

Protecting the Courts from the Barrage of Frivolous Prisoner Litigation: A Look at Judicial Remedies and Ohio's Proposed Legislative Remedy

GAIL L. BAKAITIS DEWOLF

I. INTRODUCTION

There has been an explosion of civil rights lawsuits brought by prisoners over the past three decades. From just a few hundred in the 1960s to more than 33,000, prisoner lawsuits accounted for fifteen percent of all civil suits filed in the federal courts in 1993.¹ The burden is particularly heavy in state courts, where civil rights suits are filed by inmates of state prisons who do not have to exhaust grievance processes before filing suit, a limit imposed upon federal prisoners.²

While prisoners may cry, "alas, the mutinous ship of unconstitutionality has sailed in the harbor of my rights once more,"³ the truth is that most filings by prisoners are frivolous.⁴ Suits range from charges of cruel and unusual punishment for allowing a prisoner's ice cream to melt,⁵ and similar charges

¹ Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort to Limit Filings*, N.Y. TIMES, Mar. 21, 1994, at A1.

² Dunn, *supra* note 1, at B4; *see also* 42 U.S.C. § 1997(e) (1988) (providing that federal courts may require prisoners to exhaust administrative remedies before having their claims heard in court).

³ Elizabeth Rhodes, *Lone Warrior for Justice?—Jailhouse Lawyer's Filings Brought Special Ruling by Supreme Court*, SEATTLE TIMES, May 20, 1991, at A1.

⁴ Michael J. Mueller, Note, *Abusive Pro Se Plaintiffs in the Federal Courts: Proposals for Judicial Control*, 18 U. MICH. J.L. REF. 93, 102 n.30 (1984); *see also* Michael Noone McCarty, *Limitation of State Prisoners' Civil Rights Suits in the Federal Courts*, 27 CATH. U. L. REV. 115, 116-17 (1977) (discussing the temptation of prisoners bringing actions in forma pauperis to file frivolous or malicious lawsuits).

⁵ Dunn, *supra* note 1, at A1. Courts have generally held that punishment for an offense is cruel and unusual if there is a gross disparity between the offense committed and the punishment imposed for more serious offenses, *see* *Weems v. United States*, 217 U.S. 349 (1910), or where the proportionality of the punishment to the crime is so disproportionate as to shock the sense of justice. *See* *Solem v. Helm*, 463 U.S. 277 (1983). "[While prison c]onditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment . . . to the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." *Wilson v. Seiter*, 893 F.2d 861, 861 (6th Cir. 1990) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)), *vacated and remanded*, 501 U.S. 294 (1991). It is difficult to believe that a claim alleging cruel and unusual punishment for allowing an inmate's ice cream to melt could be brought in good

for receiving creamy peanut butter instead of crunchy,⁶ to a three-year battle in which a prisoner claimed a conspiracy by the Arizona State Department of Corrections to bombard him with lasers, ultrasound, and microwaves in order to send him subliminal messages, all (he alleged) in violation of his civil rights.⁷

A number of prisoners filing frivolous claims are "career plaintiffs"⁸ who abuse the courts to pursue illegitimate goals.⁹ Many are driven by a desire to further personal vendettas or to show contempt and disrespect for the legal system;¹⁰ others have fundamental personality and mental health problems;¹¹ and still others are simply bored.¹² Whatever their motivations, the result has

faith.

⁶ See Dunn, *supra* note 1, at B4. For additional commentary, see Steven Fromm, *Jailhouse Lawyers: A Growth Industry*, NEW JERSEY LAW., Oct. 17, 1994, at 1.

⁷ Pamela Manson & Karen Kaplan, *Prisoners' Suits over Trifles Jam U.S. Courts, State Claims*, ARIZONA REPUBLIC, July 18, 1993, at B1. Other bizarre examples of prisoner litigation include the case of a federal prisoner who declared himself president of the fictitious "Olympian Nation" and applied for diplomatic relations with the United States—thereby, he alleged, entitling him to diplomatic immunity for his crime. When immunity was denied, the prisoner declared himself *persona non grata* and demanded that he be expelled from the United States. When that was denied, the "President of the Olympian Nation" declared war on the judge. Laura Blumenfeld, *Case Dismissed! Those Loopy Lawsuits; Nothing Clogs the Wheels of Justice Like a Lost Cause*, WASH. POST, Aug. 30, 1991, at C4. Additionally, a prisoner who represented himself filed a \$5 trillion suit against the Attorney General of Texas, calculating his attorney fees at \$100,000 an hour. The prisoner asked officials to deposit half of the money in his trust fund and give the rest to his mother. He also enclosed deposit slips for the court's convenience. *Id.*

⁸ Mueller, *supra* note 4, at 104.

⁹ *Id.*; see, e.g., *In re Green*, 669 F.2d 779, 782 (D.C. Cir. 1981) ("[G]reen has deliberately flooded the courts with his complaints and petitions (and encouraged other prisoner churchmembers to do the same), in a vain attempt to gain his release from prison.").

¹⁰ Mueller, *supra* note 4, at 107; see, e.g., *Carter v. Telectron, Inc.*, 452 F. Supp. 944, 947 (S.D. Tex. 1977) ("[T]he bulk of Carter's filings represent a number of lengthy private wars and vendettas which Carter has carried out at no monetary expense to himself pursuant to 28 U.S.C. § 1915.").

¹¹ Mueller, *supra* note 4, at 109; see, e.g., *In re Martin-Trigona*, 737 F.2d 1254, 1256 57 (2d Cir. 1984) (citing several cases involving Anthony R. Martin-Trigona in which his personality was questioned), *cert denied*, 474 U.S. 1061 (1986).

¹² See Jonathan C. Rose & David K. Karp, *Congress' Inaction to Blame for Federal Court Backlog*, LEGAL TIMES, Jan. 23, 1984, at 14, 21; see also *In re Martin-Trigona*, 573 F. Supp. 1245, 1253 (D. Conn. 1983) ("His career in court establishes that, for him, legal trouble is a veritable sport, a means of making life challenging and enjoyable."), *aff'd in part, vacated in part and remanded*, 737 F.2d 1254 (2d Cir. 1984), *cert denied*, 474 U.S. 1061 (1986).

been backlogged courts and an enormous expense to the taxpayers.¹³ A balancing must take place between protecting prisoners' rights to access the civil courts, and protecting the courts and government defendants from the necessity of processing frivolous claims and defending against abusive litigation tactics. The result must be fair, uniform, and effective.

The purpose of this Note is to examine the phenomenon of frivolous prisoner litigation. Part II describes this problem and Part III looks at prisoners' rights to access the court system and various judicial approaches which have limited these rights when frivolous prisoner litigation has become abusive. Included in Part III is a brief discussion of why these judicial responses have not been adequate in remedying the problem of frivolous prisoner lawsuits. Part IV describes the increasing demand for legislation to address the difficulties of multiple, frivolous filings by prisoners and examines legislation proposed in Ohio to remedy the problem of frivolous prisoner litigation. Part V then analyzes this legislation under the United States Constitution.

II. ABUSIVE PRISONER LITIGATION

Federal courts have defined frivolous lawsuits in light of a number of policy concerns.¹⁴ The term "frivolous" is generally defined as "without arguable substance in law and in fact."¹⁵

¹³ See *Procup v. Strickland*, 792 F.2d 1069, 1071 (11th Cir. 1986) ("Every lawsuit filed, no matter how frivolous or repetitious, requires the investment of court time, whether the complaint is reviewed initially by a law clerk, a staff attorney, a magistrate, or the judge."); see also *infra* notes 26-27 and accompanying text.

¹⁴ Stephen M. Feldman sets forth six policy factors considered by the federal courts:

First, an enormous number of in forma pauperis complaints are filed, and the vast majority of these are meritless. Second, unlike paying plaintiffs, in forma pauperis plaintiffs have no economic disincentives to filing meritless claims. Third, in forma pauperis claims are a drain on public funds and judicial resources. Fourth, in forma pauperis plaintiffs who are also prisoners arguably have an incentive to file meritless claims: they might get a trip to the courthouse. Fifth, allowing meritless claims of prisoners to progress through the judicial system is likely to undermine the authority of prison officials and interfere with prison discipline. Finally, as a matter of comity, the federal courts should avoid conflicts with state authorities by minimizing the instances where they tell state authorities how to manage state prisons.

Stephen M. Feldman, *Indigents in the Federal Courts: The In Forma Pauperis Statute—Equality and Frivolity*, 54 *FORDHAM L. REV.* 413, 419-20 (1985).

¹⁵ *Woodall v. Foti*, 648 F.2d 268, 271 (5th Cir. 1981); see also *Franklin v. Murphy*,

Although not all frivolous suits should be categorized as “abusive,” nor should every plaintiff who files a frivolous, indefinite, or meritless complaint be labeled an “abusive litigant,”¹⁶ frivolous suits may become abusive when filed repeatedly by the same individual.¹⁷ Robert Procup is a prime example of an abusive prisoner litigant because “the court can conservatively estimate that Procup has himself filed in excess of 300 lawsuits within the past few years. Furthermore, that total does not include the cases in which [he] has acted as a ‘law clerk’ for various other inmates.”¹⁸ Similarly, Reverend Clovis Carl Green, Jr. would qualify as an abusive prisoner litigant,¹⁹ having filed over

745 F.2d 1221, 1227–28 (9th Cir. 1984) (adopting the holding of *Watson v. Ault*, 525 F.2d 886, 892 (5th Cir. 1976) that in determining if a complaint is frivolous the court must make “an assessment of the claim presented, *i.e.*, is there a factual and legal basis, of constitutional dimension, for the asserted wrong, however inartfully pleaded.”); *Crisafi v. Holland*, 655 F.2d 1305, 1307–08 (D.C. Cir. 1981) (a complaint is frivolous if there is no factual or legal basis for remedy of the asserted wrong and no claim upon which relief can be granted by the court); *Wiggins v. New Mexico State Supreme Court Clerk*, 664 F.2d 812, 815 (10th Cir. 1981) (“The test of legal frivolity is whether a plaintiff can make a rational argument on the law and facts in support of his claim.”) (citing *Bennett v. Passic*, 545 F.2d 1260 (10th Cir. 1976)). *But see* *Malone v. Colyer*, 710 F.2d 258, 260–61 (6th Cir. 1983) (affirming the standard set forth in *Byrd v. Wilson*, 701 F.2d 592, 594 (6th Cir. 1983) that if it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief, the action is frivolous and may be dismissed).

¹⁶ See Howard F. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 419, 438, 440 (1993). Eisenberg suggests that in some cases, to the prisoner, the claims are not frivolous.

“[F]rivolity” is viewed only from the point of view of the court, and not from the viewpoint of the prisoner when, in fact, the inmate may have very different objectives in filing suit. Many prisoners file suit because the prison administration had dealt with them in some arbitrary, irrational, bureaucratic, or dehumanizing manner, even when no constitutional—or even legal—right is involved.

Eisenberg also suggests that for some prisoners the ability to file suits is therapeutic, and access to the courts operates as an important safety valve. *Id.*

¹⁷ Mueller, *supra* note 4, at 102 n.30.

¹⁸ *Procup v. Strickland*, 567 F. Supp. 146, 150–51 (M.D. Fla. 1983), *rev'd*, 760 F.2d 1107 (11th Cir. 1985). Prisoners, such as Procup, who assist other prisoners in writing and filing complaints are often referred to as “jail-house lawyers” or “writ writers.” *Green v. Wyrick*, 428 F. Supp. 732 (W.D. Mo. 1976), *aff'd sub nom. In re Green*, 586 F.2d 1247, 1251 (8th Cir. 1978), *cert. denied*, 440 U.S. 922 (1979).

¹⁹ See, *e.g.*, *Green*, 428 F. Supp. at 736 (“[D]espite the experience of having filed ‘hundreds’ of lawsuits, petitioner consistently and deliberately has failed to follow the proper procedures and rules for filing actions in this Court.”).

550 complaints in the federal and state courts.²⁰ Likewise, Anthony R. Martin-Trigona, a pro se litigant, who has filed more than 250 civil actions, appeals, and other matters in less than a decade,²¹ would be considered an abusive prisoner litigant. "The purpose, nature and effect of Anthony R. Martin-Trigona's career in litigation is simply to multiply litigation Martin-Trigona has managed to have a significant malign effect on judicial administration to the prejudice of others seeking justice" ²² And the list of abusive prisoner litigants continues.²³

As one court has noted, prisoner litigants often possess several advantages over ordinary litigants. These include: "time to draft multiple and prolonged pleadings; ability to proceed in forma pauperis and thus escape any financial obstacles confronting the usual litigant; and availability of free materials which the state must provide the prisoner, including paper and postage."²⁴ While a staggering ninety-seven percent of the 33,000 prisoner lawsuits filed in federal courts in 1993 were dismissed before trial, and only thirteen percent of those that continued resulted in any success for the prisoners—the worst rate of any type of civil suit filed in the federal courts²⁵—it was not without a great expense of precious court time,²⁶ and considerable expense to taxpayers.²⁷

²⁰ See *Green v. Arnold*, 512 F. Supp. 650, 651 (W.D. Tex. 1981); see also *In re Green*, 669 F.2d 779, 781 (D.C. Cir. 1981) (per curiam) ("Clovis Carl Green is in all likelihood the most prolific prisoner litigant in recorded history."); *Green v. Camper*, 477 F. Supp. 758, 759 68 (W.D. Mo. 1979) (listing over 500 cases and noting that Green has also drafted hundreds of complaints on behalf of other inmates).

²¹ See *In re Martin-Trigona*, 573 F. Supp. 1245, 1261 (D. Conn. 1983), *aff'd in part, vacated in part and remanded*, 737 F.2d 1254 (2d Cir. 1984), *cert denied*, 474 U.S. 1061 (1986).

²² *Id.* at 1264 65.

²³ See, e.g., *Franklin v. Oregon*, 563 F. Supp. 1310, 1333 (D. Or. 1983) (plaintiff claimed to have more than 140 pending lawsuits); *Carter v. Telectron, Inc.*, 452 F. Supp. 944, 946 (S.D. Tex. 1977) (noting that Albert Carter, as a pro se litigant, is known to have filed over 178 cases).

²⁴ *Procup v. Strickland*, 792 F.2d 1069, 1071 (11th Cir. 1986).

²⁵ *Dunn*, *supra* note 1, at A1.

²⁶ See *supra* note 13 (citing *Procup*, 792 F.2d at 1071). In the one-year period ending June 30, 1993, 1,652 federal lawsuits were filed by prisoners in New York State. *Dunn*, *supra* note 1, at A1. That total was exceeded by Texas, California, Missouri, and Florida. *Id.* The New York Attorney General estimated that his office had a backlog of 28,000 prisoner lawsuits and stated: "This has become the single most prolific source of litigation. It's a major burden on us." *Id.* at B4. Similarly, an assistant Arizona attorney general estimates that inmates have filed nearly half of the cases pending in federal courts in Arizona, stating: "That means 16,000 prisoners file as many cases as 3.4 million law-abiding Arizonians." *Manson & Kaplan*, *supra* note 7, at B1. He further stated: "Only one to two percent of prisoner litigation is legitimate with the rest amounting to 'recreational

Must the courts stand by, helplessly subjected to the barrage of frivolous lawsuits? The answer, ultimately, is no.

III. PRISONERS AND THE JUDICIAL SYSTEM

A. Prisoners' Rights to Access the Courts

Prisoners undoubtedly have a right to access the courts.²⁸ While this right is not absolute, as the Supreme Court in *Bounds v. Smith* stated, access must be "adequate, effective and meaningful."²⁹ The Court in *Bounds* noted that the right of access imposes an affirmative duty on prison officials to assist inmates in preparing and filing legal papers, either by establishing a law library or by providing adequate assistance from persons trained in the law.³⁰ Prison officials are not required to provide both, however, as long as access is meaningful.³¹

Many prisoners access the courts through in forma pauperis petitions.³²

litigation." *Id.* For additional description of several problems which result from multiple frivolous prisoner lawsuits, see Mueller, *supra* note 4, at 113. Mueller describes:

The most apparent effect of excessive litigation is the imposition of unnecessary burdens on adjudicators and useless consumption of court resources. As caseloads increase, judges have less time to devote to each case. A lack of adequate time for reflection threatens the quality of justice. Second, long delays in adjudication create public dissatisfaction and frustration with the courts Fourth, allowing abusive litigation to go unchecked allows prolonged harassment of defendants.

Id.

²⁷ See John Sanko, *Norton Calls for Laws to Quash Frivolous Lawsuits*, ROCKY MOUNTAIN NEWS, Aug. 30, 1994, at 8A (the Arizona Attorney General's Office spent 5,580 hours on frivolous lawsuits last year at a cost of \$242,000).

²⁸ See *Bounds v. Smith*, 430 U.S. 817, 824-25, 828 (1977) (holding that prisoners have fundamental constitutional rights to adequate, effective, and meaningful access to courts to challenge violations of constitutional rights); *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (prisoners' rights of access to courts may not be denied or obstructed). *But see Bounds*, 430 U.S. at 839-40 (1977) (Rehnquist, J., dissenting) (the "fundamental constitutional right of access to the courts' . . . is found nowhere in the Constitution. . . . [T]he 'fundamental constitutional rights . . . ' which the Court announces today is created virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived."); *id.* at 833-34 (Burger, C.J., dissenting) (quoting the majority opinion). For further discussion see Feldman, *supra* note 14, at 432-36.

²⁹ 430 U.S. at 822.

³⁰ *Id.* at 828.

³¹ See *id.* at 832.

³² In forma pauperis means "in the character or manner of a pauper." Alexander

The main provision of the modern in forma pauperis statute, 28 U.S.C. § 1915(a), enables a litigant to file a civil suit without paying a filing fee.³³ However, court permission to proceed in forma pauperis is itself a matter of privilege and not of right, and denial of in forma pauperis status does not violate the applicants' rights to due process.³⁴

Under 28 U.S.C. § 1915(d), a court may dismiss an in forma pauperis complaint "if satisfied that the action is frivolous or malicious."³⁵ The discretionary controls contained in this provision enable a court to dismiss an action sua sponte "if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious."³⁶

In defining the purpose of § 1915(d), the First Circuit Court of Appeals in *O'Connell v. Mason*³⁷ stressed the responsibility of courts to ensure a reasonable, good faith use of the in forma pauperis statute:

It is quite clear that Congress, while intending to extend to poor and meritorious 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 from costs" for the purpose

Wohl, *Barred from Court: Some Observers Worried by Justices' Rejection of Indigent Petitions*, 80 ABA J., Feb. 1994, at 44. For a discussion of in forma pauperis filings, see Feldman, *supra* note 14; William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610 (1979).

³³ 28 U.S.C. § 1915(a)(1982). That section 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 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.

Id. A person must ordinarily pay a filing fee of \$120 before filing a civil action. See 28 U.S.C. § 1914(a) (1982).

³⁴ See *Weller v. Dickson*, 314 F.2d 598, 600 (9th Cir.) ("In connection with in forma pauperis proceedings . . . the benefits are entirely statutory, they are granted as a privilege and not as a matter of right. The refusal to grant is not a violation of due process."), *cert. denied*, 375 U.S. 845 (1963); see also *Startti v. United States*, 415 F.2d 1115, 1116 (5th Cir. 1969) ("There is no absolute right to be allowed to proceed in forma pauperis in civil matters; rather it is a privilege extended to those unable to pay filing fees when the action is not frivolous or malicious.").

³⁵ 28 U.S.C. § 1915(d) (1982).

³⁶ *Carter v. Telectron*, 452 F. Supp. 944, 950 (S.D. Tex. 1977).

³⁷ 132 F. 245 (1st Cir. 1904).

of harassing those with whom they were not in accord, by subjecting them to vexatious and frivolous legal proceedings.³⁸

Thus, while prisoners are entitled to meaningful access to the courts,³⁹ this right may be curbed when it is abused.⁴⁰ In addition to dismissing frivolous claims *sua sponte* under the *in forma pauperis* statute, courts have employed a number of other techniques in an attempt to remedy the problem of abusive prisoner litigation.

B. *Judicial Attempts to Remedy Abusive Prisoner Litigation*

Courts have taken numerous approaches in attempting to alleviate the problem of multiple filings of frivolous lawsuits by prisoners.⁴¹ "In devising methods to attain the objective of curtailing such prisoner activity, however, courts must carefully observe the fine line between legitimate restraints and impermissible restrictions on prisoners' constitutional right to access the courts."⁴²

One method courts have used to inhibit multiple and repetitious prisoner filings of frivolous claims is to enjoin litigants from litigating specific claims, or claims arising from the same set of factual circumstances, similar to *res judicata*, or issue and claim preclusion.⁴³ Recognizing that "plaintiffs clearly possess no constitutional right to harass the court and state officials with malicious lawsuits"⁴⁴ courts rely on the power given by 28 U.S.C. § 1651(a) "to enjoin litigants who are abusing the court system,"⁴⁵ and those "litigants

³⁸ *Id.* at 247.

³⁹ *See supra* note 28.

⁴⁰ For examples of abusive prisoner litigation see *supra* notes 18 23 and accompanying text.

⁴¹ The court in *Procup v. Strickland*, 792 F.2d 1069 (11th Cir. 1986) lists several of the methods courts have employed to curtail frivolous prisoner litigation. *Id.* at 1071. For additional analysis of judicial responses to abusive prisoner litigation, see Mueller, *supra* note 4, at 124 63.

⁴² *Procup*, 792 F.2d at 1071.

⁴³ *See Harrelson v. United States*, 613 F.2d 114, 116 (5th Cir. 1980) (*per curiam*) (affirming the district court's injunction).

⁴⁴ *Hill v. Estelle*, 423 F. Supp. 690, 694 (S.D. Tex.), *aff'd*, 543 F.2d 754 (5th Cir. 1976).

⁴⁵ *Harrelson*, 613 F.2d at 116; *see also In re Green*, 598 F.2d 1126, 1128 (8th Cir. 1979) (*en banc*) ("In view of Green's continued abuse this court orders that no further petitions for writs of mandamus may be filed in this court by the petitioner challenging the regularity of proceedings in the district court.").

who are using the courts as a stage for their vendetta of harassment."⁴⁶

This method, however, may be limited in effectuating its intent because most career plaintiffs, like Martin-Trigona, Procup, and Franklin, are proficient at changing dates, names, and other facts to avoid these injunctions.⁴⁷ It is often difficult to detect relitigation of previous claims due to the expansive volume of claims filed and the constant changing of named defendants by prisoners attempting to escape the confines of the injunctions.⁴⁸

As they search for a solution to the problem of frivolous prisoner litigation, some courts have ordered litigants to seek leave of the court before filing pleadings in any new or pending lawsuit;⁴⁹ others have directed litigants to attach a list of any pleadings previously filed involving the same, similar, or related causes of action to all future complaints and have required litigants to

⁴⁶ *Hill*, 423 F. Supp. at 694.

⁴⁷ Mueller, *supra* note 4, at 128 n.169; *see also In re Martin-Trigona*, 573 F. Supp. 1245, 1265 (D. Conn. 1983) (nationwide injunctive relief, an extraordinary remedy, ordered as appropriate "where principles of res judicata and collateral estoppel are powerless to stem the tide of litigation."), *aff'd in part, vacated in part and remanded*, 737 F.2d 1254 (2d Cir. 1984), *cert denied*, 474 U.S. 1061 (1986); *Procup v. Strickland*, 567 F. Supp. 146, 154 (M.D. Fla. 1983) ("Procup advances approximately five or six different types of claims in which only the names of the wrongdoers and the dates on which the wrong was supposedly perpetrated have been changed . . . this tactic makes it difficult for the Court to effectuate wholesale consolidation of his cases."), *rev'd*, 760 F.2d 1107 (11th Cir. 1985); *Franklin v. Oregon*, 563 F. Supp. 1310, 1333 (D. Or. 1983) ("It is well within the broad scope of . . . 28 U.S.C. § 1651, for a district court to issue an order restricting the filing of meritless cases by a litigant whose manifold complaints raise claims identical or similar to those that have already been adjudicated But this type of order would not significantly deter Franklin because his claims are more often ridiculous than repetitive.").

⁴⁸ *See, e.g., Carter v. Telectron, Inc.*, 452 F. Supp. 944, 1002 (S.D. Tex. 1977) ("[A] pro se litigant, devious enough in most instances to avoid more expedient remedies such as res judicata . . . or the across-the-board imposition of a bar against further legal proceedings once the merits of an action have been determined . . . can successfully prolong a cause of action through a series of autonomous courts and utilize tactics designed to harass both courts and defendants, all at public expense.").

⁴⁹ *See, e.g., Abdullah v. Gatta*, 773 F.2d 487, 488 (2d Cir. 1985) (per curiam); *Urban v. United Nations*, 768 F.2d 1497, 1500 (D.C. Cir. 1985) (per curiam); *In re Martin-Trigona*, 737 F.2d 1254 (2d Cir. 1984), *cert. denied*, 474 U.S. 1061 (1986); *Green v. Warden*, 699 F.2d 364, 370 (7th Cir.), *cert. denied*, 461 U.S. 960 (1983); *In re Green*, 669 F.2d 779, 786 (D.C. Cir. 1981) (per curiam); *see also Carter v. United States*, 733 F.2d 735, 737 (10th Cir. 1984) (per curiam), *cert. denied*, 469 U.S. 1161 (1985) (while not imposing an injunction in this particular case, the court recognized the power of courts to enter injunctions and to "impose conditions upon a litigant—even onerous conditions—so long as they . . . are . . . not so burdensome as to deny the litigant meaningful access to the courts.").

send an extra copy of each pleading filed to the law clerk of the chief judge.⁵⁰ These methods, however, are not efficient enough to remedy the enormous magnitude of frivolous prisoner litigation. It is difficult to determine if a prisoner has complied with the mandates of this proposed solution since an enjoining court cannot know every court in which the prisoner plaintiff files subsequent complaints.⁵¹ Furthermore, the varied standards for granting leave to file within the different courts prohibits a uniform application of the strictures of this remedy across judicial realms.⁵²

Courts have also required accompanying affidavits with all future claims being raised, certifying that the claims are new—having never before been raised and disposed of on the merits by any federal court—in an attempt to deal with vexatious and repetitious filings. This approach includes a criminal contempt of court charge for failure to certify or upon false certification.⁵³ This method, however, has also had minimal impact on the problem of abusive prisoner litigation. First, it is difficult to implement a system which verifies the validity of prisoner affidavits which purport to certify the validity of a claim.

⁵⁰ See, e.g., *Green v. White*, 616 F.2d 1054, 1056 (8th Cir. 1980) (per curiam).

⁵¹ See *Green v. Camper*, 477 F. Supp. 758, 768 n.3 (W.D. Mo. 1979) ("These five hundred plus cases do not include any of the uncounted hundreds of cases inmate Green has filed under the name or ostensibly on behalf of other inmates. While he is enjoined from writ writing in the Western District of Missouri, he continues to engage in writ writing in other jurisdictions."); see also *In re Martin-Trigona*, 573 F. Supp. 1245, 1265 (D. Conn. 1983) ("[M]artin-Trigona has not been encumbered in his litigation by geographical boundaries. He has been an active litigant in, among others, courts in Massachusetts, Connecticut, New York, the District of Columbia, and Illinois."), *aff'd in part, vacated in part and remanded*, 737 F.2d 1254 (2d Cir. 1984); *Carter v. Telectron, Inc.*, 452 F. Supp. 944, 947, 989 (S.D. Tex. 1977) ("[T]he de-centralized and uncoordinated court system has been an easy target for a litigant who, although schooled in law, lacks requisite good faith in implementing its use . . . Carter thrives on the lack of communication and coordination between courts which, given their autonomous nature and the necessary focus on their own heavy caseload, generally remain unaware of the activities and experiences of other courts, even other court units within the same unit."); Mueller, *supra* note 4, at 139.

⁵² Mueller, *supra* note 4, at 138.

⁵³ See *Green v. Warden*, 699 F.2d 364, 369-70 (7th Cir.) (in making the order the court noted: "The requirement that he certify to the novelty of his claims (which is distinct from actually proving them) can hardly be described as burdensome and is necessary in light of the avalanche of pleadings, petitions, and other papers of Green's that have deluged the courts."), *cert. denied*, 461 U.S. 960 (1983); *In re Green*, 669 F.2d 779, 787 (D.C. Cir. 1981) (per curiam) (while noting the severity of the order, the court, frustrated by the frivolous filings, stated: "[W]e are saying point-blank that if he continues to show his contempt for the orderly judicial process, the process will accord him further [prison] time as summarily as the law allows."); *Demos v. Kincheloe*, 563 F. Supp. 30, 33 (E.D. Wash. 1982).

This is due to the great volume of claims filed and the creativity of prisoners in altering the faces of the documents but not the substance of the claims filed.⁵⁴ Second, prisoners ineligible for parole for many years are not likely to be deterred by the threat of a contempt of court sentence for falsifying affidavits.⁵⁵

More drastic approaches have been taken by courts to limit the filing of in forma pauperis claims by abusive prisoner plaintiffs to those who allege actual or threatened physical harm, and to require payment of a filing fee to bring other claims.⁵⁶ In particular, this was a remedy to which some courts resorted in attempting to deal with the litigious Reverend Clovis Green.⁵⁷ Courts have held, however, that the legitimacy of a total ban on all in forma pauperis filings by a particular litigant as a sanction for abusive filings is questionable.⁵⁸ Additionally, limiting claims to only those who allege actual or threatened physical harms poses other problems which prevent it from being a valid solution. First, it is an onerous response which establishes presumptions of frivolity in subsequent suits.⁵⁹ This is subversive of the congressional intent behind 28 U.S.C. § 1915 to provide indigents with a case-by-case analysis comparable to that provided to more affluent plaintiffs.⁶⁰ Also, abusive prisoner plaintiffs can disarm the effect of these restrictions by simply including allegations of physical harms in future complaints.⁶¹ Further, while limiting the

⁵⁴ See *supra* notes 46-47 and accompanying text.

⁵⁵ See *Procup v. Strickland*, 567 F. Supp. 146, 159 & n.12 (M.D. Fla. 1982) (noting that the Reverend Clovis Carl Green, Jr., originally sentenced to a ten-year imprisonment term for rape, continued his numerous legal activities for other prisoners despite receiving several criminal contempt sentences for violating an injunction against writ-writing, and that it would be unlikely that Procup, serving a sentence of life in prison, would be deterred by a contempt of court charge), *rev'd*, 760 F.2d 1107 (11th Cir. 1985).

⁵⁶ See *Green v. White*, 616 F.2d 1054, 1055-56 (8th Cir. 1980) (*per curiam*).

⁵⁷ See *id.*

⁵⁸ See *Abdullah v. Gatto*, 773 F.2d 487, 488 (2d Cir. 1985) (*per curiam*) (stating that such an order is overbroad, but may be cured by requiring plaintiff to seek leave of the district court before filing such actions); *Franklin v. Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984) (directing the district court to amend its order to "avoid the constitutionally questionable conclusive presumption that all of Franklin's subsequent submissions are frivolous or malicious."); *Carter v. United States*, 733 F.2d 735, 736-37 (10th Cir. 1984) (*per curiam*) (holding that the district court's order of requiring the full payment of filing fees unduly impaired the appellant's right to access the court), *cert. denied*, 469 U.S. 1161 (1985); *In re Green*, 669 F.2d 779, 786 (D.C. Cir. 1981) (*per curiam*) (rejecting the district court's order directing the clerk not to file any further papers submitted by Green, but supporting the notion that courts are nonetheless entitled to take severe action when warranted).

⁵⁹ See *In re Green*, 669 F.2d at 786.

⁶⁰ Mueller, *supra* note 4, at 146.

⁶¹ See, e.g., *Procup v. Strickland*, 567 F. Supp. 146, 160 n.13 (M.D. Fla. 1983)

privileges of the in forma pauperis statute will sometimes be useful,⁶² it will not deter prisoners who pay their own filing fees and other costs while bombarding the court system with abusive filings.⁶³

Finally, some courts have attempted to remedy the problem of abusive prisoner litigation through use of their injunctive powers, by limiting the number of filings allowed by particular inmates,⁶⁴ or entering injunctions against abusive prisoners acting as jail-house lawyers for other inmates.⁶⁵ However, limiting jail-house lawyering could lead to challenges involving the First Amendment right to association.⁶⁶ Additionally, as previously noted, injunctions limiting the number of claims allowed to be filed can be overbroad in scope.⁶⁷ Finally, injunctions leave the courts with the difficult task of

("This proposal would be an open invitation for Procup to proceed apace with this abuse of the system by including the "magic" allegation of physical injury to his person."), *rev'd*, 760 F.2d 1107 (11th Cir. 1985); *Franklin v. Oregon*, 563 F. Supp. 1310, 1333 (D. Or. 1983) ("It would not take long before all of Franklin's complaints 'would allege some type of physical harm and of course, all would be of a constitutional magnitude.'") (quoting *Demos v. Kincheloe*, 563 F. Supp. 30, 34 (E.D. Wash. 1982)).

⁶² See Mueller, *supra* note 4, at 143.

⁶³ See, e.g., *In re Martin-Trigona*, 573 F. Supp. 1245 (D. Conn. 1983), *aff'd in part, vacated in part and remanded*, 737 F.2d 1254 (2d Cir. 1984) (noting that the district court and court of appeals had repeatedly denied Martin-Trigona's permission to proceed in forma pauperis for failing to state facts in supporting affidavit sufficient to demonstrate indigency).

⁶⁴ See *Franklin*, 563 F. Supp. at 1334 (limiting the prisoner to six in forma pauperis filings per year).

⁶⁵ See *Hanson v. Goodwin*, 432 F. Supp. 853, 853 (W.D. Wash.), *appeal dismissed*, 566 F.2d 1181 (9th Cir. 1977) (ordering that "plaintiffs shall not advise, counsel, or assist in any way any other person to commence such lawsuit or other legal proceeding"); *Green v. Wyrick*, 428 F. Supp. 732 (W.D. Mo. 1976) (Green was perpetually enjoined and restrained from acting as a "writ writer" or "jailhouse lawyer."), *aff'd sub nom. In re Green*, 586 F.2d 1247, 1251 (8th Cir. 1978), *cert. denied*, 440 U.S. 922 (1979).

⁶⁶ Mueller, *supra* note 4, at 133; see U.S. CONST. amend. I; see generally *NAACP v. Buttons*, 371 U.S. 415 (first Supreme Court case holding that the right of access to the courts protects activities of political and social organizations).

⁶⁷ See *supra* notes 58-60 and accompanying text. *But see Franklin v. Murphy*, 745 F.2d 1221, 1232 (9th Cir. 1984) (in approving the district court's injunction, the court of appeals imposed the following qualification: "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 limitation 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.").

monitoring prisoner filing activities;⁶⁸ and there are those prisoners who will blatantly defy such injunctive orders.⁶⁹

Although this list of judicial remedies is not exhaustive,⁷⁰ it is extensive and illustrates two fundamental problems with judicial remedies. First, despite the extensive number of judicial remedies available, courts are unable to master the fundamental problem of abusive prisoner litigation alone. While some restraints are legitimate, these restraints are often ineffective at offering a broad solution to the problem; other restraints are either ineffective, or of questionable constitutionality. Second, the judicial remedies are not uniform; application of the varied remedies leads to inconsistencies in both results and prisoners' expectations of the court system. A solution is needed which offers broad coverage, uniformity in application, and an effective result.

IV. REMEDYING FRIVOLOUS PRISONER LITIGATION THROUGH LEGISLATION

A. *The Need for Legislation to Protect Courts from Frivolous Prisoner Litigation*

Despite attempted judicial remedies, the problem of multiple filings of frivolous claims by prisoners has not been alleviated. In Ohio alone, it cost the Attorney General's Office more than \$1.35 million to defend the State against more than 600 inmate civil lawsuits in 1993, and this figure does not include the costs incurred by the Department of Rehabilitation and Corrections for such things as gathering documents and transporting inmates to court.⁷¹ In fact, the

⁶⁸ Mueller, *supra* note 4, at 132.

⁶⁹ See, e.g., *Green v. Camper*, 477 F. Supp. 758, 768 n.3 (W.D. Mo. 1979) ("While he is enjoined from writ writing in the Western District of Missouri, [Green] continues to engage in writ writing in other jurisdictions.").

⁷⁰ The *Procup* court notes that other restrictions that might be considered include: limiting the number of pages to a complaint and other pleadings; requiring a plaintiff to file an affidavit setting forth what attempts he has made to obtain an attorney to represent him; and limiting further pleadings without order of the court, after the complaint has been filed. 792 F.2d 1069, 1071 (11th Cir. 1986). For further discussion of these, and other judicial remedies, see Mueller, *supra* note 4, at 125-63.

⁷¹ *Hearings on S.B. 261 Before the Ohio Senate Judiciary Criminal Justice Subcomm.*, 120th General Assembly (1994) (testimony of Bill Butler, Attorney General's Office) [hereinafter "Butler Testimony"] (copy on file with author). Senate Bill 261 and House Bill 679 were predecessors to the legislation currently pending in the Ohio legislature. These proposed bills were virtually identical to current H.B. 455 and S.B. 196. See *infra* notes 88-111 for a discussion of the current legislation.

The cost of inmate litigation stems from several factors. First, the Department of

number of these suits in Ohio nearly doubled from 1989 to 1993,⁷² and it was estimated that at the end of 1995 there would be a 161 percent increase in the number of such suits filed since 1989.⁷³ The majority of these suits were frivolous,⁷⁴ and many of the inmates filing suits were repeat litigants.⁷⁵

“While a few courts around the nation have limited a particular inmate’s ability to file endless frivolous suits, they do it infrequently and usually only after such egregious behavior that thousands of taxpayers’ dollars are already spent.”⁷⁶ Legislators have also approached the problem with caution, recognizing that “all citizens, including prison inmates, are entitled to their day

Rehabilitation and Corrections employs a number of employees who are involved in defending or preventing inmate litigation. Second, deposition expenses, copying expenses and other expenses related to defending a case must be taken into consideration. Finally, there is the expense of assistant attorneys general who are assigned to defend against inmate litigation. Memorandum from Timothy J. Mangan, Chief, Criminal Justice Section, Ohio Attorney General’s Office, to Karen Romanoff, Assistant to the Chief of Staff, Ohio Attorney General’s Office (Sept. 1, 1994) (copy on file with author).

⁷² Attorney General Lee Fisher, *Fighting Frivolous Inmate Legislation*, LAW & FACT, July/Aug., 1994, at 6; see also Tim Bryant, *Lawsuits: Court Here Is 3rd in U.S. in Inmate Civil Rights Cases*, ST. LOUIS POST-DISPATCH, Jan. 4, 1992, at 1A, 5A (according to a United States Courts administrative office, of 3,133 federal suits filed in Missouri in 1991, 1,172 were prisoner civil rights suits; in the U.S. District Court in Kansas City, 1,012 of 2,565 cases were prisoner civil rights suits; and in the Southern District of Illinois, prisoner civil rights suits accounted for 481 out of 1,468 suits filed).

⁷³ *Hearings on H.B. 455 Before the House Judiciary and Criminal Justice Comm.*, 120th General Assembly (1995) (testimony of Representative Twyla Roman) [hereinafter “Roman Testimony”] (copy on file with author).

⁷⁴ See Memorandum from Bob Myers, Ohio Attorney General’s Office, to Timothy J. Mangan, Chief, Criminal Justice Section, Ohio Attorney General’s Office (Aug. 25, 1994) (copy on file with author).

⁷⁵ As Kathleen McDonald O’Malley testified before the Senate Judiciary Committee on proposed Senate Bill 261:

By way of example, in the past two years, one inmate at the Lebanon Correctional Institute has filed over 35 suits. Another inmate at the Chillicothe Correctional Institute has filed 35 suits and another at the Trumbull Correctional facility has filed 41 lawsuits. To these prisoners and others, resort to our judicial system has become a hobby. And it is a hobby with out [sic] cost or downside to those who chose to engage in it.

Hearings on S.B. 261 Before the Senate Judiciary Comm., 120th General Assembly (1994) (testimony of First Assistant Attorney General Kathleen McDonald O’Malley) [hereinafter “O’Malley Testimony”] (copy on file with author).

⁷⁶ *Id.* (also stating that “[t]he courts in [Ohio] have been particularly loathe to choke off even obviously abusive prisoner suits. We have been told that this is partially true because the legislature has done nothing but encourage such actions.”).

in court” and that “over the years, civil rights suits have become a powerful method to force improvements in prisoner medical care, legal access and inmate treatment.”⁷⁷ However,

[C]ivil rights . . . have been severely compromised by the filing of an unprecedented number of civil rights claims in our state prisons where the claims are simply frivolous. The time and expense of litigating frivolous lawsuits have diverted valuable and limited public resources from being focused on meritorious claims and on providing better facilities and rehabilitative opportunities throughout our prison system.⁷⁸

This fact has stirred several state legislatures, including Ohio’s, to recognize the magnitude of the problem and respond.⁷⁹

B. *Ohio’s Legislative Response to Abusive Prisoner Litigation: A Case Study*

Increasingly aware of the burden frivolous prisoner litigation was having on the courts, Ohio public officials began in earnest, in the early 1990s to arrive at a solution to the problem. These efforts eventually culminated in House Bill 455,⁸⁰ which was passed on November 15, 1995, and Senate Bill 196,⁸¹ which is currently before the Senate Judiciary Committee. This legislation, drafted to discourage and deter frivolous prisoner litigation without infringing upon the constitutional rights of prisoner litigants, is the result of a lengthy undertaking.

In the first step towards developing remedial legislation, the Ohio Attorney General’s Office contacted judges around the state seeking their input and ideas, and solicited other states for their help and insight.⁸² It soon became clear from discussions with other states that ideas such as alternative dispute resolution or grievance proceedings were not effective solutions. “Often, once the inmate exhausted these internal remedies, the inmate filed a lawsuit with the

⁷⁷ Fisher, *supra* note 72, at 6.

⁷⁸ O’Malley Testimony, *supra* note 75.

⁷⁹ See *infra* notes 80–86, 112–113 and accompanying text.

⁸⁰ H.B. 455, 121st General Assembly (1995), available in OH-BLLTXT, Westlaw. House Bill 455, “[e]stablishes procedures for handling a civil action commenced against the State or a State employee in a court of common pleas by an inmate; broadens the costs and expenses that may be awarded for frivolous conduct in a civil action.” H.B. 455, Synopsis, available in OH-BILLTRK, Westlaw.

⁸¹ S.B. 196, 121st General Assembly (1995), available in OH-BLLTXT, Westlaw.

⁸² See Fisher, *supra* note 72.

court anyway. The cost of managing these cases actually increased."⁸³

Ohio also participated in a multi-state task force which addressed the issue of frivolous and abusive prisoner litigation and considered legislative responses to the problem.⁸⁴ "The group worked with the understanding that it is important to preserve and protect the rights of inmates to file and pursue meritorious claims, while attempting to relieve the burden placed upon Attorney General offices and other state and local offices by inmates who file frivolous, non-meritorious lawsuits."⁸⁵ Attorneys general across the nation, including former Ohio Attorney General Lee Fisher, unanimously passed a resolution in support of the multi-state task force's drafts of model state and federal legislation.⁸⁶ The input from Ohio judges and the multi-state task force model legislation provided the framework from which Ohio's legislation developed.⁸⁷

1. *The Substance of Ohio House Bill 455 and Senate Bill 196*

Focusing on the fact that "there is no disincentive to inmates who wish to file repeated lawsuits,"⁸⁸ Attorney General Fisher emphasized that "[i]n our justice system, fees and court costs serve an important function—they help ensure that potential litigants consider whether their claims are truly worthy of the courts' attention."⁸⁹ This is the premise upon which proposed House Bill 455 and Senate Bill 196 are founded.

"The majority of inmates who file frivolous suits claim *in forma pauperis*, or pauper, status to avoid having to pay filing fees and attorney bills, costs which the average citizen would have to pay."⁹⁰ The purpose of House Bill 455 and Senate Bill 196 is to hold inmates responsible for the court costs they incur by requiring those with money in their inmate accounts⁹¹ to pay the filing

⁸³ *Id.*

⁸⁴ See O'Malley Testimony, *supra* note 75.

⁸⁵ *Id.*

⁸⁶ Butler Testimony, *supra* note 71.

⁸⁷ See *id.*; Roman Testimony, *supra* note 73 (Representative Roman stated that the National Association of Attorneys General model legislation "is the blueprint for House Bill 455.").

⁸⁸ *Fisher Announces Legislation to Minimize Frivolous Inmate Lawsuits*, Press Release, Office of Ohio Attorney General Lee Fisher, issued on Feb. 17, 1994.

⁸⁹ *Id.*

⁹⁰ Roman Testimony, *supra* note 73.

⁹¹ Prisoner trust accounts are routinely maintained by prisons. Money earned through convict labor, as well as funds sent into the institution by family and friends, is held in these accounts for the individual prisoner's use. Eisenburg, *supra* note 16, at 480.

fees⁹² from their prisoner accounts, and by subjecting them to court costs and attorney's fees for frivolous conduct.⁹³

Under the legislation, the fees and costs would be collected by a gradual withdrawal of funds from the prisoner litigant's account.⁹⁴ This process is to apply notwithstanding a contrary poverty affidavit or any contrary court rule.⁹⁵ If the inmate is to be released before the total fees owed are paid, the appropriate officials are permitted to deduct from the inmate's account the entire amount of fees owed or, if the account contains insufficient funds to cover the entire amount owed, the court is permitted to take appropriate action to otherwise secure payment.⁹⁶

House Bill 455 and Senate Bill 196 provide for the imposition against the prisoner litigant of court costs and attorney's fees⁹⁷ for frivolous conduct,⁹⁸

⁹² In Ohio, filing fees are generally about \$25 to sue the state in common pleas court. Mary Beth Lane, *Getting Tough with Inmates; Frivolous Lawsuits Irk Lawmakers*, PLAIN DEALER, Aug. 3, 1995, at B1.

⁹³ See H.B. 455, § 2323.51(B)(1); S.B. 196, § 2323.51(B)(1).

⁹⁴ See H.B. 455, § 2969.22; S.B. 196, § 2969.22, both providing in relevant part:

(A)(1) If an inmate commences a civil action against the State or a State employee in a court of common pleas . . . the clerk of the court of common pleas . . . shall accept payment of the requisite fees from the inmate in the following manner

(a) The clerk shall notify the inmate of the deductions and procedures

(b) The clerk shall charge to the inmate at the time of commencement of the civil action as a partial payment of the requisite fees or . . . the total payment of the requisite fees an amount equal to the lesser of the requisite fees or twenty per cent of the average monthly balance during the six calendar months preceding the commencement of the civil action of the funds in the inmate's account

(c) Unless the amount charged under division (A)(1)(b) of this section constitutes the total amount of the requisite fees, during each calendar month following the month in which the inmate commenced the civil action and until the total payment of the requisite fees occurs, the clerk shall charge to the inmate an amount equal to twenty per cent of the average monthly balance during the six preceding calendar months of the funds in the inmate's account

Id. A list of filing fees is provided in § 2303.20 of both bills. See H.B. 455, § 2303.20(A)-(Z); S.B. 196, § 2303.20(A)-(Z).

⁹⁵ H.B. 455, § 2969.22(A)(2); S.B. 196, § 2969.22(A)(2).

⁹⁶ H.B. 455, § 2969.22(D); S.B. 196, § 2969.22(D).

⁹⁷ H.B. 455, § 2323.51(B)(1); S.B. 196, § 2323.51(B)(1). Attorney's fees under the statute equal:

The approximate amount of the compensation and, if any, the fringe benefits of the Attorney General, an assistant attorney general, or special counsel appointed by the

these costs and fees to be collected in the same manner as the filing fees.⁹⁹ Frivolous conduct is defined as:

(A)(2)(A) Conduct of a party to a civil action or of the party's counsel of record that satisfies either of the following:

(i) It obviously serves merely to harass or maliciously injure another party in the civil action.

(ii) It is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.¹⁰⁰

The bills also provide that a prisoner engages in frivolous conduct when (1) the claim that is the basis of the civil action fails to state a claim; (2) it is clear that the inmate cannot prove material facts in support of the claim; or (3) the claim brought by the inmate is substantially similar to a claim previously brought by the inmate because the previous and current claims involve the same parties or arise from the same operative facts.¹⁰¹

If the court ascertains that a prisoner's claim is frivolous or malicious¹⁰² it may dismiss the action sua sponte.¹⁰³ An inmate who files a civil action has to file with the court an affidavit or unsworn declaration describing each civil action filed by the inmate in the previous year.¹⁰⁴ If the inmate has already

Attorney General that has been or will be paid by the state in connection with the legal services that were rendered . . . in a civil action commenced against the State or a State employee in a court of common pleas, including, but not limited to, a civil action commenced by a pro se plaintiff who is an inmate, and that were necessitated by frivolous conduct of the plaintiff, the counsel of record of the plaintiff, or the pro se plaintiff.

H.B. 455, § 2323.51(A)(4); S.B. 196, § 2323.51(A)(4).

⁹⁸ See H.B. 455, § 2323.51(B)(1); S.B. 196, § 2323.51(B)(1), providing in relevant part: "[T]he court may award court costs, reasonable attorney's fees, and other reasonable expenses incurred in connection with the civil action to any party to the civil action who was adversely affected by frivolous conduct."

⁹⁹ See H.B. 455, § 2969.23(A)(1)(a)-(d); S.B. 196, § 2969.23(A)(1)(a)-(d).

¹⁰⁰ H.B. 455, § 2323.51(A)(2)(a)(i)-(ii); S.B. 196, § 2323.51(A)(2)(a)(i)-(ii).

¹⁰¹ H.B. 455, § 2323.51(A)(2)(b)(i)-(iii); S.B. 196, § 2323.51(A)(2)(b)(i)-(iii).

¹⁰² In determining whether a claim is frivolous or malicious, a court may consider whether (1) the claim fails to state a claim; (2) the claim has no arguable basis in law or fact; (3) it is clear the inmate cannot prove material facts in support of the claim; and (4) the claim is substantially similar to a claim previously filed by the inmate. H.B. 455, § 2969.24(B)(1)-(4); S.B. 196, § 2969.24(B)(1)-(4).

¹⁰³ H.B. 455, § 2969.24(A)(2); S.B. 196, § 2969.24(A)(2).

¹⁰⁴ H.B. 455, § 2969.25(A); S.B. 196, § 2969.25(A).

filed three or more civil actions in the state during the preceding year, the court must appoint an attorney to review the claim and make recommendations regarding whether the claim is frivolous or malicious.¹⁰⁵ This aids the court in determining whether to dismiss the claim.¹⁰⁶

In addition, a court will be permitted, either *sua sponte* or on the motion of a party, to dismiss an action brought by an inmate if the inmate falsifies the allegation of indigence in a poverty affidavit,¹⁰⁷ or files an affidavit or unsworn declaration that is false.¹⁰⁸ And further, when inmates are awarded damages in a successful civil action, the legislation does not permit the prisoners to escape financial responsibility for the wrongs they have committed. Courts are required to order that the following be deducted on a pro rata basis from a prisoner's damages award:

(A) any fine imposed upon the inmate for an offense for which the inmate is confined;

(B) any court costs taxed to the inmate for the trial in which the inmate was convicted of or pleaded guilty to an offense for which the inmate is confined;

(C) any court ordered restitution imposed upon the inmate relative to an offense for which the inmate is confined.¹⁰⁹

Finally, prisoners whose claims are subject to the grievance system in the state correctional facilities in which they are imprisoned must exhaust the grievance procedures before bringing suit in court.¹¹⁰ If the prisoner brings suit in court after thirty days following the prisoner's receiving the decision from the grievance proceedings, the court must dismiss the prisoner's civil action.¹¹¹

Thus, the legislation is drafted to filter out those lawsuits which are frivolous and malicious before they burden courts' dockets and to deter prisoners from becoming abusive litigants. It imposes upon prisoners the same responsibilities as others filing suit in the court system by imposing filing fees, as well as court costs and attorney fees, when appropriate. Further, it holds prisoners accountable for their interactions with Ohio's justice system.

¹⁰⁵ H.B. 455, § 2969.25(B); S.B. 196, § 2969.25(B).

¹⁰⁶ See *supra* note 102 and accompanying text (listing the factors considered by the courts in deciding whether to dismiss because the claim is frivolous or malicious).

¹⁰⁷ H.B. 455, § 2969.24(A)(1); S.B. 196, § 2969.24(A)(1).

¹⁰⁸ H.B. 455, § 2969.24(A)(3); S.B. 196, § 2969.24(A)(3).

¹⁰⁹ H.B. 455, § 2969.27(A)-(C); S.B. 196, § 2969.27(A)-(C).

¹¹⁰ H.B. 455, § 2969.26(A)-(D), S.B. 196, § 2969.26(A)-(D).

¹¹¹ H.B. 455, § 2969.26(A)-(D), S.B. 196, § 2969.26(A)-(D).

2. A Critique of Ohio's Legislation

Arizona has already passed legislation, similar to Ohio's House Bill 455 and Senate Bill 196, that requires a filing fee,¹¹² and many other states are considering the same type of disincentive.¹¹³ There are skeptics who question the effect of such legislation saying: "The problem is that if they don't have any money in their accounts, then we still have to pay for it."¹¹⁴ However, this legislative approach has already proven to have a significant impact on prisoner litigation. Statistics from the Northern District of New York succinctly illustrate this point. Between 1983 and 1985, the Northern District of New York experienced an annual increase of twenty prisoner cases per year.¹¹⁵ Using that figure, the projected estimate of cases to be filed in 1992 was 707 suits if the trend had been permitted to continue.¹¹⁶ However, the imposition of a filing fee in 1985 resulted in only 383 of the projected 707 cases being filed in 1992, roughly forty-seven percent fewer cases than the predicted number.¹¹⁷ Additionally, Arizona experienced a thirty-five percent drop in filings during the year in which its filing fee legislation was enacted.¹¹⁸ These figures inspire hope that similar results will attain in those states proposing legislation that imposes similar filing fee requirements.

Ohio's legislative approach has received support from various sectors of

¹¹² See ARIZ. REV. STAT ANN. § 12-306 (1995).

¹¹³ See, e.g., 1995 AK H.B. 201, 19th Legislature, (1995-96) (unless exceptional circumstances exist, prisoner may not commence litigation against the state unless the prisoner has paid in full the filing fees); 1995 NH H.B. 532, Regular Session (1995-96), 1995 NH S.B. 6, Regular Session (1995-96) (prisoners who file civil suits shall pay twenty percent of preceding month's income from inmate trust account towards court fees and, thereafter, ten percent of preceding month's income towards court costs); 1995 NY A.B. 8381, 218th General Assembly, Regular Session (1995-96), 1995 NY S.B. 4408, 218th General Assembly, Regular Session (1995-96) (prisoners shall be required to pay amount equal to ten percent of the preceding three months inmate account unless special circumstances exist); 1995 SC H.B. 4371, Statewide Session (1995-96), 1995 SC S.B. 950, Statewide Session (1995-96) (prisoners bringing civil actions shall pay partial payment of any filing fees required of twenty percent of the preceding six months income and, thereafter, monthly payments of ten percent of the preceding month's income).

¹¹⁴ See Kevin Lawrence Williams, *Prisoners Clog Courts with Suits; Bill Seeks to Curtail Frivolous Complaints*, PLAIN DEALER, Sept. 11, 1994, at 10B (quoting Captain Frank Leonbruno, administrative supervisor, Lake County jail).

¹¹⁵ Butler Testimony, *supra* note 71.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Roman Testimony, *supra* note 73.

the judicial and criminal justice systems.¹¹⁹ However, there are those who raise valid questions about the necessity and probable impact of the legislation. One question posed is “whether legislation is necessary to deal with the problem, since it would appear that the courts have sufficient authority in their rule making power.”¹²⁰ While it is true that courts do have broad rule making power and authority to take judicial initiatives to remedy the problem,¹²¹ this has not eliminated the need for legislation addressing the issue. First, many of the judicial remedies cannot significantly effect frivolous prisoner litigation on a system-wide basis,¹²² and many are ineffective even with respect to a single abusive prisoner litigant.¹²³ Secondly, while a few judges nobly try to address the situation,¹²⁴ the majority are apprehensive about taking an active role without some guidance from the legislature.¹²⁵

Another question regarding the necessity for remedial legislation is raised by those who suggest that the problem of frivolous lawsuits exists primarily in the federal system.¹²⁶ However, statistics provided by the Ohio Attorney General’s Office indicate that, while the majority of prisoner lawsuits in Ohio have been filed in federal court, the number of cases filed in Ohio’s state courts is hardly insignificant.¹²⁷ Of the 586 new prisoner inmate cases filed in 1993 in

¹¹⁹ See, e.g., Letter from Judge Dana A. Deshler, Court of Appeals of Ohio, Tenth Appellate District, to Senator Betty Montgomery (May 16, 1994) (“This letter is sent in support of passage of S.B. 261 . . . regarding frivolous pro se litigation. Something must be done to free various courts of junk litigation. I believe Sen. Watts’ bill is a step in the right direction.”) (copy on file with author); Letter from Gary Haines, Montgomery County Sheriff, to Representative Wayne Jones (March 24, 1994) (“[I] was pleased to see that you and the Attorney General support legislation that would restrict the ability of inmates to file frivolous suits.”) (copy on file with author).

¹²⁰ Letter from P. Daniel Fedders, Presiding Judge, Court of Common Pleas, Warren County, to Lee D. Fisher, Ohio Attorney General (March 17, 1994) (copy on file with author).

¹²¹ See *supra* note 41 and accompanying text.

¹²² See, e.g., *supra* notes 50–51 and accompanying text.

¹²³ See *supra* note 57 and accompanying text.

¹²⁴ See, e.g., Letter from P. Daniel Fedders, *supra* note 120 (“[I] am enclosing herewith a copy of our Rule of Court that we recently implemented to deal with the problem. The staff workers at the two institutions [penitentiaries located in Warren County] assure me that this procedure poses no difficulties for them.”).

¹²⁵ See Butler Testimony, *supra* note 71 (discussing the results of canvassing judges around the state about their ideas on the abusive prisoner litigation problem); see also Roman Testimony, *supra* note 73 (“There are current standards for dismissal of cases, but many judges are reluctant to dismiss.”).

¹²⁶ See, e.g., Letter from Senator Bruce Johnson to Richard Cordray, Attorney General’s Office (Sept. 2, 1994) (copy on file with author).

¹²⁷ Memorandum from Timothy J. Mangan, Chief, Criminal Justice Section, Ohio

Ohio, 246 were filed in state court and 340 were filed in federal court.¹²⁸ Thus, approximately forty-two percent of Ohio civil inmate litigation was filed in state court and fifty-eight percent was filed in federal court. Furthermore, of the 401 cases filed in Ohio from January 1994, through September 1994, 164 (forty percent) were filed in state court, and 237 (sixty percent) were filed in federal court.¹²⁹ Although these statistics support the notion that the majority of cases are filed in federal court, they also reveal that a significant number are being filed in Ohio's state courts as well.

Despite the number of cases being brought in both the state and federal courts, some still believe that such bills are unnecessary "because administrative rules dispose of most cases when the prisoner has not filed the appropriate fee."¹³⁰ Furthermore, it is argued that the administrative burdens of creating a method for prisoners to pay court costs would only add problems.¹³¹ These are very persuasive arguments against the proposed legislation, but equally persuasive is the fact that many judges are reluctant to dismiss prisoner lawsuits¹³² and that, although most prisoner inmate suits are ultimately dismissed, it is not before they consume massive amounts of time and money.¹³³ For instance, as previously mentioned, even though the majority of prisoner civil suits were dismissed in 1993, it still cost the Ohio Attorney General's office more than \$1.35 million to defend the state against more than

Attorney General's Office, to Karen Romanoff, Assistant to the Chief of Staff, Ohio Attorney's Office (Sept. 1, 1994) (copy on file with the author).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Hearings on S.B. 261 Before the Senate Criminal Justice Subcomm.*, 120th General Assembly (1994) (testimony of Miles Durfey, Clerk, Court of Claims) (Durfey stated that the court had 700 inmate cases filed in 1993. Most of these (440) were from the Lucasville riots to recover loss of property. Only three were large judicial cases and the others were handled administratively.).

¹³¹ *Id.* (Durfey asserted that it would take over six years to collect a \$25 filing fee from prisoners making \$3 per month, and that 90 percent of the prison cases are filed by nonindigents); *see also* Howard Mintz, *No Pay, No Play: A Federal Court Drowning in Prisoners' Petitions Is Watching the Fate of One Docket-Clearing Plan—Requiring Inmates to Pay All or Part of the Filing Fees*, *RECORDER*, July 23, 1993, at 1 (reporting concerns expressed by Ira Robbins, a law professor at American University, about prisoners paying a portion of the filing fees. Professor Robbins stated: "Is this going to stem the tide of prison litigation? I don't think so. It may take more time to figure out how much a prisoner should pay than it does to decide one of these cases.").

¹³² Roman Testimony, *supra* note 73.

¹³³ *See supra* notes 13, 26–27 and accompanying text; *see also* Blumenfeld, *supra* note 7 (reporting that, even when a case is dismissed, the court still must research and write up the legal justification).

600 civil inmate lawsuits.¹³⁴ The imposition of filing fees, as proposed in the Ohio legislation, has resulted in a significant reduction in the number of prisoner civil lawsuits filed elsewhere.¹³⁵ A similar result of the enactment of the proposed Ohio legislation would be that the additional problems pointed out by critics would be curbed as the number of prisoner lawsuits decreased. Likewise, the ultimate costs in terms of time, money, and resources expended in defending the frivolous lawsuits filed by the inmates would be significantly reduced.

Overall, Ohio's legislation appears to be a viable way to "help stem the tide of frivolous lawsuits filed by inmates over such issues as the seasoning in their food, the location of the prison benches and the prompt delivery of personal televisions."¹³⁶ However, before the final stamp of approval must be given, the proposed legislation examined for constitutional difficulties.

V. HOUSE BILL 455 AND SENATE BILL 196 UNDER THE UNITED STATES CONSTITUTION¹³⁷

Statutes like Ohio House Bill 455 and Senate Bill 196 raise obvious constitutional questions. These questions are: (1) whether this legislation violates the First Amendment guarantee of the right to petition the government for redress of grievances,¹³⁸ and (2) whether it violates equal protection and due process.¹³⁹

¹³⁴ Butler Testimony, *supra* note 71.

¹³⁵ See *supra* notes 115-18 and accompanying text.

¹³⁶ O'Malley Testimony, *supra* note 75.

¹³⁷ The author concedes that the following discussion of the constitutional issues involved with the proposed filing fee legislation is not exhaustive. For more in-depth discussion of constitutional issues regarding court access, see generally Christopher E. Austin, *Due Process, Court Access Fees, and the Right to Litigate*, 57 N.Y.U. L. REV. 768; Eisenberg, *supra* note 16; Jean F. Rydstrom, Annotation: *The Supreme Court and the First Amendment Right to Petition the Government for A Redress of Grievances*, 30 L. Ed. 2d 914 (1996).

¹³⁸ See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom . . . to petition the Government for redress of grievances.").

¹³⁹ See U.S. CONST. amend. XIV § 1 (States may not "deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."). Federal Due Process is afforded by the Fifth Amendment. ("No person . . . shall be deprived of life, liberty, or property, without due process . . ."). U.S. CONST. amend. V.

A. *The First Amendment Right to Petition for Redress of Grievances*

The Supreme Court has held in a series of cases that there is a right to petition for redress of grievances by filing lawsuits.¹⁴⁰ These cases, while relevant to the analysis, do not appear to threaten the Ohio legislation's constitutional soundness.

Confronted with determinations of where an individual's freedom ends and the State's power begins, the Court has noted that:

Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions.¹⁴¹

As a general matter, the Supreme Court has interpreted the First Amendment right to petition to preclude government imposed bars to the courts except in "sham" situations.¹⁴² This notion has been articulated through a series of cases, establishing what has been called the "*Noerr-Pennington*" doctrine.¹⁴³

The first relevant case in the series was *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*¹⁴⁴ In this private antitrust action it was alleged that impermissible concerted efforts were at work to destroy competition by the exertion of influence on the legislative and executive branches of the government.¹⁴⁵ In response to the petitioner's request that such activities be halted, the Court recognized that legislation¹⁴⁶ cannot be construed to prohibit

¹⁴⁰ In general, these cases recognize the right to petition the government for redress of grievances as a guarantee of the right to access the courts. *See infra* notes 163-64 and accompanying text.

In another line of cases, the Court has found, through the guarantee of free association, additional First Amendment protection for the right to litigate. These cases have relied upon freedom of association to protect groups advising members of their legal rights and referring them to lawyers. *See, e.g.,* *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *NAACP v. Buttons*, 371 U.S. 415 (1963). Because Ohio's legislation is directed towards the individual litigant acting alone, and does not implicate freedoms of association, this line of cases will not be discussed further in this Note.

¹⁴¹ *Thomas v. Collins*, 323 U.S. 516, 529 (1945).

¹⁴² *See infra* notes 159-167 and accompanying text.

¹⁴³ David Goldberger, *First Amendment Constraints on the Award of Attorney's Fees Against Civil Rights Defendant-Intervenors: The Dilemma of the Innocent Volunteer*, 47 OHIO ST. L.J. 603, 615 (1986).

¹⁴⁴ 365 U.S. 127, *reh'g denied*, 365 U.S. 875 (1961).

¹⁴⁵ *Id.* at 129-30.

¹⁴⁶ The legislation at issue in *Noerr* was the Sherman Act. *See id.* at 133.

two or more persons from associating in an attempt to solicit governmental action with respect to the passage and enforcement of laws.¹⁴⁷ To do so would be an abridgment of the right of petition, one of the freedoms protected by the Bill of Rights.¹⁴⁸ The Court acknowledged that, while incidental injury might be inflicted upon the opposition in a campaign for change which has been rallied upon the government, such attempts to influence the passage or enforcement of laws is nonetheless permissible and cannot be impeded.¹⁴⁹

The Court did, however, note an exception to this rule to be applied in "sham" situations. Under circumstances in which "a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationship of a competitor,"¹⁵⁰ justification will lie for an application of the legislation which may preclude redress.¹⁵¹

In a second antitrust case, *United Mine Workers of America v. Pennington*,¹⁵² the Court followed its main holding in *Noerr*.¹⁵³ It noted that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."¹⁵⁴ The Court concluded that such a finding was necessary in order to preserve the informed operation of governmental processes and to protect the right of petition guaranteed by the First Amendment.¹⁵⁵

The next important development of the *Noerr-Pennington* doctrine came in *California Motor Transport Co. v. Trucking Unlimited*,¹⁵⁶ yet another antitrust case. The Court applied the holdings of *Noerr* and *Pennington* and found that the right to petition extends to all departments of the Government.¹⁵⁷ The Court thus concluded that access to the agencies and courts, like the legislature and arms of the executive, cannot be denied.¹⁵⁸ In addition, the *California Motor Transport* Court reiterated the limit, upon which the *Noerr* Court had originally commented, which could permissibly be placed upon this right in

¹⁴⁷ *Id.* at 130.

¹⁴⁸ *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138, *reh'g denied*, 365 U.S. 875 (1961).

¹⁴⁹ *Id.* at 143-44.

¹⁵⁰ *Id.* at 144.

¹⁵¹ *Id.*

¹⁵² 381 U.S. 657 (1965).

¹⁵³ *See id.* at 669-72.

¹⁵⁴ *Id.* at 669-70.

¹⁵⁵ *Id.* at 670.

¹⁵⁶ 404 U.S. 508 (1972).

¹⁵⁷ *Id.* at 510.

¹⁵⁸ *Id.* at 510-11.

“sham” situations.¹⁵⁹ In such instances, “First Amendment rights may not be used as the means or the pretext for achieving ‘substantive evils’ which the legislature has the power to control.”¹⁶⁰ Therefore, the Court concluded, claims of the First Amendment right to petition under “sham” circumstances, where harassment is the purpose, will not be provided immunity from legislative action.¹⁶¹

Finally, in *Bill Johnson’s Restaurant v. National Labor Relations Board*,¹⁶² the Court again, while recognizing the right to petition the courts for redress of grievances,¹⁶³ emphasized that this right need not remain unencumbered when a petition of the court is a “mere sham” for the purpose of harassment.¹⁶⁴ In other words, suits based on insubstantial claims are not to be afforded First Amendment protections.¹⁶⁵ The Court stated:

“The first amendment interests involved in private litigation—compensation for violated rights and interests, the psychological benefits of vindication, public airing of disputed facts—are not advanced when the litigation is based on intentional falsehoods or on knowingly frivolous claims. Furthermore, since sham litigation by definition does not involve a bona fide grievance, it does not come within the first amendment right to petition.”¹⁶⁶

Through the cases discussed above, the Court has recognized a First Amendment right to petition all branches of the Government, including the judiciary, unimpeded by legislation, when there exist legitimate purposes for seeking redress. This same right has not been extended to “sham” litigation. It is in light, therefore, of the Court’s development of the *Noerr-Pennington* doctrine and subsequent cases, that Ohio’s legislation must be scrutinized.

From an analysis of Ohio House Bill 455 and Senate Bill 196 under the preceding First Amendment protective standards, it appears that these bills are constitutionally sound. No impermissible restraint has been levied upon prisoners seeking redress of their grievances through the judiciary. It is true

¹⁵⁹ The Court expanded upon the “sham” theory to include circumstances in which the “power, strategy, and resources of the petitioners were used to harass and deter respondents in their use of administrative and judicial proceedings so as to deny them ‘free and unlimited access’ to those tribunals.” *Id.* at 511.

¹⁶⁰ *California Motor Transp. Co. v Trucking Unlimited*, 404 U.S. 508, 515 (1972).

¹⁶¹ *Id.* at 513.

¹⁶² 461 U.S. 731 (1983).

¹⁶³ *Id.* at 741.

¹⁶⁴ *Id.* at 741-43.

¹⁶⁵ *Id.* at 743.

¹⁶⁶ *Id.* (quoting Thomas A. Balmer, *Sham Litigation and the Antitrust Laws*, 29 BUFF. L. REV. 39, 60 (1980)).

that the legislation is drafted with aspirations of deterring frivolous litigation that subverts precious court funds and time and thereby interferes with the efficient administration of meritorious claims. But, it has been made clear by the Supreme Court, through the development of the *Noerr-Pennington* doctrine, that there are no First Amendment protections for such “sham” litigation. Ohio’s legislative goal of curbing frivolous prisoner filings while maintaining judiciary access is, therefore, constitutionally legitimate and is accomplished in several equally legitimate ways.

First, no absolute prohibition is placed on prisoners which impedes their access to the courts for redress of legitimate grievances. Prisoners are entitled to bring their civil actions to the doors of the courthouse, but payment of filing fees will be required of those prisoners having money in their prisoner accounts.¹⁶⁷ For the truly indigent, however, the Senate version of the bill suggests that such fees may be waived.¹⁶⁸ Access is, therefore, at least under the Senate version of the bill, available for those prisoners with or without funds.

Secondly, the legislation is designed to ward off only frivolous or “sham” litigation, which is not protected by the First Amendment. For instance, when a claim has been brought against the State, the legislation requires that all institutional internal grievance procedures be exhausted before a prisoner brings it to court.¹⁶⁹ In this way, frivolous claims are siphoned off before clogging an already burdened court system. However, if dissatisfied with the resolution of the grievance through the internal mechanisms, the prisoner may commence a civil action in court for redress of his or her claim.¹⁷⁰ Therefore, although additional steps may be required before access to the courts will be available for certain types of civil claims, the legislation does not deny court access. This applies as well to the provision requiring those prisoners filing three or more suits in one year to have their claims reviewed by a court appointed attorney for a determination of whether the new filing is meritorious. If a legitimate claim is found to exist, then the path to the courthouse remains clear for the prisoner to proceed.¹⁷¹

Finally, for those prisoners wishing to file frivolous lawsuits, the

¹⁶⁷ These funds are withdrawn on a gradual basis once suit has been filed, so even prisoners with nominal funds in their accounts can pay the normal fees required to access the courts for civil suits. *See supra* note 94 and accompanying text.

¹⁶⁸ Compare S.B. 196 § 2969.22(A)(2) (“This procedure applies notwithstanding a contrary court rule.”) with H.B. 455 § 2969.22(A)(2) (“This procedure applies notwithstanding a *contrary poverty affidavit* or any contrary court rule.”) (emphasis added).

¹⁶⁹ *See supra* notes 110–11 and accompanying text.

¹⁷⁰ *See* H.B. 455, § 2969.26(A)–(C); S.B. 196, § 2969.26(A)–(C).

¹⁷¹ *See supra* notes 102–109 and accompanying text.

legislation does not expressly forbid it. However, in addition to paying their own filing fees, prisoners must be prepared to pay the court costs and attorney's fees which will be charged to them for filings that are found to be frivolous.¹⁷² Such a requirement is not a "dubious intrusion" into the sanctity of the First Amendment liberty to petition the government, since no First Amendment right exists to file frivolous lawsuits. Overall, Ohio's legislation does not place an absolute bar before prisoners seeking redress of their grievances. What it *does* place permissible restraints upon court access to prisoners filing frivolous civil suits, in order to accomplish the legitimate state goal of judicial efficiency. Deterring frivolous prisoner litigation is permissible under the *Noerr-Pennington* doctrine, and therefore, it seems that Ohio's legislation is constitutionally sound under the First Amendment.

B. *Equal Protection and Due Process*

The Supreme Court has found a limited fundamental right to access the courts.¹⁷³ Because Ohio's legislation affects prisoners' access to the courts by imposing filing fees on prisoners filing civil suits, it necessarily raises both equal protection and due process considerations.¹⁷⁴

"[T]he concepts of equal protection and due process stemming from our American ideal of fairness, are not mutually exclusive."¹⁷⁵ The Supreme Court has, thus, discussed the constitutionality of filing fee requirements necessary to bring civil actions under both considerations.¹⁷⁶ Three cases in which the Court

¹⁷² See *supra* notes 97-106 and accompanying text.

¹⁷³ Feldman, *supra* note 14, at 433 (citing *Bounds v. Smith*, 430 U.S. 817 (1976)). In *Bounds* it was determined under a due process analysis that there must be meaningful access to the courts. 830 U.S. at 821. It has also been suggested that a limited fundamental right to access the courts has been developing under the First Amendment. See *Carter v. University of Washington*, 536 P.2d 618, 623 n.4 (1975).

¹⁷⁴ The equal protection and due process guarantees are found in the Fourteenth Amendment which provides that, "No State . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1.

¹⁷⁵ *United States v. Kras*, 409 U.S. 434, 458 (1973) (Douglas, J., and Brennan, J., dissenting).

¹⁷⁶ With respect to due process, it has been suggested that a procedural due process analysis would not be triggered in filing fee cases. See Feldman, *supra* note 14, at 435-36. This is based on the rationale that, in order to trigger a procedural due process analysis a person must be deprived of "life, liberty, or property." *Id.* at 436. The Court has narrowly defined these to those rights created by the states or specified in the Constitution, and, although there is a fundamental right to meaningful access to the courts, different treatment of indigents does not interfere with this. See *id.* On the other hand, Justice Douglas

has undertaken such discussions are *Boddie v. Connecticut*,¹⁷⁷ *United States v. Kras*,¹⁷⁸ and *Ortwein v. Schwab*.¹⁷⁹ These cases indicate that, while the Court is willing to afford the constitutional protections to court access when an important societal interest, such as marriage,¹⁸⁰ is implicated, and no alternative forum for resolution exists,¹⁸¹ the Court does not feel it incumbent to do so under all circumstances.

The first important holding came in *Boddie*,¹⁸² in which court fees for indigents seeking a divorce were challenged.¹⁸³ The Court, applying a due process analysis,¹⁸⁴ determined that due process prohibits a state from denying, solely on the basis of inability to pay, access to its courts for the termination of a marriage.¹⁸⁵

Critical to this determination were the facts that marriages involve interests of basic importance to our society,¹⁸⁶ and that the state has a monopoly over the ability to terminate marriages.¹⁸⁷ Under such circumstances, due process requires at a minimum that "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."¹⁸⁸

The Court, however, was explicit in limiting its holding to the facts of the case before it, stating, "[w]e do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed

suggested in *Boddie* that "[w]hatever residual element of substantive law the Due Process Clause may still have, it essentially regulates procedure." *Boddie v. Connecticut*, 401 U.S. 371, 384-85 (1971) (Douglas, J., concurring).

¹⁷⁷ 401 U.S. 371 (1971).

¹⁷⁸ 409 U.S. 434 (1973).

¹⁷⁹ 410 U.S. 656 (1973).

¹⁸⁰ See *Boddie*, 401 U.S. at 376.

¹⁸¹ *Id.* at 375-76.

¹⁸² *Id.* at 371.

¹⁸³ *Id.* at 372-73.

¹⁸⁴ *Id.* at 374-84. While the majority applied a due process analysis, other members of the Court believed that it was equal protection which was triggered. Justice Douglas rested his conclusion on equal protection rather than on due process. *Id.* at 386 (Douglas, J., concurring in the result). Justice Brennan believed that this case implicated equal protection considerations as well. *Id.* at 389 (Brennan, J., concurring in part). Finally, Justice Black did not believe that the court costs were barred by either the Due Process Clause or the Equal Protection Clause. *Id.* at 391-92 (Black, J., dissenting).

¹⁸⁵ *Id.* at 374.

¹⁸⁶ *Id.* at 376.

¹⁸⁷ *Id.* at 376-77.

¹⁸⁸ *Id.* at 377.

beyond the reach of any individuals.”¹⁸⁹ It was this reservation that would allow the Court to move away from its holding in subsequent cases.

In *United States v. Kras*,¹⁹⁰ the Court again was confronted with the constitutionality of a filing fee requirement. This time the petitioner, seeking voluntary bankruptcy, challenged the requirement on Fifth Amendment grounds.¹⁹¹ Applying both equal protection and due process analyses, the Court relied on the reservation previously stated in *Boddie*, to hold that the filing fee requirement was constitutionally sound.¹⁹² Effectively distinguishing the facts of the two cases, the Court highlighted several factors supporting its holding.

Regarding due process, the Court noted that, unlike in *Boddie*, the judiciary was not the exclusive dispute-settlement technique in *Kras*.¹⁹³ Rather, “in contrast with divorce, bankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditor.”¹⁹⁴ Thus, however unrealistic the remedy may be in a particular situation, the fact that an alternative remedy exists in theory is enough to distinguish *Kras* from *Boddie*.¹⁹⁵ Additionally, the Court found that the failure of *Kras* to obtain the bankruptcy relief he was seeking would not materially alter his position in any constitutional sense.¹⁹⁶ Stating that “[g]aining or not gaining a discharge will effect no change with respect to basic necessities,”¹⁹⁷ the Court thus found there was no due process violation.¹⁹⁸

Similarly, the Court found that the filing fee requirement in no way denied *Kras* equal protection of the laws.¹⁹⁹ It observed that “bankruptcy is hardly

¹⁸⁹ *Id.* at 382–83.

¹⁹⁰ 409 U.S. 434 (1973).

¹⁹¹ *Id.* at 435.

¹⁹² *Id.* at 442–47.

¹⁹³ *Id.* at 443–46.

¹⁹⁴ *Id.* at 445.

¹⁹⁵ *Id.* at 445–46.

¹⁹⁶ *Id.* at 445.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* An equal protection analysis focuses on whether suspect classifications (race, religion, or alienage) or fundamental rights (those rights which have their source and are explicitly or implicitly guaranteed by the federal Constitution) are involved. *See Felix v. Milliken*, 463 F. Supp. 1360, 1365 (E.D. Mich. 1978). If a fundamental interest or a suspect class is implicated, the government must have a compelling interest in order to prevail against the strict scrutiny analysis the Court will undertake. *Id.* Where no fundamental right and no suspect class have been implicated, the Court will consider whether the government has a rational basis for the law in determining its legitimacy. *See City of New Orleans v. Duke*, 427 U.S. 297, 302 (1976) (“Unless a classification trammels

akin to free speech or marriage or those other rights, so many of which are imbedded in the First Amendment, that the Court has come to regard as fundamental and that demand the lofty requirement of a compelling governmental interest before they may be significantly regulated."²⁰⁰ Furthermore, as no suspect criteria of race, nationality, or alienage was touched upon,²⁰¹ the Government merely had to show a rational justification for imposing the requirement.²⁰²

The same equal protection analysis was applied by the Court in *Ortwein v. Schwab*.²⁰³ In *Ortwein* the appellants challenged the constitutionality of a twenty-five dollar filing fee required to appeal to the state appellate court an agency determination which reduced their welfare payments.²⁰⁴

Relying on the reasoning of *Kras*,²⁰⁵ the Court determined that the filing fee requirement was constitutional.²⁰⁶ First, the appellants had been provided alternatives to the judicial remedy which were not conditioned on the payment of fees.²⁰⁷ Secondly, no suspect classification, such as race, nationality, or alienage, was present.²⁰⁸ Consequently, the applicable standard of review was rational justification.²⁰⁹ Rational justification was found by the Court on the basis that the generated fees helped offset operating costs of the court, were not disproportionate, and were an effective means to accomplish the state's goal.²¹⁰

Of course, the previously discussed cases did not involve prisoners. Prisoners, particularly poor prisoners, have traditionally been afforded great

fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discrimination and require only that the classification challenged be rationally related to a legitimate state interest.").

²⁰⁰ *Kraus*, 409 U.S. at 445.

²⁰¹ *Id.* Wealth, or the lack thereof, has not been used to determine the existence of a suspect class. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973) ("[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.").

²⁰² *Id.* The Court determined that such a rational justification was presented in *Kras*. The finding of a rational justification was supported by the historical congressional power over bankruptcy, existing bankruptcy laws, such as the automatic stay, which protect the debtor, and the incidental effect of the fees which make the bankruptcy system self-sufficient. *Kraus*, 409 U.S. at 447-49.

²⁰³ 410 U.S. 656, 659-60 (1973).

²⁰⁴ *Id.* at 656.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 665.

²⁰⁷ In this case, the appellants had pretermination evidentiary hearings. See *id.* at 659.

²⁰⁸ *Id.* at 660.

²⁰⁹ *Id.*

²¹⁰ *Id.*

protections by the Court against discrimination in criminal trials.²¹¹ However, the Court has “studiously and carefully refrained from saying one word or sentence suggesting that the rule . . . announced to control the rights of criminal defendants would control in the quite different field of civil cases.”²¹² Moreover, “[o]ur Federal Constitution . . . does not place such private disputes on the same high level as it places criminal trials and punishments.”²¹³ Therefore, it is probable that, if called upon, the Court will apply a similar analysis to that which it undertook in *Boddie*, *Kras*, and *Ortwein*, to determine the constitutionality of filing fees affecting court access in prisoners’ civil suits.

Ohio House Bill 455 and Senate Bill 196 would, most likely, withstand any such constitutional examination. First, although the Court has recognized a limited fundamental right to access the courts, no liberty guaranteed by the Constitution is being denied or unconstitutionally impaired by the legislation. Alternatives to the judicial remedy for claims against the State are provided which are not conditioned on the payment of fees,²¹⁴ and court access for other meritorious claims remains essentially unimpeded.²¹⁵

Furthermore, no suspect class has been discriminated against by the legislation. While it may be argued that the overall impact of legislation requiring payment of filing fees if a prisoner has funds in his prison account discriminates against poorer pro se prisoner litigants, wealth, or the lack thereof, has not been recognized as suspect classification.²¹⁶ Additionally, under Ohio’s legislation, truly indigent prisoners may have the fees waived.²¹⁷ And for other prisoners, this legislation merely holds them to the same responsibilities as other citizens. As one judge on the Washington Supreme Court approvingly commented on filing fees, private disputes, and accountability of the individual litigant:

It seems unjust to me . . . to direct the expenditure of public money for purely private purposes. Plaintiff here brings this case to vindicate a private wrong; the avails, if any, will inure wholly to her exclusively for her personal benefit

²¹¹ *Boddie v. Connecticut*, 401 U.S. 371, 390 (1971) (Black, J., dissenting); *see also* *Douglas v. California*, 372 U.S. 353 (1963) (holding that indigent convicted defendants have a fundamental right under the Fourteenth Amendment to be represented by counsel during the appellate process); *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that indigent defendants in criminal cases must be afforded the same rights to appeal their convictions as are afforded to defendants who have ample funds to pay their own costs).

²¹² *Boddie*, 401 U.S. at 390 (citing *Griffin*, 351 U.S. at 12).

²¹³ *Id.* at 390.

²¹⁴ *See supra* note 167 and accompanying text.

²¹⁵ *See supra* notes 94–95, and accompanying text.

²¹⁶ *See supra* note 201.

²¹⁷ *See supra* note 168.

in recovery of her personal claim or demand. This litigation has already cost the public far more than the amount in controversy. Speaking of justice, I think it an injustice that one person be afforded privileges and immunities at public expense not available to all persons under like conditions.

....

. . . Court costs and attorney fees in private actions simply do not rank with food, shelter and medical care and necessary transportation as among the responsibilities which the public has thus far assumed.²¹⁸

Because no fundamental right or suspect class is unduly burdened or discriminated against, Ohio's legislation must have merely a rational justification.²¹⁹ A rational justification can be found in the State's desire to curb the frivolous prisoner filings that burden Ohio's court dockets and impede the efficient administration of justice for meritorious claims.²²⁰ Therefore, it appears that Ohio House Bill 455 and Senate Bill 196 would successfully withstand any equal protection or due process challenge.

²¹⁸ *Iverson v. Marine Bancorporation*, 517 P.2d 197, 200-01 (1973) (the court found, after reviewing *Boddie*, *Kras*, and *Ortwein*, no due process or equal protection violations resulting from denial of motions to appeal civil suit without cost).

²¹⁹ See *supra* note 199.

²²⁰ See *supra* notes 71-75 and accompanying text (discussing the problem of frivolous prisoner litigation in Ohio).

V. CONCLUSION

Increasing public attention has been given to the problematic issue of frivolous prisoner litigation.²²¹ Pressure has been placed not only upon state legislatures,²²² but upon Congress as well,²²³ and both the state and federal governments are starting to respond. Ohio legislators have not turned their backs on this problem, but have risen to the challenge presented by frivolous prisoner litigation. House Bill 455 and Senate Bill 196 constitute Ohio's attempt to stem the tide of burdensome, frivolous prisoner litigation flooding Ohio courts today. These bills provide uniformity, and, as has been demonstrated by legislation elsewhere, they will broadly and effectively discourage frivolous filings by prisoners. This legislation will make significant in-roads towards alleviating the problems created by frivolous prisoner litigation.

²²¹ From television, *see, e.g., The Great Prison Pastime; Frivolous Lawsuits*, 20/20 (ABC television broadcast, July 29, 1994), to newspapers, *see e.g.,* Dunn, *supra* note 1; Manson & Kaplan, *supra* note 7, the public, through mass media, is becoming increasingly aware of the problem of frivolous prisoner litigation.

²²² *See supra* notes 80-86, 112-13, and accompanying text.

²²³ *See* Gregory C. Baumann, *Curran Seeks Federal Curbs on Frivolous Inmate Suits: Curran, Chief Law Enforcers from Nine Other States, Win Pledge from Senator Hatch to Sponsor Bill to Stem Tide of Meritless but Expensive Claims*, DAILY RECORD, Aug. 2, 1995, at 1; *see also* Senators Dole, Harry Reid, Orrin Hatch and Others Hold News Conference on Legislation Concerning Prisoner Lawsuits, News Conference, FDCH Political Transcripts (Wash., D.C., Sept. 27, 1995).