
ARTICLES

OF MICE AND PRISONERS: THE CONSTITUTIONALITY OF EXTENDING PRISONERS' CONFINEMENT FOR FILING FRIVOLOUS LAWSUITS

LYNN S. BRANHAM*

Members of a prison gang assaulted Ricky Neals when he was confined in the general-population unit of a Texas prison.¹ They then issued their threat: if he did not capitulate to their demands for money and sex, they would attack him again in the future.² He appealed to several prison officials for help, asking them to move him to the protective-custody unit where he would be segregated from the gang members who had beaten him.³ In response to his entreaty, prison officials removed two of the assailants from the general-population unit.⁴ The prison officials, however, repeatedly rebuffed his request to be housed in the protective-custody unit for "safe keeping."⁵

Neals then filed a civil-rights suit against the prison officials in a federal district court claiming that their failure to take the requisite steps to

* Visiting Professor, University of Illinois College of Law; B.A. 1976, University of Illinois; J.D., 1980, University of Chicago Law School. I would like to extend my thanks to John Boston, the director of the Prisoners' Rights Project, Legal Aid Society of New York, and Professor Erwin Chemerinsky for their helpful feedback during the drafting of this article.

1. See *Neals v. Norwood*, 59 F.3d 530, 531-32 (5th Cir. 1995).
2. See *id.*
3. See *id.*
4. See *id.* at 532.
5. Neals filed thirty-three grievances in which he contended that his confinement in the general-population unit jeopardized his safety. *Id.* When he refused to be housed in the same building with his assailants, he was sanctioned for disciplinary misconduct and placed in solitary confinement. *Id.*

protect him from future harm violated his constitutional rights.⁶ In order to prevail on such a failure-to-protect claim, he had to prove that prison officials were deliberately indifferent to a “substantial” risk of “serious harm.”⁷ In other words, he had to prove that they failed to respond in an adequate manner to a significant risk of harm of which they were actually aware.⁸ The district court concluded, however, that he had asserted only a negligence claim against them, one not rising to the level of deliberate indifference.⁹ The court therefore found his claim was “frivolous” and dismissed the complaint.¹⁰

A federal district court also dismissed prisoner Barry Miles’ claim as frivolous.¹¹ He brought suit after a fellow inmate in the segregation unit of an Illinois prison found a dead mouse in his food.¹² All of the inmates in the unit received food from the same source.¹³ Although the district court acknowledged that the discovery of a rodent in a person’s food “would disturb almost anyone,” the court concluded that he had not suffered the amount of harm needed to sustain a finding of a constitutional violation.¹⁴ Consequently, his claim was, in the legal sense, also frivolous.¹⁵

6. *Id.* Neals initially filed three complaints against various prison officials, including members of the prison’s classification committee. *Id.* The district court then consolidated the three cases into one action. *Id.*

7. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Such deliberate indifference violates the Eighth Amendment right of prisoners not to be subjected to cruel and unusual punishment. *See id.* at 834.

8. *See id.* at 837. In *Farmer v. Brennan*, the Supreme Court underscored that the deliberate-indifference requirement is not met if prison officials were unaware of the risk or the gravity of the risk faced by a prisoner even though a reasonable person would have been cognizant of it. *Id.* at 837–38. In addition, the Court noted that even when prison officials are aware of a significant threat of serious harm to a prisoner, they meet their constitutional responsibilities as long as they take reasonable steps to protect the prisoner. *See id.* at 844.

9. *See Neals*, 59 F.3d at 532–33.

10. *Id.* at 532. On appeal, the Fifth Circuit Court of Appeals held that the district court had not abused its discretion in dismissing the case. *Id.* at 533.

11. *See Miles v. Konvalenka*, 791 F. Supp. 212, 215 (N.D. Ill. 1992).

12. *Id.* at 213.

13. *Id.*

14. *Id.* at 214. The court described the harm to the plaintiff as “minimal” because he had not alleged that he had ingested the food had become sick or nauseated by news of the food contamination. *Id.*

15. *See id.* at 215. Miles also claimed that the failure to serve inmates in the segregation unit coffee with their breakfast violated their right to the equal protection of the law, because those in the general-population unit were given coffee in the morning. *See id.* The court dismissed the entire complaint under 28 U.S.C. § 1915(d) (1994). *See id.* at 215. At the time of the court’s decision, this statute authorized, but did not require, courts to sua sponte dismiss cases brought in forma pauperis that were “frivolous or malicious.” *See* 28 U.S.C. § 1915(d) (1994). The amended statute now requires courts to dismiss such cases. *See id.* § 1915(e)(2)(B)(i) (2001).

So was the claim of Kenneth Gardner, who filed a lawsuit after prison officials placed him in a cell with a mentally ill inmate who threw cleaning chemicals into his face, injuring his eye.¹⁶ And so were Bobby Brown's claims, one of which contested the vile conditions of the jail's slime-encrusted and bug-infested showers on constitutional grounds.¹⁷ In another claim, he protested that the only way to avoid the second-hand smoke which permeated the general-population unit was to agree to be housed elsewhere in a single cell where he would enjoy fewer privileges than the other inmates.¹⁸

The common thread between all of the above claims is that a court dismissed each one on the grounds that it was legally frivolous. But if prisoners were to file such claims in court today, they would share yet another common bond in many states—the mandatory or potential revocation of good-time credits because they filed a legally frivolous claim in court.¹⁹ In other words, they might be incarcerated for a longer period of time—in some states, for more than a year²⁰—because of what was, in retrospect, an ill-advised decision to file a lawsuit to redress their grievances.

This Article analyzes the constitutionality of statutes that authorize or require the revocation of good-time credits when a prisoner files a “frivolous” claim or lawsuit. In Part I, the Article begins with an overview of several mechanisms courts have devised to thwart and impose sanctions for civil lawsuits whose filing constitutes an abuse of the legal system. Part

16. See *Gardner v. Cato*, 841 F.2d 105, 106–07 (5th Cir. 1988). In upholding this dismissal, the Fifth Circuit Court of Appeals observed that Gardner had asserted, at most, that prison officials were negligent in placing him in the same cell with a mentally ill inmate who had access to caustic chemicals, not enough to support a finding that his constitutional rights had been violated. *Id.* at 107.

17. See *Brown v. Bowles*, No. 3:99-CV-2158-BC, 2000 WL 980011 at *2–*4 (N.D. Tex. July 17, 2000). The court dismissed this claim because Brown did not suffer any “physical injury,” as required by 42 U.S.C. § 1997e(e) (1994), from these allegedly filthy conditions. See *id.* The Court held that insect bites did not constitute the requisite physical injury. See *id.* See *infra* text accompanying notes 60–62 for a discussion of this physical-injury requirement.

18. See *Brown*, 2000 WL 980011 at *4. Brown asserted two other claims in his complaint that the court also dismissed as frivolous. See *id.* at *3–*4. In one, he contended a telephone company had illegally conspired with jail officials to overcharge inmates and their families for calls placed from the jail, and in the other, he alleged he had been unfairly disciplined.

19. See *infra* Part II.B. Good-time credits, as their name suggests, are typically awarded for prisoners' good behavior in prison or their participation in rehabilitative programs. The sentences of most, though not all, Illinois prisoners, for example, are reduced by one day for every day of good behavior while in prison. 730 ILL. COMP. STAT. 5/3-6-3(a)(2.1) (1998). In addition, prisoners who successfully complete an assignment to an educational, vocational, or substance-abuse program are entitled to additional good-time credits. See *id.* at 5/3-6-3(a)(4).

20. See *infra* notes 78–88 and accompanying text.

II discusses some recently enacted statutes designed to curb the filing of frivolous lawsuits by prisoners. After highlighting the pertinent provisions of the federal Prison Litigation Reform Act,²¹ the Article examines the state statutes that provide for the deferral of prisoners' release from prison when they have filed a legally frivolous claim.

Part III analyzes the constitutionality of these state revocation statutes.²² Some of the questions addressed include: Do the revocation statutes constitute unconstitutional *ex post facto* laws? When the statutes are applied to claims filed in federal courts or federal claims filed in state courts, do they abridge the Supremacy Clause? Do the revocation statutes flout the requirements of due process by effectively punishing some prisoners for their ignorance, and do they unconstitutionally impair prisoners' right to have access to the courts and petition the government for a redress of grievances? Part IV concludes with some policy recommendations for state legislatures.

I. MECHANISMS DEvised BY THE JUDICIARY TO DETER THE ABUSIVE FILING OF CIVIL LAWSUITS

Civil lawsuits are designed to avert or provide redress for certain kinds of harm, such as physical injuries caused by the negligence of others. But sometimes they can themselves be an instrument for inflicting harm on others. They can produce two kinds of harm: injuries that ensue from the nature of the claim asserted in the lawsuit and injuries that are the by-product of being drawn into the litigation process. Examples of the former type of harm are the damage to a doctor's reputation and the emotional tumult he or she experiences when faced with a baseless claim for medical malpractice. The attorney's fees and litigation-related costs incurred in defending against such a claim are examples of the latter kind of harm.

This second type of harm can be further divided into two subcategories. The costs incurred by a party against whom such a lawsuit was filed fall within the first subcategory. These costs include both out-of-pocket expenditures necessitated by the lawsuit, such as fees for attorneys, investigators, and the like; and in-kind costs, primarily the value of the

21. Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-66 to 1321-77 (1996) (codified as amended at 18 U.S.C. §§ 3624(b), 3626 (1994) scattered sections of titles 28 and 42 of the U.S.C.).

22. At this point, only the constitutionality of the Mississippi revocation statute has been adjudicated in a reported decision, with the Mississippi Supreme Court having ruled that it is constitutional. *See* *Tubwell v. Anderson*, 776 So.2d 654, 658-59 (Miss. 2000).

defendant's time spent on litigation-related matters, such as time spent in meetings with attorneys. The second subcategory of costs consists of those incurred because of the lawsuit by persons or entities other than the defendant. The monetary value of the judge's time and that of other court personnel in processing it through the court system exemplifies this kind of cost.

Because lawsuits can be a tool for a bad as well as good, courts have inherent power to impose sanctions on litigants who file lawsuits in bad faith.²³ A plaintiff acts in bad faith by bringing it for an "improper purpose," such as to harass a defendant.²⁴

The Federal Rules of Civil Procedure also contain several provisions designed to avert and sanction abusive litigation practices.²⁵ One of those rules, Rule 11, outlines the repercussions that may follow from the improper filing of a complaint.²⁶ It requires that an attorney or, in the case of a *pro se* litigant, the plaintiff, sign a complaint filed with the court.²⁷ In signing the complaint, the signator is attesting that "to the best of [his or her] knowledge, information, and belief" it has not been filed for an "improper purpose," that the asserted claims are either supported by current law or by a nonfrivolous argument for modifying the law, and that evidence exists to support the complaint's factual allegations or is likely to be adduced during the plaintiff's factual investigation and the discovery process.²⁸ It further provides that the attorney's or plaintiff's signature certifies that the belief as to the complaint's adequacy is grounded on "an inquiry reasonable under the circumstances."²⁹

If a court later determines that a complaint was filed in violation of Rule 11(b), the court may impose an "appropriate sanction" on the person who signed it or who is otherwise responsible for the violation.³⁰ It can

23. See, e.g., *Schlaifer Nance & Co. v. Estate of Warhol*, 194 F.3d 323, 336 (2d Cir. 1999).

24. *Id.* For examples of the types of sanctions courts impose when exercising their inherent authority, see GREGORY P. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* 450–52 (3d ed. 2000).

25. See, e.g., FED. R. CIV. P. 37(b)(2)(D)–(E) (authorizing sanctions for the failure to comply with a discovery order); FED. R. CIV. P. 56(g) (requiring courts to direct a party who submitted an affidavit under Rule 56 in bad faith or "solely" to protract the lawsuit to reimburse the other party for expenses incurred, including attorney's fees, because of the affidavit's filing). See also *infra* notes 138–141 and accompanying text.

26. See FED. R. CIV. P. at 11(c)(2).

27. See *id.* at 11(a).

28. *Id.* at 11(b)(1)–(3).

29. *Id.* at 11(b).

30. *Id.* at 11(c).

choose from an array of sanctions, both monetary and otherwise.³¹ In making this selection, however, its discretion is circumscribed, in that it must impose the least severe sanction needed to effectuate Rule 11's deterrent purpose.³² The principal purpose is to deter "baseless filings,"³³ but a subsidiary objective is to punish abusive litigation practices.³⁴ While the imposition of sanctions may have the side effect of compensating another party for costs incurred because of litigation abuses, the rule's purpose is not compensatory.³⁵

One of the questions concerning Rule 11's scope is whether sanctions can be imposed on a plaintiff who signed a complaint with the subjective belief that it met the three prescriptions set forth by it. The answer to this question is yes. When originally adopted in 1938, it provided that only attorneys could make the potentially sanction-triggering certifications when affixing their signatures to complaints.³⁶ In addition, under this earlier version, a court could not impose a sanction when the attorney subjectively, even if unreasonably, believed in the factual and legal veracity of the complaint tendered to the court.³⁷

In its original form, Rule 11 was ineffectual in deterring abusive court filings.³⁸ Consequently, in 1983 and again in 1993, the rule was revised.³⁹ The revised rule extends the court's sanctioning authority to *pro se* parties who sign a complaint or other document filed with the court as well as to other persons responsible for a violation.⁴⁰ In addition, the amended rule discards the subjective, bad-faith litmus test, replacing it with an objective unreasonableness standard.⁴¹ If the person signing a complaint errs in

31. *See id.* at 11(c)(2). For examples of the range of sanctions that courts may impose under Rule 11, see JOSEPH, *supra* note 24, at 259-60, 286.

32. *See id.* ("A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.")

33. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990).

34. *See Pavelic & LeFlore v. Marvel Entm't Group*, 493 U.S. 120, 126 (1989) ("The purpose of the provision . . . is not reimbursement but 'sanction' . . .").

35. FED. R. CIV. P. 11 advisory committee's note (stating that "the purpose of Rule 11 sanctions is to deter rather than to compensate").

36. FED. R. CIV. P. 11 ("The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.")

37. *Id.*; FED. R. CIV. P. 11 advisory committee's note (referring to the "good-faith formula" of the original Rule 11).

38. *See* FED. R. CIV. P. 11 advisory committee's note (1983).

39. *See id.*; FED. R. CIV. P. 11.

40. *See* FED. R. CIV. P. 11 (b)-(c).

41. FED. R. CIV. P. 11 advisory committee's note. *See Business Guides, Inc. v. Chromatic Communications Enter.*, 498 U.S. 533, 549-51 (1991).

concluding that it is factually and legally well-founded and fails to conduct a reasonable inquiry that would reveal that error, the court may sanction them.⁴²

The Advisory Committee that drafted the amended Rule 11 emphasized that whether or not the factual and legal inquiry which preceded a complaint's filing was reasonable would depend on "the circumstances."⁴³ In other words, a reasonable investigation and assessment of the facts and law in one case might, in another case, be flagrantly unreasonable.⁴⁴ For example, while a court might consider the steps taken by a *pro se* plaintiff to confirm a complaint's legal validity reasonable, the court might find an attorney's identical steps in delving into the law palpably insufficient and unreasonable.⁴⁵

The objective standard of Rule 11 is therefore marked by its flexibility.⁴⁶ Even the filing of a frivolous complaint by a *pro se* plaintiff is not necessarily, or even usually, an infraction.⁴⁷ Whether or not Rule 11 has been violated will depend on all of the circumstances, including the plaintiff's ability to both garner and understand information about the requirements that must be met in order to state a legally cognizable claim.⁴⁸

42. See FED. R. CIV. P. 11(b). Rule 11(b) now provides as follows:

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Id.

43. FED. R. CIV. P. 11 advisory committee's note.

44. See *Business Guides, Inc.*, 498 U.S. at 550.

45. See *id.* (noting that the legal investigation that could be reasonably expected of an attorney may differ from what could be reasonably expected of the client who also signed the complaint).

46. See *id.* at 551.

47. See, e.g., *McC Campbell v. KPMG Peat Marwick*, 982 F. Supp. 445, 448 (N.D. Tex. 1997) (declining to impose Rule 11 sanctions on a *pro se* plaintiff unless the plaintiff has repeatedly filed frivolous claims); *Pankey v. Webster*, 816 F. Supp. 553, 562 (W.D. Mo. 1993) (refusing to find that the *pro se* plaintiff violated Rule 11 when she filed a frivolous complaint because she was "severely limited in her ability [to] make effective use of legal materials and to apply the law to objective reality").

48. See FED. R. CIV. P. 11 advisory committee's note (outlining examples of factors courts should consider in determining whether to impose Rule 11 sanctions, including whether the person is "trained in the law").

Furthermore, even if a court determines that the filing of a *pro se* complaint transgressed Rule 11, the extenuating circumstances that often hamper the prefatory legal and factual investigations by *pro se* litigants, especially prisoners, may mitigate the penalty the court imposes.⁴⁹

II. STATUTES ENACTED TO CURB THE FILING OF FRIVOLOUS LAWSUITS BY PRISONERS

A. THE PRISON LITIGATION REFORM ACT

The Prison Litigation Reform Act (“PLRA”)⁵⁰ was enacted in 1996 in part to curb the filing of frivolous lawsuits by prisoners.⁵¹ To effectuate this purpose, it requires prisoners to exhaust their administrative remedies before filing a lawsuit under 42 U.S.C. § 1983 or any other “[f]ederal law” to challenging the legality of the conditions of their confinement.⁵² In addition, all prisoners, including indigent ones, must at some point pay the full filing fee when bringing a civil action or appeal in federal court.⁵³ Indigent prisoners can pay this fee in installments, but they still must generally pay a prescribed portion of it up front as a precondition to court adjudication of their claims.⁵⁴ After the complaint or appeal is filed, the prisoner must pay off the balance of the filing fee in monthly installments equaling twenty percent of the income credited to the prisoner’s trust-fund account the month before.⁵⁵ If the prisoner has ten dollars or less in the

49. See FED. R. CIV. P. 11 advisory committee’s note (noting that when determining the kind and severity of sanctions to impose under Rule 11, a court should take a party’s “actual or presumed knowledge” at the time he or she signed the pleading into account). Thus, when determining what sanction to impose for a Rule 11 violation, the fact that a party had no legal counsel is a relevant mitigating factor. *See id.*

50. Prison Litigation Reform Act, Pub. L. No. 104-34, 110 Stat. 1321-66 to 1321-77 (1996).

51. H.R. REP. NO. 104-21, at 7-8 (1995); 141 CONG. REC. S14413-14 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) (introducing S. 1279, “The Prison Litigation Reform Act of 1995”). The other espoused purpose of the PLRA was to end what Congress considered the judicial micromanagement of correctional institutions. *Id.*

52. 42 U.S.C. § 1997e(a) (2000).

53. 28 U.S.C. § 1915(b)(1) (2000).

54. *See id.* at § 1915(b)(1)-(2). The initial partial filing fee that an indigent prisoner must pay is twenty percent of whichever is greater: (1) the average monthly deposits to the prisoner’s account; or (2) the average monthly balance in that account during the six months preceding the filing of the complaint or appeal. *Id.* at § 1915(b)(1). If the prisoner lacks the funds to pay this fee, though, he or she can still file the complaint or appeal. *Id.* at § 1915(b)(4).

55. *Id.* at § 1915(b)(2).

account, however, prison officials cannot forward the installment payment to the court.⁵⁶

Additionally, federal courts must screen prisoner complaints, preferably before they are docketed, and dismiss any claims that are frivolous, malicious, fail to state a claim for which relief can be granted, or seek monetary relief from a defendant with immunity from such relief.⁵⁷ Courts need not, and generally should not, await the filing of a motion to dismiss before dismissing such claims.⁵⁸ If a court previously dismissed three or more of a prisoner's civil lawsuits or appeals because they were frivolous, malicious, or failed to state a cognizable claim, the PLRA bars the prisoner from bringing a civil action or appeal in forma pauperis.⁵⁹ Only if the prisoner is facing an "imminent" threat of "serious physical injury" can the prisoner file the action or appeal without first paying the full filing fee.⁶⁰

The PLRA furthermore prohibits prisoners from seeking recompense for mental or emotional injuries unless they also suffered a physical injury.⁶¹ Courts must dismiss these types of claims.⁶² In addition, a federal district court may revoke the good-time credits of federal prisoners who file a civil lawsuit for malicious reasons—such as "solely" to harass a defendant—or who present false information to the court.⁶³ The PLRA does not, however, authorize such revocation of good-time credits simply because a prisoner's lawsuit was frivolous.⁶⁴

56. *See id.*

57. *See id.* at §§ 1915(e)(2), 1915A(a)–(b), 42 U.S.C. § 1997(e)(c) (2000).

58. *See* 28 U.S.C. § 1915A(a) (requiring courts, "if feasible," to screen prisoners' civil complaints against governmental officials or entities before the complaint is docketed or otherwise as soon as possible after docketing).

59. *See id.* § 1915(g).

60. *Id.*

61. *See* 42 U.S.C. § 1997e(e) (2000).

62. *See, e.g., Harper v. Showers*, 174 F.3d 716, 717, 719 (5th Cir. 1999) (dismissing the prisoner's claim for damages because his confinement in allegedly filthy, feces-smearred cells had caused no physical injury).

63. 28 U.S.C. § 1932 (2000).

64. *See id.*

B. STATE STATUTES PROVIDING FOR THE REVOCATION OF GOOD-TIME CREDITS FOR FILING A FRIVOLOUS LAWSUIT

The PLRA catalyzed the enactment of state statutes designed to further curb prisoners filing frivolous lawsuits.⁶⁵ Many of these tracked their federal counterpart, adding partial filing fees,⁶⁶ “three strikes” provisions,⁶⁷ and preemptory screening of prisoner complaints⁶⁸ to the repertoire of mechanisms that already existed to thwart the filing of frivolous claims. But many of these statutes took a significant step further than the PLRA, authorizing, and in many cases requiring, the revocation of good-time credits of a prisoner who had so filed.⁶⁹

65. See, e.g., GA. CODE ANN. §§ 42-12-1 to 42-12-8 (1997 & Supp. 2000); LA. REV. STAT. ANN. §§ 15:1181-90 (West Supp. 2001); MICH. COMP. LAWS ANN. §§ 600.5501-.5531 (West 2000); 42 PA. CONS. STAT. ANN. §§ 6601-08 (West 2000).

66. See, e.g., 735 ILL. COMP. STAT. 5/22-105(a) (1998); MASS. ANN. LAWS ch. 261, § 29(d) (Law. Co-op. Supp. 2000); 42 PA. CONS. STAT. ANN. § 6602(b)-(c) (West 2000); TENN. CODE ANN. § 41-21-807(b)-(d) (1997).

67. See, e.g., COLO. REV. STAT. ANN. § 13-17.5-102.7 (West Supp. 2000); IOWA CODE ANN. § 610A.1(1)(f) (West Supp. 2001); MD. CODE ANN., CTS. & JUD. PROC. § 5-1005(c)(1) (1998); MISS. CODE ANN. § 47-5-76(1) (2000). Some of these state statutes have a broader scope than the PLRA’s “three strikes” provision, totally barring prisoners who have filed three or more cases dismissed for frivolousness or for other prescribed reasons from filing any further civil lawsuits except in narrowly defined circumstances. See, e.g., COLO. REV. STAT. ANN. § 13-17.5-102.7 (West Supp. 2000) (prohibiting an inmate who has had three cases contesting prison conditions dismissed for frivolousness, maliciousness, or failure to state a claim for which relief can be granted from bringing additional conditions-of-confinement cases unless the inmate is in “imminent” peril of “serious physical injury” or a judge grants leave to file the lawsuit). By contrast, the PLRA generally bars inmates with “three strikes” from suing in forma pauperis but does not foreclose them from filing future lawsuits as long as they pay the full filing fee up front. See 28 U.S.C. § 1915(g). See also *supra* notes 59-60 and accompanying text.

68. See, e.g., FLA. STAT. ANN. § 57.085(6) (West Supp. 2001); KY. REV. STAT. ANN. § 454.405(1) (Michie Supp. 2000); MD. CODE ANN., CTS. & JUD. PROC. § 5-1004(a)-(b) (1998).

69. See, e.g., DEL. CODE ANN. tit. 10, § 8805 (1999) (authorizing the forfeiture of good-time credits for filing a factually frivolous action or a legally frivolous action when a *pro se* plaintiff, acting with “due diligence,” should have found “well settled law” confirming a claim’s frivolousness); FLA. STAT. ANN. § 944.28(2)(a) (West Supp. 2001) (authorizing forfeiture for bringing a frivolous claim, lawsuit, or appeal); 730 ILL. COMP. STAT. 5/3-6-3(d) (1998) (requiring prison officials to hold a disciplinary hearing to revoke good-conduct credits when a court found a prisoner’s complaint filed against the state or state officials to be frivolous); KY. REV. STAT. ANN. § 197.045(5)(a) (Michie Supp. 2000) (requiring the Department of Corrections to develop regulations defining the amount of good-time credits to be forfeited for filing a factually frivolous action and specifying the effect of such a filing on the prisoner’s future ability to earn such credits); MINN. STAT. ANN. § 244.035(b) (West Supp. 2001) (requiring the Department of Corrections to develop sanctions, that may include the loss of good-time credits, for filing a frivolous claim); MISS. CODE ANN. § 47-5-138(3) (2000) (requiring the forfeiture of accrued good-time credits upon receipt of a final court order dismissing a prisoner’s lawsuit as frivolous or for failure to state a claim for which relief can be granted); N.Y. CORRECT. LAW § 803(1)(d) (McKinney Supp. 2001) (directing the withholding of good-time allowances after a judicial finding that a prisoner filed a frivolous claim or action); OKLA. STAT. ANN. tit. 57, § 566(C)(3) (West

A total of twelve states permit the extension of a prisoner's incarceration, generally through the revocation of good-time credits, for filing a frivolous lawsuit.⁷⁰ These states do not require as a predicate to revocation that the prisoner file the frivolous lawsuit with a malicious or otherwise improper purpose, such as to harass a correctional officer. All that is required for a prisoner to lose accumulated good-time credits is for the complaint to lack an arguable factual or legal foundation.⁷¹ Thus, if a judge concludes that a prisoner's claim is baseless from a legal perspective, the length of time the prisoner is confined in prison can be extended beyond the date he or she would otherwise have been released had the claim not been filed. This prolongation of the prisoner's confinement may ensue even if the prisoner actually believed that the asserted claim was legally cognizable.

The filing of a frivolous complaint in either federal or state court can, under most revocation statutes, trigger the loss of good-time credits.⁷² The statutes vary in other particulars, however. Some state courts order the revocation of good-time credits when dismissing a prisoner's frivolous complaint.⁷³ In other states, a court order dismissing a prisoner's claim as frivolous triggers, or may trigger, an administrative disciplinary process that can or will culminate in the revocation of good-time credits.⁷⁴ Some

Supp. 2001) (authorizing the revocation of "earned credits" if a judge finds that a cause of action was frivolous); TENN. CODE ANN. § 41-21-816 (1997) (requiring the forfeiture of good-conduct credits upon the receipt of a final court order dismissing a claim or lawsuit as frivolous if the prisoner previously filed a frivolous or malicious claim or lawsuit); TEX. GOV'T CODE ANN. § 498.0045 (Vernon 1998) (requiring the forfeiture of good-conduct time upon receipt of a court order dismissing a lawsuit as frivolous); W. VA. CODE ANN. § 25-1A-6 (Michie Supp. 2000) (authorizing the forfeiture of good-time credits when a court finds a civil action to be frivolous) [hereinafter STATE REVOCATION STATUTES].

70. See STATE REVOCATION STATUTES, *supra* note 69; S.C. CODE ANN. § 24-27-300 (Law. Co-op. Supp. 2000) (authorizing an extension of the inmate's imprisonment term if the inmate has had three or more actions or appeals dismissed sua sponte for frivolousness unless the prisoner faced an "imminent danger" of "great bodily injury" when he or she filed the action or appeal).

71. See, e.g., 730 ILL. COMP. STAT. 5/3-6-3(d)(1)(A) (1998) (allowing revocation of good-time credits if complaint "lacks an arguable basis in law or fact").

72. Some of the revocation statutes state explicitly that the filing of a frivolous claim or action in a federal or state court can result in the revocation of good-time credits. See, e.g., MISS. CODE ANN. § 47-5-138(3)(a) (2000). Other statutes simply provide for the revocation of good-time credits when a frivolous claim is filed in a court without limiting the type of court in which the prisoner must have filed the claim. See, e.g., KY. REV. STAT. ANN. § 197.045(5)(a) (Michie Supp. 2000).

73. See, e.g., W. VA. CODE ANN. § 25-1A-6 (Michie Supp. 2000).

74. See, e.g., TEX. GOV'T CODE ANN. § 498.0045 (Vernon 1998). Some of the states' revocation statutes condition revocation on the Department of Corrections' receipt of a court order dismissing a prisoner's claim as frivolous. See, e.g., *id.* The way in which these statutes are currently drafted may limit their reach because some courts often dismiss prisoners' frivolous lawsuits before the defendants

states mandate the revocation of good-time credits for filing a frivolous lawsuit,⁷⁵ while others remit the decision whether or not to revoke credits to the discretion of the court or correctional officials.⁷⁶

The amount of additional time that a prisoner can be incarcerated because he or she filed a legally frivolous lawsuit also differs dramatically from state to state. Most states provide for the forfeiture of good-time credits the prisoner has already earned, but in a few states, the filing of a frivolous lawsuit can preclude a prisoner from earning a defined amount of future credits.⁷⁷ Some states do not limit the amount of accumulated good-time credits that a prisoner can forfeit by filing a frivolous lawsuit,⁷⁸ while other states place a cap on the amount of credits a prisoner can lose,⁷⁹ although these caps vary widely in length. In Delaware, for example, the department of corrections can order the forfeiture of any good-time credits the prisoner accumulated during the pendency of the lawsuit—from the date the prisoner filed the complaint in court until the date the court disposed of the case.⁸⁰ In Illinois, by contrast, a prisoner filing a frivolous lawsuit can lose up to a maximum of 180 days of credits,⁸¹ while in New York, correctional officials can withhold “merit time” from such a prisoner equaling up to one sixth of the prisoner’s minimum sentence.⁸²

Mississippi, Tennessee, and Texas have implemented a graduated structure for the revocation of good-time credits.⁸³ In these states, the

have been served with process. *See, e.g.*, 28 U.S.C. § 1915A (2000) (directing federal courts to dismiss prisoners’ frivolous claims, if possible, before the complaint is docketed). In these circumstances, courts would not normally send copies of their dismissal orders to correctional officials.

75. *See, e.g.*, TENN. CODE ANN. § 41-21-816(a) (1997).

76. *See, e.g.*, FLA. STAT. ANN. §§ 944.279(1), 944.28(2)(a) (West Supp. 2001) (stating that good-time credits are “subject to forfeiture” during disciplinary proceedings instituted against a prisoner for filing a frivolous claim, action, or appeal); W. VA. CODE ANN. § 25-1A-6 (Michie Supp. 2000) (remitting the decision whether or not to revoke good-time credits for filing a frivolous lawsuit to the court’s discretion).

77. *See* KY. REV. STAT. ANN. § 197.045(5)(a) (Michie Supp. 2000) (authorizing the Department of Corrections to limit the ability of an inmate who filed a factually frivolous lawsuit to earn future good-time credits); N.Y. CORRECT. LAW § 803(d) (McKinney Supp. 2001) (authorizing prison officials to not only forfeit, but also withhold good-time allowances when a prisoner files a frivolous claim or action).

78. *See, e.g.*, FLA. STAT. ANN. § 944.28(2)(a) (West Supp. 2001) (authorizing forfeiture of some or all of the gain-time the prisoner has earned).

79. *See, e.g.*, OKLA. STAT. ANN. tit. 57, § 566(C)(3) (West Supp. 2001) (authorizing the revocation of up to 720 earned credits).

80. DEL. CODE ANN. tit. 10, § 8805(a)–(b) (1999).

81. 730 ILL. COMP. STAT. 5/3-6-3(d) (1998).

82. N.Y. CORRECT. LAW § 803(d) (McKinney Supp. 2001).

83. *See* MISS. CODE ANN. § 47-5-138(3)(b) (2000); TENN. CODE ANN. § 41-21-816(b) (1997); TEX. GOV’T CODE ANN. § 498.0045(b) (Vernon 1998).

filing of one frivolous lawsuit has no effect on the length of a prisoner's confinement.⁸⁴ If the prisoner files another lawsuit deemed frivolous, however, the department of corrections must revoke sixty days of the prisoner's good-time credits.⁸⁵ A third frivolous lawsuit results in the forfeiture of 120 days worth of credits, and each frivolous lawsuit thereafter actuates a 180-day forfeiture.⁸⁶

South Carolina stands, at least for now, in a class by itself in its response to the filing of frivolous prisoners' lawsuits. In all of the other states in which prisoners' confinement may be prolonged, they cannot be confined beyond their maximum prison sentences due to their alleged malfeasance in filing a frivolous lawsuit.⁸⁷ In other words, a prisoner serving a five-year prison sentence for robbery cannot be incarcerated for six years by filing a lawsuit that is frivolous. In South Carolina, however, a court can extend a prisoner's confinement by up to a year if the prisoner files a frivolous lawsuit or appeal after previously having had three or more civil lawsuits or appeals dismissed because they were frivolous, malicious, or otherwise without merit.⁸⁸

III. THE CONSTITUTIONALITY OF STATE STATUTES REDUCING THE GOOD-TIME CREDITS OF PRISONERS WHO FILE FRIVOLOUS LAWSUITS

State statutes authorizing or requiring the revocation of good-time credits raise a host of constitutional questions,⁸⁹ including the following: Are these statutes unconstitutional *ex post facto* laws? Does the Supremacy Clause bar application of these statutes to federal claims? Do

84. *See id.*

85. *See id.*

86. *See id.*

87. *See* STATE REVOCATION STATUTES, *supra* note 69.

88. S.C. CODE ANN. § 24-27-300 (Law. Co-op. Supp. 2000). The court can hold a prisoner who filed a frivolous lawsuit or appeal in these circumstances in contempt and then impose the extended prison term for the contempt. *Id.* If, however, the prisoner who brought the frivolous action or appeal was in "imminent danger" of "great bodily harm," the court cannot hold the prisoner in contempt for bringing the frivolous lawsuit or appeal. *Id.*

89. In addition to the constitutional claims analyzed in this Article, prisoners might assert other grounds for invalidating the states' revocation statutes. For example, because only prisoners face the prospect of prolonged confinement for filing a frivolous lawsuit, the differential treatment of prisoners and nonprisoners might spawn an equal-protection challenge to the revocation statutes. In addition, prisoners might contend that the procedures followed when applying the revocation statutes do not comport with the requirements of procedural due process. *Cf. Wolff v. McDonnell*, 418 U.S. 539, 563-71 (1974) (outlining the procedural safeguards that must attend the revocation of good-time credits for institutional misconduct).

the statutes violate due process by effectively punishing prisoners for their ignorance? And do they abridge a prisoner's constitutional right to have access to the courts? Each of these questions will be discussed, in turn, below.

A. REVOCATION OF GOOD-TIME CREDITS FOR FRIVOLOUS FILINGS:
UNCONSTITUTIONAL EX POST FACTO LAWS?

The state statutes providing for the revocation of a prisoner's good-time credits for filing frivolous lawsuits are drafted in a broad-brush manner. These statutes purport to apply to all prisoners and contain no temporal limitation restricting their application to prisoners incarcerated for crimes committed after the date of the statutes' enactment.⁹⁰ Do the statutes, as drafted, therefore constitute unconstitutional ex post facto laws?

The answer to that question appears, rather clearly, to be yes. Article I, Section 10 of the United States Constitution prohibits states from enacting ex post facto laws.⁹¹ A prototypical ex post facto law is one that increases the punishment for a crime after the date on which the crime was committed.⁹² If, for example, the maximum penalty for a particular crime was five years when a person committed the crime, a subsequently enacted statute could not constitutionally increase that person's maximum sentence beyond those five years.

The Supreme Court has not confined application of the ex post facto prohibition to statutes that directly increase a convicted offender's sentence. According to the Court, the prohibition's focus is on the imposition of increased punishment, not simply an increased sentence.⁹³ The Court has therefore construed the prohibition to encompass laws the effect of which is to increase the length of a convicted offender's term of

90. See, e.g., 730 ILL. COMP. STAT. 5/3-6-3(d) (1998):

If a lawsuit is filed by a prisoner in an Illinois or federal court against the State, the Department of Corrections, or the Prisoner Review Board, or against any of their officers or employees, and the court makes a specific finding that a pleading, motion, or other paper filed by the prisoner is frivolous, the Department of Corrections shall conduct a hearing to revoke up to 180 days of good conduct credit by bringing charges against the prisoner sought to be deprived of the good conduct credits before the Prisoner Review Board.

91. U.S. CONST. art. I, § 10, cl. 1. Another constitutional provision prohibits Congress from enacting ex post facto laws. *Id.* art. I, § 9, cl. 3.

92. See, e.g., *Lindsey v. Washington*, 301 U.S. 397, 401-02 (1937) (holding that a statute mandating a fifteen-year prison sentence for a crime that could have yielded a shorter sentence at the time the crime was committed was an unconstitutional ex post facto law).

93. See *Weaver v. Graham*, 450 U.S. 24, 32 n.17 (1981) ("The critical question . . . is whether the new provision imposes greater punishment after the commission of the offense, not merely whether it increases a criminal sentence.").

confinement even though the offender's maximum sentence is left undisturbed.⁹⁴

Two Supreme Court cases in particular point to the unconstitutionality of state statutes revocation of good-time credits when prisoners whose crimes preceded the enactment of the statute file a frivolous lawsuit. The first case is *Weaver v. Graham*.⁹⁵ At issue in this case was a Florida statute that reduced the sentencing credits, known in that state as "gain-time credits," that prisoners could earn for their good conduct while in prison.⁹⁶ The statute decreased the monthly deductions from a prisoner's sentence for good conduct from five days to three during the first two years of confinement, from ten days to six during the third and fourth years of incarceration, and from fifteen days to nine days during all subsequent years.⁹⁷

The Supreme Court struck down the Florida statute to the extent that it applied to prisoners whose crimes predated the statute's enactment.⁹⁸ In doing so, the Court dismissed the Florida Supreme Court's contention that the ex post facto prohibition was inapposite because the Florida statute did not impair a "vested right," but only a privilege accorded by a nonobligatory "act of grace" by the state.⁹⁹ For ex post facto purposes, what mattered to the Supreme Court was not whether the statute implicated a privilege as opposed to a vested right, but rather, the statute's practical effect—that it reduced the gain-time credits prisoners could earn, thereby prolonging their incarceration beyond the date they could have been released under the law existing at the time they committed their crimes.¹⁰⁰

The Supreme Court's decision in *Lynce v. Mathis*¹⁰¹ removes any doubt as to whether the state statutes providing for the reduction of good-time credits when prisoners file frivolous lawsuits contravene the

94. See, e.g., *Lynce v. Mathis*, 519 U.S. 433, 446–47 (1997) (holding that a statute canceling gain-time credits awarded prisoners convicted of murder and attempted murder was an ex post facto law as applied to prisoners whose crimes predated the statute's enactment); *Weaver*, 450 U.S. at 33, 36 (ruling that statute reducing gain-time credits that prisoners can earn for good conduct violated the ex post facto prohibition when applied to prisoners who had committed their crimes before the statute went into effect).

95. 450 U.S. 24 (1981).

96. See *id.* at 25–26.

97. See *id.* at 26.

98. See *id.* at 36.

99. See *id.* at 28–29.

100. See *id.* at 30–31, 33 (observing that whether or not a statute affects an "affirmative, enforceable right" is, from an ex post facto standpoint, "not relevant").

101. 519 U.S. 433 (1997).

constitutional prohibition on ex post facto laws. *Lynce* involved the constitutionality of another Florida statute, one that revoked sentencing credits earned by prisoners convicted of murder or attempted murder.¹⁰² Prisoners had not earned the sentencing credits affected by this statute through good conduct.¹⁰³ These credits instead automatically accrued, under a statute in effect at the time of the prisoner's crime, whenever the prison population exceeded a defined percentage of the Florida prison system's capacity.¹⁰⁴

The state in *Lynce* attempted to distinguish the statute revoking overcrowding credits from the statute the Supreme Court had found unconstitutional in *Weaver*.¹⁰⁵ The state argued that because the statute granting the (now repealed) sentencing credits was driven by administrative considerations, namely the desire to alleviate prison overcrowding, those credits had nothing to do with the punishment imposed on the state's prisoners.¹⁰⁶ Consequently, according to the state, its subsequent tinkering with certain prisoners' entitlement to these credits did not increase their punishment in contravention of the Ex Post Facto Clause.¹⁰⁷ The Supreme Court rebuffed this attempt to distinguish *Weaver*, noting that the state's focus on the legislature's intent in adopting a statute affecting the length of a prisoner's confinement was misdirected.¹⁰⁸ The Court reiterated what it had said earlier in *Weaver*—that the measure of an ex post facto law is its practical effect.¹⁰⁹ And because the practical effect of the Florida statute revoking overcrowding credits accumulated by convicted murderers was to lengthen their term of imprisonment, the Supreme Court held that the statute was invalid under the Ex Post Facto Clause.¹¹⁰

102. *Id.* at 436.

103. *Id.*

104. *Id.* at 437–38, 447–49. The statute in force when the petitioner in *Lynce* committed his crime provided for the reduction of prisoners' sentences by up to thirty days whenever the prison population reached ninety-eight percent of the prison system's capacity. *Id.* at 447–48. Under this statute and slightly modified variants enacted after his crime, the petitioner earned 1,860 sentencing credits because of prison overcrowding. *Id.* at 435–36, 448–49.

105. *Id.* at 442.

106. *See id.* at 439.

107. *See id.* at 445.

108. *See id.* at 442.

109. *Id.* at 442–43. Specifically, the Court in *Weaver* said that the "essential inquiry" under the Ex Post Facto Clause is whether the cancellation of gain-time credits, for whatever reason, "had the effect of lengthening petitioner's period of incarceration." *Id.*

110. *See id.* at 443. The petitioner in *Lynce* was actually no longer confined when the Florida legislature enacted the statute canceling murderers' gain-time credits. *Id.* at 438–39. Reimprisoned under this statute, the petitioner faced the prospect of almost six more years in prison before he could, once again, be released. *Id.* at 435–36.

States defending the constitutionality of their frivolous-filing revocation statutes might attempt to argue that the statutes comport with ex post facto requirements because, unlike in *Lynce*, the focus in enacting the revocation statutes was on a subject extraneous to the length of prison sentences—the curtailing of frivolous inmate litigation. By contrast, prison overcrowding, the problem that activated the awarding of the sentencing credits whose subsequent repeal *Lynce* held violated the ex post facto prohibition, is integrally related to the length of prison sentences. The longer the sentences are, the more likely it is that prisons will be overcrowded.¹¹¹

As mentioned earlier, however, the Supreme Court conclusively decided in *Lynce* that the purpose that animated a statute's enactment is irrelevant to any ex post facto inquiry. For ex post facto purposes, what is relevant is the statute's real-life effect. The actual and prohibited effect of the statute the Supreme Court struck down in *Lynce* was to increase the amount of time a certain class of prisoners, primarily convicted murderers, could be confined. Similarly, the effect of statutes authorizing the revocation or withholding of a prisoner's good-time credits if they file frivolous lawsuits is to lengthen the amount of time prisoners who file such lawsuits can be incarcerated. In ex post facto terms, the effect of the frivolous-filing revocation statutes is to retroactively increase the punishment inflicted on this category of prisoners.

In an attempt to surmount an ex post facto challenge to their frivolous-filing revocation statutes, states might highlight another potentially distinguishing feature of those statutes—the assumed fact¹¹² that prisoners can control whether or not their incarceration is prolonged under these statutes. The crux of the states' argument would be that by refraining from filing frivolous lawsuits, prisoners could ensure that they are released from prison within the time contemplated by the law when they committed their crimes. By contrast, the prisoners in *Weaver* and *Lynce* could do nothing, or so the states might argue, to avoid the reduction or cancellation of sentencing credits under the statutes at issue in those cases.

Weaver, however, forecloses this argument. In that case, the statute the Supreme Court considered an unconstitutional ex post facto law

111. See Allen J. Beck, *Prisoners in 1999*, BUREAU OF JUST. STAT. BULL., Aug. 2000, at 12 (reporting that the increase in the size of the states' prison population between 1990 and 1998 was attributable, in part, to the increase in the amount of time prisoners are serving in prison).

112. For a discussion of circumstances that impede inmates' ability to differentiate between frivolous and nonfrivolous claims, see *infra* notes 216–17 and 374 and accompanying text

admittedly provided for an across-the-board, unconditional reduction in the monthly gain-time credits inmates would automatically earn for their good conduct.¹¹³ But, as the Supreme Court recognized, the Florida legislature enacted that statute in conjunction with several other statutes that enabled inmates to make up the loss in gain-time.¹¹⁴ For example, prisoners who both exceeded normal expectations in executing their prison assignments and “diligently” performed their academic or vocational work could earn one to six extra gain-time days each month.¹¹⁵ The fact that the prisoners in *Weaver* could take steps that might nullify the effects of the statute reducing their monthly gain-time deductions did not, in the Supreme Court’s opinion, eradicate the statute’s constitutional defect.¹¹⁶ The Court explained that before the Florida legislature had enacted this package of gain-time statutes, prisoners only had to behave to earn the monthly gain-time credits.¹¹⁷ Now, however, prisoners had to meet additional conditions in order to be released from prison at the same time they would have been released under the gain-time statute in effect at the time of their crimes.¹¹⁸ Because the statute reducing an inmate’s monthly gain-time credits for good conduct diminished the opportunity to be released early from prison, the statute inflicted a more severe punishment than state law previously authorized for crimes that preceded the statute’s enactment.¹¹⁹ This increased punishment, according to the Supreme Court, fell flatly within the proscriptions of the Ex Post Facto Clause.¹²⁰

Similarly, the frivolous-filing revocation statutes place a new precondition on the early release of prisoners whose crimes predated enactment of the statute. Now, in order to gain early release at the time they were eligible for such release under the extant law at the time of their crimes, prisoners must not only meet the original requirements for early release, but also refrain from filing any lawsuit that a court later denominates as frivolous. As in *Weaver*, this new predicate for early release “constricts the inmate’s opportunity” for such release,¹²¹ augmenting, from an ex post facto standpoint, the inmate’s criminal punishment. Consequently, the frivolous-filing revocation statutes should

113. *Weaver*, 450 U.S. at 26.

114. *Id.* at 34 n.18.

115. *Id.*

116. *See id.* at 35.

117. *Id.* at 35 n.20.

118. *Id.* at 35.

119. *See id.* at 35–36.

120. *See id.* at 36.

121. *Id.* at 35–36.

be considered unconstitutional when applied to prisoners incarcerated for antecedent crimes.

B. APPLICATION OF FRIVOLOUS-FILING REVOCATION STATUTES TO
FEDERAL CLAIMS: THE PREEMPTION QUESTION

As discussed earlier,¹²² many of the state statutes authorizing the revocation or withholding of good-time credits when a prisoner files a frivolous lawsuit apply to lawsuits filed in federal court as well as to those filed in state court. Even those statutes that apply solely to state lawsuits on their face implicate federal claims filed in state court.¹²³ State courts have concurrent jurisdiction over civil-rights actions brought under 42 U.S.C. § 1983,¹²⁴ the statute typically invoked by state and local inmates seeking to enforce and vindicate their constitutional and other civil rights.¹²⁵ A prisoner filing a frivolous § 1983 claim in a state court may therefore, in many states, trigger the loss of good-time credits. The question that arises, of course, is whether states have the power and the authority to prolong the incarceration of prisoners for filing federal claims that do not meet a prescribed legal standard. The answer to that question lies, in part, in the intricacies of preemption law.

Determining whether or not Congress has preempted a state statute depends on congressional intent—on whether Congress intended exclusively to occupy the field into which the state statute has delved.¹²⁶ Typically, though not always, Congress's preemptive intent is implied from the circumstances; Congress does not often expressly manifest its intent to preclude state regulation in a certain area.¹²⁷ There are several bases for inferring Congress's preemptive intent. First, this intent may be evident from Congress's pervasive regulation of a field, which is considered confirmation that Congress did not and would not countenance state encroachment into that field.¹²⁸ Second, the federal interest in a particular matter may be so strong that federal regulation bearing on that subject is

122. See *supra* note 72 and accompanying text.

123. See W. VA. CODE ANN. § 25-1A-6 (Michie Supp. 2000) (authorizing revocation for any frivolous civil action filed by a prisoner in a state court).

124. *Howlett v. Rose*, 496 U.S. 356, 358 (1990).

125. ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP'T OF JUST., *CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION I* (1995).

126. See *Barnett Bank v. Nelson*, 517 U.S. 25, 30 (1996).

127. See *id.* at 31.

128. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 182 (1983).

designed to have supplanted all related state regulation.¹²⁹ Finally, even when Congress has not totally preempted state legislation in a particular area, courts will find congressional intent to preempt a particular state statute when it conflicts with a federal statute.¹³⁰ A federal statute, for example, preempts a state statute that thwarts “the full purposes and objectives of Congress” in enacting the federal statute.¹³¹

The ensuing discussion examines two preemption questions. First, has Congress, through its regulation of federal courts, preempted state legislation providing for the revocation or withholding of good-time credits for filing frivolous claims in federal court? Second, did Congress, in enacting § 1983, effectively foreclose states from adopting statutes that sanction prisoners through lengthened incarceration for filing certain types of § 1983 claims, namely frivolous ones in state court?

1. Preemptive Effect on Prisoner Claims Filed in Federal Court

The threshold preemption question is whether states have usurped federal authority by sanctioning prisoners who file frivolous claims in federal court. From a pragmatic standpoint, it is understandable that states bent on revoking the good-time credits of prisoners who file frivolous lawsuits might want their frivolous-filing revocation statutes to extend to prisoner claims filed in federal court. Otherwise, prisoners with frivolous claims would simply file those claims in federal court instead of state court to avoid the risk of losing good-time credits. Consequently, state officials might fear that unless the revocation statutes encompass claims filed in federal court, they would still be subject to the burdens of frivolous litigation that the statutes were designed to avert. Even if these fears were justified, however, they would not abnegate the preemption question, for even if a state statute promotes a valid state interest, as one would expect, or at least hope, the statute might still represent an unwarranted incursion into federal affairs—in this case into the operation of federal courts.¹³²

It is apparent that Congress has reserved to itself and to federal courts the authority to determine which consequences should ensue from a

129. *Id.*

130. *See id.*

131. *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). A state statute also conflicts with a federal statute in a way that gives rise to an inference of preemptive intent when compliance with both statutes would be impossible. *Id.*

132. *See, e.g., Felder v. Casey*, 487 U.S. 131, 145 (1988) (finding that a state statute clashed with the “remedial purposes of the federal civil rights laws” despite the fact that it served legitimate state interests).

litigant's alleged misuse of the federal courts, for two reasons. First, Congress, in conjunction with the federal courts, has regulated access to and the operation of those courts. It has, for example, defined the jurisdiction of the federal courts,¹³³ explicated venue requirements,¹³⁴ set up a system for the payment of filing fees and court costs,¹³⁵ and delegated to the federal courts the authority to develop rules to govern their procedures.¹³⁶ As part of this all-encompassing regulation at the federal level, Congress and the courts have delineated the repercussions for engaging in abusive litigation practices in federal court. One federal statute, for example, authorizes federal courts to require an attorney to pay attorney's fees, costs, and expenses incurred when the attorney has "multiplie[d] the proceedings . . . unreasonably and vexatiously."¹³⁷ In addition, as discussed earlier in this Article,¹³⁸ Rule 11 of the Federal Rules of Civil Procedure provides for the imposition of sanctions when an attorney or a *pro se* litigant files a document, including a complaint, in court for an inappropriate purpose, such as to harass the opposing litigant.¹³⁹ Rule 11 also authorizes, though does not require, federal courts to levy sanctions in certain circumstances when a document filed in court is factually or legally unfounded.¹⁴⁰ In addition, a whole host of other federal rules provide for the imposition of sanctions when an attorney or litigant has unreasonably protracted or increased the costs of the litigation.¹⁴¹

133. See, e.g., 28 U.S.C. §§ 1330–68 (defining the jurisdiction of the federal district courts).

134. See *id.* §§ 1391–1413.

135. See *id.* §§ 1911–15, 1917–32.

136. See *id.* §§ 2071(a), 2072(a), 2075. While the Supreme Court has the power, under 28 U.S.C. § 2072(a), to establish procedural rules to govern proceedings in the district and appellate courts, these rules must be submitted to Congress before they go into effect. *Id.* § 2074(a). If Congress does not override a proposed rule within a prescribed period of time, it then takes effect. *Id.*

137. *Id.* § 1927.

138. See *supra* notes 28 and 30 and accompanying text.

139. See FED. R. CIV. P. 11(b)(1), (c).

140. See *id.* at 11(b)(2)–(3), (c).

141. See, e.g., *id.* at 16(f) (authorizing sanctions when a party or his or her attorney disobeys a pretrial order, fails to appear at a pretrial conference, is grossly unprepared to participate in the conference, or participates in the conference in bad faith); *id.* at 30(g)(1) (providing that reasonable expenses may be charged to the party who notices a deposition, but then fails to appear for it); *id.* at 30(g)(2) (authorizing an assessment of costs on a party who fails to subpoena a witness to be deposed when the witness then fails to appear for the deposition); *id.* at 37(a)(4) (providing for the imposition of sanctions when a party's failure to cooperate in the discovery process necessitates the filing of a motion to compel discovery); *id.* at 37(b)(1) (approving a finding of contempt when a deponent refuses to comply with a court's order to answer a question); *id.* at 37(b)(2)(D)–(E) (authorizing sanctions for the failure to comply with a discovery order); *id.* at 37(c)(1) (allowing "appropriate sanctions" for the nondisclosure of discoverable information); *id.* at 37(c)(2) (authorizing an order directing a party to pay expenses incurred because of the party's failure to make certain requested admissions); *id.* at 37(d) (authorizing a similar order when a party failed to attend his or her deposition or to respond to

In determining whether Congress has preempted state legislation punishing prisoners for filing frivolous civil lawsuits in federal court, it is particularly noteworthy that Congress has outlined in great detail the consequences that can or must ensue if a prisoner files such a lawsuit.¹⁴² The PLRA directs courts to immediately sift out and dismiss frivolous claims by prisoners.¹⁴³ The PLRA also prohibits the bringing of an action or appeal in forma pauperis when a prisoner has filed three or more frivolous civil lawsuits or appeals unless the prisoner is facing an “imminent” threat of “serious physical injury.”¹⁴⁴

Finally, and notably, the PLRA authorizes federal courts in some circumstances to revoke the good-time credits of federal prisoners who filed a federal lawsuit.¹⁴⁵ What is most significant about this provision, though, is not what it says about the negative consequences that may attend the filing of a prisoner’s complaints. What is significant is what the provision does not say, namely, that it does not authorize courts to revoke good-time credits simply because a federal prisoner filed a frivolous claim or lawsuit. Instead, the provision strictly limits the forfeiture of good-time credits to three situations: when a prisoner files a claim with a “malicious purpose,”¹⁴⁶ when a prisoner brings a claim “solely” to harass the person sued,¹⁴⁷ and when a prisoner submits information to the court that the prisoner knows is untrue.¹⁴⁸

The second indication that the federal government has preempted state laws regulating access to federal courts through the imposition of sanctions is the predominant national interest implicated by the operation of the federal courts. The primacy of that federal interest is evident from the

interrogatories or a request for inspection); *id.* at 56(g) (directing courts to order a party submitting a summary-judgment affidavit in bad faith or “solely” to prolong the litigation to pay the other party’s expenses, including attorney’s fees, stemming from the affidavit’s filing and also authorizing a contempt finding).

142. See *supra* Part II.A.

143. See 28 U.S.C. § 1915A(a), (b)(1) (2000) (directing the dismissal of prisoners’ frivolous claims against governmental entities or officials before the complaints are docketed, if possible, but otherwise as soon as possible after docketing). See also *id.* § 1915(e)(2)(B)(i) (requiring courts to dismiss the frivolous claims and appeals of prisoners proceeding in forma pauperis in the district court or on appeal); 42 U.S.C. § 1997(e)–(c)(1) (2000) (mandating the dismissal of frivolous actions brought by prisoners under 42 U.S.C. § 1983 (2000) or some other “federal law” to contest the legality of prison conditions).

144. 28 U.S.C. § 1915(g).

145. *Id.* § 1932.

146. *Id.* § 1932(1).

147. *Id.* § 1932(2).

148. See *id.* § 1932(3).

structure and language of the Constitution. Article III of the Constitution vests “[t]he judicial power of the United States” in the federal courts.¹⁴⁹ Article III then proceeds to define the scope of the judicial power, extending the dominion of the federal courts to cases that implicate a preeminent national interest. These cases include, for example, those involving foreign ambassadors, disputes between states, and rights accorded by the Constitution and federal laws.¹⁵⁰ The Framers of the Constitution clearly envisioned that the federal courts would serve as a primary vehicle for enforcing the Constitution,¹⁵¹ but the text of the Constitution does more than confirm the strong national interest in the enforcement of its terms. The Constitution also reflects the paramount national interest in federal control of federal courts. The Constitution, for example, vests Congress, not the states, with the authority to regulate the Supreme Court’s appellate jurisdiction.¹⁵² In addition, the Constitution specifically grants Congress, not the states, the power to establish lower federal courts,¹⁵³ a power that the Supreme Court has construed to include regulatory authority over those courts’ rules of operation and jurisdiction.¹⁵⁴

The reason there is a singular national interest in federal control over federal courts, including litigation within those courts, is fairly obvious: without it, states, through their interference with federal lawsuits, could sap the powers of the federal courts and undercut their constitutionally imbued purposes. The truth of this point is evident from several Supreme Court cases in which the Court jealously guarded the federal courts from state encroachment, reflecting an awareness that state regulation of federal litigation can eviscerate the power of the national government, including that of its courts. One of those cases, *Donovan v. Dallas*, was the outgrowth of a lawsuit filed in state court by a group of citizens from Dallas to enjoin the construction of a new runway at a Dallas airport.¹⁵⁵ When the state court entered summary judgment for the city, the Dallas citizens turned to the federal district court for redress.¹⁵⁶ Because of this

149. U.S. CONST. art. III, § 1.

150. *See id.* § 2, cl. 1.

151. *See id.* (“The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution . . .”).

152. *See id.* § 2, cl. 2.

153. *See id.* art. I, § 8, cl. 9.

154. *See Yakus v. United States*, 321 U.S. 414, 443 (1944); *United States v. Knight’s Adm’r*, 66 U.S. 488, 489–90 (1861).

155. *See* 377 U.S. 408, 408–09 (1964).

156. *See id.* at 409.

pending litigation, the bonds needed to pay for the runway's construction could not, under Texas law, be issued.¹⁵⁷ Consequently, the city of Dallas sought a writ of prohibition from the state court barring the Dallas citizens from further litigating their case in federal court.¹⁵⁸

The state court eventually issued the writ, but when the federal district court later dismissed the federal lawsuit, the Dallas citizens appealed the dismissal order.¹⁵⁹ The state court then found many of the citizens and their attorney in contempt for having violated the writ of prohibition.¹⁶⁰ The court imposed a twenty-day jail sentence on the attorney for disregarding the court's order and a \$200 fine on each citizen the court had found in contempt.¹⁶¹ When the federal case reached the Supreme Court, the Court held that in restraining the Dallas citizens from pursuing a lawsuit in federal court, the state court had usurped federal authority.¹⁶² The Court noted that Congress had created a "right to federal-court remedies," one that the state had no power to take away.¹⁶³ Consequently, once jurisdiction over the federal lawsuit attached in the federal court, the state court could not effectively abate that lawsuit through a peremptory order.¹⁶⁴ Even if the federal lawsuit was unfounded, as it indeed was here because it was foreclosed by the *res judicata* defense, it was still a matter to be addressed by the federal court.¹⁶⁵

It is noteworthy that the Supreme Court in *Donovan* did not dispute dissenting Justice Harlan's description of the federal lawsuit initiated by the Dallas citizens as "vexatious, duplicative litigation."¹⁶⁶ In fact, in a subsequent case, *General Atomic Co. v. Felter*, the Court explicitly concurred in this description, observing that "*Donovan* presented as compelling a case as there could be for permitting a state court to enjoin the further prosecution of vexatious federal proceedings."¹⁶⁷ Nonetheless, the

157. *See id.*

158. *See id.*

159. *See id.* at 410.

160. *See id.*

161. *See id.*

162. *See id.* at 413-14 ("[S]tate courts are completely without power to restrain federal-court proceedings in *in personam* actions . . .").

163. *Id.* at 413.

164. *See id.* at 412-13.

165. *See id.* at 412.

166. *See id.* at 415 (Harlan, J., dissenting).

167. 434 U.S. 12, 17 (1977).

Supreme Court held in *Donovan* that the state court had no power to intervene in federal court proceedings.¹⁶⁸

In *General Atomic Co.*, the Supreme Court underscored that its holding in *Donovan* was not narrow in scope.¹⁶⁹ *General Atomic Co.* was the outgrowth of a contract dispute that culminated in the filing of a lawsuit in a state court in New Mexico.¹⁷⁰ After the price of uranium increased fivefold, the plaintiff in that lawsuit, General Atomic Company (“GAC”), sought a declaratory judgment to relieve itself from its contractual obligation to supply uranium to United Nuclear Corporation (“UNC”).¹⁷¹ While that lawsuit was pending, GAC became embroiled in several other lawsuits in federal court, which were brought by some utility companies.¹⁷² Alerted that GAC might implead it in one of those federal lawsuits, UNC then sought and secured an injunction from a New Mexico state court barring GAC from filing “any” lawsuit or third-party complaint against UNC that bore on the same subject matter as the pending state case.¹⁷³

When addressing whether the state trial court had the authority to issue an injunction applicable to federal court litigation, the New Mexico Supreme Court concluded that *Donovan* was distinguishable from this case.¹⁷⁴ According to the state supreme court, *Donovan* involved a state court’s interference in a case in which the federal court’s in personam jurisdiction had attached, while in this case, UNC was not yet a party in the federal lawsuit.¹⁷⁵ The state supreme court therefore held that the state trial court had the power to forestall a yet-to-be-filed, federal claim.¹⁷⁶

The Supreme Court not only rejected this argument but seemed piqued with its assertion. Using capital letters to reiterate its holding in *Donovan*, the Court effectively rebuked UNC and the New Mexico state court for the court’s usurpation of federal authority: “[S]tate courts are completely without power to RESTRAIN FEDERAL-COURT PROCEEDINGS IN *IN PERSONAM* ACTIONS”¹⁷⁷ The Supreme Court thought it was irrelevant whether or not a state court was interceding in an existing federal

168. See 377 U.S. at 413.

169. See 434 U.S. at 17.

170. See *id.* at 12–13.

171. See *id.*

172. See *id.* at 13.

173. See *id.* at 13–14 n.4.

174. See *id.* at 15.

175. See *id.*

176. See *id.* at 16.

177. *Id.* (quoting *Donovan v. Dallas*, 377 U.S. 408, 413 (1964)).

lawsuit or attempting to inhibit the filing of a future one.¹⁷⁸ The critical fact, according to the Court, was that Congress had created a right to bring in personam actions in federal court.¹⁷⁹ Because the New Mexico state court's injunction limited the exercise of this right, the Supreme Court concluded that the state court had encroached on an area falling within Congress's domain, in contravention of the Constitution's Supremacy Clause.¹⁸⁰

After *Donovan* and *General Atomic Co.*, it is clear that a state cannot restrain a person from continuing to litigate a pending in personam federal lawsuit or from filing one in the future without derogating Congress' authority to regulate access to the federal courts. But can a state wait until a federal lawsuit is concluded and then impose a sanction on a person for having filed that lawsuit? In other words, is the infliction by the state of a back-end penalty for engaging in federal litigation somehow less odious from a preemption standpoint than a state's front-end restraint of that litigation?

Court rulings in another line of cases concerning the scope of a prisoner's constitutional right to be afforded access to the courts provide helpful insights to the resolution of these questions. Courts have long held unconstitutional prison regulations that unduly obstruct an inmate's access to the courts to challenge the legality of their convictions or the constitutionality of the conditions of their confinement.¹⁸¹ For example, in *Ex Parte Hull*, the Supreme Court struck down a prison regulation that required a prisoner's legal documents to be screened by correctional officials before being filed in a court.¹⁸² Although the purported purpose of this regulation was to ensure that the documents were drafted properly, the Supreme Court held that it impinged on an inmate's right to seek habeas corpus relief from a federal court.¹⁸³

While the regulation the Supreme Court held unenforceable in *Ex Parte Hull* is a classic example of a front-end barrier to litigation, courts

178. *See id.* at 17.

179. *See id.* ("[R]ights conferred by Congress to bring in personam actions in federal courts are not subject to abridgement by state-court injunctions, regardless of whether the federal litigation is pending or prospective.")

180. *See id.* at 15.

181. *See, e.g.,* *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (holding that a prison regulation prohibiting attorneys from using paralegals and law students to interview prisoners violates inmates' right to have access to the courts). *See also infra* Part III.D.1.

182. *See* 312 U.S. 546, 548-49 (1941).

183. *See id.*

have equally assailed state officials for imposing back-end sanctions on prisoners who turn to a court for legal redress. Concerned that retaliatory actions taken by prison officials against prisoners who contest the constitutionality of prison conditions or their treatment while confined will deter prisoners from pursuing vindication of their constitutional rights,¹⁸⁴ courts have held that such retaliation abridges a prisoner's constitutional right of access to the courts.¹⁸⁵ Whether or not the state revocation statutes violate a prisoner's constitutional right of access to the courts is discussed later in this Article.¹⁸⁶ However, by holding that prison officials' retaliatory actions against prisoner litigants is unconstitutional, case law confirms that back-end sanctions can, like front-end barriers, stymie a prisoner's efforts to obtain remedial relief from a court. This reality, in turn, informs the resolution of the preemption question arising from the application of state revocation statutes to claims filed in federal court: in conferring a statutory right on prisoners to bring certain *in personam* actions in federal court, did Congress intend to forestall a state's post-adjudicatory actions placing a substantial burden on the exercise of that right? The answer to this question seems most clearly to be yes.

The Supreme Court's opinion in *Donovan* supports this conclusion. The *Donovan* Court condemned not only the state court's effort to enjoin the filing of the federal lawsuit, but its order holding the plaintiffs in contempt for flouting that injunction.¹⁸⁷ In addressing whether the state court had the prerogative to punish the plaintiffs for invoking their "right[] . . . to bring *in personam* actions in federal court,"¹⁸⁸ the Court observed: "That right was granted by Congress and cannot be taken away by the State. The Texas courts were without power to take away this federal right by contempt proceedings or otherwise."¹⁸⁹ Similarly, state legislatures lack the power to take away through good-time revocation proceedings a prisoner's congressionally bestowed right to bring such actions, even when those actions ultimately prove, like the federal lawsuit in *Donovan*,¹⁹⁰ to be frivolous.

184. See *Crawford-El v. Britton*, 523 U.S. 574, 589 n.10 (1998) (noting that "[t]he reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right").

185. See, e.g., *Allah v. Seiverling*, 229 F.3d 220, 224–25 (3d Cir. 2000) (holding that transferring a prisoner to administrative segregation in retaliation for having filed civil rights suits may impinge on the constitutional right to have access to the courts).

186. See *infra* Part III.D.

187. See 377 U.S. 408, 413–14 (1964).

188. *General Atomic Co.*, 434 U.S. at 17.

189. See *id.*

190. See *supra* notes 155–66 and accompanying text.

2. Preemptive Effect on Prisoner Federal Claims Filed in State Court

Concluding that Congress has preempted state laws punishing prisoners because of the invalidity and even speciousness of claims they filed in federal court leaves unresolved another preemption question, one derived from the fact that prisoners can file civil rights actions under § 1983 in state courts as well as federal courts.¹⁹¹ Has Congress preempted state revocation laws as applied to frivolous § 1983 claims filed by prisoners in state court?

The Supreme Court's decision in *Felder v. Casey* provides some helpful guidance in answering this question.¹⁹² In that case, the state of Wisconsin enacted a statute that required prospective plaintiffs to provide state and local governments and their officials with advance notice of a claim before filing a lawsuit against them.¹⁹³ This notice of intent to sue had to outline the basis for the claim against the governmental entity or official and identify the relief being sought.¹⁹⁴ If the claimant did not file the notice within 120 days after the incident giving rise to the claim, the lawsuit was, in most instances, barred.¹⁹⁵ In addition, after filing the notice, the claimant had to wait 120 days before filing a lawsuit.¹⁹⁶

The Wisconsin Supreme Court cited a number of state interests furthered by this statute.¹⁹⁷ By affording officials the opportunity to settle claims before the instigation of a lawsuit, state and local governments could avoid the encumbrances and costs of litigation.¹⁹⁸ The prompt notification mandated by the statute of incidents likely to generate litigation also protected governmental officials and entities from stale and trumped-up claims.¹⁹⁹ Finally, the prelitigation notice alerted officials early on about the misdeeds of other governmental employees, facilitating the timely implementation of corrective measures.²⁰⁰

191. See *Howlett v. Rose*, 496 U.S. 356, 358 (1990).

192. See 487 U.S. 131 (1988).

193. See *id.* at 134.

194. See *id.*

195. See *id.* at 136 n.2. If the claimant could prove that the official or entity knew of the claim and was not prejudiced by the delay or failure in sending a written notice, the claimant could still file the lawsuit. *Id.*

196. *Id.* at 134.

197. See *id.* at 137.

198. See *id.*

199. See *id.*

200. See *id.*

Despite the patent legitimacy of these state interests, the Supreme Court held that the notice-of-claim statute conflicted with Congress's purposes and objectives in enacting § 1983.²⁰¹ One of the Court's principal concerns was that the statute would bar § 1983 lawsuits even when individuals did not become aware of their right to remedial relief under § 1983 until after the four-month claim period elapsed.²⁰² The Court was also troubled by the disparate litigation outcomes that would result from the statute's enforcement.²⁰³ While a state court would have to dismiss § 1983 lawsuits filed by plaintiffs who failed to comply with the notice-of-claim statute, plaintiffs who filed their § 1983 suits in federal court without first tendering notice of their claims could obtain remedial relief for the violation of their constitutional rights.²⁰⁴ Because the notice-of-claim statute impeded the realization of § 1983's remedial objectives, the Supreme Court held that the Supremacy Clause foreclosed its enforcement. In other words, the federal civil rights law preempted the state statute.²⁰⁵

It is true, of course, that the notice-of-claim statute erected a clear prefiling obstacle in the path of § 1983 claims. But the overtness of this barrier does not detract from the preemptive effect of § 1983 on more covert barriers to the enforcement of civil rights. State statutes threatening prisoners with the possibility or certainty of prolonged incarceration if they file § 1983 lawsuits later determined to be frivolous are the archetypal covert barrier. That these statutes may dissuade prisoners from filing § 1983 claims to enforce their civil rights is readily apparent from the constitutional rule that prohibits prison officials from retaliating against prisoners who file lawsuits against them. As discussed earlier, this rule is predicated in part on the premise that retaliating against prisoners for filing lawsuits will deter them from seeking remedial relief from the courts.²⁰⁶ Yet the retaliatory measures (such as reduced prison privileges²⁰⁷) that courts have condemned for their inhibiting effects on the enforcement of a prisoner's constitutional rights are generally much less opprobrious than the extended incarceration that would result from the application of a

201. *See id.* at 143, 145.

202. *See id.* at 146.

203. *See id.* at 141.

204. *See id.*

205. *See id.* at 138.

206. *See supra* notes 184–85 and accompanying text.

207. *See, e.g.,* *Samuels v. Mockry*, 142 F.3d 134, 137 (2d Cir. 1998) (holding that the entry of summary judgment for the defendants was inappropriate when the prisoner-plaintiff alleged that he had been placed in a "Limited Privileges Program" in retaliation for a previous lawsuit he had brought against prison officials).

state's revocation statutes to prisoners who filed frivolous lawsuits under § 1983.

Thus, on close examination, the notice-of-claim statute at issue in *Felder* and a state's revocation statute share a common, legally fatal feature: both operate to obstruct the enforcement of civil rights under § 1983.²⁰⁸ In addition, application of a state's revocation statute to prisoners who file § 1983 suits in state court can lead to the kind of discrepant treatment of § 1983 litigants that the Supreme Court in *Felder* said Congress never intended.²⁰⁹ As discussed earlier, the Supremacy Clause bars the application of the revocation statutes to a prisoner's claims filed in federal court. But if these statutes were applied to federal claims filed in state court, two prisoners who filed identical claims under § 1983, though in different courts—one in federal court and the other in state court—would face vastly different consequences if the courts ultimately ruled that their claims were legally frivolous. Only the prisoner who decided to seek remedial relief in state court for what the prisoner thought was a violation of his or her constitutional rights would forfeit the opportunity to be released earlier from prison.

The state revocation statutes and § 1983 seem discordant for still another reason. Congress enacted § 1983 during the Reconstruction period following the Civil War in response to the widespread failure of state officials to enforce civil rights.²¹⁰ The statute had two primary purposes: to compensate individuals whose civil rights had been violated by persons acting under state authority and to deter such civil rights violations.²¹¹ Yet the ironic effect of applying the state revocation statutes to a prisoner's § 1983 claims filed in state court is to enable state officials, the very principals against whom § 1983 is directed,²¹² to undercut its compensatory and deterrent objectives. By threatening to revoke the good-time credits of

208. The Supreme Court's decision in *Nash v. Florida Indus. Comm'n*, 389 U.S. 235 (1967) further affirms § 1983's preemptive effect on state revocation statutes. In that case, a state refused to pay unemployment compensation benefits to an employee who was laid off after filing an unfair labor practice charge under the National Labor Relations Act ("NLRA") against her employer. The Supreme Court held that this denial frustrated the enforcement of the terms of the NLRA as Congress had intended; employees, like the petitioner in the case before the Court, might refrain from seeking redress under the NLRA for fear of losing unemployment compensation benefits if they are discharged from employment. *Id.* at 239. Similarly, prisoners might refrain from seeking redress under § 1983 for fear of losing good-time credits if their claims are later found by a court to be frivolous.

209. *Felder*, 487 U.S. at 141.

210. *Monroe v. Pape*, 365 U.S. 167, 174–76 (1961).

211. *Robertson v. Wegmann*, 436 U.S. 584, 590–91 (1978).

212. *Monroe*, 365 U.S. at 175–76 (observing that § 1983 was not directed against the Ku Klux Klan, but against state officials who would not, or could not, enforce state law).

prisoners who inaccurately assess the legal viability of their § 1983 claims, state officials can discourage and obstruct the exercise of what *Felder* described as “the right to bring suit against the very persons and entities Congress intended to subject to liability.”²¹³

The PLRA provides additional confirmation that Congress, in enacting § 1983, preempted state statutes providing for the revocation of good-time credits when a prisoner files a § 1983 claim that proves to be frivolous. As noted earlier, the PLRA contains a number of provisions designed to curb the filing of frivolous lawsuits by prisoners.²¹⁴ One of those provisions authorizes, but does not require, a federal court to order a federal prisoner’s good-time credits to be revoked if the prisoner filed a civil claim that was “malicious,” was filed “solely” to harass the defendant, or set forth facts that the prisoner knew were untrue.²¹⁵ Significantly, this PLRA provision does not authorize the revocation of good-time credits for filing a frivolous claim. Thus, through the limits the PLRA placed on the revocation of a federal prisoner’s good-time credits for litigation-related activities, Congress seemed to signal that the revocation of credits simply because a claim is frivolous is an excessive response to the problem of frivolous lawsuits filed by prisoners. This evidence of congressional intent is a further indicator that the Supremacy Clause forecloses the application of state revocation statutes to any federal claims, whether filed by prisoners in federal or state court.

C. PUNISHING PRISONERS FOR FILING FRIVOLOUS LAWSUITS IN GOOD FAITH: A DUE PROCESS VIOLATION?

1. Prisoner Civil Lawsuits: Emblematic Bad Faith?

State statutes authorizing the revocation of good-time credits when a prisoner files a frivolous civil lawsuit are grounded on two assumptions: one, that most prisoners deliberately file frivolous lawsuits knowing that their claims are devoid of legal merit, and two, that most prisoners file multiple baseless claims in an effort to hassle and harass prison officials.

The results of a national study of prisoner literacy rates conducted by the National Center for Education Statistics refutes the first premise underlying state revocation statutes: that most prisoners file frivolous

213. *Felder*, 487 U.S. at 144–45.

214. *See supra* Part II.A.

215. 28 U.S.C. § 1932.

claims with full awareness of that they lack legal merit.²¹⁶ This study found that seven out of every ten inmates perform at the lowest literacy levels, making it difficult for them to perform such mundane tasks as locating an intersection on a street map or filling out an application for a Social Security card.²¹⁷ Because of their educational and intellectual deficiencies, most prisoners are therefore generally unable to “integrate or synthesize information from complex or lengthy texts,” skills obviously critical to the ability to discern the law from cases and statutes.²¹⁸

The available data about prisoner lawsuits also suggest that most prisoners do not file lawsuits while they are imprisoned.²¹⁹ Of those who do, few are what the courts call “serial litigators,”²²⁰ filing dozens and sometimes hundreds of lawsuits.²²¹ One study of prisoner civil rights suits filed in the United States District Court for the Northern District of Illinois, for example, found that eighty percent of the prisoner-plaintiffs had filed only one civil rights lawsuit during the six-year time period upon which the study focused.²²²

The facts unearthed about inmate litigation, therefore, suggest that many, and perhaps most, prisoners file civil complaints believing, based on the law and facts of which they are aware, that they are entitled to legal redress. These prisoners who file their complaints in good faith fall into two categories—those who reasonably believe that their complaints are

216. See KARL O. HAIGLER, CAROLINE HARLOW, PATRICIA O’CONNOR & ANNE CAMPBELL, U.S. DEP’T OF EDUC., *LITERACY BEHIND PRISON WALLS: PROFILES OF THE PRISON POPULATION FROM THE NATIONAL ADULT LITERACY Survey* xviii (1994).

217. *Id.* at 17–19.

218. *Id.* at xviii.

219. At midyear 2001, for example, there were a total of 1,334,255 federal and state prisoners. Allen J. Beck, Jennifer C. Karberg & Paige M. Harrison, *Prison and Jail Inmates at Midyear 2001*, BUREAU OF JUST. STAT. BULL., Apr. 2002, at 1. But during the twelve-month period ending on September 30, 2001, prisoners filed a total of 24,118 lawsuits in federal district courts to contest the conditions of their confinement or otherwise enforce their civil rights. ADMIN. OFFICE OF THE U.S. COURTS, *JUDICIAL BUSINESS OF THE UNITED STATES COURTS* 131 tbl.C-2 (2001), available at <http://www.uscourts.gov/jusbus2001/appendices/c02sep01.pdf>.

220. See, e.g., *Murphy v. Lane*, 833 F.2d 106, 106 (7th Cir. 1987).

221. See, e.g., *Procup v. Strickland*, 792 F.2d 1069, 1070 (11th Cir. 1986) (noting that the plaintiff, who was serving a life sentence, had filed over 176 cases in one division of the federal district court); *Sandles v. Randa*, 945 F. Supp. 169, 170 (E.D. Wis. 1996) (listing eighteen lawsuits filed by the prisoner-plaintiff in the preceding four years); *Green v. Wilson*, 517 F. Supp. 332, 334–35 (E.D. Ken. 1981) (describing the plaintiff, who had filed over five hundred lawsuits in seven years, as “a notorious litigant who has left a trail of cases from the sandy shores of the Atlantic to the snow-capped mountains of the Great Rockies, from the chilly climate of Minnesota to the warm, blistering heat of Texas”).

222. Jim Thomas, *The “Reality” of Prisoner Litigation: Repackaging the Data*, 15 N. ENG. J. ON CRIM. & CIV. CONFINEMENT 27, 45–47 (1989).

factually and legally well-founded and those who unreasonably believe in the validity of their claims.

2. Good-Faith Filings and the Ramifications of Due Process

The visceral reaction to extending the confinement of a layperson who is unaware that a claim fails to meet legal requirements may be that such punishment is unfair—that it is tantamount to punishing a person for his or her ignorance. But the perceived unfairness of punishing someone because of actions attributable to his or her ignorance does not by itself give rise to due process concerns,²²³ as is evident from several Supreme Court cases in which the Court rebuffed arguments that criminalizing conduct when the defendants were unaware of the unlawfulness of their actions abridged due process. In *Shevlin-Carpenter Co. v. Minnesota*, for example, the Court held that a state could punish the cutting of timber on public lands as a felony even when the individuals cutting and removing the timber reasonably believed that they had the legal authority to do so.²²⁴

In a second case, *United States v. Balint*, the defendants, who were prosecuted for selling illegal narcotics, claimed that they did not know that the drugs they were selling were illegal narcotics.²²⁵ The Supreme Court, however, gave short shrift to their claim that due process consequently barred their criminal prosecution, despite its acknowledgment that such a prosecution could result in the “possible injustice” of convicting an “innocent seller.”²²⁶ Nonetheless, the Court found no affront to due process because Congress could have concluded that the “evil” stemming from the sale of narcotics outweighed the ill effects of this injustice.²²⁷

Williams v. North Carolina is still another Supreme Court case in which the Court rejected the argument that due process forbids a criminal conviction when a person has unwittingly violated a criminal law.²²⁸ The defendants in this case were prosecuted and convicted in North Carolina for

223. The Supreme Court has observed that strict criminal liability “may, in particular circumstances, be harsh . . . but this court cannot set aside legislation because it is harsh.” *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 70 (1910).

224. *Id.* at 67, 69–70.

225. 258 U.S. 250, 251 (1922).

226. *Id.* at 252, 254. In capsulizing its holding in *Shevlin-Carpenter*, the Court reiterated that in prohibiting or punishing certain acts as crimes for public policy reasons, the state may constitutionally decide “that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance.” *Id.* (quoting *Shevlin-Carpenter*, 218 U.S. at 70).

227. *Id.*

228. 325 U.S. 226, 238 (1945).

bigamous cohabitation.²²⁹ In their defense, they had presented evidence that they obtained divorces from a court in Nevada before remarrying.²³⁰ The North Carolina jury, however, found that the divorces were legally invalid because the defendants were not domiciled in Nevada at the time they obtained the divorces.²³¹ Citing the state's significant interest in protecting "the integrity of family life," the Supreme Court concluded that the defendants' good faith and their ignorance of the invalidity of the Nevada court decrees were irrelevant.²³² In holding that the defendants' convictions comported with due process, the Supreme Court observed: "Mistaken notions about one's legal rights are not sufficient to bar prosecution for crime."²³³

The Supreme Court's decisions in *Shevlin-Carpenter*, *Balint*, and *Williams* are strong indications that the state revocation statutes do not violate due process simply because they sanction prisoners who may have acted in good faith and ignorance. Indeed, according to the Supreme Court, a state can constitutionally criminalize certain actions that were not only taken in good faith, but were objectively reasonable.²³⁴ Because state revocation statutes do not give rise to the stigma and penalties of a criminal conviction, it is even less likely that a prisoner's good faith would exempt them, as a matter of due process, from the application of those statutes.

D. THE REVOCATION OF GOOD-TIME CREDITS FOR FRIVOLOUS LAWSUITS: A VIOLATION OF PRISONERS' RIGHT TO COURT ACCESS?

1. Prisoner Right of Access to the Courts: A Preliminary Overview

As discussed above, the fact that a person has acted in good faith—with the subjective belief that his or her actions were not disallowed—will not, by itself, generally insulate that person from civil or criminal penalties. The Supreme Court has thus far refused to enunciate a "general constitutional doctrine of *mens rea*."²³⁵ This refusal does not mean, however, that a state's discretion to criminalize or otherwise sanction

229. *Id.* at 227.

230. *Id.* at 235.

231. *Id.* at 237–38.

232. *Id.* at 238.

233. *Id.*

234. In *Shevlin-Carpenter*, the state supreme court found that the record showed "conclusively" that the defendants honestly believed that they had the authority to cut the timber and that their belief was reasonable. 218 U.S. at 64.

235. *Powell v. Texas*, 392 U.S. 514, 535 (1968).

certain actions or inaction is unbounded. In fact, the Constitution itself places significant constraints on the nature of the acts for which penalties can be imposed. For example, states cannot punish a person for exercising a right accorded by the Constitution. Thus, a state cannot criminally sanction a woman for exercising her right to procure an abortion at certain stages of a pregnancy.²³⁶ Nor can a state generally treat the burning of a flag as a crime.²³⁷ Moreover, in the prison context, a prisoner cannot be placed in solitary confinement for sharing his religious beliefs with other prisoners.²³⁸

One of the constitutional rights arguably implicated by state statutes under which prisoners forfeit good-time credits for filing frivolous lawsuits is their right to have access to the courts. The Supreme Court has variously described the source of this right, pointing at times to the Due Process Clause,²³⁹ at other times to the equal protection guarantee,²⁴⁰ and still other times to the First Amendment right to petition the government for a redress of grievances.²⁴¹ While courts may differ regarding the source point of the right of court access, they concur regarding its centrality.²⁴² Without this right, which provides the principal means through which all other constitutional rights are protected and enforced, the civil liberties that the Constitution purports to secure would be ephemeral indeed. This right of access to the courts applies to prisoners no less than nonprisoners.²⁴³ In fact, the preservation of this right for prisoners may be even more critical than for nonprisoners, who can exert political pressure on members of the

236. *Roe v. Wade*, 410 U.S. 113, 164–65 (1973).

237. *United States v. Eichman*, 496 U.S. 310, 318 (1990); *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

238. *Cruz v. Beto*, 405 U.S. 319, 319 (1972) (per curiam).

239. *See, e.g., Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (“The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights.”).

240. *See, e.g., Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987) (analyzing the “equal protection guarantee of ‘meaningful access’” to the courts).

241. *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 523 (1984) (“Like others, prisoners have the constitutional right to petition the Government for redress of their grievances, which includes a reasonable right of access to the courts.”).

242. *See, e.g., McCarthy v. Madigan*, 503 U.S. 140, 153 (1992) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)) (“Because a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most ‘fundamental political right, because preservative of all rights.’”); *Beville v. Ednie*, 74 F.3d 210, 212 (10th Cir. 1996) (quoting *DeMallory v. Cullen*, 855 F.2d 442, 446 (7th Cir. 1988)) (“‘A prison inmate’s right of access to the courts is the most fundamental right he or she holds.’”); *Cruz v. Hauck*, 475 F.2d 475, 476 (5th Cir. 1973) (“It is clear that ready access to the courts is one of, perhaps *the*, fundamental constitutional right.”).

243. *See Procunier*, 416 U.S. at 419.

executive and legislative branches of the government to change practices that encroach on civil liberties.²⁴⁴ The pivotal nature of the right of court access in the prison context was perhaps best captured by the Seventh Circuit Court of Appeals when it observed: “[A]n inmate’s right of unfettered access to the courts is as fundamental a right as any other he may hold. . . . All other rights of an inmate are illusory without it, being entirely dependent for their existence on the whim or caprice of the prison warden.”²⁴⁵

In safeguarding an inmate’s constitutional right to court access, the Supreme Court invalidated a number of prison rules and regulations impeding that access. For example, the Court held that prison officials cannot require prisoners to clear legal documents with them before being transmitted to a court.²⁴⁶ The Court also found that a prison regulation barring attorneys from using paralegals and law students to interview prisoners about legal matters violated a prisoner’s right to have access to the courts.²⁴⁷ And the Court held that prison officials cannot prohibit inmates, serving as “jailhouse lawyers,” from assisting illiterate inmates in preparing habeas corpus petitions and complaints challenging the constitutionality of the conditions of their confinement unless the officials provide some “reasonable” alternative assistance to inmates in need of legal aid.²⁴⁸

According to the Supreme Court, a prisoner’s constitutional right to court access entails more than a prohibition on state-erected obstacles impeding that access. To preserve that right, prison officials must not only refrain from blocking a prisoner’s access to the courts; they must also take affirmative steps to facilitate that access.²⁴⁹ In *Bounds v. Smith*, the Supreme Court described the contours of that affirmative assistance, holding that prison officials must either afford prisoners access to “adequate” law libraries or provide them with “adequate” assistance from individuals “trained in the law.”²⁵⁰

244. See *McCarthy*, 503 U.S. at 153.

245. *Adams v. Carlson*, 488 F.2d 619, 630 (7th Cir. 1973).

246. *Ex Parte Hull*, 312 U.S. 546, 548–49 (1941).

247. *Procunier*, 416 U.S. at 419.

248. See *Wolff v. McDonnell*, 418 U.S. 539, 578–79 (1974); *Johnson v. Avery*, 393 U.S. 483, 490 (1969).

249. See *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

250. *Id.*

The Supreme Court clarified the required scope of this affirmative assistance in *Lewis v. Casey*.²⁵¹ While the Court reiterated what it said in *Bounds*—that ““meaningful access to the courts is the touchstone”” when defining the scope of prison officials’ affirmative constitutional obligations,²⁵² the Court, for the most part,²⁵³ very narrowly construed those obligations. First, the Court stated that prison officials must provide prisoners only that assistance needed to enable them to submit their legal claims to a court.²⁵⁴ Once a prisoner’s claims are before a court, prison officials have no constitutional obligation to provide ongoing assistance that would enable the inmate to litigate those claims “effectively.”²⁵⁵ Nor are prison officials, as a threshold matter, obligated to render assistance that will enable prisoners to “discover grievances” that might be the foundation of a lawsuit.²⁵⁶

Second, the Supreme Court specifically limited the types of claims for which prison officials must provide assistance.²⁵⁷ The Court assured prison officials that they do not have to equip prisoners to become “litigating engines” capable of litigating myriad types of legal claims.²⁵⁸ According to the Court, the Constitution only requires prison officials to take whatever steps are needed to enable prisoners to present claims challenging their convictions, sentences, and conditions of confinement to a court.²⁵⁹

The third way in which the Supreme Court narrowly construed the scope of legal assistance prison officials must provide prisoners was by holding that courts should apply the “*Turner* test” when assessing the constitutionality of prison regulations that impede a prisoner’s access to

251. 518 U.S. 343 (1996).

252. *Id.* at 351 (quoting *Bounds*, 430 U.S. at 823).

253. One part of the Supreme Court’s analysis in *Lewis v. Casey* seemed to expand the scope of prison officials’ affirmative-assistance obligations. Previously, in *Bounds v. Smith*, the Court indicated that prison officials can meet these obligations by affording inmates access to “adequate” law libraries. *Bounds*, 430 U.S. at 828. However, in *Lewis*, the Court intimated that providing illiterate or non-English-speaking inmates with access to a law library will not suffice to protect their constitutional right to have access to the courts. *See Lewis*, 518 U.S. at 356–57 (remitting to prison officials the responsibility of ensuring that inmates have a “reasonably adequate opportunity to file nonfrivolous legal claims” contesting their convictions or confinement conditions, but noting that “it is that capability, rather than the capability of turning pages in a law library, that is the touchstone”).

254. *See Lewis*, 518 U.S. at 354.

255. *See id.* (emphasis omitted).

256. *See id.*

257. *See id.* at 355.

258. *See id.*

259. *Id.* at 355–56.

legal services.²⁶⁰ Under this test, a regulation that impairs an inmate's ability to prepare and file a lawsuit is still constitutional as long as it is "reasonably related to legitimate penological interests."²⁶¹ For example, if delays in delivering legal materials to inmates in the segregation unit stem from a regulation that promotes institutional security, the regulation will pass constitutional muster even if its effect is to encumber the segregated inmate's access to the courts.²⁶²

The threshold question when determining whether the state revocation statutes unconstitutionally abridge a prisoner's right to have access to the courts is whether a prisoner's filing of a frivolous claim even implicates this right. After all, a frivolous claim is one that is clearly baseless, either because the facts or the law on which it rests do not suggest even arguably that the prisoner is entitled to legal redress.²⁶³ Who, one might argue, could seriously contend that prisoners have a constitutional right to bring what is, in the eyes of the law, a specious claim?

At first glance, the Supreme Court does not seem to have been wholly consistent in its description of the breadth of a prisoner's right of access to the courts. In some parts of its opinion in *Lewis v. Casey*, for example, the Court described the right to bring claims to court in broad terms, not conditioned on the strength or weakness of the asserted claim. The right of access to the courts is "a right to bring to court a grievance that the inmate wished to present."²⁶⁴ Elsewhere in the *Lewis* opinion, the Court stated that prisoners must be afforded "a reasonably adequate opportunity to present *claimed* violations of fundamental constitutional rights to the courts."²⁶⁵ The Court also referred to prison officials' constitutional duty to provide prisoners with "the capability of bringing *contemplated* challenges to sentences or conditions of confinement before the courts."²⁶⁶ Other comments in *Lewis*, however, suggest that the Court views the right to court access as encompassing only the right to bring nonfrivolous claims. While the Court initially described the right as encapsulating "a reasonably

260. *Id.* at 361-62.

261. *Id.* at 361 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

262. *Id.* at 361-62.

263. *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

264. *Lewis*, 518 U.S. at 354.

265. *Id.* at 351 (quoting *Bounds*, 430 U.S. at 830) (emphasis added).

266. *Id.* at 356 (emphasis added). *See also Wolff*, 418 U.S. at 579 ("The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.").

adequate opportunity” to present constitutional claims to a court,²⁶⁷ the Court later embellished this description, referring to the “reasonably adequate opportunity to file nonfrivolous legal claims.”²⁶⁸

Upon closer examination, the seeming inconsistency in the language employed by the Supreme Court in *Lewis* in describing the scope of the right of access may not reflect discrepant views on the scope of that right, but simply the nature of the issues before the Court in that case. One of those issues was whether the prisoners who had filed the lawsuit in that case had standing to challenge the constitutional adequacy of Arizona’s legal-assistance program for prisoners.²⁶⁹ In resolving this question, the Court cited the traditional requirement for standing—that the plaintiff have suffered “actual injury” from the defendant’s allegedly illegal conduct or face an imminent threat of such injury.²⁷⁰ According to *Lewis*, what this standing requirement means in the prison context is that only prisoners with nonfrivolous claims can contest the adequacy of the prison’s legal services.²⁷¹ Prisoners with frivolous claims have obviously not suffered the “actual injury” that would give them standing to sue;²⁷² even if prison officials had corrected alleged deficiencies in a legal-assistance program, the prisoners with frivolous claims could not and would not prevail on the claims they were unable to file. In the words of the Court, “[d]epriving someone of a frivolous claim . . . deprives him of nothing at all.”²⁷³

To say, though, that only prisoners conceivably harmed by prison officials’ failure to meet their affirmative-assistance obligations derived from the constitutional right to court access have standing to seek legal redress for that failure does not necessarily mean that states can, with impunity, punish prisoners whose claims fail to meet the standard of nonfrivolousness. Similarly, to hold that prison officials need only assist prisoners in bringing nonfrivolous claims says nothing about either the roadblocks prison officials can constitutionally place in the path of prisoners whose claims may or may not be frivolous or the punishment they can exact when a prisoner’s claims prove frivolous.

It is evident that the right to have access to the courts does not mean that a litigant is immune from sanctions for litigation-related activity.

267. *Lewis*, 518 U.S. at 351.

268. *Id.* at 356.

269. *See id.* at 346, 348–49.

270. *See id.* at 349.

271. *See id.* at 353 & n.3.

272. *Id.*

273. *Id.*

Otherwise, states would be powerless to prosecute a litigant for perjurious testimony. In addition, courts could not exercise their inherent authority to sanction abuse of the court system,²⁷⁴ nor could they utilize court rules, such as Rule 11, to accomplish that end.²⁷⁵ The question then is how and where to draw the line between sanctions that appropriately penalize misuses of the litigation process and those that unconstitutionally curb the right to turn to the courts for legal redress. Since the right to have access to the courts is, according to the Supreme Court, an offshoot of the First Amendment right to petition the government for a redress of grievances, case law regarding limits that the First Amendment places on governmental authority to restrict freedom of expression provides a benchmark for answering this question.

2. First Amendment Considerations

a. Thwarting the Chilling Effect of Strict Liability on Protected Speech

An overarching theme of First Amendment cases is that the First Amendment tolerates and protects speech that is reprehensible and even harmful in order to give First Amendment freedoms the “breathing space” that they “need . . . to survive.”²⁷⁶ The protective constitutional veil that often envelops speech that has injurious consequences springs from the recognition that restrictions on speech having illegitimate ends or certain adverse consequences can have a chilling effect on speech clearly protected by the First Amendment.²⁷⁷ The constraints the First Amendment places on a state’s power to provide remedies for or to sanction defamatory statements is a classic illustration of how the Constitution sometimes insulates unprotected speech in order to prevent an unconstitutional chilling effect on protected speech.²⁷⁸

274. See *supra* notes 23–24 and accompanying text.

275. See *supra* notes 26–49 and accompanying text.

276. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 443 (1963)). See also *Gertz v. Welch, Inc.*, 418 U.S. 323, 342 (1974); *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

277. See *Boos v. Barry*, 485 U.S. 312, 322 (1988) (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)) (“[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide ‘adequate “breathing space” to the freedoms protected by the First Amendment.’”); *Garrison v. Louisiana*, 379 U.S. 64, 72–73 (1964) (holding that an intent to inflict harm will not, by itself, support a criminal conviction for defaming a public official).

278. See, e.g., *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768–69 (1986) (holding that when a private individual, who is neither a public official nor a public figure, sues a media defendant for defamation, the plaintiff must prove the falsity of the allegedly defamatory statements); *Gertz*, 418 U.S.

At common law, a defamatory statement gave rise to strict liability.²⁷⁹ In other words, a person who uttered a false statement of fact about another individual that would clearly harm that individual's reputation, such as a false statement that the individual has venereal disease or is a member of the Ku Klux Klan, could be held civilly liable even if the speaker reasonably believed that the statement was true. In a series of cases, however, the Supreme Court held that the First Amendment significantly circumscribes a state's authority to remedy the harm caused by defamatory statements. For example, public officials and public figures that sue for defamation must prove that the alleged defamer acted with "actual malice," in other words, either with knowledge that the statements were false or with reckless disregard as to their veracity.²⁸⁰ Even a private person defamed by a statement made by a media defendant cannot constitutionally recover damages for defamation absent proof that the speaker or writer was at least negligent in failing to ascertain the statement's falsity.²⁸¹

The rationale of the fault requirement that has insinuated itself into defamation law is that strict liability for defamation would cause people to refrain from protected speech—communications that were not in fact defamatory—out of fear that their statements might trigger a defamation suit.²⁸² In other words, strict liability would have an unconstitutional chilling effect on the exercise of the freedom of expression safeguarded by the First Amendment.

If the First Amendment accords this level of protection for clearly defamatory statements, how much stronger is the case for shielding nondefamatory statements from the strict liability that chills the exercise of First Amendment freedoms. The Supreme Court recognized this truism in *Time, Inc. v. Hill* when it extended the "actual malice" standard to a case in which the plaintiff, who was neither a public official nor a public figure,

at 347 (holding that states cannot hold media defendants strictly liable for defamatory statements about private individuals); *N.Y. Times Co.*, 376 U.S. at 279–80 (concluding that public officials cannot recover damages for defamation absent proof that the defamatory statement was made with "actual malice").

279. See *Gertz*, 418 U.S. at 346.

280. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 162 (1967); *N.Y. Times Co.*, 376 U.S. at 279–80.

281. *Gertz*, 418 U.S. at 347–49.

282. See, e.g., *Phila. Newspapers, Inc.*, 475 U.S. at 778 (quoting *N.Y. Times Co.*, 376 U.S. at 272) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)) ("To provide 'breathing space' for true speech on matters of public concern, the Court has been willing to insulate even *demonstrably* false speech from liability, and has imposed additional requirements of fault upon the plaintiff in a suit for defamation.").

sought damages for nondefamatory statements that allegedly invaded the plaintiff's privacy.²⁸³ In that case, the plaintiff brought suit against the publisher of "LIFE" magazine for invasion of privacy after publication of an article entitled "True Crime Inspires Tense Play."²⁸⁴ The article profiled a Broadway play that, according to the article, was based on the true ordeal of the plaintiff and his family when they were held hostage by three escaped convicts.²⁸⁵ In fact, the play departed in many significant respects from the real-life events that had transpired during the hostage-taking.²⁸⁶ The play, for example, depicted the father and his son being beaten and the daughter being subjected to verbal sexual harassment even though the plaintiff had emphasized in earlier media interviews that the convicts had treated his family and him politely.²⁸⁷

The question before the Supreme Court in *Time, Inc.* was whether the First Amendment engrafted any preconditions to liability for invasion of the plaintiff's privacy.²⁸⁸ The Court answered that question in the affirmative.²⁸⁹ In explaining the genesis of the actual-malice requirement it held applicable in this context, the Court noted that mistakes would inevitably be made when transmitting information of interest to the public.²⁹⁰ Consequently, if a law placed the "impossible burden" of guaranteeing the accuracy of transmitted information on its disseminators, the freedom of the press embodied within the First Amendment would be imperiled.²⁹¹ According to the Court, not even a negligence standard would provide adequate protection for First Amendment liberties when a communication was nondefamatory.²⁹² In a nondefamatory context, nothing in the facts communicated would alert the publisher of the information of its injurious nature and of the consequential need to take

283. See 385 U.S. 374, 388 (1967). See also *Gertz*, 418 U.S. at 348 (noting that the analysis of the fault needed for liability in the case before it would differ if liability rested on "a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential").

284. *Time, Inc.*, 385 U.S. at 376-77.

285. *Id.* at 377-78.

286. *Id.* at 378.

287. *Id.*

288. *Id.* at 376-77.

289. See *id.* at 387-88.

290. *Id.* at 388.

291. *Id.* at 389. See also *Gertz v. Welch, Inc.*, 418 U.S. 323, 340 (1974) ("Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate . . . [a]nd punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press.").

292. See *Time, Inc.*, 385 U.S. at 389.

extra precautions to verify the information's accuracy.²⁹³ In addition, a negligence standard would be unwieldy and "most elusive" outside of the defamation context because it would place on the speaker or writer the "intolerable burden" of predicting whether a jury would consider the steps taken to confirm the information's accuracy to be reasonable.²⁹⁴

If these constitutional concerns bar the imposition of strict civil liability for press communications, they even more strongly proscribe the imposition of strict quasi-criminal liability for the petitioning activity of prisoners when they file a court claim.²⁹⁵ Prisoners are far less equipped than the media to ferret out facts, facts that in their case would demonstrate the nonfrivolousness of their claims.²⁹⁶ Because of their confinement, they often have no access to witnesses, such as those confined in a segregation unit or another prison. Even when prisoners can surmount the logistical problems that hamper their ability to unearth the facts bearing on their case, they will often not know which facts need to be included in a complaint to avoid its dismissal for frivolousness.²⁹⁷ For example, a prisoner who contests on constitutional grounds the adequacy of the medical care he or she received may simply complain about the poor quality of the medical treatment without mentioning in the complaint the facts indicating that the defendant acted with the "deliberate indifference" that is a requisite for Eighth Amendment liability.²⁹⁸

Currently, neither courts nor correctional officials are legally obliged to help prisoners overcome the obstacles and impediments that prevent them from discerning whether their claims are legally frivolous. Prisoners have no constitutional right to assistance from an attorney in preparing and presenting a civil claim,²⁹⁹ who would alert a prisoner to the frivolousness of any of his or her claims. While some state courts may, like federal

293. *See id.*

294. *Id.*

295. The Supreme Court has described the rights subsumed within the First Amendment—to freedom of speech, to freedom of the press, and to freedom to petition the government for a redress of grievances—as "inseparable" and has refused to interpret the scope of the right to petition the government differently than the scope of other First Amendment freedoms. *See McDonald v. Smith*, 472 U.S. 479, 485 (1985).

296. *See Billman v. Ind. Dep't of Corr.*, 56 F.3d 785, 790 (7th Cir. 1995) (noting prisoners' inability to conduct a factual investigation before filing lawsuits).

297. *See supra* notes 216–18 for a discussion of the prevalence of functional illiteracy amongst prisoners. *Cf. Bounds v. Smith*, 430 U.S. 817, 825 (1977) (noting that even lawyers must know what the law is in order to know what facts state a cause of action).

298. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

299. *Lewis v. Casey*, 518 U.S. 343, 354 (1996).

courts,³⁰⁰ have the discretion to appoint an attorney to represent a prisoner, that appointment will come too late—after the filing of a complaint—to avoid the effects of a state’s revocation statute.³⁰¹

Correctional officials also do not have to, nor do they typically attempt to, alleviate the hindrances that make it difficult or impossible to differentiate frivolous claims from those that are nonfrivolous.³⁰² It is true that correctional officials have a constitutional obligation to provide prisoners with the assistance they need to file nonfrivolous claims contesting their convictions, sentences, and conditions of confinement.³⁰³ But mechanisms that are designed to ensure that nonfrivolous claims can be presented to a court will not invariably, or even usually, sift out frivolous claims.

A farming analogy may be helpful in comprehending the distinction between mechanisms that facilitate the bringing of certain claims and mechanisms that siphon off other kinds of claims. The legal-assistance mechanisms designed to ensure that prisoners can present their nonfrivolous claims to a court often mirror, in many ways, the first step of the process through which wheat is harvested (when the wheat plants are cut).³⁰⁴ Through the operation of these mechanisms, both nonfrivolous claims (the wheat) and frivolous claims (the chaff) are funneled to the courts. Only when they arrive in court does a systemic “threshing” process

300. See 28 U.S.C. § 1915(e)(1). Under this statute, federal courts have the authority to “request” that attorneys represent indigent prisoners bringing civil actions or appeals, but the courts have no statutory authority to require attorneys to undertake such representation. *Mallard v. U.S. Dist. Ct.*, 490 U.S. 296, 298 (1989).

301. Very few prisoners are, in any event, represented by attorneys in civil cases. See HANSON & DALEY, *supra* note 125, at 21 (reporting that prisoners proceed *pro se* in 96% of the § 1983 suits they file in federal court).

302. Most often, prisoners receive their legal assistance from a cadre of fellow inmates, some, but not all of whom, have received some legal training. BRENDA VOGEL, *DOWN FOR THE COUNT: A PRISON LIBRARY HANDBOOK* 89 (1995). In describing the legal-assistance programs available to prisoners, the Coordinator of the Maryland Correctional Education Libraries at the Maryland State Department of Education observed:

On average, the quality of legal assistance received by inmates is abysmal. One cannot imagine the patchwork of service and resources offered nationwide. They vary in degrees of accessibility to materials, in the availability of a comprehensive and up-to-date collection, in credentials and training of those responsible for the service, in levels of programmatic expectation, in quality of commitment to enabling prisoners to petition the courts.

Id.

303. See *Lewis*, 518 U.S. at 355–56.

304. Before the advent of the combine, farmers harvested wheat in a two-step process. In the first step, farmers cut the wheat plants, either by hand or by machine. In the second step, the farmers separated the kernels of grain from the rest of the wheat plants, first by hand and, in later years, with threshing machines. 21 *THE WORLD BOOK ENCYCLOPEDIA* 278 (1991).

begin, with the courts winnowing out and dismissing frivolous claims in complaints.³⁰⁵ But by affording prisoners a “reasonably adequate opportunity” to present their nonfrivolous claims to a court, prison officials have met their constitutional obligations to provide affirmative assistance to prisoners,³⁰⁶ even if the legal-assistance programs they have put in place perform poorly, or not at all, in halting the flow of frivolous claims into the courts.

Dictum in the Supreme Court’s opinion in *Lewis v. Casey* may have cemented, and perhaps widened, the gap between the constitutionally required “funneling function” of a prison’s legal-assistance program and the “threshing function” that would protect prisoners from an extension of their confinement because they unwittingly filed a frivolous lawsuit. In *Lewis*, the Court volunteered one way in which prison officials might meet their constitutional obligation to guarantee a prisoner’s access to the courts. Instead of affording prisoners access to prison law libraries, prison officials could provide them with “minimal access to legal advice” and standardized complaint forms, court-prepared forms that elicited just the facts underlying prisoners’ claims and asked them to refrain from “legal analysis.”³⁰⁷ The Supreme Court did not fully flesh out what would constitute the “minimal help” that, along with standardized complaint forms, would satisfy prison officials’ affirmative-assistance obligations under the Constitution.³⁰⁸ However, the Court did, in general terms, refer to the help that is required as that which would enable prisoners to bring their claims before a court.³⁰⁹ The Court specifically denied that prisoners have a constitutional right to conduct legal research; all that the Constitution bestows on them, according to the Court, is the right to present their claims challenging their convictions, sentences, and conditions of confinement to a court.³¹⁰

305. A few prisons have developed legal-assistance programs whose purpose is both to facilitate the filing of nonfrivolous claims and to help prisoners weed frivolous claims from their complaints. See LYNN S. BRANHAM, *LIMITING THE BURDENS OF PRO SE INMATE LITIGATION: A TECHNICAL-ASSISTANCE MANUAL FOR COURTS, CORRECTIONAL OFFICIALS, AND ATTORNEYS GENERAL* 103–04 (American Bar Association 1997) (describing the review of complaints by a contract attorney hired to ensure that inmates’ claims meet legal requirements).

306. See *Lewis*, 518 U.S. at 356 (noting that the constitutional right to have access to the courts guarantees “the conferral of a capability—the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts”).

307. *Id.* at 352.

308. See *id.* at 360.

309. See *id.*

310. See *id.* (“[T]he Constitution does not require that prisoners (literate or illiterate) be able to conduct generalized research, but only that they be able to present their grievances to the courts—a

It therefore appears as though the Supreme Court in *Lewis* was condoning, at least from a constitutional perspective, a fact-focused, legal-assistance program. Such a program would need to ensure that prisoners with nonfrivolous claims include the facts in their complaints from which the courts could discern the nonfrivolousness of their claims. But the program has no correlative obligation to enlighten prisoners about the law or the strength or weakness of their legal claims. In other words, while the program might enable prisoners to file nonfrivolous claims with courts, it might do nothing to enable them to differentiate frivolous from nonfrivolous claims. As a result, prisoners might file claims that, unbeknownst to them, are legally frivolous. In addition, their uncertainty about the boundary between frivolous and nonfrivolous claims and their corresponding fear of losing good-time credits for filing a frivolous complaint might prompt them to refrain from filing claims that are, in fact, nonfrivolous.³¹¹

b. Litigation and the Protective Veil of the Right to Petition

Several Supreme Court cases discussing the government's power to enjoin a pending lawsuit or punish a litigant for having filed a lawsuit shed light on the First Amendment constraints on the exercise of that power and, in turn, on the constitutionality of state revocation statutes. In one of those cases, *California Motor Transport Co. v. Trucking Unlimited*, the plaintiff, a highway carrier, filed a lawsuit against the defendant, also a highway carrier, for violating antitrust laws.³¹² The plaintiff alleged that the defendant had conspired to monopolize the market for transporting goods in California.³¹³ As part of this conspiracy, according to the plaintiff, the defendant filed multiple lawsuits and appeals to obstruct the plaintiff's efforts to gain operating rights that would expand the sphere of its business.³¹⁴ For relief, the plaintiff sought both an injunction and damages.³¹⁵

more limited capability that can be produced by a much more limited degree of legal assistance.”). *See also id.* at 402 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (observing that prison officials can rely on a “complaint-form procedure” to facilitate inmates’ access to the courts rather than provide inmates with access to prison law libraries).

311. The inconsistency with which judges draw the line between frivolous and nonfrivolous claims confirms the legitimacy of this fear. *See infra* notes 394–395 and accompanying text.

312. 404 U.S. 508, 509 (1972).

313. *Id.*

314. *Id.*

315. *Id.*

The Supreme Court prefaced its analysis with the acknowledgment that the right to petition the government for a redress of grievances encompasses petitioning activity directed to the courts.³¹⁶ Consequently, lawsuits cannot normally give rise to antitrust liability.³¹⁷ Such liability would, according to the Court, vitiate the First Amendment right to petition the court.³¹⁸ The Supreme Court did, however, carve out an exception to the general rule that litigation-related activities are insulated from antitrust liability.³¹⁹ Under that exception, known as the “sham exception,” lawsuits that are a “mere sham,” whose real and only objective is to thwart a competitor, can spark antitrust liability.³²⁰ It was not altogether clear in *California Motor Transport Co.* what the Supreme Court considered “sham” litigation that would remove it from the protective umbrella of the First Amendment. The Court did say that one “baseless” claim “may go unnoticed,” while a “pattern of baseless, repetitive claims” might support the conclusion that a litigant had abused the adjudicatory process.³²¹ Because of the Court’s conditional language, however, the extent to which the First Amendment immunizes a single, baseless claim filed with a court was left in doubt.

In *Professional Real Estate Investors, Inc. v. Columbia Picture Industries, Inc.*, the Supreme Court elaborated on the scope of the “sham exception” to antitrust liability.³²² In this case, a major movie studio filed suit against the operators of a resort hotel after the hotel began renting movies to hotel patrons to which the studio held the copyrights.³²³ The hotel operators counterclaimed, alleging that the lawsuit for copyright infringement contravened a federal antitrust act because the lawsuit’s purpose was to restrain trade and further the movie studio’s monopolization of the movie market.³²⁴ The Supreme Court responded that an anticompetitive purpose in filing a lawsuit will not alone bring it within the “sham exception.”³²⁵ Instead, a lawsuit must satisfy both prongs of a two-

316. *See id.* at 510.

317. *See id.* at 510–11.

318. *See id.*

319. *See id.* at 511.

320. *Id.* at 511, 516. The Court explained that the First Amendment cannot be used as a tool to inflict the very “substantive evils” that Congress is empowered to avert, in this case, the “evils” of anticompetitive activity that may, if not halted, eliminate a market competitor. *Id.* at 515 (quoting *NAACP v. Button*, 371 U.S. 415, 444 (1963)).

321. *Id.* at 513.

322. 508 U.S. 49, 50–51 (1993).

323. *Id.* at 51–52.

324. *Id.* at 52.

325. *See id.* at 57, 59.

pronged test to trigger potential antitrust liability.³²⁶ Under the first part of this test, the asserted legal claim must be “objectively baseless.”³²⁷ In other words, “no reasonable litigant could realistically expect success on the merits.”³²⁸ The second prong of the “sham” test is subjective in nature.³²⁹ Only if a litigant initiated a baseless legal claim for the purpose of quashing competition is the claimant unshielded from antitrust liability for filing the claim.³³⁰ A “sham” claim, the Court elaborated, is the opposite of a “genuine” claim.³³¹ A “genuine” claim, according to the Court, not only meets certain objective parameters, but is one that is “sincerely and honestly felt or experienced.”³³² A lawsuit can engender antitrust liability, therefore, only when it fails under both measures—when it is both “objectively baseless” and not instituted in a sincere and honest effort to obtain legal redress.³³³

In *Bill Johnson’s Restaurants, Inc. v. NLRB*, the Supreme Court once again confronted the nature of the interconnection between “First Amendment values” and governmental restraint of purportedly harmful litigation.³³⁴ That case arose out of a labor dispute between a restaurant owner and his employees.³³⁵ After the owner fired one of his veteran waitresses, reportedly for her union-organizing efforts, she filed unfair labor practice charges with the NLRB.³³⁶ She and several others began to picket the restaurant, encouraging the public not to patronize it because the management treated its employees poorly.³³⁷ The restaurant manager then threatened to “get even” with the demonstrators “if it’s the last thing I do.”³³⁸

This threat was soon followed by the filing of a lawsuit in state court by the restaurant owner and co-owners to enjoin the picketing that the complaint alleged blocked patrons’ access to the restaurant.³³⁹ The

326. *See id.* at 60–61.

327. *Id.* at 60.

328. *Id.*

329. *Id.* at 60–61.

330. *Id.*

331. *Id.* at 61.

332. *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 948 (1986)).

333. *See id.*

334. 461 U.S. 731, 741 (1983).

335. *Id.* at 733.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.* at 734. The plaintiffs also included a libel claim in their complaint, contending that a leaflet the picketers distributed charging them with sexual harassment defamed them. *Id.*

owners' complaint also sought compensatory damages and half of a million dollars in punitive damages.³⁴⁰ The NLRB responded by issuing an order directing the owners to abandon the state lawsuit and to reimburse the picketers for their litigation-related expenses.³⁴¹ This cease-and-desist order was predicated on the Board's finding that the filing of the lawsuit constituted an unfair labor practice because of the retaliatory intent with which it had been filed.³⁴²

The issue before the Supreme Court was whether retaliatory intent alone supported issuing a cease-and-desist order under the National Labor Relations Act ("NLRA") to abate litigation.³⁴³ The Court first acknowledged that a lawsuit could be a powerful weapon utilized by employers to punish employees for exercising their rights under the NLRA and to discourage them from doing so.³⁴⁴ The Court, however, then pointed to competing First Amendment interests that counseled against enjoining lawsuits just because they were initiated for retaliatory reasons.³⁴⁵ Recognizing that employers are sometimes entitled to legal relief because of the tortious conduct of employees, the Court concluded that the constitutional right to have access to the courts is simply "too important" to cordon off the courts whenever an employer acts with retaliatory animus in filing a lawsuit against employees.³⁴⁶

The Supreme Court therefore interpreted the NLRA as dictating both objective and subjective prerequisites to the issuance of a cease-and-desist order barring an employer's further prosecution of a lawsuit.³⁴⁷ On the objective side, the lawsuit had to lack any "reasonable basis,"³⁴⁸ and on the subjective side, the employer had to initiate the lawsuit in order to retaliate against employees for exercising their rights under the NLRA.³⁴⁹

What is not entirely clear from the Supreme Court's opinion is whether the Court, driven by First Amendment considerations, read another subjective requirement into the NLRA. The Court quoted, with seeming

340. *Id.*

341. *Id.* at 737.

342. *Id.* at 736–37. The Board adopted the finding of the administrative law judge. *Id.* at 737.

343. *See id.* at 733, 740.

344. *Id.* at 740–41.

345. *Id.* at 741.

346. *See id.* at 741–42 (quoting *Peddie Buildings*, 203 N.L.R.B. 265, 272 (1973), *enforcement denied on other grounds*, *NLRB v. Visceglia*, 498 F.2d 43 (3d Cir. 1974)).

347. *See id.* at 743, 748.

348. *Id.* at 743–44, 748. A claim could be baseless, according to the Court, either because there were no facts to support it or because the claim was unfounded under the law. *Id.* at 748.

349. *Id.*

approval, a passage of a law review article that describes “sham” litigation as that which is founded on “intentional falsehoods” or “knowingly frivolous claims.”³⁵⁰ In addition, elsewhere in its opinion, the Court denied that courts must resolve the issue of whether or not there was a “reasonable basis” to file a lawsuit based on the pleadings alone,³⁵¹ although typically, a court’s review in assessing the frivolousness of a claim is confined to the pleadings.³⁵² Consequently, the Supreme Court’s allusion to a reasonable-basis inquiry that goes beyond the face of the pleadings suggests that the determination of reasonable basis may hinge on facts about the employer’s state of mind regarding the substantiality of the legal claim, facts that may be in dispute.

c. Lessons Distilled from Supreme Court Caselaw

The decisions of the Supreme Court do not provide a definitive answer to the question of what constraints the First Amendment places on the revocation of a prisoner’s good-time credits for filing a frivolous lawsuit, but lessons can clearly be distilled from these decisions.

First, the First Amendment does not immunize a litigant from negative consequences for filing a baseless claim.³⁵³ Consequently, the filing of a frivolous claim can in some circumstances give rise to the imposition of sanctions, such as those under Rule 11.³⁵⁴

350. *Id.* at 743 (quoting Thomas A. Balmer, *Sham Litigation and the Antitrust Laws*, 29 BUFF. L. REV. 39, 60 (1980)). In *BE & K Constr. Co. v. NLRB*, 122 S. Ct. 2390 (June 24, 2002), which was decided shortly before this article went to press, the Supreme Court also suggested that an employer’s “retaliatory motive” in filing a lawsuit will not alone satisfy the subjective predicate to the imposition of sanctions by the NLRB, at least under the Board’s broad construction of that term. The NLRB had defined retaliatory intent to encompass any lawsuit filed with the intent of interfering with rights protected under the National Labor Relations Act. *Id.* at 2400. But the Court noted that even though actions may actually be protected by the NLRA, an employer might genuinely and reasonably believe that they are unlawful. *Id.* In other words, even though the employer might intend to impede union activities that are lawful, the employer might not recognize that those activities are legal. Consequently, the Court held that the NLRA did not authorize the Board’s broad construction of the kinds of lawsuits that can give rise to sanctions under the NLRA. *Id.* at 2402. The Court did not, however, ultimately resolve what state-of-mind requirement is actually subsumed within the NLRA or is otherwise dictated by the First Amendment.

351. 461 U.S. at 744–45.

352. *See Denton v. Hernandez*, 504 U.S. 25, 32–33 (1992) (describing the process of determining frivolousness as one “based solely on the pleadings”).

353. *Bill Johnson’s Rests., Inc.*, 461 U.S. at 743. *See also McDonald v. Smith*, 472 U.S. 479, 485 (1985) (holding that the right to petition the government for redress does not accord absolute immunity for defamatory statements).

354. *See supra* notes 26–30 and accompanying text.

Second, while it is technically true that “baseless litigation is not immunized by the First Amendment right to petition,”³⁵⁵ First Amendment requirements designed to safeguard protected speech, including nonfrivolous claims, have the side-effect of insulating some unprotected speech, including some frivolous claims, from sanctions.³⁵⁶ The verity of this point is evident from the line of defamation cases discussed earlier.³⁵⁷ Although the Supreme Court has unequivocally stated that the First Amendment right to freedom of speech does not immunize false statements,³⁵⁸ just like the right to petition does not immunize baseless lawsuits, the Court has interpreted the First Amendment as incorporating certain fault requirements into defamation law in order to avoid a chilling effect on truthful speech.³⁵⁹ This constitutional gloss on defamation law has the inevitable effect of exempting from liability some, and perhaps many, defamatory statements that caused real and significant harm.³⁶⁰

Third, in order to avert a chilling effect on the filing of nonfrivolous claims, the First Amendment appears to place two limitations on the government’s power to penalize a person, at least in certain ways,³⁶¹ for bringing a lawsuit. The reason why it cannot be conclusively said that there is a constitutionally derived two-part limitation on the government’s sanctioning authority in this context is that the cases from which this two-part test was extrapolated are cases in which the Supreme Court engaged in statutory interpretation. *California Motor Transport Co.* and *Professional Real Estate Investors, Inc.* construed the Sherman Act, determining the circumstances in which the filing of a lawsuit can give rise to antitrust

355. *Bill Johnson’s Rests., Inc.*, 461 U.S. at 743.

356. *See Gertz v. Welch, Inc.*, 418 U.S. 323, 340–41 (1974) (“Although the erroneous statement of fact is not worthy of constitutional protection . . . [t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.”).

357. *See supra* Part III.D.2.a.

358. *Bill Johnson’s Rests., Inc.*, 461 U.S. at 743.

359. *See supra* notes 278–83 and accompanying text.

360. *See Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986).

361. This Article focuses exclusively on the constraints the First Amendment places on one type of sanction for filing a frivolous lawsuit—prolonged incarceration. The Supreme Court has recognized the particular opprobriousness of an incarcerative sanction compared to other kinds of sanctions. *See, e.g., Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (holding that indigents convicted of misdemeanors have the right to appointed counsel at trial only if they were sentenced to some period of confinement). *See also Glover v. United States*, 531 U.S. 198, 203 (2001) (holding that any increase in the length of incarceration due to defense counsel’s incompetent representation constitutes the prejudice needed to sustain a Sixth Amendment claim for ineffective assistance of counsel). Consequently, a threat of extended incarceration for filing a frivolous lawsuit has a particularly acute chilling effect on the constitutional right to seek redress from the courts.

liability under that Act.³⁶² In addition, *Bill Johnson's Restaurants, Inc.* determined when the filing of a lawsuit is an enjoined unfair labor practice.³⁶³ Nonetheless, some of the language, and certainly the tenor, of the Court's opinions suggest that the two-part "sham test" has its origins, not in the statutes, but in the First Amendment in conformance with whose requirements the Court was interpreting the statutes.³⁶⁴

The first constitutionally derived limitation on the government's authority to impose sanctions for instituting a lawsuit is objective in nature.³⁶⁵ The First Amendment prohibits punishing a plaintiff for seeking redress from a court unless the plaintiff's legal claim lacked a "reasonable basis."³⁶⁶ But even if a plaintiff's claim is palpably devoid of legal merit, that fact alone does not give the government carte blanche to prolong a prisoner's confinement for filing the lawsuit. The First Amendment condones such punishment only if the plaintiff filed the lawsuit with a certain state of mind.³⁶⁷

The challenge of course is to flesh out the contours of these objective and subjective requirements in the context of state revocation statutes. With regard to the objective component, the salient question is whether a frivolous claim is, by definition, a claim without a "reasonable basis" within the meaning of First Amendment law. The reflexive answer to this question is that a frivolous claim must lack a reasonable basis. How, one

362. See *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56–60 (1993) (discussing cases outlining the scope of antitrust liability under the Sherman Act); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (referring to the immunity from liability under the antitrust laws).

363. See *Bill Johnson's Rests., Inc.*, 461 U.S. at 742–43 (rejecting the National Labor Relations Board's interpretation of the NLRA). In a Supreme Court decision rendered shortly before this article went to press, *BE & K Constr. Co. v. NLRB*, No. 01-518, 2002 WL 1357297, at *3 (June 24, 2002), the Supreme Court once again construed the NLRA, addressing the question whether the statute authorized the imposition of sanctions on an employer who had filed a lawsuit against unions that was "reasonably based," but ultimately unsuccessful.

364. See, e.g., *Prof'l Real Estate Investors, Inc.*, 508 U.S. at 56 (quoting *E. R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961)) (stating that when interpreting the scope of the Sherman Act, the Court does not "impute to Congress an intent to invade the First Amendment right to petition"); *Bill Johnson's Rests., Inc.*, 461 U.S. at 741 (noting that the Court should construe the NLRA in light of "First Amendment values"); *Id.* at 742–43 (holding that the NLRB's interpretation of the NLRA is unfounded when considered against the backdrop of the First Amendment right to have access to the courts); *Cal. Motor Transp. Co.*, 404 U.S. at 510–11 (concluding that "it would be destructive of rights of association and of petition" if limits are not placed on antitrust liability for filing a lawsuit).

365. *Prof'l Real Estate Investors, Inc.*, 508 U.S. at 60.

366. *Bill Johnson's Rests., Inc.*, 461 U.S. at 743.

367. See *Prof'l Real Estate Investors, Inc.*, 508 U.S. at 60–61.

might ask, could a claim have no “arguable basis either in law or in fact,” thereby making it legally frivolous,³⁶⁸ and yet at the same time have a “reasonable basis,” thereby insulating a prisoner from a revocation of good-time credits for having filed the claim?

The answer to this question lies in the precepts of First Amendment law. The objective baselessness of a claim that is a constitutional prerequisite to the sanctioning of a plaintiff for bringing a nonmeritorious legal claim derives from First Amendment concerns about the chilling effect of such sanctions. Consequently, the “no reasonable basis” requirement must be construed in a way that is sensitive to these First Amendment concerns. In defining the First Amendment boundaries of the government’s punitive powers, this construction of the requirement may not necessarily parallel the definition courts have adopted for legal frivolousness, a standard adopted to facilitate the culling of frivolous claims in order to conserve courts’ and parties’ resources.³⁶⁹

When a judge determines whether a claim is legally frivolous, the judge does not assess frivolousness from the litigant’s perspective. For example, the judge who conducted the frivolousness review of Neals’ claim described at the beginning of this Article did not consider whether a reasonable person with Neals’ level of education, his comprehension of legal requirements, and his level of access to legal assistance would have believed that he was legally entitled to remedial relief to protect him from future assaults. Instead, the judge assessed the claim’s viability, as would all judges, from his own perspective—in other words, based on his awareness, derived from his legal expertise that a claim for negligence is not cognizable under the Eighth Amendment.³⁷⁰

Assessing the baselessness of a claim from the judge’s perspective makes sense and is entirely appropriate when winnowing out claims that do not warrant further processing by the court. However, when the purpose of the baselessness inquiry is to ensure that the sanctioning of a plaintiff for filing a lawsuit does not have an unconstitutional chilling effect on the right to petition the court for legal redress, assessing whether there was a “reasonable basis” for the lawsuit from a judge’s standpoint frustrates this purpose. This conclusion stems from the fact that what constitutes a “reasonable basis” for the filing of a legal claim by a *pro se* litigant can vary greatly from what constitutes a “reasonable basis” for the bringing of

368. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

369. *Id.* at 327.

370. *See Neals v. Norwood*, 59 F.3d 530, 532–33 (5th Cir. 1995).

such a claim by a lawyer—a person trained in the nuances and complexities of the law. The Supreme Court recognized this practical reality in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*³⁷¹ In expounding on Rule 11’s objective reasonableness standard, the Court observed: “The most that can be said is that the legal inquiry that can reasonably be expected from a party may vary from case to case. Put another way, ‘what is objectively reasonable for a client may differ from what is objectively reasonable for an attorney.’”³⁷²

Similarly, the legal investigation that is objectively reasonable for a prisoner to undertake may, and generally does, differ dramatically from the legal investigation that a court can and should expect an attorney to undertake before initiating a lawsuit. Therefore, if the standard in measuring the objective baselessness of a claim that is an essential predicate for the revocation of good-time credits does not account for these differences, as Rule 11 does, the end result is a substantial chilling effect on the bringing of nonfrivolous claims by prisoners, an effect condemned by the First Amendment. Prisoners, who are often uneducated,³⁷³ who have little capacity to understand the intricacies of the law, and who face substantial, and sometimes insurmountable, hurdles in investigating the facts of, and the law bearing on, a potential legal claim, often have no basis for discerning or predicting whether a judge would consider their claim to be frivolous.³⁷⁴ Fearful of spending more time in prison if they err in their predictions, some or many of them might refrain from filing potentially meritorious claims. Consequently, unless the circumstances that faced a prisoner trying to assess the legal legitimacy of a claim are considered when determining whether the prisoner had a “reasonable basis” for filing a lawsuit, the revocation of good-time credits for filing a frivolous claim does not afford the prisoner’s constitutional right to petition the courts the “breathing space”³⁷⁵ it needs to survive and flourish.

371. 498 U.S. 533 (1991).

372. *Id.* at 550.

373. BUREAU OF JUST. STAT., U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1997, 48 (2000) (reporting that 14.2% of the state prisoners in 1997 completed eighth grade or less and an additional 28.9% attended high school for some period of time but neither graduated nor received their GED).

374. See Part III.C–D. Judges’ differing opinions regarding what is and is not a frivolous claim further compound the difficulty of the daunting task often facing prisoners trying to predict whether a complaint would be considered frivolous from a legal perspective. See *infra* notes 394–395 and accompanying text.

375. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

The nature of the subjective requirement that must be met in order for the revocation of a prisoner's good-time credits to comport with the First Amendment is also unclear. In *Professional Real Estate Investors, Inc.*, the Supreme Court spoke of the need for a litigant to have "sincerely and honestly felt or experienced" a claim in order to avoid antitrust liability for filing an objectively baseless claim.³⁷⁶ If this same standard were transported into the good-time revocation context, bringing a lawsuit for a malicious purpose fails to meet this standard. Typically, a malicious purpose connotes some purpose other than that of having the claim properly adjudicated by a court.³⁷⁷ Thus, for example, if a prisoner filed a groundless claim in order to harass a correctional officer, revoking good-time credit would generally comport with the First Amendment.³⁷⁸

The requisite sincere and honest belief in a claim is also lacking when a prisoner knew the claim was frivolous. But what if a prisoner recklessly files a baseless claim? In other words, what if the prisoner is aware that there is a substantial risk that the claim is groundless, but files it anyway? In that situation, does revoking the prisoner's good-time credits fall outside the penumbral protections of the First Amendment?

The answer to that question is not readily evident. It is certainly true that in other contexts, recklessness satisfies the fault requirement derived from the First Amendment. For example, holding a defendant liable for publishing a defamatory statement about a public official or a public figure with reckless disregard for the statement's falsity is consonant with First Amendment protections.³⁷⁹ Recklessness also suffices for liability in certain false-light privacy cases.³⁸⁰ In addition, and perhaps most significantly, because the Supreme Court was construing the scope of the First Amendment right to petition the government, the Court has condoned the imposition of liability for defamatory falsehoods recklessly included in a petition to the President.³⁸¹

In determining whether recklessness in bringing a frivolous claim suffices to support the revocation of good-time credits, it is important to remember that claims can be dismissed on frivolousness grounds for one of

376. 508 U.S. 49, 61 (1993) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 948 (1986)).

377. See, e.g., RESTATEMENT (SECOND) OF TORTS § 676 (1976).

378. Subjecting only prisoners to such a draconian sanction for filing a frivolous lawsuit might, of course, raise other constitutional concerns, particularly under the Equal Protection Clause.

379. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 162 (1967); *N.Y. Times Co.*, 376 U.S. at 279–80.

380. *Time, Inc. v. Hill*, 385 U.S. 374, 387–88 (1967).

381. See *McDonald v. Smith*, 472 U.S. 479, 484 (1985).

two reasons—because they are factually frivolous or because they are legally frivolous.³⁸² The cases in which the Supreme Court has applied an actual-malice standard arguably support the transplantation of this standard, including its recklessness component, to dismissals for factual frivolity. In those cases, the Court indicated that imposing liability on defendants for disseminating certain kinds of false information about a person does not unduly chill First Amendment freedoms if the defendants were aware of the substantial likelihood that the asserted facts were untrue.³⁸³ For several reasons, revoking good-time credits when prisoners recklessly ignore the factual frivolousness of court claims should also not erode their First Amendment right to petition the courts.

First, factually frivolous claims may be, and probably often are, the product of delusions—of the fanciful imaginings of mentally ill prisoners.³⁸⁴ Classic examples of factually frivolous claims include claims that Robin Hood and his Merry Men confiscated prisoners' mail or that a genie granted the warden's wish to deprive prisoners access to legal resources.³⁸⁵ When mentally ill prisoners file such factually frivolous claims, it is unlikely that they are aware that their allegations are false or even of the risk that they are untrue. To the contrary, these claims are generally marked by the genuine earnestness with which they are asserted. Under these circumstances, where the state-of-mind requirement derived from the First Amendment has not been met, whatever its outer contours, filing factually frivolous claims could not normally spawn the revocation of good-time credits.

In the probably small subset of cases where factually frivolous claims have not emanated from the befuddled minds of mentally ill prisoners, the fantastical nature of the allegations,³⁸⁶ like the discernibly harmful nature of a defamatory statement,³⁸⁷ provides notice to the person transmitting the information or claim of the need to confirm the existence of the facts alleged. The defamation cases in which the actual-malice standard applies

382. See *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (noting that courts can dismiss claims as frivolous when they lack "an arguable basis either in law or in fact").

383. See, e.g., *Time, Inc.*, 385 U.S. at 389–90 (noting that "constitutional guarantees can tolerate sanctions against calculated falsehood," defined to include reckless falsehoods, "without significant impairment of their essential function") (emphasis omitted).

384. See *Neitzke*, 490 U.S. at 327–28 (citing "delusional scenarios" as examples of factually frivolous claims).

385. See *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990).

386. See *Neitzke*, 490 U.S. at 328 (explaining that "fantastic" as well as "delusional" factual allegations typify factually frivolous claims).

387. See *supra* notes 282 and 293 and accompanying text.

thus provide some support for applying a fault standard that encompasses recklessness when good-time credits are revoked for filing factually frivolous claims.

From a practical perspective, though, it may make very little difference whether knowledge or also recklessness will support the revocation of good-time credits in this context. When a prisoner who is not mentally ill files a claim containing “wholly incredible” factual allegations,³⁸⁸ it is most likely that the prisoner filed the claim for malicious reasons. And, if the prisoner did act with a malicious purpose in filing the complaint, the revocation of the prisoner’s good-time credits does not transgress the First Amendment.³⁸⁹ The risk that the sanctioning of complainants who maliciously file claims would chill the bringing of nonfrivolous claims is, at worst, nominal.

By contrast, revoking the good-time credits of prisoners who recklessly file claims that are legally but not factually frivolous might have a significant chilling effect on the exercise by prisoners of their constitutional right to petition courts for redress. Because of their legal ineptitude, many prisoners probably recognize that there is a substantial risk that claims they are contemplating bringing for remedial relief may not be legally cognizable. Yet because they do not have the legal resources or the capacity to determine whether their claims meet legal requirements, some of the prisoners proceed to file their claims, some of which prove to be nonfrivolous, others of which do not. Thus, many prisoners file complaints with a degree of recklessness—not necessarily in the sense that they act irresponsibly in filing their complaints, but in the legal sense that they are aware that a court might consider their claims to be legally inadequate.

Revoking good-time credits for recklessly filing legally frivolous claims would consequently have a substantial inhibitory effect on the filing of claims for legal redress by prisoners. While deterring frivolous claims is from a policy perspective laudable, the deterrent effects of a recklessness rule would, from a constitutional perspective, sweep too widely in this context. Unsure of the legal validity of their claims and unwilling to risk prolonged confinement if, due to their ignorance, they are wrong in their legal assessment, prisoners would refrain from filing some, and possibly a

388. *Denton v. Hernandez*, 504 U.S. 25, 33 (1992).

389. *See supra* note 377–78 and accompanying text.

considerable number of, nonfrivolous claims that clearly fall within the protection of the First Amendment.

Some state officials might argue otherwise, pointing to the objective requirement that must also be met before a prisoner's good-time credits can constitutionally be revoked because of deficiencies in a complaint filed with a court.³⁹⁰ Because the objective baselessness of a claim takes the prisoner's circumstances into account, including both the depth and breadth of the prisoner's legal knowledge and the prisoner's access to legal assistance, these officials might contend that any unwanted deterrent effects of a recklessness standard are tempered. In other words, even though prisoners may be aware of the risk that their claims are, in the law's eyes, frivolous, they also recognize that, despite what would be considered their recklessness in filing their claims in light of this awareness, their good-time credits will not be revoked for filing frivolous claims as long as they did what they could under the circumstances to ascertain the claim's legal validity.

The weakness of this argument is that, where an awareness of one's lack of legal prowess and knowledge is the norm and a finding of recklessness is, therefore, almost a foregone conclusion, the only thing that stands between a prisoner's prolonged confinement for filing a frivolous claim is a judge's concurrence that the prisoner had a "reasonable basis" under the circumstances for believing that the claim was viable. Yet to require prisoners to predict accurately the outcome of a judge's *post hoc* assessments of whether they had a "reasonable basis" for filing a lawsuit places a burden on prisoners that they are ill-equipped to meet.³⁹¹ The objective baselessness requirement therefore does not mitigate, in any meaningful sense, the chilling effect of applying a recklessness standard when prisoners file legally frivolous claims.

In sum, revoking good-time credits when a prisoner has filed an objectively baseless legal claim with a malicious purpose does not unconstitutionally impinge on a prisoner's First Amendment right to petition the courts. In addition, revoking these credits when a prisoner has filed such a claim with a reckless disregard for its factual frivolousness comports with First Amendment requirements. But applying a recklessness

390. See *supra* notes 365–72 and accompanying text.

391. *Cf.* *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (holding that a negligence standard in a lawsuit brought against a media defendant for placing the plaintiff in a false light "would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy" of the reported information).

standard when a prisoner's claim was legally frivolous unconstitutionally chills a prisoner's right to turn to the courts for legal redress. Because prisoners are well aware of their limited legal acumen, the ease and frequency with which courts could find that prisoners were reckless in filing legally frivolous claims would discourage the filing of claims by the many prisoners unwilling to spend more time in prison if their belief that they are entitled to remedial relief proves incorrect.

IV. CONCLUSION

State statutes authorizing or requiring that prisoners' good-time credits be revoked for filing frivolous lawsuits are, for a number of reasons, unconstitutional. When applied to prisoners whose crimes preceded a revocation statute's enactment, the statutes operate as unconstitutional *ex post facto* laws. The statutes violate the Supremacy Clause when applied to prisoner claims filed in federal court and to federal claims brought under 42 U.S.C. § 1983 in state court. For the remaining state claims, the revocation statutes in their current form place an unconstitutional chilling effect on the right of prisoners embedded in the First Amendment to petition courts for a redress of grievances.

All of these constitutional defects in state revocation statutes could be corrected with substantial redrafting. Legislatures could revise the statutes so that they operate only prospectively, applying only to prisoners whose crimes postdate a revocation statute's enactment. Legislatures could limit the reach of the statutes to state-law-based claims filed in state court. They could also revamp the statutes to meet the requirements of the First Amendment, incorporating into them the objective and subjective predicates to revocation. While state legislatures might be able to restructure their revocation statutes to meet constitutional requirements,³⁹² should they do so and retain these statutes in modified form? It would behoove state legislatures to answer this question, not in isolation, but as one of many questions to be addressed in the course of developing a comprehensive and cost-effective plan to reduce the costs and other burdens that attend the filing of frivolous lawsuits by prisoners. Such a plan holds the most promise for diminishing the number of frivolous lawsuits filed by prisoners without compromising their legal rights. Indeed, a well-thought-out plan should lead to improvements in

392. Even if the legislatures made all of the delineated changes to the revocation statutes, prisoners might still challenge the statutes on other grounds, such as equal protection grounds.

correctional operations and to the rectification of the manifold problems in those operations that often spawn the filing of legally frivolous claims.

In crafting a comprehensive response to frivolous inmate litigation, state legislatures need to take certain complexities about that litigation into account. First, and most fundamentally, the plan must be developed with a full understanding of the distinction between legally frivolous and substantively frivolous claims. While the filing of legally frivolous claims by prisoners has provoked much hyperbolic rhetoric,³⁹³ the fact that these claims often spring from real and substantial problems in the operation or conditions of correctional facilities—problems like the inmate assaults, food contamination, unsanitary conditions, and second-hand smoke that prompted the filing of the lawsuits described at the beginning of this Article—has been little acknowledged. Unless and until legislatures ensure that mechanisms are in place for meaningfully addressing the root causes of prisoners' substantively legitimate, though legally frivolous, claims, the filing of many legally frivolous claims is likely to continue unabated.

Second, the legislative plan needs to reflect the reality that most prisoners do not know or understand the intricacies of the law. Furthermore, it needs to address the fact that, because so many prisoners are functionally illiterate, they would not master these intricacies even if they were to receive legal training. Therefore, if legislatures are truly serious about diminishing the flow of frivolous lawsuits into the courts, but are also committed, as they should be, to ensuring that prisoners' legal rights are protected, they need to explore ways to fine-tune existing mechanisms for providing legal assistance to prisoners to better enable them to differentiate claims that are legally frivolous from those that are not before they file them.

Third, in crafting their plans to reduce the number of frivolous lawsuits filed by prisoners, state legislatures need to be cognizant of the elliptical line between frivolous and nonfrivolous claims. Judges often differ in their perceptions of a claim's frivolousness. Judges sometimes dismiss claims that other judges in cases with almost identical facts have ruled to be nonfrivolous.³⁹⁴ Moreover, appellate courts often reverse

393. See, e.g., 141 CONG. REC. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) (referring to the "alarming explosion" in the number of frivolous lawsuits filed by prisoners).

394. Compare, e.g., *McBride v. Deer*, 240 F.3d 1287, 1292 (10th Cir. 2001) (holding that the prisoner's claim contesting the constitutionality of his confinement for three days in a feces-covered cell stated a claim for which relief can be granted) with *Davis v. Scott*, 157 F.3d 1003, 1006 (5th Cir. 1998) (affirming dismissal on frivolousness grounds of a prisoner's claim contesting the

district court orders dismissing claims on the grounds that they are frivolous.³⁹⁵

The obscurity of the distinction in some cases between a frivolous and a nonfrivolous claim counsels caution in the development of sanctions for prisoners filing frivolous claims. As Rule 11 recognizes, all frivolous claims are not alike. Under that Rule, a court considers the circumstances that impeded a plaintiff's ability to discern whether a claim was frivolous in determining whether the plaintiff violated the rule. In addition, the court tailors the sanction to be imposed for a Rule 11 violation to its nature and severity.³⁹⁶

When incorporating punitive sanctions into comprehensive plans to curb the filing of frivolous claims by prisoners, states also need to ensure that the circumstances that contribute to the filing of such claims, including the difficulty of differentiating between frivolous and nonfrivolous claims, are factored into decisions whether to impose a sanction and, if so, which one. Developing a more calibrated response to the problem of frivolous filings better serves the dual objectives of reducing the filing of such claims and ensuring that prisoners with valid legal claims are not dissuaded from seeking the legal redress to which they are entitled.

In discussing the difficulty prisoners face when sifting out the facts and evidence bearing on their legal claims, the Seventh Circuit Court of Appeals has observed: "We do not think that the children's game of pin the tail on the donkey is a proper model for constitutional tort law."³⁹⁷ Nor is it a model for any state addressing the problem of frivolous inmate litigation that professes a commitment to the precept that the cloak of the law protects even "the least of the least"—those persons confined behind prison walls.

constitutionality of his confinement for three days in a cell with blood on the walls and excrement on the floor).

395. See, e.g., *Cruz v. Hauck*, 404 U.S. 59, 61 n.8 (1971) (Douglas, J., concurring) (citing twenty-one cases in which the Supreme Court reversed lower courts' findings that a claim was frivolous).

396. See *supra* notes 43–49 and accompanying text.

397. *Billman v. Ind. Dep't of Corr.*, 56 F.3d 785, 789 (7th Cir. 1995).

