissals. One holds that a complaint which presents a rational argument on the law or facts should not be dismissed regardless of the likelihood of eventual success.[154] The nar-

150. *See* I. SENSENICH, *supra* note 18, at 43-44; *see also* Gordon v. Leeke, 574 F.2d 1147, 1152-53 (4th Cir.), *cert. denied*, 439 U.S. 970 (1978); Mitchell v. Beauboeuf, 581 F.2d 412, 416 (5th Cir. 1978), *reh'g denied*, 586 F.2d 842, *cert. denied*, 441 U.S. 966 (1979); Townsend v. Frame, 587 F. Supp. 369, 371 (E.D. Pa. 1984).

151. *See* REPORT, *supra* note 18, at 60; *see also* Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980); Watson v. Ault, 525 F.2d 886, 892 (5th Cir. 1976).

152. Martin-Trigona v. Stewart, 691 F.2d 856, 857 (8th Cir. 1982) (per curiam); Boyce v. Alizaduh, 595 F.2d 948, 950-51 (4th Cir. 1979); Mitchell v. Beauboeuf, 581 F.2d 412, 415 (5th Cir. 1978), *reh'g denied*, 586 F.2d 842, *cert. denied*, 441 U.S. 966 (1979); Smart v. Villar, 547 F.2d 112, 113-14 (10th Cir. 1976); Franklin v. Oregon, 563 F. Supp 1310, 1325 (D. Or. 1983), *aff'd in part, rev'd in part*, 745 F.2d 1221 (9th Cir. 1984); Neal v. Miller, 542 F. Supp. 79, 81 (S.D. Ill. 1982). *But see* Lewis v. New York, 547 F.2d 4, 5 (2d Cir. 1976); Wartman v. Wisconsin, 510 F.2d 130, 133-34 (7th Cir. 1975).

153. *See* I. SENSENICH, *supra* note 18, at 10-11. Consider also, as an example, the case of Sparks v. Fuller, 506 F.2d 1238, 1239 (1st Cir. 1974), where prisoners claimed a right under § 1983 to enjoin the warden from evicting the prison cats "Sneakers," "Rastus," and "Socrates" without a due process hearing.

154. Catz & Guyer, *supra* note 109, at 672-79; Dreibelbis v. Marks, 675 F.2d 579, 580 (3rd Cir. 1982) (per curiam); Collins v. Hladky, 603 F.2d 824, 825 (10th Cir. 1979) (per curiam); *see* Holloway v. Gunnell, 685 F.2d 150, 155 (5th Cir. 1982) (frivolity is determined by whether there is an "arguable factual and legal basis, of constitutional dimension, for the asserted wrong"); *see also* Franklin v. Murphy, 745 F.2d 1221, 1227 (9th Cir. 1984); Crisafi v. Holland, 655 F.2d 1305, 1308 (D.C. Cir. 1981) (per curiam); Boyce v. Alizaduh, 595 F.2d 948, 951-52 (4th Cir. 1979); Watson v. Ault, 525 F.2d 886, 892 (5th Cir. 1976); *cf.* Anders v. California 386 U.S. 738 (1967).

For instance, in Crisafi v. Holland, 655 F.2d 1305, 1307-08 (D.C. Cir. 1981) (per curiam), the court held, "A court may dismiss as frivolous complaints reciting bare legal conclusions with no *suggestion* of supporting facts, or postulating events and circumstances of a wholly fanciful kind." (emphasis added). Similarly, in Brandon v. District of Columbia Bd. of Parole, 734 F.2d 56 (D.C. Cir. 1984), the court noted the distinction between sua sponte dismissals under 28 U.S.C. § 1915(d) and dismissals under FED. R. CIV. P. 12(b)(6). It held that complaints under § 1915(d) should be held to a lesser standard than those under 12 (b)(6):

> [A] complaint need not indisputably state a cause of action to survive *sua sponte* dismissal; instead, if the complaint has at least *an arguable* basis in law and fact — if the complaint is *viable* — it cannot be deemed frivolous. . . . [T]he filing of responsive papers should be required and the normal course of litigation pur-

rower view, however, holds that a petition is frivolous if it has little chance of success on the merits.[155]

Some courts dismiss complaints as frivolous and malicious where the plaintiff has abused the right of proceeding in forma pauperis by bringing many complaints that make the same allegations and seek the same relief.[156] The courts are willing to impose special requirements on these plaintiffs in an attempt to discourage the filing of repetitive claims. Courts have attempted to alleviate this problem by limiting the total number of pauper complaints a prisoner files in a year[157] or by requiring a showing of good cause before the court will allow bringing an action at the public's expense.[158] These limitations must be narrowly tailored, however, to

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sued. Following this course assures that proper adversarial attention is paid to the question whether a cause of action exists and facilitates appellate review of this question. . . . Dismissal of pro se suits under the frivolous standard must therefore be reserved for those cases in which there is indisputably absent any factual and legal basis for the asserted wrong.

Id. at 59 (emphasis in original).

155. Jones v. Ault, 67 F.R.D. 124, 129 (S.D. Ga. 1974), *aff'd mem.*, 516 F.2d 898 (5th Cir. 1975) ("A pauper's affidavit is not . . . a broad highway into the federal courts" and courts have discretion to deny motions under § 1915 where there is want of realistic chances of ultimate success); State *ex rel.* Purkey v. Ciolino, 393 F. Supp. 102, 106 (E.D. La. 1975); *see also* Anderson v. Coughlin, 700 F.2d 37, 43 (2d Cir. 1983) (requiring more stringent pleading standards in § 1915 actions than those required in 12(b)(6)); Walker v. Missouri Bd. of Probation & Parole, 586 F. Supp 411, 412 (W.D. Mo. 1984) (court's authority to dismiss is broader under § 1915(d) than rule 12(b)(6), and gives the court "a measure of control over in forma pauperis suits").

156. One court stated:

> It is quite clear that Congress, while intending to extend to poor . . . suitors the privilege of having their wrongs redressed without the ordinary burdens of litigation, at the same time intended to safeguard members of the public against an abuse of the privilege by evil-minded persons who might avail themselves of the shield of immunity . . . with whom they were not in accord, by subjecting them to vexatious and frivolous legal proceedings.

Graham v. Riddle, 554 F.2d 133,134 (4th Cir. 1977) (quoting O'Connell v. Mason, 132 F. 245, 247 (1st Cir. 1904)); *see also* Demos v. Kincheloe, 563 F. Supp 30, 35 (E.D. Wash. 1982) (inmate who filed 184 suits in three years would be required to certify that any subsequent suits were new claims not previously raised and disposed of on the merits).

157. *See, e.g.*, Franklin v. Murphy, 745 F.2d 1221 (9th Cir. 1984) (prisoner plaintiff limited to six in forma pauperis lawsuits in 12-month period); Demos v. Kincheloe, 563 F. Supp. 30, 35 (E.D. Wash. 1982); *see infra* notes 160-65 and accompanying text; *cf.* Gast v. Dailey, 577 F. Supp. 14 (E.D. Wis. 1984) (limiting number of in forma pauperis suits any inmate can file).

Other courts have issued injunctions against further filings by particularly litigious prisoners. *See, e.g.*, Gordon v. United States Dep't of Justice, 558 F.2d 618 (1st Cir. 1977); Kane v. City of New York, 468 F. Supp. 586, 590-91 (S.D.N.Y.), *aff'd*, 614 F.2d 1288 (2d Cir. 1979).

158. One exceptionally litigious prisoner plaintiff filed 178 cases in a 15-year period and in most he attempted to proceed in forma pauperis. The court found that petitioner has misused the § 1915 privilege by filing false allegations of poverty, by repeatedly suing

ensure that they do not unduly restrict the prisoner's right of access to the courts.[159]

Consider the case of Harry Franklin in Oregon. Franklin has filed in excess of one hundred civil rights complaints within a period of a few years.[160] The overwhelming majority have been dismissed as frivolous. For example, Franklin has alleged that prison officials violated his "right to be at piece [sic] and/or treated better" by housing him near a vile-mouthed inmate;[161] and by refusing to do anything about the passing railroad train's early morning whistle;[162] that prison officials harassed him "by water," in that excessive sprinkling of the lawns in summer makes it difficult for him to find a dry place to lay down;[163] and by prison guards who "wear clopping heels on their boots, which causes plaintiff to feel he's in a Natsy [sic] prison camp."[164] In light of these and numerous other seemingly groundless complaints, the district court refused to allow Harry Franklin to file any more than six in forma pauperis lawsuits in any twelve-month period.[165] While the limita-

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defendant in different districts on the same or similar causes of action, by varying his allegation of citizenship in order to invoke federal diversity jurisdiction, by failing to disclose formerly disposed similar actions, and by failing to serve pleadings on defendant. Carter v. Telectron, Inc., 452 F. Supp. 944, 991-98 (S.D. Tex. 1977). As a result, the court adopted a special procedure whereby any future request to proceed in forma pauperis would be denied unless the plaintiff made a specific showing of good cause for bringing an action at the public's expense. The court stated:

> Because of his prior pattern of abuse, which this Court has no reason to expect will abate, plaintiff henceforth should carry a stronger burden of proving that he is economically unable to pay the initial filing and service fee or some portion thereof . . . and that the action is in good faith and not "without arguable merit" or malicious.

Id. at 998.

159. For example, in Carter v. United States, 733 F.2d 735 (10th Cir. 1984), the district court had upheld a magistrate's recommendation that a litigious prisoner be precluded from filing any claims in the District Court for the District of Colorado without payment of all filing fees. The appellate court reversed, finding the district court's directive violative of § 1915(a) because it was "unlimited to the nature of the claims and constitute[d] a total barrier to the filing of actions." *Id.* at 737; *see also* Franklin v. Murphy, 745 F.2d 1221, 1231-32 (9th Cir. 1984); *In re* Green, 669 F.2d 779, 787 (D.C. Cir. 1981) (per curiam).

160. Franklin v. Murphy, 745 F.2d 1221, 1231 n.13 (9th Cir. 1984). See also Franklin v. Oregon, 563 F. Supp. 1310 (D. Or. 1983), for the district court's discussion of Franklin's cases and its frustration in attempting to curb his excessive filings.

161. *Franklin*, 563 F. Supp. at 1330.

162. *Id.* at 1328.

163. *Id.* at 1329. Franklin supported his argument with evidence of the robins' lethargy. He argued that if the lawns were not so frequently watered, the worms would be deeper in the ground, the robins would have to work harder to extricate them, and hence the robins would not be so lethargic.

164. *Id.* at 1326.

165. *Id.* at 1334. The Ninth Circuit qualified this order, however. It held:

tion should discourage the filing of repetitive claims, it is also sufficiently liberal to allow the inmate to bring valid complaints to the court's attention.

One particularly notorious contributor to the backlog of the courts and probably the most prolific prisoner litigant in recorded history is the Reverend Clovis Carl Green.[166] He alone has generated at least twenty-six published opinions and has filed between 600 and 700 complaints in the past ten years.[167] Most of his complaints regard the conditions of his confinement and the restrictions on "his" church, the Human Awareness Universal Life Church.[168] In response to Green's litigiousness, four circuits and one district court have actually enjoined his abuse of the legal system.[169] A refusal to allow any action unless Green paid a filing fee, however, was held to be unconstitutional.[170] Although the appeals court in that case refused to uphold the district court's solution of totally blocking suits brought by this particular plaintiff, it did issue its own order in an attempt to address the district court's concerns and frustrations over Green's harassment of the courts. The order prohibited Green from filing any civil action without leave of the court.[171] To obtain leave of the court, Green must now certify that his claims are new ones that have never been raised and dis-

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> [S]ix free filings per year should be adequate access, but we cannot be certain that it will. If a request is made for the filing of additional cases beyond the number prescribed by the court, Franklin must be afforded an opportunity to make a showing that the limitations to six filings is prejudicial because inclusion of these claims by amendment of his existing claims is not possible. If such a showing is made, the district court must amend its order. This will avoid the constitutionally questionable conclusive presumption that all of Franklin's subsequent submissions are frivolous or malicious.

Franklin v. Murphy, 745 F.2d 1221, 1232 (9th Cir. 1984).

166. *In re* Green, 669 F.2d 779, 781 (D.C. Cir. 1981) (per curiam); Franklin v. Oregon, 563 F. Supp. 1310, 1323 n.17 (D. Or. 1983).

167. *In re* Green, 669 F.2d at 781 & n.4. See Green v. Camper, 477 F. Supp. 758, 759-68 (W.D. Mo. 1979), where the court's listing of Green's cases filed between 1972 and 1979 spans 10 pages in the Federal Supplement. This listing did not include Green's filings in state court or those filed under another inmate's name or "ostensibly" on behalf of other prisoners. *Id.* at 768 n.3.

168. Clovis Green is founder and sole reverend of the Human Awareness Universal Life Church. For some background on Green's church, see 669 F.2d 779, 781 n.5 (D.C. Cir. 1981) and Green v. Warden, 699 F.2d 364, 365 (7th Cir.), *cert. denied*, 461 U.S. 960 (1983).

169. Green v. Warden, 699 F.2d 364 (7th Cir.), *cert. denied*, 460 U.S. 960 (1983); *In re* Green, 669 F.2d 779 (D.C. Cir. 1981); Green v. Carlson, 649 F.2d 285 (5th Cir.), *cert. denied*, 454 U.S. 1087 (1981); Green v. White, 616 F.2d 1054 (8th Cir. 1980); Green v. Wyrick, 428 F. Supp. 732 (W.D. Mo. 1976).

170. *In re* Green, 669 F.2d 779, 786 (D.C. Cir. 1981).

171. *Id.* at 787. The Seventh Circuit has issued a similar order against Green. Green v. Warden, 699 F.2d 364, 367, 370 (7th Cir.), *cert. denied*, 461 U.S. 960 (1983).

posed of on the merits by any federal court.[172] To date, the Supreme Court has refused to grant certiorari in any of Green's cases.

A steady stream of petitions from the likes of Franklin and Green contributes to the perception—both of the public and the courts—that prisoners' lawsuits are frivolous and a waste of the courts' time. It is just this perception that creates difficulties for courts that are faced with the requirement of distinguishing the few valid claims from the tidal wave of complaints filed each year.[173] Summary dismissal is the most obvious procedural means of dealing with the majority of complaints.

b. Summary Dismissals

Prisoner civil rights suits create an undisputed drain on the federal courts. The number of suits filed has increased exponentially in the past twenty years, and recent statistics indicate that this trend is not likely to abate in the future.[174] The recognition of the prisoners' right of access to the courts has fueled this increase in prisoner litigation by providing an avenue for judicial consideration of genuine prisoner grievances. Unfortunately, in addition to protecting legitimate claims, the right of access also provides a vehicle for an overwhelming number of patently frivolous claims filed by indigent prisoners to harass their incarcerators.

The district courts are thus left with the difficult task of wading through the morass of prisoner complaints filed annually and sorting the legitimate claims from the frivolous ones. This task is not an easy one. In the early 1970's, when the number of prisoners' suits had already begun to multiply, Justice Powell forecast that the sheer volume of prisoner suits would harden the judiciary and tend to mask meritorious complaints.[175] The frustration of the courts in this area is easily understandable. Obviously, overly litigious prisoners like Harry Franklin and Clovis Carl Green are not likely to discontinue their present patterns of abuse voluntarily. These prisoners, or others in their stead, will continue to plague

172. *In re* Green, 669 F.2d 779 (D.C. Cir. 1981).

173. *See* Franklin v. Oregon, 563 F. Supp. 1310 (D. Or. 1983), *aff'd in part, rev'd in part*, 745 F.2d 1221 (9th Cir. 1984); Carter v. Ingalls, 576 F. Supp. 834 (S.D. Ga. 1983).

174. *See supra* note 15.

175. In Boyd v. Dutton, 405 U.S. 1, 8 (1972) (Powell, J., dissenting), Justice Powell predicted: "The current flood of petitions . . . already threatens-because of sheer volume-to submerge meritorious claims and even to produce a judicial insensitivity to . . . petitioners." (citations omitted). *See also* Turk, *Foreword, Access to the Federal Court by State Prisoners in Civil Rights Actions*, 64 VA. L. REV. 1349, 1353-58 (1979) (many meritorious prisoner claims are lost in pro se prisoner litigation).

the district courts and contribute to the general belief that most, if not all, prisoner suits are frivolous.

As a result, many pro se prisoner civil rights cases are summarily dismissed before the defendant is required to answer, and some even before the case is filed. In the twelve-month period ended June 30, 1982, 14,187 prisoner civil rights suits were closed in federal district courts. Of these, 12,873 were terminated before the pretrial stage, 615 during or after pretrial, and 699 went to trial.[176] A mere 4.9% of the civil rights actions filed ever survived pretrial proceedings.

Summary dismissal, however, creates its own problems. One problem of summarily dismissing these claims under section 1915(d) arises because most courts review the denial of leave to proceed in forma pauperis and the resulting summary dismissal under the low "abuse of discretion" standard.[177] The usual standard of review for dismissal of a complaint is that a claim should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[178] The discriminatory treatment of pro se pauper claims is further exacerbated by courts which hold that discretion to grant pauper status should be used sparingly in civil cases for damages[179] and even more parsimoniously in prisoners' suits against their incarcerators.[180]

Moreover, the district courts have a constitutional duty to en-

176. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1982 ANNUAL REPORT 243 (1982).

177. *See, e.g.*, Jones v. United States, 453 F.2d 351 (5th Cir. 1972); Williams v. Field, 394 F.2d 329 (9th Cir.), *cert. denied*, 393 U.S. 891 (1968).

178. Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

179. *See, e.g.*, Flowers v. Turbine Support Division, 507 F.2d 1242, 1244 (5th Cir. 1975); Weller v. Dickson, 314 F.2d 598, 601 (9th Cir.), *cert. denied*, 375 U.S. 845 (1963); Jones v. Bales, 58 F.R.D. 453, 464 (N.D. Ga. 1972), *aff'd mem.*, 480 F.2d 805 (5th Cir. 1973).

180. Daye v. Bounds, 509 F.2d 66, 68 (4th Cir.) (discretion is "especially" broad in prisoners' suits), *cert. denied*, 421 U.S. 1002 (1975); Shobe v. California, 362 F.2d 545, 546 (9th Cir.) (per curiam), *cert. denied*, 385 U.S. 887 (1966); Weller v. Dickson, 314 F.2d 598, 604 (9th Cir.) (Duniway, J., concurring), (stating that in forma pauperis status should be denied even if a claim is stated, if the court is of the opinion that the prisoner's chances of success are slight), *cert. denied*, 375 U.S. 845 (1963).

Consider the statement of the court in Carey v. Settle, 351 F.2d 483, 485 (8th Cir. 1965):

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

sure that prisoners receive "adequate, effective and meaningful" access to the courts. In *Bounds*, the Supreme Court held that states had to "shoulder affirmative obligations" to ensure meaningful access to the courts.[181] This responsibility also rests with the courts, as "meaningful" access also includes open-minded judicial consideration of the prisoner's claim.[182]

Accordingly, the tactic of summary dismissals at the outset of the prisoner's case should be used sparingly. Although this may require greater time expenditures by the district courts, it also provides an important check against the possibility that meritorious claims will be lost in the shuffle.[183] Prisoner plaintiffs have a very difficult road to travel before their claims will be heard by the courts. Those with meritorious claims should receive the judicial recognition they deserve.[184]

B. Right to Counsel

The obstacles confronting a prisoner who seeks to proceed in forma pauperis are compounded by the fact that he generally has no attorney representing his interests. The right of access to the courts includes the right to *seek* counsel.[185] However, prisoners

181. Bounds v. Smith, 430 U.S. 817, 824 (1977).

182. *See* Turk, *supra* note 175, at 1354-58; *see also* Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1212 (11th Cir. 1981), quoted *supra* note 116.

183. This is the approach adopted by the Second Circuit. *See supra* note 148. Consider the rationale of the Fifth Circuit:

> We recognize the hardships a § 1983 suit may impose upon persons acting for a state. We are aware that a large number of prisoner suits are predicated primarily upon the prisoner's boredom and resentment of authority, and upon investigation are found to lack substantial basis in fact. But judges must balance their misgivings and skepticism about the usual § 1983 prisoner suit against the cold knowldege that in certain instances injustices to prisoners occur in jails and prisons, some of which violate constitutional mandates. Sometimes practices are uncovered shocking even to those most unsympathetic to prisoner rights. Section 1983 in such instances offers the only practical remedy available to the prisoner in such a system; it is the responsibility of the courts to be sensitive to possible abuses in order to ensure that prisoner complaints, particularly pro se complaints, are not dismissed prematurely, however unlikely the set of facts postulated. *An opportunity should be provided the prisoner to develop his case at least to the point where any merit it contains is brought to light.*

Hogan v. Midland County Commissioners, 680 F.2d 1101, 1103-04 (5th Cir. 1982) (quoting Taylor v. Gibson, 529 F.2d 709, 713 (5th Cir. 1976)) (emphasis in original); *see also* Catz & Guyer, *supra* note 109, at 672-79.

184. *See generally* Turk, *supra* note 175.

185. *See, e.g.*, Dawson v. Kendrick, 527 F. Supp. 1252, 1314 (S.D. W. Va. 1981) (right of access "carries with it the right to seek, obtain and communicate privately with counsel"). Prison regulations which interfere with this right to seek counsel will fall if not necessary to legitimate institutional concerns of order and security. *See* Procunier v. Martinez, 416 U.S. 396, 419 (1974).

bringing civil rights actions under section 1983 of the Civil Rights Act do not have a constitutional right to have counsel *appointed* to represent them.[186] Prisoners seeking pauper status under section 1915 may request the court to appoint counsel once it is determined that the prisoner is indigent and that the complaint has some merit.[187] Whether to assign counsel or not is a decision solely within the court's discretion.[188]

In determining whether to grant a prisoner's request for counsel, the court will first determine whether the plaintiff's claim has any factual or legal merit.[189] If there is merit, then the court will generally consider the likelihood of success on the complaint.[190] Other factors which the court will consider include whether the prisoner is in a position to be able to investigate adequately the crucial facts needed to support the allegations; whether there are factual disputes and whether those disputes are complex or substantial; the complexity of the legal issues raised; and the ability of the indigent prisoner to present the case and conduct the litigation.[191] In bor-

186. Caruth v. Pinkney, 683 F.2d 1044 (7th Cir. 1982), *cert. denied*, 459 U.S. 1214 (1983); Randall v. Wyrick, 642 F.2d 304, 307 n.6 (8th Cir. 1981); Hardwick v. Ault, 517 F.2d 295, 298 (5th Cir. 1975); Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975); *cf.* Lassiter v. Department of Social Services, 452 U.S. 18, 25 (1981).

187. 28 U.S.C. § 1915 (d) (1982).

188. *See, e.g.*, Caruth v. Pinkney, 683 F.2d 1044, 1048 (7th Cir. 1982), *cert. denied*, 459 U.S. 1214 (1983); *see also* Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1980) (per curiam) (court should appoint counsel in civil case only when exceptional circumstances exist); Gordon v. Leeke, 574 F.2d 1147, 1153 (4th Cir. 1978) (court should appoint counsel where pro se litigant has colorable claim); ABA STANDARDS, *supra* note 64, Standard 2.2(c) (providing that prisoners unable to obtain adequate representation should have legal assistance provided to the same extent such assistance is made available to the general public).

For cases where the circuit courts found the refusal to appoint counsel an abuse of discretion, see McCarthy v. Weinberg, No. 84-1316, slip op. (10th Cir. Jan 23, 1985) (available on LEXIS, Genfed library, Cases file); Whisenant v. Yuam, 739 F.2d 160, 163-64 (4th Cir. 1984); Maclin v. Freake, 650 F.2d 885 (7th Cir. 1981); *see also* Hyman v. Rickman, 446 U.S. 989 (1980) (Blackmun, J., Brennan, J., and Marshall, J., dissenting from denial of certiorari).

189. Maclin v. Freake, 650 F.2d 885, 887 (7th Cir. 1981).

190. *See, e.g.*, Caruth v. Pinkney, 683 F.2d 1044, 1048 (7th Cir. 1982), *cert. denied*, 459 U.S. 1214 (1983).

191. For a thoughtful and complete discussion of the factors to be considered in deciding whether counsel should be assigned to the pauper prisoner plaintiff, see Maclin v. Freake, 650 F.2d 885, 887-89 (7th Cir. 1981). In *Maclin*, the Seventh Circuit held that the district court's refusal to appoint counsel where the prisoner was a paraplegic suffering from muscle spasms constituted an abuse of discretion. *Id.* at 889.

The *Maclin* factors were recently used by the Tenth Circuit to reverse a district court's refusal to appoint counsel in McCarthy v. Weinberg, No. 84-1316, slip op. (10th Cir. Jan. 23, 1985) (available on LEXIS, Genfed library, Cases file). In *McCarthy*, the plaintiff, confined to a wheelchair and suffering from multiple sclerosis, impaired eyesight, and hearing, was refused appointment of counsel and forced to proceed pro se. The court

derline cases, some courts believe that appointment of counsel may be a matter of due process, and a decision to refuse to assign counsel may be overturned when the denial has resulted in "fundamental unfairness impinging on due process rights."[192]

In addition to the due process considerations, there are clear benefits to the plaintiff and to the court by assignment of counsel. Appointment of attorneys could lead to fewer frivolous cases being filed since attorneys would most likely be more candid and rigorous in evaluating the merits of a case than jailhouse lawyers.[193] An attorney can more effectively conduct discovery, negotiate settlements, and perform the other difficult tasks of litigation.[194] Although courts recognize the advantages in having prisoner plaintiffs represented by counsel,[195] there are practical difficulties that in all likelihood enter into the decision not to appoint counsel. Fore-

held that, under the circumstances, the district court's refusal to appoint counsel was "fundamentally unfair." *Id.*

See also Thorpe v. Allan, No. 84-7594, slip op. (S.D.N.Y. Feb. 7, 1985) (available on LEXIS, Genfed library, Cases file), where the court refused to appoint counsel in part because the plaintiff had not even attempted to secure legal assistance by other means. In another case, the court held that plaintiff had demonstrated such familiarity with judicial procedure and the substance of cases that appointment of counsel was not warranted. Mosby v. Mabry, 697 F.2d 213, 214-15 (8th Cir. 1982) (per curiam).

192. The Ninth Circuit has reiterated this point:

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

Dillon v. United States, 307 F.2d 445, 446-47 (9th Cir. 1962) (citations omitted); *see also* McCarthy v. Weinberg, No. 84-1316, slip op. (10th Cir. Jan. 23, 1985) (available on LEXIS, Genfed library, Cases file); Whisenant v. Yuam, 739 F. 2d 160, 163-64 (4th Cir. 1984); Maclin v. Freake, 650 F.2d 885, 886 (7th Cir. 1981); Roach v. Bennett, 392 F.2d 743, 748 (8th Cir. 1968) ("anything less than a meaningful presentation of the petitioner's claims is the equivalent of no hearing at all").

193. *See generally* Jacob & Sharma, *supra* note 42.

194. When an attorney is involved, the likelihood of a prisoner obtaining discovery, a hearing, and ultimate relief increases significantly. *See generally* Turner, *supra* note 15, at 624-25.

195. One court stated:

> It is a service to the court for counsel to explain the applicable legal principles to the complainant and to limit litigation to potentially meritorious issues. In addition, appointment of a lawyer provides the unlettered inmate with an opportunity to obtain representation equally qualified with the professional counsel usually provided by the state for the defendant.

Wright v. Dallas County Sheriff Dep't., 660 F.2d 623, 626 (5th Cir. 1981) (quoting Knighton v. Watkins, 616 F.2d 795, 799 (5th Cir.1980)); *see also* Stringer v. Rowe, 616 F.2d 993, 1001 (7th Cir. 1980) (appointment of counsel eases the burdens on the court which arise from a plaintiff's inartfully drawn and incomplete complaint); Heidelberg v. Hammer, 577 F.2d 429, 430 (7th Cir. 1978).

most, the court has no authority under section 1915(d) to require[196] or to compensate an attorney to represent indigent prisoners in civil rights actions.[197] In an extraordinary case, the court does appoint counsel for an indigent plaintiff, but in the overwhelming number of cases, it does not.

Even for non-indigent prisoners, the fees charged by an attorney may be such that it is deemed preferable to proceed pro se. Where the chances of having counsel appointed by the court are so slim, and where the normal attorney fees are prohibitive to an incarcerated plaintiff, it is not surprising that most indigent prisoner plaintiffs proceed pro se.

C. Pro Se Plaintiffs

While no law or rule of procedure expressly discriminates against individuals who proceed without an attorney, pro se litigants nonetheless endure many disadvantages by virtue of their status.[198] Unfamiliar with the tools of legal reasoning and argumentation, prisoners' complaints and briefs are often written in an intellectual fog. The litigant is faced with difficulties in formulating pleadings, obtaining meaningful discovery, preparing motions and briefs, conducting thorough research, attending pretrial conferences and hearings, and ultimately in presenting a case.[199]

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196. *See, e.g.*, Caruth v. Pinkney, 683 F.2d 1044, 1049 (7th Cir. 1982) (court has the authority only to request an attorney to represent an indigent prisoner), *cert. denied*, 459 U.S. 1214 (1983). In United States v. Leser, 233 F. Supp. 535, 538 (S.D. Cal. 1964), *cert. denied*, 379 U.S. 983 (1965), the court stated:

> While the Court is mindful of the high duty of every member of the Bar to serve those who are oppressed, it has no more power to compel [an attorney] to do the tremendous amount of work and put in the tremendous amount of time it would require . . . than I have to make an order compelling . . . defendants . . . to pick cotton for a private individual.

But see 42 U.S.C. § 2000e-5(f)(1) (1982) (authorizing appointment of counsel in some civil rights actions).

197. An attorney who succeeds in a § 1983 action may be entitled to fees under 42 U.S.C. § 1988. The amount is determined by the court and the defendants pay the bill. *See* Hensley v. Eckerhart, 461 U.S. 424 (1983) (the extent of a plaintiff's success is a crucial factor in determining proper amount of award under § 1988); Gordon v. Leeke, 574 F.2d 1147, 1154-55 (4th Cir. 1978) (Hall, J., dissenting).

Of course, a prisoner may attempt to find private counsel through civil rights, civil liberties, legal services, and legal aid offices. For instance, see *A Jailhouse Lawyer's Manual*, *supra* note 40, at 449-70 (listing all legal aid offices in New York Area). For a list of the national and state organizations, see MANVILLE, PRISONERS' SELF-HELP LITIGATION MANUAL 445-50 (1983).

198. For the view of a law clerk who handled all pro se matters in the Southern District of New York, see Ziegler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 159 (1972).

199. For a description of the procedural problems confronting a prisoner proceeding

There is no doubt that a good case can be lost by poor presentation. While prisoner plaintiffs may expend a great deal of time and energy in composing their complaints and briefs, the web of esoteric legal doctrines, complex procedural requirements, and summary dismissals often prove fatal to the cause of many pro se plaintiffs.[200] Even an otherwise meritorious claim can become lost in a tangle of facts, extraneous material, unsupported assertions, and fallacious arguments.

Some procedural and technical errors merely prolong the amount of court time required to resolve a case by increasing the number of proceedings necessary to move from one stage to the next.[201] Others may permanently impair the pro se plaintiff's chance of ultimate success. Generally, however, pro se complaints are held to less stringent standards than are formal pleadings drafted by lawyers.[202] A prisoner plaintiff who omits the allegation of any essential element of the cause of action is subject to dismissal of the complaint;[203] however, courts disfavor summary dismissals for failure to state a claim for "mere technical defects or ambiguities in pleadings."[204] Because of the potential due process violations posed by summary treatment of technical defects that are easily correctible, many courts have held that before a pro se complaint is dismissed, the plaintiff should be given notice and fair opportunity to supplement his papers in order to cure the defect.[205]

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pro se, see Bagwell, *Procedural Aspects of Prisoner § 1983 and § 2254 Cases in the Fifth and Eleventh Circuits*, 95 F.R.D. 435 (1982).

200. *Cf.* Falzerano v. Collier, 535 F. Supp. 800, 803 (D.N.J. 1982) (difficulty of providing legal materials to inmates unversed in legal doctrines).

201. *See generally* Bagwell, *supra* note 199.

202. Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam).

203. *Id.* FED. R. CIV. P. 12(b)(6) provides that defendant may move the court to dismiss plaintiff's complaint for "failure to state a claim upon which relief can be granted." For a discussion of dismissals for failure to state a claim under the pauper statute, see *supra* notes 141-84 and accompanying text.

204. *See, e.g.*, Arfons v. E.I. DuPont de Nemours & Co., 261 F.2d 434, 435 (2d Cir. 1958).

205. See, e.g., Gordon v. Leeke, 574 F.2d 1147, 1152-53 (4th Cir. 1978), where the court stated:

> A district court is not required to act as an advocate for a pro se litigant; but when such a litigant has alleged a cause of action which may be meritorious against a person or persons unknown, the district court should afford him a reasonable opportunity to determine the correct person or persons against whom the claim is asserted, advise him how to proceed and direct or permit amendment of the pleadings to bring that person or persons before the court.

Similarly, courts have held that pro se complaints dismissed under § 1915(d) should be dismissed without prejudice unless patently frivolous, in order to give the prisoner an opportunity to replead what may be a valid claim. *See* Mitchell v. Beauboeuf, 581 F.2d 412, 416 (5th Cir. 1978) (dismissed without prejudice so that plaintiff could file an

A court may allow a pro se plaintiff to amend the pleadings, but may not do the plaintiff's work for him. One court held that the district court judge had gone too far in helping a pro se prisoner plaintiff.[206] The plaintiff had written to the judge complaining that the prison officials had refused to let him have his legal materials, and sought injunctive relief. The judge drafted a complaint in the nature of the section 1983 action and ordered the defendants to show cause why a preliminary injunction should not issue. The court also improperly granted class action injunctive relief, which plaintiff had not sought, and required the state to furnish a legal library, further relief not sought by the plaintiff.[207]

The procedural mishaps that can befall a pro se plaintiff are numerous. For instance, two very common errors with prisoner plaintiffs are failure to file a timely notice of demand for jury trial[208] and failure to comply with requirements of exhaustion of administrative remedies in those circuits which require exhaustion.[209] Here again, as with technical errors, the pro se litigant either does not understand the requirements well enough to show that they have been satisfied or is not given an opportunity to add the issue before dismissal of the claim.[210]

D. Obtaining the Presence of Prisoner Plaintiffs and Prisoner Witnesses in Court

If a prisoner plaintiff can meet the prerequisites of section 1915, then the benefits of proceeding in forma pauperis may be conferred by prepayment or partial prepayment of the various court fees and costs, and by disbursement of public funds for payment of witness fees, transportation costs, transcription expenses, and other ex-

amended complaint within a reasonable time), *reh'g denied*, 586 F.2d 842, *cert. denied*, 441 U.S. 966 (1979); Townsend v. Frame, 587 F. Supp. 369, 371 (E.D. Pa. 1984) (dismissed without prejudice to "preserve the dual objectives of weeding out frivolous claims and keeping the federal courts open to legitimate civil rights claims").

206. Wilson v. Zarhadnick, 534 F.2d 55 (5th Cir. 1976).

207. *Id.* at 57-58; *cf.* Hahn v. McLey, 737 F.2d 771, 774 (8th Cir. 1984) (abuse of discretion to allow jailhouse lawyer to represent prisoner-plaintiff at trial).

208. *But see* Merritt v. Faulkner, 697 F.2d 761, 766-67 (7th Cir.) (abuse of discretion to deny untimely jury demand of in forma pauperis prisoner), *cert. denied*, 104 S. Ct. 434 (1983).

209. State prisoners bringing § 1983 actions do not have to exhaust state administrative or judicial remedies before proceeding in federal court. Steffel v. Thompson, 415 U.S. 452 (1974). Under 42 U.S.C. § 1997-1997j (1982), a federal court may stay pending proceedings and require exhaustion of available, effective administrative remedies, in some cirumstances. *See* Bagwell, *supra* note 199, at 438-39 (describing initial problems confronting prisoners).

210. Note, *supra* note 69, at 1301.

penses. Even if the prisoner is allowed to proceed in forma pauperis, major problems remain. The plight of all prisoner plaintiffs is further exacerbated by the reality of confinement. The problems brought about by the absence of counsel and the likelihood of summary dismissal for technical errors and procedural irregularities are worsened by the administrative and financial difficulties associated with obtaining the presence in court of prisoner plaintiffs and their witnesses.

1. Personal Appearance in Court

Arguably, a prisoner plaintiff's presence in court is necessary for an effective trial. After all, often only the plaintiff can testify as to crucial facts and knows the specific information for effective cross-examination. On the other side of the policy coin, however, is the threat of escape and the administrative burden of transporting the prisoner to court.

Plaintiffs in civil rights actions who are incarcerated in state or federal prisons have no absolute right to appear personally at a hearing in the action.[211] The extent of the right of access is to petition a judicial tribunal and have it pass on the merits of a claim.[212] In its discretion, a court may order state or federal custodians to deliver a prisoner to court to prosecute a civil rights action, or to

211. Pell v. Procunier, 417 U.S. 817, 822 (1974); Stone v. Morris, 546 F.2d 730, 735 (7th Cir. 1976); *see also* Pollard v. White, 738 F.2d 1124, 1125 (11th Cir.) (cost and risk of transporting prisoner plaintiff outweighed detriment incurred by his absence at trial of his civil rights claim), *cert. denied*, 105 S. Ct. 791 (1984); Mitchum v. Purvis, 650 F.2d 647, 648 (5th Cir. 1981) (per curiam); Ballard v. Spradley, 557 F.2d 476, 480 (5th Cir. 1977); McKinney v. Boyle, 447 F.2d 1091, 1094 (9th Cir. 1971) ("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, including the right given by 28 U.S.C. § 1654 to all parties in the courts of the United States to plead and conduct their own cases personally"); Kirk v. United States, 589 F.Supp. 808 (E.D. Va. 1984).

212. A prisoner in the custody of state or federal officials at the time of the action is entitled, however, to have:

> (1) process issued and served; (2) notice of any motion thereafter made by a defendant or the court to dismiss the complaint and the grounds therefor; (3) an opportunity to at least submit a written memorandum in opposition to such motion; (4) in the event of dismissal, a statement of the grounds therefor; and (5) an opportunity to amend the complaint to overcome the deficiency unless it clearly appears from the complaint that the deficiency cannot be overcome by amendment.

Crawford v. Bell, 599 F.2d 890, 893 (9th Cir. 1979) (quoting Potter v. McCall, 433 F.2d 1087, 1088 (9th Cir. 1978)); Armstrong v. Rushing, 352 F.2d 836, 837 (9th Cir. 1965); *see also* Catz & Guyer, *supra* note 109, at 679.

testify, by issuing a writ of habeas corpus ad testificandum.[213] While the decision to issue the writ lies solely within the discretion of the court, one court recently discussed several factors that should be considered by the trial judge in determining whether to grant a prisoner plaintiff's request to appear at the trial of his civil rights claim:

> (1) the costs and inconvenience of transporting a prisoner to the courtroom;
> (2) any potential danger or security risk which the presence of a particular inmate would pose to the court;
> (3) the substantiality of the matter at issue;
> (4) the need for an early determination of the matter;
> (5) the possibility of delaying trial until the prisoner is released;
> (6) the probability of success on the merits;
> (7) the integrity of the correctional system; and
> (8) the interests of the inmate in presenting his testimony in person rather than by deposition.[214]

At least one circuit has precluded consideration of one of these factors: the possibility of delaying trial until the prisoner is released. In *Wimberly v. Rogers*,[215] the Ninth Circuit held the district court was not authorized to stay the section 1983 proceeding of an inmate scheduled for release on parole within a short period of time.[216]

One alternative to bringing the prisoner plaintiff to court is for the judge or magistrate to travel to the prison to conduct the hearing.[217] Although taking a United States marshal along for safety,

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213. The power of the district court to grant this writ is expressly conferred by 28 U.S.C. § 2241(c)(5) (1982). *See* Bagwell, *supra* note 199, at 449-50.

The authority to issue the writ extra-territorially has been affirmed. *See, e.g.*, Itel Capital Corp. v. Dennis Mining Supply & Equipment, Inc., 651 F.2d 405, 406-07 (5th Cir. 1981); Stone v. Morris, 546 F.2d 730, 737 (7th Cir. 1976); Word v. State of North Carolina, 406 F.2d 352, 356 n.5 (4th Cir. 1969).

214. *See* Maurer v. Pitchess, 530 F. Supp. 77, 80 (C.D. Cal. 1981); *see also* Stone v. Morris, 546 F.2d 730, 735-36 (7th Cir. 1976); *cf.* Andrews v. Atkins, 100 F.R.D. 762, 763 (D. Kan. 1984) (describing similar inquiry for prisoner witnesses in general). In one case, the Ninth Circuit approved the use of individual leg manacles and waist chains to prevent a prisoner's escape during trial. Spain v. Procunier, 600 F.2d 189, 196-98 (9th Cir. 1979).

215. 557 F.2d 671 (9th Cir. 1977).

216. The court reasoned:

> The district court's indefinite stay of all proceeding is tantamount to a denial of due process. Simply because a person is incarcerated does not mean that he is stripped of free access to the courts and the use of legal process to remedy civil wrongs. . . . "This is governed by law and not by discretion."

Id. at 673 (quoting in part Cancino v. Sanchez, 379 F.2d 808, 809 (9th Cir. 1967)).

217. *See* REPORT, *supra* note 18, at 17 n.29; Heidelberg v. Hammer, 577 F.2d 429, 431 (7th Cir. 1978) (one alternative to prisoner's presence in court is a trial within the prison, if the parties waive a jury).

the judge would be still somewhat dependent for security upon the prison officials. A conflict may arise in that some of these prison officials insuring the safety of the judge may also be the defendants in the case being heard. In addition, this conflict, coupled with the fact that prisoner plaintiffs seeking damages against their incarcerators have a right to a jury trial, make the alternative of bench trials in the jail less than ideal.

Another alternative to a court hearing is to conduct a trial by deposition or affidavit. This alternative also has its drawbacks. The pro se prisoner's lack of experience in drafting affidavits may hamper effective presentation of a valid claim. Several courts have held that if the suit involves resolution of crucial, disputed issues of fact, trial by affidavit would be "procedurally improper."[218]

Generally, in deciding whether to issue the writ enabling the prisoner to attend, the court must determine if the fundamental interest of the prisoner plaintiff reasonably requires his transport to the hearing or whether some alternative process would suffice. If the plaintiff's presence in court is required, then the court must determine whether the plaintiff's fundamental interests outweigh the state's interest in avoiding the risk and expense of the transportation.

Once the court decides to issue a writ of habeas corpus ad testificandum to bring the prisoner to court, problems frequently arise over allocation of the cost of transporting the prisoner.[219] The United States marshals urge that the state custodian should deliver the prisoner to the federal correctional facility nearest the court, but prison officials have resisted.[220] Once the inmate is there, the United States marshal takes responsibility for custody, housing, and transportation of the prisoner to and from trial at federal ex-

218. *See, e.g.*, Collins v. Cundy, 603 F.2d 825, 827 (10th Cir. 1979) (per curiam); Collins v. Hladkey, 603 F.2d 824, 825 (10th Cir. 1979); Martinez v. Chavez, 574 F.2d 1043, 1045 n.1 (10th Cir. 1978) (per curiam); Taylor v. Gibson, 529 F.2d 709, 716 (5th Cir. 1976).

219. The district courts are authorized by 28 U.S.C. § 569 (1982) to require United States marshals to execute all "lawful writs, process and orders." Additionally, 28 U.S.C. § 567(z)(1982) makes funds available for "the expense of transporting prisoners, including the cost of necessary guards and the travel and subsistence expense of prisoners and guards."

220. *See, e.g.*, Moeck v. Zajackoski, 541 F.2d 177 (7th Cir. 1976) (court held it was denial of equal protection for a state to refuse to transport a prisoner to federal court while on the same basis the state would transport the prisoner to state court); *see also* Ford v. Allen, 728 F.2d 1369 (11th Cir. 1984) (per curiam) (district court can require United States marshal to bear the entire habeas corpus ad testificandum responsibility for producing a state inmate to testify in his § 1983 action in federal court).

pense.[221] At least one court has held that the custodial state must bear the costs of complying with the court's order to produce the plaintiff or witness to the federal contract facility,[222] but courts have rejected the United States marshal's argument that the state should bear the entire cost of producing the witness.[223] The shared expense solution is becoming a workable standard and has been upheld in the Third, Fifth, and Seventh Circuits.[224] In any event, the custodian may move to have writs of habeas corpus ad testificandum quashed in particular cases upon a showing that the testimony of the plaintiff or witness is unneccessary.[225]

2. Witnesses

Prisoner plaintiffs prosecuting civil rights actions have the right to call witnesses if they can demonstrate to the court the nature and materiality of the witness's testimony.[226] The Report of the Committee on Prisoner Civil Rights of the Federal Judicial Center suggests that the plaintiff who is incarcerated at the time of the action be required to summarize in a pretrial statement his testimony and the anticipated testimony of witnesses who are also

221. *See* Order, U.S.M. 4530.1A, United States Department of Justice, U.S. Marshal Service, June 21, 1978. *Accord* Story v. Robinson, 689 F.2d 1176 (3rd Cir. 1982).

The Supreme Court recently granted a writ of certiorari in a case addressing the district court's authority to direct United States marshals to transport state prisoners. Garland v. Sullivan, 737 F.2d 1283 (3d Cir. 1984), *cert. granted*, 105 S. Ct. 1166 (1985).

222. Story v. Robinson, 689 F.2d 1176, 1180 (3rd Cir. 1982).

223. Ballard v. Spradley, 557 F.2d 476, 481 (5th Cir. 1977) (rejecting the marshal's argument that the state's interests so outweigh those of the federal government that it should be required to bear total responsibility for the prisoners' transportation); Ford v. Allen, 728 F.2d 1369 (11th Cir. 1984)(per curiam).

224. *Id.* Ballard v. Spradley, 557 F.2d 476 (5th Cir. 1977); Moeck v. Zajackowski, 541 F.2d 177 (7th Cir. 1976). Note, however, that in a Seventh Circuit case subsequent to *Moeck*, the court held that the state could make an assessment against the United States Marshal Service for its costs associated with the production of an inmate plaintiff on the basis of a writ of habeas corpus ad testificandum. Ford v. Carballo, 577 F.2d 404, 407 (7th Cir. 1978) (federal court may impose duties to produce prisoners, but cannot impose the unreasonable burden of requiring the state to pay the costs associated with that production).

225. Story v. Robinson, 689 F.2d 1176, 1180-81 (3rd Cir. 1982).

226. *See, e.g.*, Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975); *cf.* Manning v. Lockhart, 623 F.2d 536, 539 (8th Cir. 1980) (per curiam) (trial court has the discretionary power to refuse to subpoena witnesses and prevent abuse of process). For a description of the factual showing a prisoner plaintiff may be required to make before a court will order the presence of prisoner witnesses, see Andrews v. Atkins, 100 F.R.D. 762, 763-65 (D. Kan. 1984). *See also* Miles v. Evans, 591 F. Supp. 623, 624-25 (N.D. Ga. 1984) (issuance of writ may be necessary to insure "adequate, effective and meaningful" assistance guaranteed in *Bounds*).

imprisoned.[227]

In the event the court determines that a witness's live testimony is required, however, the issue is whether a district court has the authority to order the payment of fees and mileage to witnesses subpoenaed by an indigent plaintiff in a civil rights action.[228] Although providing that witnesses may be compelled to appear in actions by plaintiffs proceeding in forma pauperis, the pauper statute does not specifically authorize payment of witness fees and mileage by the federal government. The courts are in disagreement on this issue. The Fourth Circuit has held that witnesses must appear without prepayment of fees and mileage costs since there is no explicit authorization to expend the public's funds in such a way.[229] Conversely, the Sixth Circuit has recognized that it is within the discretion of the district court to order payment of witness fees as well as other normal costs out of government funds under section 1915.[230]

The situation is different when the witnesses are currently incarcerated. Because they are in the custody of the government, these prisoners are not in a position similar to an ordinary witness who must incur private costs to testify. Courts that have reached the issue agree that prisoner witnesses are never entitled to witness fees and mileage.[231]

E. Repayment by Plaintiff

Allowing a prisoner to proceed in forma pauperis does not guarantee the prisoner immunity from any costs associated with the lawsuit.[232] Recently, courts have interpreted 28 U.S.C. § 1915 to delay payment of fees and costs until final determination of the

227. *See* REPORT, *supra* note 18, at 17 n.30; *see also* Andrews v. Atkins, 100 F.R.D. 762 (D. Kan. 1984).

228. 28 U.S.C. § 1915 (1982). *See generally* Catz & Guyer, *supra* note 109, at 669-70.

229. Marks v. Calendine, 80 F.R.D. 24, 29 (N.D. W. Va. 1978), *aff'd sub nom.* Flint v. Haynes, 651 F.2d 970 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982).

230. Morrow v. Igleburger, 584 F.2d 767, 770, 772 n.7 (6th Cir. 1978) (plaintiff must make sufficient showing that witness is necessary for the full presentation of the case in order to have these fees waived), *cert. denied*, 439 U.S. 1118 (1979); Johnson v. Hubbard, 698 F.2d 286, 290-91 (6th Cir.) (upholding refusal to pay witness fees for indigent nonprisoner plaintiff proceeding in forma pauperis), *cert. denied*, 104 S. Ct. 282 (1983); *accord* Flowers v. Turbine Support Division, 507 F.2d 1242, 1245 (5th Cir. 1975); White v. Sullivan, 368 F. Supp. 292, 293 (S.D. Ala. 1973).

231. Catz & Guyer, *supra* note 109, at 666-68; *see, e.g.*, Marchese v. United States, 453 F.2d 1268, 1270-71 (Ct. Cl. 1972); *In re* Witness Fees for Prisoner, 533 F. Supp. 401, 402 (E.D. Pa. 1982), *aff'd*, 697 F.2d 103, 104 (3rd Cir. 1983) (per curiam).

232. The statutory authority cited for allowing a court to assess fees against an in forma pauperis plaintiff is 28 U.S.C. § 1915(e) (1982). *See supra* note 109.

case, rather than entirely waving payment by pauper parties. In *Marks v. Calendine*,[233] the court held that fees, costs, and litigation expenses of prisoner plaintiffs can be assessed as part of a judgment order entered against a nonprevailing prisoner plaintiff who proceeded in forma pauperis. The court interpreted "fees and costs" to include filing fees, marshals' fees for service of process, and nonprisoner witness fees and mileage.[234]

V. CONCLUSION

The due process right of access to the courts has defined parameters; the right includes access in varying degrees to inmate assistance, trained legal assistance, law books and materials, writing materials, mail privileges, and communication with attorneys and courts. The benchmark of the right is "meaningful" access. The methods of implementing that access need not be cumulative. If a prison provides an adequate library, then it may not have to provide legal assistance programs. The prison may create restrictions on the vehicles of access, but those rules may not strip the right of its substance.

In analyzing the constitutionality of prison regulations that impinge on the prisoners' right of access, courts pay heed to the state's need for prison management, order, and security. Ultimately, the court must consider whether the prisoners' right of access is unduly compromised by the prison restriction. That is, it must consider the extent to which the prisoners' right of access to the courts is "burdened by a particular regulation or practice," and how that "weigh[s] against the legitimate interest of penal administration and the proper regard that judges should give to the expertise and discretionary authority of correctional officials."[235] If the restriction is not necessary to achieve legitimate administrative interests of the prison, or if less drastic means are available to accomplish the same objectives, then the regulation will be struck down. On the other hand, if the restriction only minimally affects the in-

233. 80 F.R.D. 24, 27 (N.D. W. Va. 1978), *aff'd sub nom.* Flint v. Haynes, 651 F.2d 970, 972-74 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982).

234. *Id.*; *see also* Harris v. Forsyth, 742 F.2d 1277, 1278 (11th Cir. 1984) (assessing costs to print appellate brief); Toner v. Wilson, No. 82-0608, slip op. (M.D. Pa. July 12, 1984) (available on LEXIS, Genfed library, Cases file) (court assessed fees as discovery sanction against indigent prisoner plaintiff); Chevrette v. Marks, 558 F. Supp. 1133, 1135 (M.D. Pa. 1983) and cases cited therein; Partee v. Lane, 528 F. Supp. 1254, 1265 (N.D. Ill. 1981).

235. *See* Procunier v. Martinez, 416 U.S. 396, 420-21 (1974).

mates' right of access to the courts and alternative forms of access exist, then the regulation will probably be upheld.

It is apparent that the prisoner plaintiff must confront myriad obstacles in prosecuting a civil rights action against prison authorities. If he proceeds in forma pauperis, as most prisoners do, he may have all fees and costs waived. It is more likely, however, that he will have the responsibility of paying some percentage of the fees himself. If he does not succeed in his case, he may be responsible for all the costs and fees associated with the action. As part of the pauper application process his complaint will be scrutinized by overworked judges and their law clerks to determine whether it is frivolous or malicious. He may or may not have been given the opportunity to amend, or even file, his complaint before it is dismissed. There will probably be no counsel appointed to assist him in his case. For those four percent of prisoner plaintiffs who actually get to trial, there is an outside chance that they or their witnesses will be allowed to appear personally.

The courts are left with the difficult task of sorting out legitimate prisoner complaints from frivolous ones. The frustration that the courts experience in this area is understandable. Despite their predicament, however, the courts share a constitutional duty with the states to ensure that prisoners have meaningful access to the courts.[236] This entails curbing the practice of using summary dismissals as a means of diminishing the number of prisoner suits filed in federal courts.

236. *See supra* notes 181-82 and accompanying text.