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An Overview of Prisoners' Rights: Part I, Access to the Courts under Section 1983 Symposium - Selected Topics on Constitutional Law - Comment.

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COMMENTS

An Overview of Prisoners' Rights: Part I, Access to the Courts Under Section 1983

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I. INTRODUCTION

The United States Congress enacted what is now section 1983 of the Civil Rights Act[1] in an attempt to curtail the lawless conditions prevalent

1. 42 U.S.C. § 1983 (1976 & Supp. IV 1980). The section reads in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. The Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1976 & Supp. IV 1980)), had its inception in a letter written by President

in the South during the Reconstruction Era.[2] Congress intended, among other things, to provide a federal remedy to persons whose fourteenth amendment rights had been violated under color of state law, either where the state law was inadequate or where, if adequate in theory, it was inadequate in practice at providing a remedy.[3] While the scope of section 1983 appeared all-encompassing, it was for many years rarely utilized due to the courts' imposition of a requirement of proof of intentional deprivation of one's rights.[4] This impediment to the utilization of section 1983 was vitiated by the Supreme Court's holding in *Monroe v. Pape*.[5]

The petitioner in *Monroe* had brought suit in federal district court against thirteen Chicago policemen and the city of Chicago alleging that the defendants violated his constitutional rights by subjecting him to an unreasonable search and warrantless arrest.[6] The petitioner further alleged that such deprivation was made "under color of the statutes, ordinances, regulations, customs and usages" of the state and city.[7] The suit was dismissed by the district court against all defendants and was affirmed by the court of appeals.[8] The Supreme Court reversed the district court's ruling as it applied to the police officers, holding that even though the police had exceeded the bounds of the state's constitution and laws, which forbade unreasonable searches, they were still within the ambit of

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Grant to Congress on March 23, 1871, expressing concern over conditions existing in "some States of the Union rendering life and property insecure . . . ." Monroe v. Pape, 365 U.S. 167, 172-73 (1961) (citing CONG. GLOBE, 42d Cong., 1st Sess., 244 (1871)).

2. *See* Monroe v. Pape, 365 U.S. 167, 173-74 (1961).

3. *See id.* at 173-74. The Court stated that:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Id. at 180.

4. *See* Comment, *The Evolution of the State of Mind Requirement of Section 1983*, 47 TUL. L. REV. 870, 871 (1973).

5. 365 U.S. 167, 187 (1961).

6. *See id.* at 169-70. Mr. Monroe alleged the following: that the police broke into his house early in the morning and made him and his wife stand naked in one room of the house while the rest of the house was ransacked; that he was subsequently forced to go to the police station and interrogated for ten hours about a recent murder; that he was not heard by a magistrate nor given the opportunity to call an attorney; and that the police had neither a search warrant nor an arrest warrant. *See id.* at 169.

7. *See id.* at 169 (quoting from petitioner's brief).

8. *See id.* at 170. The police had defended by arguing that the "under color of" provision of section 1983 applied only to unconstitutional actions which are expressly authorized by the state and not to unconstitutional acts done without state authority. *See id.* at 183-85. The city defended by claiming that it was not a "person" within the meaning of the statute. *See id.* at 187-92.

acting "under color of law."[9] More importantly, the Court distinguished section 1983 from section 242,[10] the criminal law counterpart to section 1983, in determining that a showing of specific intent to deprive one of his constitutional or statutory rights is not necessary under section 1983.[11] The section should instead be "read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[12] Finally, the Court held that section 1983 is supplementary to state remedies, thereby alleviating the need to exhaust state remedies prior to invocation of the federal remedy.[13]

In the prisoner civil rights area, a more substantial impediment to relief under section 1983 was manifested in what came to be known as the "hands-off" doctrine.[14] In contrast to the courts' receptive disposition towards reviewing the soundness of state judgments resulting in the offender's incarceration, the federal courts prior to the 1960's refused to consider prisoners' complaints challenging the propriety and constitutionality of prison conditions.[15] The courts variously characterized their reluctance to review challenges by inmates on prisons as deference to the ex-

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9. *See id.* at 186-87.

10. 18 U.S.C. § 242 (1976). Section 242 provides:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, *willfully* subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life.

Id. (emphasis added).

11. *See* Monroe v. Pape, 365 U.S. 167, 187 (1961).

12. *Id.* at 187. *But see* Bristow, *§ 1983: An Analysis and Suggested Approach*, 29 ARK. L. REV. 255, 318 (1975) (issue in section 1983 cases not whether act or failure to act caused alleged violation, but whether violation of complainant's federal, constitutional, or statutory rights). The Court has not, however, consistently applied *Monroe*'s abolition of the state of mind requirement. *Compare* Parratt v. Taylor, 451 U.S. 527, 535 (1981) (previous cases suggested section 1983 provides remedy without state of mind requirement) *with* Estelle v. Gamble, 429 U.S. 97, 105-06 (1976) (prison's negligent failure to provide inmate with needed medical care not actionable under section 1983 as cruel and unusual punishment; only deliberate indifference offends either amendment giving rise to section 1983 claim).

13. *See* Monroe v. Pape, 365 U.S. 167, 183 (1961).

14. *See* Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 181 n.20 (1970) (stating that phrase first expressed in FRITCH, CIVIL RIGHTS OF FEDERAL PRISONER INMATES 31 (1961)).

15. *See* PRISONER CIVIL RIGHTS COMM., FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 29 n.42 (1980); Calhoun, *The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal*, 4 HASTINGS CONST. L.Q. 219, 220-21 (1977).

pertise of prison officials, fear of infringing upon the separation of powers, and the possibility that prison discipline might deteriorate in the face of judicial intervention.[16] While this posture was ostensibly beneficial in that it left institutional decision-making with those most sensitive to the internal workings of the penal system, it had at the same time the palpable disadvantage of relegating potentially important constitutional questions to administrative instead of judicial disposition.[17] The Supreme Court initiated the decline of the "hands-off" doctrine in *Ex parte Hull*[18] and subsequent cases dealing with prisoners' right of access to the courts.[19] With respect to prisoners' right of access cases, the question today is not whether an inmate is entitled to air a constitutional claim before a federal forum; rather, the question is how can the federal judiciary best insure "that inmate access to the courts is adequate, effective, and meaningful."[20]

The purposes of this comment are first to trace the history of Supreme Court cases, which either directly or indirectly added to the establishment of the broad rules concerning prisoners' right of access to the courts. Second, an attempt has been made to indicate the important lower federal court cases which have for the most part established the fine delineations, the emphasis being on those cases concerning prisoners' right of access in the area of civil rights. This comment does not purport to be an exhaustive treatment of the area.[21] It does intend, however, to be a fairly

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16. *Compare* Gilmore v. Lynch, 319 F. Supp. 105, 112 (N.D. Cal. 1970) (prison officials more capable of making prison administrative decisions than judiciary), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam) *with* United States *ex rel.* Wagner v. Ragen, 213 F.2d 294, 295-96 (7th Cir. 1954) (outside province of federal courts to regulate or review ordinary state prison management and discipline regulations), *dismissed sub nom.* Wagner v. Stratton, 350 U.S. 926 (1956) *and* Golub v. Krimsky, 185 F. Supp. 783, 784 (S.D.N.Y. 1960) (prison discipline might be compromised by allowing prisoner to sue warden for inadequate medical care).

17. *See* PRISONER CIVIL RIGHTS COMM., FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 29-30 (1980).

18. 312 U.S. 546 (1941).

19. *See* Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 478 (1971). *Hull* was the precursor of the "open-door" policy which was firmly established during the late 1970's. This posture has been praised for condemning the "deplorable conditions and Draconian restrictions" once found in a number of prisons in this country. *See* Bell v. Wolfish, 441 U.S. 520, 562 (1979). It has, however, also been soundly criticized for flooding the federal judiciary with cases one normally expects to find in small claims court. *See id.* at 562 ("courts have . . . become increasingly enmeshed in the minutiae of prison operations").

20. Bounds v. Smith, 430 U.S. 817, 822 (1977); *see* Turk, *Foreward to Access to the Federal Courts by State Prisoners in Civil Rights Actions*, 64 VA. L. REV. 1349, 1351 (1978).

21. Those of us who have done research in this area, and in section 1983 generally, have perhaps come as close as humanly possible to an experiential awareness of the essence of infinity.

broad coverage of the more recent cases, generally dealing with earlier cases only when there has been a lack of decisions on particularly relevant points. Finally, while this paper hopes to be a timely exposition, "new precedents under . . . [section 1983] are established on an almost daily basis."[22]

II. Supreme Court Establishes "Beyond Doubt That Prisoners Have a Constitutional Right of Access to the Courts"[23]

A prisoner's right of access to the courts "encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him."[24] In reference to other constitutional areas, the development of prisoner rights law since its very recent emergence has been nothing short of meteoric.[25] To arrive at such an all-inclusive definition of a prisoner's right of access is remarkable when one considers that as recently as thirteen years ago, prisoners were frequently being subjected to punitive segregation for helping other prisoners prepare petitions for writs of habeas corpus.[26] In *Hull,* the case which precipitated this ascent, the Court found invalid a Michigan state prison regulation,[27] which required that all petitions, writs of habeas corpus, motions, and other legal documents be submitted for approval to the prison welfare office and then to a legal investigator of the parole board before being presented to the Court.[28] The Court held that a prisoner's right to petition the federal courts for a writ of habeas corpus may not be denied or impaired by the state or its officers and in so hold-

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22. Turk, *Foreward to Access to the Federal Courts by State Prisoners in Civil Rights Actions,* 64 Va. L. Rev. 1349, 1350 (1978).

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

24. Gilmore v. Lynch, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971); *see also* Hatfield v. Bailleaux, 290 F.2d 632, 637 (9th Cir. 1961) (right of access includes "opportunity to prepare, serve and file . . . pleadings . . . necessary . . . to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein . . .").

25. *See* Turk, *Foreward to Access to the Federal Courts by State Prisoners in Civil Rights Actions,* 64 Va. L. Rev. 1349, 1350-51 (1978).

26. *See* Johnson v. Avery, 393 U.S. 483, 490 (1969).

27. *See Ex parte* Hull, 312 U.S. 546, 548 (1941).

28. *See id.* at 548. Petitioner had prepared a petition for writ of habeas corpus to file in the Supreme Court. After seeking to have the papers notarized and meeting with refusal, petitioner attempted to deliver them to his father for him to file with the Court. At this time the documents were confiscated by prison officials and petitioner responded by attempting to mail a newly drawn-up, unnotarized petition directly to the Clerk of the Supreme Court. *See id.* at 547 & n.1. The petition was intercepted and sent to the legal investigator who apprised petitioner by letter that his writ did not meet with formal standards and would be refused by the Court. *See id.* at 547 & n.1. Finally, a third petition reached the Court by way of petitioner's father. *See id.* at 548.

ing stressed that only the judiciary was competent to determine whether a petition meets with formal requirements.[29]

Following the Court's decision in *Hull*, a series of cases, dealing with issues tangential to prisoners' access to the courts, alleviated what had previously amounted to restrictions involving indigent prisoners' access to the appellate system. The Court established that in order to prevent foreclosure of access, indigent prisoners must be extended the opportunity to file petitions for habeas corpus and appeals without having to pay docket fees.[30] Further, indigent prisoners are denied "adequate and effective appellate review"[31] if unable to obtain the aid of trial transcripts[32] or counsel[33] simply because of the fact of their indigence. The defendant in

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29. *See id.* at 549; *see also* Cochran v. Kansas, 316 U.S. 255, 257-58 (1942) (enforcement of prison rules which result in prisoner's self-prepared appeal documents being held by prison officials until time for appeal had passed would violate fourteenth amendment's Equal Protection Clause).

30. *See* Smith v. Bennett, 365 U.S. 708, 713-14 (1961) (refusal of federal district clerk to file petition for writ of habeas corpus because of indigent prisoner's inability to pay filing fee violative of Equal Protection Clause of fourteenth amendment); Burns v. Ohio, 360 U.S. 252, 258 (1959) (violation of equal protection for state to make indigent prisoner pay filing fee before allowing filing of motion for leave to appeal).

31. Griffin v. Illinois, 351 U.S. 12, 20 (1956).

32. *See id.* at 18-20 (due process and equal protection require states provide indigent prisoners free trial records for appellate review); *see also* Mayer v. Chicago, 404 U.S. 189, 195-97 (1971) (equal protection requires indigents be provided with transcripts of non-felony trials); Williams v. Oklahoma City, 395 U.S. 458, 459-60 (1969) (equal protection demands indigent receive free transcript of petty offense trial); Gardner v. California, 393 U.S. 367, 369-70 (1969) (indigent prisoner must receive habeas corpus transcript to satisfy equal protection); Roberts v. LaValle, 389 U.S. 40, 42 (1967) (transcript of preliminary hearing must be furnished to indigent prisoner); Long v. District Court, 385 U.S. 192, 194 (1966) (equal protection requires state provide records of post-conviction proceedings); Rinaldi v. Yeager, 384 U.S. 305, 308 (1966) (requiring only defendants who were unsuccessful and subsequently imprisoned to reimburse cost of trial transcript violative of equal protection); Lane v. Brown, 372 U.S. 477, 478-81 (1963) (violative of equal protection to require public defender's signature before receiving coram nobis transcript); Draper v. Washington, 372 U.S. 487, 498-99 (1963) (whether indigent prisoner receives trial transcript may not be made conditional on judge's approval); Eskridge v. Washington State Bd., 357 U.S. 214, 216 (1958) (per curiam) (receipt of trial transcript cannot be based on ability to pay or judge's approval).

33. *See* Douglas v. California, 372 U.S. 353, 357-58 (1963) (state must provide indigent prisoners with counsel for direct appeal to comport with Equal Protection Clause). The Court did not reach the question of whether counsel should be provided to indigent prisoners for preparation of petitions for discretionary review or for more than one mandatory review. *See id.* at 356; *see also* Scott v. Illinois, 440 U.S. 367, 369, 372 (1979) (no violation of due process or sixth amendment where defendant in criminal trial not provided with counsel when fined instead of imprisoned upon conviction); Argersinger v. Hamlin, 407 U.S. 25, 30-31 (1972) (indigent prisoners must be provided with counsel for trial of misdemeanor); Anders v. California, 386 U.S. 738, 741 (1967) (appointed counsel is to be active advocate, not simply amicus curiae); Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963) (that state

Mayer v. Chicago[34] was convicted of disorderly conduct in interfering with a police officer.[35] The city argued that since the defendant was subject only to fines and not to a term of imprisonment, the state's fiscal concerns and legitimate interest in maintaining a workable docket outweighed the defendant's interest in a transcript.[36] The Court, however, denied this argument and held that such a balancing process is not circumscribed within the right to an adequate and effective appellate review, but rather such right is a "flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way."[37]

In keeping with its holding in *Hull* that a state may not interfere with a prisoner's right to petition a federal court for writ of habeas corpus,[38] the Court in *Johnson v. Avery*[39] held that a prison regulation which categorically denied prison inmates assistance from fellow inmates in the preparation of habeas corpus applications and other legal documents[40] was constitutionally impermissible because its effect was to bar illiterate inmates from pursuing post-conviction relief.[41] The Court stated that prisoners' right of access to the courts was fundamental and should neither be denied nor obstructed[42] and that until the state provided a reasonable alter-

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must supply indigent with counsel for criminal trial to comport with sixth amendment made applicable to states by fourteenth amendment); *cf.* Burns v. Ohio, 360 U.S. 252, 257 (1959) (state must afford indigent prisoner access to appellate review beyond first appeal by providing free filing of motions regardless of whether appeal mandatory or discretionary). *But cf.* Ross v. Moffitt, 417 U.S. 600, 612 (1974) (Equal Protection Clause does not require that states provide counsel to indigent prisoners seeking discretionary review from state's highest court or filing for certiorari in Supreme Court). The Court stated that the primary interest of a court in awarding or withholding discretionary review is not whether the judgment below is found to be correct, but whether the case presents an issue of compelling public interest or significance to jurisprudence or reveals a conflict in precedent. *See id.* at 615-17. For this reason, the Court decided that a pro se petition can adequately provide a basis for the appellate court to decide if such criteria had been established. Since counsel has already been provided for his appeals of right, the prisoner probably has appellate briefs, the trial transcript, and opinion of the appellate courts to aid in writing the petition. *See id.* at 615; *see also* United States v. MacCollum, 426 U.S. 317, 317-29 (1976) (dealing with limited right to trial transcript in habeas corpus cases).

34. 404 U.S. 189 (1971).

35. *See id.* at 190.

36. *See id.* at 196.

37. *Id.* at 196-97.

38. *See Ex parte* Hull, 312 U.S. 546, 549 (1941).

39. 393 U.S. 483 (1969).

40. *See id.* at 484.

41. *See id.* at 487.

42. *See id.* at 485. The Court recognized that the right to apply for writ of habeas corpus was a far more important consideration than the sometimes disruptive effect writ-writers have on prison discipline and the burdensome effect their often unskillful petitions

native, it must allow inmates to assist other inmates in writ-writing.[43] Nevertheless, the Court held that reasonable restrictions may be placed upon the acknowledged tendency toward abuse in such situations.[44]

The right of access to the courts as firmly established by *Hull* and *Johnson* was subsequently expanded in a series of cases[45] culminating in the landmark decision of *Bounds v. Smith*.[46] In the first and shortest of these cases, *Younger v. Gilmore*,[47] the Court affirmed a district court decision[48] which enjoined the California Department of Corrections' regulation requiring "basic codes and references" be provided to prisoners for use in the prison library.[49] The district court explained that affluent inmates were permitted to buy lawbooks, but that indigent prisoners were dependent upon the prison library to aid them in gaining access to the courts.[50] In view of the very limited book list, the district court held that such a regulation was impermissible because of the serious equal protection issues raised and because the regulation impinged upon the pris-

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have on the courts. *See id.* at 488. A similar problem in the area of civil rights under section 1983 is the burden placed on the federal judiciary by frivolous lawsuits. *See, e.g.*, Sparks v. Fuller, 506 F.2d 1238, 1239 (1st Cir. 1974) (prisoners claimed right under section 1983 to enjoin warden from evicting "Sneakers," "Rastus," and "Socrates," prison cats, without procedural due process hearing); Braden v. Estelle, 428 F. Supp. 595, 597-98 (S.D. Tex. 1977) (citing report which contended that majority of prisoners' rights suits are frivolous); Jones v. Bales, 58 F.R.D. 453, 463 (N.D. Ga. 1972) (because of immunity from court cost for actions alleging malicious prosecution and abuse of process, prisoners with much free time, paper, lawbooks, ink, and postage are greatly tempted to file unfounded complaints), *aff'd per curiam*, 480 F.2d 805 (5th Cir. 1973).

43. *See* Johnson v. Avery, 393 U.S. 483, 490 (1969). The Court recited several existing alternative programs which could be employed by the state if it desired to prohibit prisoners from aiding each other in preparation of legal papers, but refrained from indicating any preference. *See id.* at 489-90. These alternative programs were as follows: public defender systems, use of law students in advising and interviewing inmates, periodic voluntary visits to the prison by members of the local bar, and designation of certain prisoners as official writ-writers. *See id.* at 489-90.

44. *See id.* at 490. The state may, for instance, restrict the time and place for obtaining inmate assistance and prohibit writ-writing for profit. *See id.* at 490 (citing Hatfield v. Bailleaux, 290 F.2d 632, 638-39 (9th Cir. 1961)).

45. *See* Wolff v. McDonnell, 418 U.S. 539 (1974); Procunier v. Martinez, 416 U.S. 396 (1974); Cruz v. Beto, 405 U.S. 319 (1972) (per curiam); Cruz v. Hauck, 404 U.S. 59 (1971); Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam).

46. 430 U.S. 817 (1977).

47. 404 U.S. 15 (1971) (per curiam) (two-paragraph opinion affirmed district court citing *Johnson* for authority).

48. *See* Gilmore v. Lynch, 319 F. Supp. 105, 111-12 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam).

49. *Id.* at 107 & n.2. The director of the Department of Corrections further required that any lawbooks not in conformity with the very minimal prescribed list be removed from the library and destroyed. *See id.* at 107 & n.2.

50. *See id.* at 110-11.

oner's clearly established right of access.[51] The *Gilmore* Court's terse two-paragraph affirmation of the district court's holding in *Gilmore* did not include any reasoning process other than a cryptic cite to *Johnson*.[52] This cite created conflict in the lower federal courts as to whether or not the Court's reference to *Johnson* mandated a federal right of access to law libraries to satisfy a prisoner's right of access to the courts.[53] The Court subsequently explained its holding in *Gilmore* in the case of *Bounds v. Smith*.[54]

In the second case, *Wolff v. McDonnell*,[55] a Nebraska state prisoner filed suit for injunctive relief and damages under section 1983, alleging, inter alia, that the legal assistance program for the inmates did not comport with constitutional dictates and that regulations providing for inspection of incoming and outgoing mail between prisoners and their attorneys were unconstitutionally restrictive.[56] The prison claimed that the holding in *Johnson*, providing for inmate assistance and preparation of legal documents in the absence of reasonable alternatives,[57] was only applicable to habeas corpus petitions.[58] The Court stated that the demarcation line separating the two causes is not always a clear one because there are situations where either form of relief is available to redress the same constitutional claim.[59] Finding that there was no reasonable distinction between a section 1983 action and a habeas corpus action, the Court remanded for a determination of whether the legal assistance program was

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51. *See id.* at 111. Prior to and for a period of time after the decision in *Gilmore*, lower federal courts held that the states were under no duty to provide prisoners with legal libraries to satisfy the inmates' right of access to the courts. *See, e.g.*, Page v. Sharpe, 487 F.2d 567, 569 (1st Cir. 1973) (neither county sheriff nor subordinate required to supply prisoners with lawbooks; however, different question if books available and prisoners denied access); Tate v. Kassulke, 409 F. Supp. 651, 657-58 (W.D. Ky. 1976) (in view of conflict among circuits and no decision from Supreme Court, prisoners not entitled to establishment of law library); Robinson v. Birzgalis, 311 F. Supp. 908, 909-10 (W.D. Mich. 1970) (*Johnson* did not require state to provide inmates with law library).

52. *See* Younger v. Gilmore, 404 U.S. 15, 15 (1971) (per curiam).

53. *Compare* Page v. Sharpe, 487 F.2d 567, 569 (1st Cir. 1973) (county sheriff not required to provide inmates with library under *Gilmore*) *and* Farrington v. North Carolina, 391 F. Supp. 714, 716-20 (M.D.N.C. 1975) (*Gilmore* and *Johnson* do not require state to provide law library to satisfy prisoners' right of access to courts) *with* Hooks v. Wainwright, 352 F. Supp. 163, 165-66 (M.D. Fla. 1972) (*Gilmore* and *Johnson* compel state to provide "expensive" law library or assistance from paralegals to satisfy right of access).

54. 430 U.S. 817, 829 (1977).

55. 418 U.S. 539 (1974).

56. *See id.* at 542-43.

57. *See* Johnson v. Avery, 393 U.S. 483, 490 (1969).

58. *See* Wolff v. McDonnell, 418 U.S. 539, 579 (1974).

59. *See id.* at 579.

adequate under the *Johnson* "reasonable alternative" standard,[60] thus establishing the right of access under section 1983 actions.

Finally, the Court in *Bounds* was asked to decide whether states must ensure prisoners' right of access to the courts by making law libraries or alternative means of acquiring legal knowledge available to the inmates.[61] The Court responded by stating that it is now "established beyond a doubt that prisoners have a constitutional right of access to the courts . . . [and that such access must be] adequate, effective, and meaningful."[62] Thus, the Court held that this "fundamental constitutional right"[63] places an affirmative duty[64] on the state to provide assistance to inmates

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60. *See id.* at 580. The Court further found that a prison procedure whereby prison officials can open mail to and from a prisoner's attorney, but only in his presence and without reading it, meets and perhaps exceeds constitutional requirements. *See id.* at 577. The prisoner had complained that his first, sixth, and fourteenth amendment rights were violated by such a procedure. The Court, however, found that his first amendment rights were not abridged since there was no censorship involved. *See id.* at 575-76. Since the sixth amendment protects the attorney-client relationship from intrusion only in the criminal sphere, the prisoner's sixth amendment claim must fail because its effect would be to insulate all attorney correspondence, whether criminal or civil in nature. *See id.* at 576. As to the fourteenth amendment claim, the Court refused to extend the right of access "further than protecting the ability of an inmate to prepare a petition or complaint." *Id.* at 576.

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

62. *Id.* at 821-22 (citations omitted).

63. *Id.* at 828. The majority refrained from indicating the exact source of this right other than to cite its establishment in prior Court decisions. *See id.* at 821-23. The Court stated that this right was recognized over 35 years ago in *Hull* and traced its development to the present time. *See id.* at 821-23. The Court also indicated without comment that the district court had based its decision on a violation of the respondent's rights of access and equal protection. *See id.* at 818. Focusing on the "theoretical and practical difficulties" in the majority's decision, Chief Justice Burger questioned the majority's failure to indicate the constitutional source of the right of access. *See id.* at 833 (Burger, C.J., dissenting). Justice Rehnquist stated that the fundamental right denominated by the majority is nowhere to be found in the Constitution. *See id.* at 837-39 (Rehnquist, J., dissenting). The Court has in the past indicated different constitutional bases for state prisoners' right of access to the courts. *Compare* Wolff v. McDonnell, 418 U.S. 539, 579 (1974) (right of access to courts founded on Due Process Clause) *and* Procunier v. Martinez, 416 U.S. 396, 419 (1974) (due process has as corollary prisoners' right of access) *with* Cruz v. Beto, 405 U.S. 319, 321 (1972) (per curiam) (prisoners retain first amendment right to petition government for redress of grievances; also includes right of access to courts to present complaints) *and* Griffin v. Illinois, 351 U.S. 12, 19-20 (1956) (due process and equal protection require state provide indigent prisoners with trial transcripts to effectuate adequate appellate review).

64. *See* Bounds v. Smith, 430 U.S. 817, 824-25 (1977). Petitioners claimed *Johnson* simply requires that the state refrain from restricting prisoners' right of access; thus, the states have no additional duty to spend state funds to affirmatively ensure the right of access. *See id.* at 823. The Court, however, stated that *Johnson* was not intended to be an exclusive definition of all that the right of access encompasses and cited previous cases which had imposed affirmative duties upon the states to provide legal assistance to indigent inmates. *See id.* at 823-25. Chief Justice Burger argued that the right being addressed in the instant

in preparing legal documents and that such duty can be met through the establishment of an adequate law library or adequate assistance from trained legal personnel.[65] After rejecting each of the state's arguments,[66] the majority stated that its holding was simply a reaffirmation of the *Gilmore* decision.[67] *Gilmore* was characterized by the Court as addressing the issue of whether the states have an affirmative duty to provide inmates with law libraries or, in the alternative, with professional or paraprofessional legal assistance.[68] The Court announced that *Gilmore* gave a unanimous answer in the affirmative and that the *Avery* "reasonable alternative" test was the basis for the *Gilmore* decision.[69] The Court remarked furthermore, that the federal government and most states had taken significant steps to implement *Gilmore*'s mandate by providing law libraries or legal assistance programs, or both.[70]

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case was the right of prisoners to initiate collateral attacks on their convictions. Since such right "is of a statutory rather than a constitutional nature," Burger contended that the Court improperly placed upon the states an affirmative duty to ensure the right. *See id.* at 834-35 (Burger, C.J., dissenting). The majority stated, however, that it was concerned "with original action seeking new trials, release from confinement, *or* vindication of fundamental civil rights." *See id.* at 827 (emphasis added).

65. *See id.* at 828.

66. *See id.* at 825-26. The state argued that since both habeas corpus petitions and civil rights complaints are required to simply state facts sufficient to allege a cause of action, a law library or legal assistance is not necessary. *See id.* at 825. The Court replied that since lawyers must generally perform preliminary research before submitting a pleading, the opportunity to do the same is no less important for pro se petitioners. *See id.* at 825-26. The Court rejected the state's claim that prisoners are incapable of making proper use of the library because of the Court's experience in receiving legitimate pro se complaints that clearly demonstrated their capability. *See id.* at 826-27. The state also argued that neither libraries nor legal assistance were necessary to assure meaningful access in view of *Ross v. Moffitt*, wherein the Court held that the right to a meaningful appeal for indigents does not include appointment of counsel for discretionary appeals. The Court rejected this position by noting that prisoners seeking discretionary review will likely have appellate briefs from their previous representations by counsel in their appeals of right. *See id.* at 827. In the instant case, however, the prisoner was pursuing an original action by collaterally attacking his conviction and thus had much greater need for legal research or advice. *See id.* at 827-28.

67. *See id.* at 829.

68. *See id.* at 829.

69. *See id.* at 829. Furthermore, as was noted by the majority, *Gilmore* was subsequently followed without question in the following cases: Wolff v. McDonnell, 418 U.S. 539, 578-79 (1974) (*Gilmore* requires that state furnish law library to inmates); Chaffin v. Stynchcombe, 412 U.S. 17, 34 n.22 (1973) (citing *Gilmore* with approval as removing "roadblocks" to appeal); Cruz v. Beto, 405 U.S. 319, 321 (1972) (per curiam) (citing *Gilmore* with approval); Cruz v. Hauck, 404 U.S. 59, 59 (1971) (per curiam) (citing *Gilmore* as basis for summarily remanding to reconsider whether county jail prisoners must be furnished legal materials).

70. *See* Bounds v. Smith, 430 U.S. 817, 829 (1977).

In view of this trend, the majority found no reason to depart from the *Gilmore* decision.[71] The Court noted, however, that neither *Gilmore* nor *Bounds* were to be construed as requiring the establishment of adequate libraries since there are viable alternative means of assuring access to the courts.[72] Finding that nearly half of the states were opting for providing legal assistance rather than libraries, the Court listed some of the ways in which such legal assistance was being provided: training chosen inmates as paraprofessionals to work under the supervision of an attorney; the use of paralegals and law students in volunteer or clinical programs; the use of volunteer attorneys, part-time consulting attorneys, or staff attorneys in prison legal services programs; and public defender and legal services programs.[73] The Court declared, however, that the states need not incorporate any of the particular listed methods, preferring instead to "encourage local experimentation."[74]

In affirming North Carolina's proposed library plan,[75] the Court indirectly established at least minimum standards for adequate law libraries.[76] To serve adequately all of the state's prisons, North Carolina proposed to establish seven large libraries in locations across the state, to be supplemented by smaller libraries at the Women's Prison and the Central Prison.[77] Inmates would gain access on an appointment basis with foreseeable delays of three to four weeks for those prisoners who were not facing deadlines.[78] Having secured an appointment, the prisoners would be provided with transportation, housing, one full day in the library, legal forms, writing paper, and the use of typewriters and copying machines.[79] Further provision was made for training inmates as paralegals and typists to further prisoners' research efforts.[80] Lastly, the state proposed to include the following in its library collection: the state statutes and reporter series, state rules of court, several titles of the United States Code, Supreme Court Reporter, Federal Reporter Second Series, Federal Supple-

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71. *See id.* at 829.

72. *See id.* at 830.

73. *See id.* at 831.

74. *See id.* at 832. Any such locally devised plan, however, will be "evaluated as a whole to ascertain its compliance with constitutional standards." *Id.* at 832.

75. *See id.* at 833. The Court noted that with the exception of the "questionable" absence of Shepard's Citations and a copy of the local rules of court, the collection proposed by the state conformed to a list approved by the American Bar Association, the American Correctional Association, and the American Association of Law Libraries. *See id.* at 819 n.4.

76. *See id.* at 819-20.

77. *See id.* at 819.

78. *See id.* at 819.

79. *See id.* at 819.

80. *See id.* at 819.

ment, a law dictionary, and various treatises on criminal and constitutional law.[81]

III. The Lower Federal Courts

A. *Generally*

The authorities are in accord that interference with a state prisoner's right of access to the courts may constitute a cause of action under section 1983.[82] While one court has declared that the right of access is perhaps "*the* fundamental constitutional right,"[83] the right is not absolute or free from limitation. The general rule is that reasonable restrictions providing for prison security may be placed upon prisoners in connection with their exercise of this right.[84] Nevertheless, if a particular restriction is challenged, the state has the burden of proving that the restriction was justified and that the overall program intended to provide access is adequate.[85] If the prisoner fails to show a prima facie case, then summary

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81. *See id.* at 819 n.4.

82. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 579-80 (1974) (right of access applies in section 1983 situations); Gilday v. Boone, 657 F.2d 1, 2 (1st Cir. 1981) (prisoner denied access to courts states cause of action cognizable under section 1983); Rudolph v. Locke, 594 F.2d 1076, 1078 (5th Cir. 1979) (Constitution guarantees right of access in civil rights action).

83. Cruz v. Hauck, 475 F.2d 475, 476 (5th Cir. 1973) (emphasis original).

84. *See, e.g., In re* Green, 669 F.2d 779, 781, 785-86 (D.C. Cir. 1981) (right of access not unconditional or absolute, but district court's categorical removal of prisoner's right to file pro se invalid even though had previously filed 600 to 700 complaints); Preast v. Cox, 628 F.2d 292, 294 (4th Cir. 1980) (per curiam) (federal judges should normally defer to expertise of prison administrators regarding daily running of prison; may result in reasonable restrictions upon prisoners' right of access); Taylor v. Sterrett, 532 F.2d 462, 472 (5th Cir. 1976) (right of access to courts may in proper case be restricted when necessary to further legitimate interest of jail security, but must be clear such interest cannot be furthered in less restrictive fashion); *cf.* Bounds v. Smith, 430 U.S. 817, 825 (1977) (prison may consider economic factors in deciding upon plan to furnish meaningful access, but such consideration does not warrant total denial of access); Procunier v. Martinez, 416 U.S. 396, 420 (1974) (prisons not required to incorporate every proposal intended to further prisoners' access; infringement on right must be balanced with legitimate penal interest and regard to expertise of prison officials); Cumbey v. Meachum, 684 F.2d 712, 714 (10th Cir. 1982) (generally, prisons may restrict prisoners' constitutional rights, but only to extent necessary to further legitimate penal goals); Hudson v. Robinson, 678 F.2d 462, 466 (3d Cir. 1982) (combination of restrictions reasonable standing alone; might amount to denial of access when taken together); Pickett v. Schaefer, 503 F. Supp. 27, 28 (S.D.N.Y. 1980) (interfering with prisoners' communications with courts may constitute denial of right of access, but Constitution requires only reasonable access to courts) (citing Lingo v. Boone, 402 F. Supp. 768, 774 (N.D. Cal. 1975)).

85. *See* Ruiz v. Estelle, 679 F.2d 1115, 1154 n.197 (5th Cir. 1982) (district court correct in holding Texas Department of Corrections had burden of showing prisoners' right of ac-

judgment is appropriate under section 1983.[86] Furthermore, some courts have held that by virtue of being before the court in the existing action or previous actions, judicial access has been afforded.[87] At least four federal circuits have held that a prisoner may have standing to assert the rights of fellow prisoners. These cases have, however, generally been limited to situations wherein prison writ-writers complain of restrictions limiting the right of their fellow inmates to obtain adequate access to the courts.[88]

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cess served by existing program); Storseth v. Spellman, 654 F.2d 1349, 1352 (9th Cir. 1981) (state's burden to prove whether methods of providing access to courts adequate); *see also* Buise v. Hudkins, 584 F.2d 223, 228 (7th Cir. 1978); Haymes v. Montanye, 547 F.2d 188, 191-92 (2d Cir.), *rev'd and remanded*, 427 U.S. 236 (1976); Henderson v. Ricketts, 499 F. Supp. 1066, 1068 (D. Colo. 1980); Rich v. Zitnay, 644 F.2d 41, 43 (1st Cir. 1981).

86. *See* Frye v. Henderson, 474 F.2d 1263, 1264 (5th Cir. 1973) (since prisoner failed to indicate how prison interference with mail denied him access to courts, judicial interference in internal workings of prison unwarranted); Perry v. Jones, 437 F.2d 759, 760 (5th Cir.) (per curiam) (affirming lower court's summary dismissal where contrary evidence showed "considerable" access to courts), *cert. denied*, 404 U.S. 914 (1971). The Supreme Court, however, has held that a pro se complaint should not be summarily dismissed unless it is clear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Haines v. Kemer, 404 U.S. 519, 521 (1972) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); *accord* United States *ex rel.* Jones v. Franzen, 676 F.2d 261, 266 (7th Cir. 1982) (lower court erred in summarily dismissing prisoner's petition from habeas corpus relief solely on basis of pro se submissions); Woodall v. Foti, 648 F.2d 268, 271 (5th Cir. 1981) (following *Haines*, district court which accepted prisoner's letters as pleadings after dismissal of section 1983 complaint should have construed them as amendments to complaint); Henderson v. Counts, 544 F. Supp. 149, 153 (E.D. Va. 1982) (summary judgment denied because not clear from inmate's section 1983 pro se complaint whether he could prove facts sufficient to grant relief).

87. *See, e.g.*, McDonald v. Hall, 610 F.2d 16, 19 (1st Cir. 1979) (prisoner claiming denied access to law library did not show denial of access to courts since he was previously provided an appeal); Glasshofer v. Sennett, 444 F.2d 106, 106 (3d Cir. 1971) (per curiam) (prisoner not denied access since petition for writ of habeas corpus recently considered by court); Perry v. Jones, 437 F.2d 759, 760 (5th Cir.) (per curiam) (evidence that notarized instruments were received and filed by district court clerk negated challenge of denial of judicial access), *cert. denied*, 404 U.S. 914 (1971).

88. *See* Wilson v. Iowa, 636 F.2d 1166, 1167 (8th Cir. 1981). Wilson, an inmate in an Iowa state prison, filed a pro se complaint in federal district court alleging that the prison had taken illegal retaliatory steps to prevent him from helping fellow inmates prepare legal documents. *See id.* at 1167. He further alleged that such interference deprived the other prisoners of adequate access to the courts. *See id.* at 1167. The district court dismissed the suit as frivolous, but the court of appeals vacated and remanded. *See id.* at 1167-68. The court reasoned that since *Johnson* requires the state to allow inmates to assist one another in preparing habeas corpus petitions and *Wolff v. McDonnell* expanded the right to apply in civil rights actions, writ-writers have standing to complain of interference which denies other prisoners the right of access to the courts. *See id.* at 1167; *see also* Rhodes v. Robinson, 612 F.2d 766, 769 (3d Cir. 1979) (*Johnson* implicitly disregarded rule against *jus tertii*, assertion of other rights; thus, prison law library clerk held to have standing to assert fellow inmates' rights under facts analogous to *Johnson*); McDonald v. Hall, 610 F.2d 16, 19 (1st Cir. 1979) (prison writ-writer has standing to "raise what is in effect the right of other pris-

B. *Access to Law Library and Legal Materials*

In following the mandate of *Bounds*,[89] the lower courts agree that in order to insure that prisoners are afforded adequate and meaningful access to the courts, the states must either provide an adequate library or adequate assistance from individuals trained in the law; but *Bounds* does not require that the states provide both.[90] If a state, in the absence of reasonable alternatives, chooses to guarantee access through the establishment of a prison library, "it must be done so fairly."[91] In other words, an adequate library standing alone will not necessarily satisfy the library component of right to access in all situations. Some courts have looked to the library collection approved by the *Bounds* Court[92] in determining the

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oners"); Haymes v. Montanye, 547 F.2d 188, 191 (2d Cir.) (following *Johnson* allowing standing), *rev'd and remanded*, 427 U.S. 236 (1976). *But see, e.g.*, Weaver v. Wilcox, 650 F.2d 22, 27 (3d Cir. 1981) (inmate who brought suit alleging, inter alia, that prison interfered with inmates' collaborating with one another in preparation of petitions held not to have standing to bring suit on other prisoners' behalf); Fowler v. Graham, 478 F. Supp. 90, 93 n.10 (D.S.C. 1979) (prisoner cannot raise constitutional right of other prisoners); Tyler v. Ryan, 419 F. Supp. 905, 906 (E.D. Mo. 1976) (disallowing raising constitutional rights of others).

89. Bounds v. Smith, 430 U.S. 817, 828-29 (1977).

90. *See* Storseth v. Spellman, 654 F.2d 1349, 1352 (9th Cir. 1981) (constitutionally valid means of providing access include adequate library or professional or paralegal assistance plan); Ramos v. Lamm, 639 F.2d 559, 583 (10th Cir. 1980) (citing *Bounds* as requiring either law library or alternative method of access), *cert. denied*, 450 U.S. 1041 (1981); Kelsey v. Minnesota, 622 F.2d 956, 958 (8th Cir. 1980) (where prison provided effective legal assistance, lower court's granting of summary judgment for defendant prisoner proper even though library clearly inadequate); Spates v. Manson, 619 F.2d 204, 210 (2d Cir. 1980) (Department of Corrections could correct deficiencies in legal assistance programs, augment library, *or* do both to satisfy prisoners' right to access); Lynott v. Henderson, 610 F.2d 340, 342 n.1 (5th Cir. 1980) (prisoners have right to "threshold level of legal information or aid"); Buise v. Hudkins, 584 F.2d 223, 232 (7th Cir. 1978) (prison required to provide library in absence of reasonable alternative providing reasonable access to courts); Nadeau v. Helgemoe, 561 F.2d 411, 417-18 (1st Cir. 1977) (since state chose provision of law library as means of providing access, expanding prisoners' access to library required); Falzerano v. Collier, 535 F. Supp. 800, 803 (D.N.J. 1982) (state satisfied duty to provide inmates with access to courts by established public defender system and had no further duty to provide full library); Carter v. Kamka, 515 F. Supp. 825, 831 (D. Md. 1980) (state has choice of providing either adequate law library or assistance from others trained in law); Fluhr v. Roberts, 460 F. Supp. 536, 537 (W.D. Ky. 1978) (alternative means of providing access to courts may be used instead of providing library).

91. *See* Farrington v. North Carolina, 391 F. Supp. 714, 719 (M.D.N.C. 1975) (state not required by Constitution to provide law library; but if it does, must do so fairly).

92. *See* Bounds v. Smith, 430 U.S. 817, 819 n.4 (1977). The state's proposed collection was as follows:

North Carolina General Statutes
North Carolina Reports (1960-present)
North Carolina Court of Appeals Reports

level of adequacy of the challenged library.[93] In deciding whether the library fairly safeguards the inmates' right of access, the focal point is whether the prisoners are sufficiently able to present their cases to courts for consideration.[94] Thus, the cases generally deal with the extent of the inmates' physical access to the library. The critical issues involved in appraising physical access normally center on the following: whether the

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Strong's North Carolina Index
North Carolina Rules of Court
United States Code Annotated:
Title 18
Title 28 §§ 2241-2254
Title 28 Rules of Appellate Procedure
Title 28 Rules of Civil Procedure
Title 42 §§ 1891-2010
Supreme Court Reporter (1960-present)
Federal 2d Reporter (1960-present)
Federal Supplement (1960-present)
Black's Law Dictionary
Sokol: Federal Habeas Corpus
LaFave and Scott: Criminal Law Hornbook (2 copies)
Cohen: Legal Research
Criminal Law Reporter
Palmer: Constitutional Rights of Prisoners.

Id. at 819 n.4. This list comports with the minimum collection proposed by the American Bar Association, the American Correctional Association, and the American Association of Law Libraries, with the exception of the absence of local court rules and Shepard's Citations. *See id.* at 819 n.4.

93. *See* Wattson v. Olsen, 660 F.2d 358, 359 n.2 (8th Cir. 1981) (per curiam) (finding collection adequate and citing state court decision which followed *Bounds*); *see also* Ramos v. Lamm, 639 F.2d 559, 584 (10th Cir. 1980) (collection consisting primarily of advance sheets, with many volumes missing throughout federal collection, "wholly indequate to meet standards" of *Bounds*), *cert. denied*, 450 U.S. 1041 (1981); Cruz v. Hauck, 627 F.2d 710, 720 (5th Cir. 1980) (in view of list found in *Bounds*, Federal Supplement beginning with 1960 cases probably should be included in adequate library); Hooks v. Wainwright, 536 F. Supp. 1330, 1338-39 & n.15 (M.D. Fla. 1982) (collection of proposed plan reasonably complete in view of *Bounds*); *cf.* Rhodes v. Robinson, 612 F.2d 766, 771 (3d Cir. 1979). The court held that summary judgment for the prison was proper where the prisoner alleged violation of access due to the prison's act of discarding volumes from the library, all of which were outdated advance sheets. *See* Rhodes v. Robinson, 612 F.2d 766, 771 (3d Cir. 1979). The court stated that a proper application of *Bounds* should focus on the volumes retained or, in the absence of an adequate collection, on alternative methods of providing access. *See id.* at 771. *Compare* Canterino v. Wilson, 546 F. Supp. 174, 216 (W.D. Ky. 1982) (prison made significant improvement in library collection, but large disparity between collection available to women inmates and male inmates required rectifying under equal protection and *Bounds*) *with* Glover v. Johnson, 478 F. Supp. 1075, 1094-96 (E.D. Mich. 1979) (women's library smaller than those at state prison for males, but constitutionally adequate since met *Bounds* standards).

94. Cruz v. Hauck, 627 F.2d 710, 720 (5th Cir. 1980).

amount of time the inmates are allowed to use the library is sufficient;[95] whether local restrictions on library use further legitimate penal objectives and policies;[96] whether simply providing an adequate collection and suitable physical access is sufficient to meet the needs of prisoners who are unskilled in legal research, illiterate, or non-English speaking;[97] and whether the state has a duty to provide a library where the complaining prisoner has legal assistance.[98] One court has said that in analyzing the legitimacy of restrictions, "restricted access to the law library is not per se denial of access to the courts . . . . The prison library is but one factor

95. *See* Ramos v. Lamm, 639 F.2d 559, 582-84 (10th Cir. 1980) (restrictions limiting access to library or time, manner, and place allotted to inmates for legal research and preparation of petitions requires scrutiny; regulations providing inmates three hours access to library every 13 weeks clearly denies inmates constitutional rights), *cert. denied*, 450 U.S. 1041 (1981); Nadeau v. Helgemoe, 561 F.2d 411, 413, 418 (1st Cir. 1977) (Constitution requires state to provide inmates more than one hour per week access to library); *cf.* Hudson v. Robinson, 678 F.2d 462, 466 (3d Cir. 1982) (delay of 10 days for notarization of document not denial of right of access); Harrell v. Keohane, 621 F.2d 1059, 1060-61 (10th Cir. 1980) (per curiam) (regulation limiting access to library to five prisoners at a time not violative of inmates' constitutional rights); Hooks v. Wainwright, 536 F. Supp. 1330, 1341 (M.D. Fla. 1982) (basing consideration on whether library plan would answer needs of *all* inmates, over half of which were illiterate).

96. *See, e.g.*, Cumbey v. Meachum, 684 F.2d 712, 714 (10th Cir. 1982) (per curiam) (prison may only implement decisions necessary to further legitimate penal goals and policies); Collins v. Ward, 544 F. Supp. 408, 414 (S.D.N.Y. 1982) (temporarily suspending access to law library during emergency situation which prison authorities thought might precipitate riot not violative of constitutional rights); Jordan v. Johnson, 381 F. Supp. 600, 602 (E.D. Mich. 1974) (in determining whether right of access to courts provided, must consider legitimate administrative interests of prison), *aff'd mem.*, 513 F.2d 631 (6th Cir. 1975).

97. *See, e.g.*, Battle v. Anderson, 614 F.2d 251, 255-56 (10th Cir. 1980) (case remanded to determine whether otherwise adequate library effectively provided access to "ignorant and/or illiterate inmates"); Wetmore v. Fields, 458 F. Supp. 1131, 1143 (W.D. Wis. 1978) (prison must supply library for inmates capable of using it and allow inmate legal assistance to unskilled and illiterate prisoners); Wade v. Kane, 448 F. Supp. 678, 684 (E.D. Pa. 1978) (prison must provide for assistance to inmates who are for reasons of ignorance or illiteracy unable to perform legal research even where prison has adequate law library); *see also* Bounds v. Smith, 430 U.S. 817, 824 & n.10 (1977) (explaining that *Wolff* required inmate assistance for illiterates and others unable to do legal research even though prison had adequate library).

98. *See, e.g.*, Storseth v. Spellman, 654 F.2d 1349, 1353-54 (9th Cir. 1981) (prisoner rejecting appointed counsel cannot claim denial of access to courts by complaining of inadequate library); Spates v. Manson, 644 F.2d 80, 84-85 (2d Cir. 1981) (prisoners who do not wish to be represented by state-appointed counsel do not have right to law library); United States v. Chatman, 584 F.2d 1358, 1360 (4th Cir. 1978) (*Bounds* does not give option to choose method of gaining access; prisoner who rejected assistance of state-provided counsel could not complain of inadequate library); *see also* Bell v. Hopper, 511 F. Supp. 452, 453 (S.D. Ga. 1981) (where state chose to satisfy *Bounds* mandate by providing for appointment of counsel and prisoner elected to pursue appeal without counsel, state not required to provide adequate law library).

in the totality of all factors bearing on the inmates' access to the courts which should be considered."[99] Finally, county[100] and municipal[101] jails have been held to the same duty to provide adequate libraries, in the absence of reasonable alternatives, as has the state.

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99. Twyman v. Crisp, 584 F.2d 352, 357 (10th Cir. 1978).

100. *See* Leeds v. Watson, 630 F.2d 674, 676-77 (9th Cir. 1980) (remanded to determine if county inmates' right of judicial access provided for through public defenders; if not, must establish plan for adequate library); Cruz v. Hauck, 515 F.2d 322, 331-32 (5th Cir. 1975) (county inmates should be provided adequate access to courts either through provision of law library or alternative means), *cert. denied,* 424 U.S. 917 (1976); Parnell v. Waldrep, 511 F. Supp. 764, 769 (W.D.N.C. 1981) (county inmates serving maximum of 180 days still entitled to either access to law library or adequate assistance from one trained in law); Ahrens v. Thomas, 434 F. Supp. 873, 898 (W.D. Mo. 1977) (lack of attorney consultation and law library at county jail violates inmates' constitutional right of access to courts); Padgett v. Stein, 406 F. Supp. 287, 297 (M.D. Pa. 1975) (York County inmates entitled to adequate library in absence of alternative method of providing for access to courts). *But see* Page v. Sharpe, 487 F.2d 567, 569 (1st Cir. 1973) ("[u]nder no stretch of the imagination" is county under duty to provide inmates with lawbooks); Tate v. Kassulke, 409 F. Supp. 651, 658-59 (W.D. Ky. 1975) (in view of conflicting authority, county jail under no duty to establish library). The holdings in *Page* and *Tate* are questionable in view of the later holding in *Bounds*. *Page* made no mention of alternative methods of providing its inmates with judicial access. The court in *Tate* stated that inmates must be provided counsel for assistance with their pending charges. *See* Tate v. Kassulke, 409 F. Supp. 651, 658 (W.D. Ky. 1975). The *Tate* court, however, refused to extend such right to assistance with habeas corpus petitions or civil rights claims. *See id.* at 658. The court reasoned that petitions for writs of habeas corpus generally follow conviction and that convicted inmates are normally transferred to a penitentiary fairly soon after their conviction. *See id.* at 658. The court cited *Wolff* in its discussion of disciplinary matters but made no mention of the *Wolff* court's holding that prisoners' right of access applies to civil rights actions challenging prison conditions in the same way that it applies to habeas corpus petitions. *See id.* at 658-59 (construing Wolff v. McDonnell, 418 U.S. 539, 579 (1974)). The *Bounds* requirement that right of access must be satisfied by either an adeqate law library or some alternative method seems to weaken these two decisions. The argument in *Tate* that prisoners need not be afforded assistance of counsel for habeas corpus petitions because of their temporary status is a more valid argument. Other courts have come to similar conclusions. *See* Williams v. Leeke, 584 F.2d 1336, 1340-41 (4th Cir. 1978), *cert. denied,* 442 U.S. 911 (1979); Cruz v. Hauck, 515 F.2d 322, 333 (5th Cir. 1975), *cert. denied,* 424 U.S. 917 (1976). The court in *Cruz* held that:

> [I]n determining whether all inmates have adequate access to the courts, the district court need not consider those inmates whose confinement is of a very temporary nature or for purposes of transfer to other institutions. The district judge should have little difficulty, realizing the fundamental nature of the right of access, in determining those cases where the brevity of confinement does not permit sufficient time for prisoners to petition the courts.

Cruz v. Hauck, 515 F.2d 322, 333 (5th Cir. 1975), *cert. denied,* 424 U.S. 917 (1976); *see also* Dawson v. Kendrick, 527 F. Supp. 1252, 1313 (S.D. W. Va. 1981).

101. *See* Williams v. Leeke, 584 F.2d 1336, 1340 (4th Cir. 1978). The court in *Leeke* held that in the absence of other legal assistance, misdemeanants in the city jail, some of whom are incarcerated for up to 12 months, must be provided reasonable access to courts, necessitating the establishment of a library. *See id.* at 1340.

C. *Access to Lawbooks, Trial Transcripts, and Other Legal Materials*

Prior to *Bounds* the lower courts heard many cases dealing with a prisoner's right to own or otherwise keep and use within his cell,[102] or other areas of the prison,[103] a private collection of lawbooks. The majority of these cases quite properly turned on whether the challenged regulation disallowing or restricting such use effectively denied the prisoner's right of access to the courts[104] or whether the right of access was adequately provided for in other ways.[105] Generally, the courts have held that regulations providing for institutional safety which reasonably restrict the time, place, and manner of a prisoner's opportunity to conduct legal research and prepare legal documents are not unconstitutional so long as the prisoner's right of access is not frustrated by the regulations.[106] Similarly, in cases involving prisoners' access to trial transcripts,[107] petitions, and

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102. *See* Wilson v. Zarhadnick, 534 F.2d 55, 57 (5th Cir. 1976). *Compare* Nadeau v. Helgemoe, 423 F. Supp. 1250, 1272-73 (D.N.H. 1976) (limiting prisoners' legal research to 50 minutes a week and allowing them to take one book back to cell does not provide prisoners with access to courts) *with* McKinney v. DeBord, 324 F. Supp. 928, 932 (E.D. Cal. 1970) (regulation limiting prisoner to 16 hardback books in cell at one time reasonable, particularly since prisoner could buy others and donate to library).

103. *See* Johnson v. Anderson, 370 F. Supp. 1373, 1383 (D. Del. 1974) (restricting prisoners in isolation section of maximum security block to one lawbook two times a week frustrates right of access and is impermissible form of disciplinary sanction); Nickl v. Schmidt, 351 F. Supp. 385, 389 (W.D. Wis. 1972) (prison rule forbiding use or possession of lawbooks in work areas effectively denied possession of legal material throughout most common areas of prison).

104. *Compare* Glasshofer v. Sennett, 444 F.2d 106, 106-07 (3d Cir. 1971) (prisoner complaining of regulation which prohibited prisoners from establishing own private library did not allege denial of access to courts) *and* Wells v. McGinnis, 344 F. Supp. 594, 597 (S.D.N.Y. 1972) (claim that prison officials removed lawbooks and other material from cell did not state claim under civil rights act where prisoner did not allege such act violated right of access) *with* Van Ermen v. Schmidt, 343 F. Supp. 377, 378-79 (W.D. Wis. 1972) (prisoner's complaint that officials allowed prisoners to receive lawbooks only from publisher and did not allow them to check out lawbooks from prison library overnight or on weekends stated claim under section 1983).

105. *See* Urbano v. McCorkle, 334 F. Supp. 161, 165 (D.N.J. 1971). The inmate's complaint regarding his inability to use his personal lawbook collection, consisting of approximately 300 reporters and other statutes and treatises, while in punitive segregation was held not to state a claim where other protections afforded the prisoner his right of access. *See id.* at 165.

106. *See* Gittlemacker v. Prasse, 428 F.2d 1, 7 (3d Cir. 1970); *see also* Procunier v. Martinez, 416 U.S. 396, 420 (1974) (infringement on right must be balanced with legitimate penal interest and regard to expertise of prison officials).

107. *Compare* Rheuark v. Shaw, 628 F.2d 297, 302-03 (5th Cir. 1980) (inordinate delay in furnishing convicted prisoner with copy of trial transcript to be used for appeal violation of due process) *with* McLallen v. Henderson, 492 F.2d 1298, 1299-1300 (8th Cir. 1974) (case remanded to trial court to determine whether court reporter acted in good faith and whether length of time prisoner denied trial transcript was unreasonable, justifying pris-

other legal materials,[108] the courts have based their decisions on whether any alleged deprivation has impermissibly burdened the prisoners' right to meaningful appeal or right of access.

D. *Access to Writing Materials*

"It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services[109] to authenticate them, and with stamps[110] to mail them."[111] Inmates, however, do not enjoy a federally guaranteed right to use typewriters as a consequence of their right to judicial access,[112] nor are

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oner's claim for money damages under section 1983).

108. *Compare* Conway v. Oliver, 429 F.2d 1307, 1308 (9th Cir. 1970) (per curiam) (prisoner alleging denial of access to his legal papers for 30 days not denied access to courts in view of number of documents and petitions filed during period of time in controversy) *with* Johnson v. Parke, 642 F.2d 377, 379-80 (10th Cir. 1981) (prisoner denied access to courts if prison officials refused to make copies of his petitions required in another pending action) *and* Berch v. Stahl, 373 F. Supp. 412, 424-25 (W.D.N.C. 1974) (prisoner denied access where prison authorities confiscated petition for writ of habeas corpus, petition complaining of jail conditions, legal pads, and notes from legal research).

109. *But see* Hudson v. Robinson, 678 F.2d 462, 466 n.5 (3d Cir. 1982). Normally, prisons must provide notarial services to inmates as per *Bounds*, but failure to do so is not necessarily a denial of access since section 1741 of title 28 of the United States Code allows unsworn documents to be submitted to courts. *See id.* at 466 n.5. Thus, the court held that having to wait ten days for notarial services was not a denial of access, especially where the document was submitted prior to the due date even though the prisoner was ready to submit the document earlier. *See id.* at 466.

110. *See* Bounds v. Smith, 430 U.S. 817, 824-25 (1977). Generally, the courts have agreed that inmates do not have a constitutional right to unlimited postage and have imposed institutional limitations. *Compare* Kershner v. Mazurkiewicz, 670 F.2d 440, 444-45 (3d Cir. 1982) (reasonable to restrict prisoners to 10 free first class letters per month) *with* Twyman v. Crisp, 584 F.2d 352, 358-60 (10th Cir. 1978) (*Bounds* does not require unlimited free postage; prison rules adequate which limited free postage to eight letters, legal or personal, per month for prisoners with five dollars or less in trust fund, exceeding that limitation for legal mail only if prisoner had no money in trust fund) *and* O'Bryan v. County of Saginaw, Mich., 437 F. Supp. 582, 601 (E.D. Mich. 1977) (indigent prisoners, defined as those with less than two dollars in commissary budget or those recently incarcerated without funds, provided free postage for two letters a week) *and* Williams v. Ward, 404 F. Supp. 170, 171 & n.3, 172 (S.D.N.Y. 1975) (prison regulation reasonable where prisoner provided four stamps per month since "a prisoner has no more right to free postal service than does the ordinary citizen"). This is particularly true where the complaining prisoner has not demonstrated that he was denied judicial access. *See* Twyman v. Crisp, 584 F.2d 352, 359 (10th Cir. 1978).

111. Bounds v. Smith, 430 U.S. 817, 824-25 (1977). At least one court has expressed doubt as to whether this statement by the *Bounds* court is a holding or dictum. *See* Kershner v. Mazurkiewicz, 670 F.2d 440, 444 (3d Cir. 1982).

112. *See* Twyman v. Crisp, 584 F.2d 352, 358 (10th Cir. 1978); Wolfish v. Levi, 573 F.2d 118, 132 (2d Cir. 1978), *rev'd and remanded on other grounds sub nom.* Bell v. Wolfish, 441

they entitled to unlimited photocopying privileges.[113]

E. *Prisoners' Right to Assistance From Writ-Writers*[114]

In the absence of reasonable alternatives assuring access to the courts, state prisoners must be allowed assistance from jailhouse lawyers in the preparation of legal documents; interference with such right may state a claim for relief under section 1983. *Johnson v. Avery*[115] established the right as it applies to habeas corpus proceedings[116] and *Wolff v. McDonnell*[117] expanded the *Johnson* rule so that it has equal application in federal civil rights cases.[118] This synthetic rule has met with universal acceptance among the circuits.[119] The rule, moreover, does not encompass simply the right to receive assistance, "[r]ather, the right is mutual; it is the right to give as well as receive, for the latter is not possible without the former."[120] The *Johnson* Court, however, made clear that the states

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U.S. 520 (1979); Inmates, Washington County Jail v. England, 516 F. Supp. 132, 140 (E.D. Tenn. 1980); Locke v. Jenkins, 464 F. Supp. 541, 552 (N.D. Ind. 1978); *see also* Tarlton v. Henderson, 467 F.2d 200, 201 (5th Cir. 1972) (per curiam). The court in *Tarlton* found that since prisoners suffered no prejudice by filing handwritten briefs, they were not denied access to the courts by a prison regulation which prohibited the purchase of typewriters. *See id.* at 201.

113. *See, e.g.*, Gibson v. McEvers, 631 F.2d 95, 98 (7th Cir. 1980) (restriction on photocopying privileges not denial of due process where most of prisoner's documents had been copied and others would have been also if left with librarian); Harrell v. Keohane, 621 F.2d 1059, 1061 (10th Cir. 1980) (per curiam) (right of access does not include free, unlimited photocopying); Rhodes v. Robinson, 612 F.2d 766, 771 (3d Cir. 1979) (no cause of action where prison allegedly violated prisoner's constitutional rights by making profit on photocopying machine); *cf.* Johnson v. Parke, 642 F.2d 377, 380 (10th Cir. 1981) (inmates not entitled to free or unlimited copying privileges; but where courts require copies of petitions and other legal documents for filing purposes, right of access requires that prisoners should be allowed to make such copies).

114. *See* Vaughn v. Trotter, 516 F. Supp. 886, 891 n.2 (M.D. Tenn. 1980). "All petitions, complaints, and the like are generally referred to by the prison population as 'writs.' Consequently, jailhouse lawyers are frequently termed 'writ-writers.' " *Id.* at 891 n.2.

115. 393 U.S. 483 (1969).

116. *Id.* at 490.

117. 418 U.S. 539 (1974).

118. *Id.* at 579-80.

119. *See* Herrera-Venegas v. Sanchez-Rivera, 681 F.2d 41, 42 (1st Cir. 1982); Storseth v. Spellman, 654 F.2d 1349, 1352 (9th Cir. 1981); Wilson v. Iowa, 636 F.2d 1166, 1167 (8th Cir. 1981); Rhodes v. Robinson, 612 F.2d 766, 769 (3d Cir. 1979); Hooks v. Wainwright, 536 F. Supp. 1330, 1340 (M.D. Fla. 1982); Dawson v. Kendrick, 527 F. Supp. 1252, 1312 (S.D. W. Va. 1981); Vaughn v. Trotter, 516 F. Supp. 886, 892 (M.D. Tenn. 1980); Ruiz v. Estelle, 503 F. Supp. 1265, 1371 (S.D. Tex. 1980), *aff'd in part and rev'd in part*, 679 F.2d 1115 (5th Cir. 1982); Laaman v. Perrin, 435 F. Supp. 319, 327 (D.N.H. 1977).

120. *See* Vaughn v. Trotter, 516 F. Supp. 886, 892 (M.D. Tenn. 1980); *see also* Navarette v. Enomoto, 536 F.2d 277, 280 (9th Cir. 1976) (denying privileges to prisoner due to legal activities for himself or other inmates is unconstitutional interference with right of

can restrict in a reasonable fashion the tendency of inmates to abuse such a situation by limiting the time, place, and manner for rendering assistance.[121] Thus, the cases in this area have dealt with whether a challenged restriction was reasonable or whether the prison had provided for the inmate's right of access to the courts through viable alternative means.

Generally, it is reasonable to prevent writ-writers from providing legal assistance for a profit.[122] It has also been held permissible to restrict writ-writers where they have not faithfully represented the interests of other prisoners,[123] where they have not complied with prison regulations requiring them to apply for official permission to provide legal assistance,[124] and where writ-writers have attempted to provide interprison legal assistance.[125] Courts have held that it is permissible to prohibit writ-writers from the following activites: keeping in their cells the legal materials of other prisoners whom they are helping;[126] acting as third-party lay counsel in another prisoner's appeal;[127] and giving and receiving legal assis-

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access), *rev'd on other grounds sub nom.* Procunier v. Navarette, 434 U.S. 555 (1978).

121. *See* Johnson v. Avery, 393 U.S. 483, 490 (1969). Clearly when one considers that jailhouse lawyers are intended to render assistance to prisoners who have limited intelligence or limited education, who are either totally or functionally illiterate, who are physically handicapped or non-English speaking, the potential for bribery, favoritism, and physical abuse is evident. *See id.* at 487-89; Battle v. Anderson, 614 F.2d 251, 255 (10th Cir. 1980).

122. *See* Johnson v. Avery, 393 U.S. 483, 490 (1969). The Court stated that prison officials can restrict writ-writing for profit and furthermore can impose punishment for such activities. *Id.* at 490; *accord* Buise v. Hudkins, 584 F.2d 223, 231 (7th Cir. 1978); Bryan v. Werner, 516 F.2d 233, 237 (3d Cir. 1975); McCarty v. Woodson, 465 F.2d 822, 825 (10th Cir. 1972); *see also In re* Green, 586 F.2d 1247, 1251-53 (8th Cir. 1978) (affirmed district court holding prisoner guilty of contempt for writ-writing after enjoined from doing so for profit), *cert. denied,* 440 U.S. 922 (1979). The court in *Green* reasoned that in the same way courts can discipline unethical practices by civilian lawyers, they likewise can curtail unethical and irresponsible practices of prisoners who have abused their right to represent other inmates. *See In re* Green, 586 F.2d 1247, 1251 (8th Cir 1978), *cert. denied,* 440 U.S. 922 (1979).

123. *See* Green v. Wyrick, 428 F. Supp. 732, 737-38 (W.D. Mo. 1976), *aff'd sub nom. In re* Green, 586 F.2d 1247, 1251 (8th Cir. 1978), *cert. denied,* 440 U.S. 922 (1979).

124. *See* Sostre v. McGinnis, 442 F.2d 178, 201 (2d Cir. 1971), *cert. denied,* 405 U.S. 978 (1972).

125. *See id.* at 201 & n.45. The court stated that any benefit to be derived from such a situation would be outweighed by the resulting interference with prison discipline. *See id.* at 201 n.45.

126. *See* Gilmore v. Lynch, 319 F. Supp. 105, 112 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam). The court suggested, however, that such a regulation could be interpreted as allowing the jailhouse lawyer to keep the other prisoners' documents in his cell during composition of the "writs," and that not until the work was finished would he be required to hand them over to his "client." *See id.* at 112.

127. *See* Herrera-Venegas v. Sanchez-Rivera, 681 F.2d 41, 42 (1st Cir. 1982) (noting distinction between right to lay assistance and lay representation from fellow inmates, court held third-party lay representation impermissible).

tance when they have been assigned to a segregation unit due to violations of prison regulations.[128] Prisons may indicate which prisoners may function as writ-writers,[129] and they may prohibit inmates from writ-writing at times when they are assigned to perform other duties.[130] Finally, the courts may restrict writ-writers who have abused the judicial process.[131]

Prisons may, moreover, deny inmates assistance from inmate writ-writers altogether if meaningful alternatives are provided,[132] but a prison doing so has the burden of proving that the need for legal assistance is otherwise being met.[133] *Johnson* suggested several alternative methods to provide prisoners with meaningful access to the courts.[134] The method most often utilized is that of providing prisoners with access to attorneys.[135] It is important to note that the Court in *Bounds* held that the right of access can be provided by either the establishment of an adequate library or by the provision of "adequate assistance from persons trained in the law."[136] If one takes the phrase "trained in the law" to

128. *See* Simmons v. Russell, 352 F. Supp. 572, 579 n.7 (M.D. Pa. 1972) (claim by prisoners in punitive segregation that they should have been allowed to receive legal assistance from another inmate in segregation "untenable").

129. *See* Storseth v. Spellman, 654 F.2d 1349, 1354 (9th Cir. 1981) (inmate not entitled to inmate assistance from prisoner of his choosing); Vaughn v. Trotter, 516 F. Supp. 886, 893 (M.D. Tenn. 1980) (Vaughn appointed to law clerk position).

130. *See* Buise v. Hudkins, 584 F.2d 223, 231 (7th Cir. 1978), *cert. denied*, 440 U.S. 916 (1979).

131. *See* Storseth v. Spellman, 654 F.2d 1349, 1354 (9th Cir. 1981). The court affirmed the district court's injunction of a writ-writer's activities which led to the withdrawal of a fellow inmate's appointed counsel. *See id.* at 1355. Since a lower court had also barred the writ-writer from any further correspondence with the other inmate, his continuing interference in the case was held to be irresponsible and the district court's injunction was held to be in the inmate's best interest. *See id.* at 1355.

132. *See id.* at 1353.

133. *See* Corpus v. Estelle, 551 F.2d 68, 70 (5th Cir. 1977); *see also* Ruiz v. Estelle, 679 F.2d 1115, 1154 n.197 (5th Cir. 1982) (rejecting Department of Corrections' claim that district court erred in holding prison had burden to show adequacy of alternative method); Storseth v. Hudkins, 654 F.2d 1349, 1352 (9th Cir. 1981) (state has burden to show adequacy of alternative method).

134. *See* Johnson v. Avery, 393 U.S. 483, 489 (1969).

135. *See* Wetmore v. Fields, 458 F. Supp. 1131, 1143 (W.D. Wis. 1978) (where prison provides prisoners with assistance from persons with legal training, writ-writers can be prohibited); Graham v. Hutto, 437 F. Supp. 118, 119 (E.D. Va. 1977) (regulation prohibiting writ-writers valid where provision for court-appointed attorney). *But see* Baker v. Crisp, 446 F. Supp. 870, 872 (W.D. Okla. 1978). The court in *Baker* held that the prison could not deny prisoners the assistance of writ-writers even where those prisoners had previously been provided access to a public defender system, which they had refused. *See id.* at 872. The court lessened the impact of this rigorous standard, however, by stating that the prison could not also be held responsible for the quality of assistance from the writ-writer. *See id.* at 872.

136. Bounds v. Smith, 430 U.S. 817, 828 (1977).

mean a formal legal education, as surely one must, then simply providing prisoners with assistance from writ-writers does not by itself seem to satisfy the *Bounds* requirement. Indeed, some courts have required the provision of both writ-writers and an adequate law library.[137] In fact, the Court in *Bounds* observed[138] that it had done precisely this in *Wolff* where it required the prison to allow inmates to receive assistance from writ-writers even though the prison already had an adequate library.[139] The *Wolff* ruling, however, was limited to requiring inmate assistance for ignorant or illiterate inmates.[140] In a similar vein, one court recently held that "[u]nless . . . [the prison] demonstrates that the legal assistance programs . . . serve *all* inmates requesting assistance, it may not foreclose inmates' rights to obtain assistance from other inmates *and* to be provided reasonable access to unit law libraries."[141] Finally, it is unconstitutional to punish, harass, or intimidate inmates because of rendering or receiving inmate assistance.[142]

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137. *See* Henderson v. Ricketts, 499 F. Supp. 1066, 1068 (D. Colo. 1980). The court in *Ricketts* held that it was a "well-established" rule that prisoners may provide assistance to one another "if the state chooses to use the law library system as a means of providing inmates with access to the courts." *Id.* at 1068; *see also* Boulies v. Ricketts, 518 F. Supp. 687, 688 (D. Colo. 1981) (to comply with *Bounds* mandate, state may "provide a prison law library *and* inmate assistance") (emphasis added); *cf.* Stevenson v. Reed, 530 F.2d 1207, 1208 (5th Cir. 1976) (per curiam) (where prisoners had access to both writ-writers and adequate law library, Due Process Clause satisfied); Wetmore v. Fields, 458 F. Supp. 1131, 1143 (W.D. Wis. 1978) (where no access to lawyers, prison cannot prohibit writ-writing and must provide adequate library).

138. *See* Bounds v. Smith, 430 U.S. 817, 824 & n.10 (1977).

139. *See* Wolff v. McDonnell, 418 U.S. 539, 543 n.2 (1974).

140. *See id.* at 570.

141. Ruiz v. Estelle, 503 F. Supp. 1265, 1371 (S.D. Tex. 1980), *aff'd in part and rev'd in part*, 679 F.2d 1115 (5th Cir. 1982) (emphasis added).

142. *See, e.g.*, McDonald v. Hall, 610 F.2d 16, 18 (1st Cir. 1979) (prisoner stated cause of action since alleged transfer in retaliation for assisting other inmates in preparing legal documents); Navarette v. Enomoto, 536 F.2d 277, 280 (9th Cir. 1976) (terminating or denying prison privileges because prisoner renders legal assistance to inmates constitutionally impermissible); Laaman v. Perrin, 435 F. Supp. 319, 321, 328-29 (D.N.H. 1977) (plaintiff stated claim for relief where he alleged retaliatory transfer because of writ-writing). These rulings apply in all situations wherein a prison punishes or harasses a prisoner because of his attempts to gain access to the courts. As one court stated:

> Disciplining inmates for pursuing legal remedies to redress alleged abuses of their rights, either by direct deprivation of privileges or by a denial of potentially available privileges, can similarly severely discourage them from effectively and appropriately utilizing the courts . . . . Classification decisions, be it for parole or for work release in the correctional system, should not be affected by an individual's efforts to petition the courts for a redress of grievances.

Moore v. Howard, 410 F. Supp. 1079, 1080 (E.D. Va. 1976); *accord* Wolff v. McDonnell, 418 U.S. 539, 577-79 (1974); Ruiz v. Estelle, 503 F. Supp. 1265, 1372 (S.D. Tex. 1980), *aff'd in part and rev'd in part*, 679 F.2d 1115 (5th Cir. 1982).

F. *Access to Attorneys*

Prisoners do not have a constitutional right to be represented by appointed counsel in civil cases.[143] The federal courts, however, have been statutorily empowered under section 1915 of title 28 of the United States Code[144] to appoint counsel to represent prisoners in civil cases where they are proceeding in forma pauperis.[145] It is, nevertheless, within the discretion of the trial court to make such an appointment,[146] and at least two

143. *See, e.g.*, Caruth v. Pinkney, 683 F.2d 1044, 1048 (7th Cir. 1982) (little doubt that litigants do not have constitutional right to appointment of counsel in civil case); Randall v. Wyrick, 642 F.2d 304, 307 n.6 (8th Cir. 1981) (no constitutional or statutory right requiring appointed counsel in civil case); Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975) (counsel should be appointed in civil actions "only in exceptional cases").

144. *See* 28 U.S.C. § 1915(a), (d) (1976). Section 1915 provides in pertinent part:

> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress . . . .
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> . . . . . .
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> (d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

Id.

145. *See* Caruth v. Pinkney, 683 F.2d 1044, 1049 (7th Cir. 1982). The district court in *Caruth* refused to appoint counsel to represent an indigent prisoner who brought a pro se action under section 1983 claiming, inter alia, that the prison had punished him in retaliation for apprising the news media of a Ku Klux Klan organization within the prison. *See id.* at 1046-47. One of the reasons given by the district court for its refusal was that it was "unreasonable to *require* a lawyer to prosecute a civil case without compensation." *Id.* at 1048 (emphasis added). The court of appeals criticized this reasoning, stating that section 1915 gives courts the authority simply to request attorneys to represent indigents, not to compel them to do so. *See id.* at 1049; *see also* United States v. Leser, 233 F. Supp. 535, 538 (S.D. Cal. 1964). The *Leser* court stated:

> [A court] has no more power to compel a member of the Bar of the State of California to do the tremendous amount of work and put in the tremendous amount of time it would require to conscientiously examine the files and records in this case, and represent the defendants on appeal, and thus compel involuntary servitude by a lawyer to convicted criminals, than I have to make an order compelling these defendants, had they not been convicted, to pick cotton for a private individual.

United States v. Lesser, 233 F. Supp. 535, 538 (S.D. Cal. 1964). If, however, the appointed counsel prevails for his client, he may be awarded attorney's fees under section 1988 of title 42 of the United States Code. *See* Caruth v. Pinkney, 683 F.2d 1044, 1049 (7th Cir. 1982); Gordon v. Leeke, 574 F.2d 1147, 1155 (4th Cir. 1978).

146. *See, e.g.*, Maclin v. Freake, 650 F.2d 885, 886 (7th Cir. 1981) (district court retains "broad discretion" in appointment of counsel under section 1915); Alexander v. Ramsey, 539 F.2d 25, 26 (9th Cir. 1976) (per curiam) (motion for appointment of counsel under section 1915 addressed to "sound discretion" of district court); Carter v. Kamka, 515 F. Supp. 825,

circuits have held that refusal to do so will only be overturned when the denial results in "fundamental unfairness impinging on due process rights."[147]

Yet if a prison seeks to satisfy the latter part of the *Bounds'* requirement, then it is necessary that prisoners receive "adequate assistance from persons trained in the law."[148] In this situation, attorneys aid prisoners in their preparation of pro se petitions, briefs, and other documents; they need not represent them. Generally, this legal assistance is provided by appointed attorneys,[149] public defenders,[150] or legal aid systems.[151] Furthermore, the sixth amendment right to counsel in criminal

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833 (D. Md. 1980) (appointment of counsel for section 1983 claims deemed necessary in minority of cases). The Seventh Circuit detailed excellent guidelines for district courts to use in deciding whether to appoint counsel for prisoners bringing section 1983 claims. *See* Maclin v. Freake, 650 F.2d 885, 887-89 (7th Cir. 1981). If the prisoner has truly alleged his poverty and his claim is neither frivolous nor malicious, then section 1915(d) allows for the appointment of counsel. A court should thus first determine whether the prisoner's claim has any factual or legal merit. *See id.* at 887. Even if there is some merit to a prisoner's claim, a court may refuse to appoint counsel where the likelihood of the prisoner's prevailing is very slim. *See id.* at 887; Miller v. Pleasure, 296 F.2d 283, 284 (2d Cir. 1961) (per curiam), *cert. denied*, 370 U.S. 964 (1962); Louisiana *ex rel.* Purkey v. Ciolino, 393 F. Supp. 102, 106 (E.D. La. 1975). Once it has satisfied itself that the claim is meritorious, the court should determine whether the indigent is physically and mentally capable of investigating the crucial facts. Appointment of counsel may be in order where the factual issues are particularly complex or where conflicting testimony is the only evidence before the court. *See* Maclin v. Freake, 650 F.2d 885, 888 (7th Cir. 1981); Burr v. Duckworth, 547 F. Supp. 192, 195 (N.D. Ind. 1982). Finally, a court should appoint counsel where the indigent prisoner is prevented from properly presenting his case either because of the complexity of the legal issues or because of the prisoner's mental incapacity. *See* Maclin v. Freake, 650 F.2d 885, 888 (7th Cir. 1981).

147. *See* Maclin v. Freake, 650 F.2d 885, 886 (7th Cir. 1981); Roach v. Bennett, 392 F.2d 743, 748 (8th Cir. 1968). The court's holding in *Roach*, however, dealt only with refusal to appoint counsel in habeas corpus proceedings. *See* Roach v. Bennett, 392 F.2d 743, 747-48 (8th Cir. 1968).

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

149. *See* Boston v. Stanton, 450 F. Supp. 1049, 1057 (W.D. Mo. 1978) (appointing counsel to function as "informal legal advisor" for prisoners satisfies *Bounds* mandate).

150. *See* Falzerano v. Collier, 535 F. Supp. 800, 803 (D.N.J. 1982) (providing public defender system, law library, and writ-writers).

151. Dreher v. Sielaff, 636 F.2d 1141, 1142 & n.1 (7th Cir. 1980) (student-staffed legal aid program). Furthermore, some prisons have chosen to provide a combination of legal assistance resources. *See* Carter v. Kamka, 515 F. Supp. 825, 828-30 (D. Md. 1980). The Maryland correctional system provides for a "Prisoner's Assistance Project," consisting of four full-time attorneys, to aid prisoners in the investigation and filing of section 1983 claims and habeas corpus claims that do not attack the validity of a conviction. *See id.* at 828. The state further provides for an "Inmate Services Division," which is run by the Maryland public defender's system and which assists inmates in preparing and, sometimes, trying habeas corpus claims attacking the validity of their convictions. *See id.* at 828-29. The state was also in the process of establishing a prison mediations system and a panel,

trials[152] and appeals of right[153] from those trials demands that adequate access be provided inmates to representative attorneys and their agents; in other words, the right of access includes the right to seek and hire counsel.[154] Prison regulations which have a diminishing effect on a prisoner's right of access to counsel must be closely scrutinized, and those which are not necessary to legitimate institutional interests of order and security will fail.[155] Even restrictions which further legitimate penal interests will fail where less restrictive alternatives exist.[156]

G. *Right to Communicate with Attorneys, Courts, and Other Legal Personnel*

It is the general rule that prison officials may not read or censor a prisoner's mail to and from his attorney or the courts; however, prison regulations which provide for opening incoming mail from a prisoner's attorney[157] or the courts[158] in the recipient prisoner's presence to check for

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staffed by the state bar, to accept section 1983 cases on referral from the Prisoner's Assistance Project. *See id.* at 829.

152. *See* Scott v. Illinois, 440 U.S. 367, 369-72 (1979); Argersinger v. Hamlin, 407 U.S. 25, 30-31 (1972); Anders v. California, 386 U.S. 738, 742 (1967).

153. *See* Douglas v. California, 372 U.S. 353, 357-58 (1963).

154. *See* Dawson v. Kendrick, 527 F. Supp. 1252, 1314 (S.D. W. Va. 1981) (right of access "carries with it the right to seek, obtain and communicate privately with counsel"); Sykes v. Kreiger, 451 F. Supp. 421, 429 (N.D. Ohio 1975) (right of access to counsel included in right of access to courts); Guajardo v. McAdams, 349 F. Supp. 211, 215 (S.D. Tex. 1972) (right to seek and obtain attorney derives from right of access), *vacated and remanded on other grounds*, 491 F.2d 417 (5th Cir. 1973) (consolidation of four cases), *cert. denied*, 416 U.S. 992 (1974); Marsh v. Moore, 325 F. Supp. 392, 394 (D. Mass. 1971) (right of access includes right to seek and obtain counsel).

155. *See* Procunier v. Martinez, 416 U.S. 396, 419 (1974) (unjustified regulations which obstruct availability of professional assistance or representation invalid).

156. *See* Souza v. Travisono, 368 F. Supp. 959, 969 (D.R.I. 1973), *aff'd in part*, 498 F.2d 1120, 1124 (1st Cir. 1974).

157. *See* Wolff v. McDonnell, 418 U.S. 539, 576-77 (1974); Jensen v. Klecker, 648 F.2d 1179, 1182 (8th Cir. 1981) (per curiam); Crowe v. Leeke, 550 F.2d 184, 188 (4th Cir. 1977); Taylor v. Sterrett, 532 F.2d 462, 475 (5th Cir. 1976); Smith v. Robbins, 454 F.2d 696, 697 (1st Cir. 1972); Inmates, Washington County Jail v. England, 516 F. Supp. 132, 140 (E.D. Tenn. 1980); Owen v. Schuler, 466 F. Supp. 5, 6-7 (N.D. Ind. 1977), *aff'd*, 594 F.2d 867 (7th Cir. 1979). *But cf.* Sherman v. MacDougall, 656 F.2d 527, 528 (9th Cir. 1981). The court in *MacDougall* noted that other circuits require mail from attorneys to be opened in the presence of the recipient inmates, but that it had not yet ruled upon this issue. *See id.* at 528. The court declined to make such a ruling since neither the district court nor the appellees addressed the issue below. *See id.* at 528. The court did, however, remand for a hearing on this point. *See id.* at 528. The court in *Crowe* acknowledged the chilling effect that a regulation allowing the reading of prisoners' mail could have on attorney-client communications. *See* Crowe v. Leeke, 550 F.2d 184, 188 (4th Cir. 1977). Since the challenged regulation provided simply for opening the mail to check for contraband in the prisoner's presence, it was

contraband are permissible.[159] On the other hand, incoming mail which is not related to an inmate's access to the courts can be opened and read

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allowed to stand. *See id.* at 188. The court further proposed several evidentiary factors to consider when judging the validity of such a policy:

> (1) the present practice of opening attorney mail addressed to inmates, with particular reference to whether letters are read and whether copies are made for subsequent examination; (2) whether such correspondence is handled at a place and in such a manner that it is subject to observation by others; (3) what basis, if any, there is for inmate apprehension that their correspondence from attorneys is being read; (4) whether it is reasonably practicable for the warden to permit any form of random observation of the opening procedure to quiet fears that information is being gleaned from such correspondence; and (5) whether the search for contraband can be accomplished in a less intrusive manner by use of electronic or photographic equipment or even by examination of configuration and thickness of envelopes.

Id. at 188-89.

158. *See* Jones v. Diamond, 594 F.2d 997, 1014 (5th Cir. 1979) (outgoing mail to courts, court officials, and attorneys cannot be opened; incoming mail may be opened in prisoner's presence to determine authenticity of sender and to inspect for contraband), *aff'd in part and rev'd and remanded in part on rehearing*, 636 F.2d 1364, 1383 (5th Cir. 1981), *cert. dismissed*, 453 U.S. 950 (1981) (under Rule 53); Taylor v. Sterrett, 532 F.2d 462, 477-78 (5th Cir. 1976) (outgoing mail to attorneys and courts may not be opened; incoming mail from same may be opened in presence of prisoner); Ramos v. Lamm, 485 F. Supp. 122, 164 (D. Colo. 1979) (privileged outgoing mail may only be opened on reasonable specific belief, improper communication, or contraband inside; incoming mail opened only in presence of inmate to inspect for contraband), *aff'd in part and vacated in part*, 639 F.2d 559, 587 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); Battle v. Anderson , 376 F. Supp. 402, 434 (E.D. Okla. 1974) (confidentiality of outgoing mail to attorneys and courts required; incoming mail from same sources may be opened only in presence of prisoner), *aff'd*, 564 F.2d 388, 403 (10th Cir. 1977); Johnson v. Lark, 365 F. Supp. 289, 305 (E.D. Mo. 1973) (enjoining prison from opening outgoing mail to courts, attorneys, elected officials, and investigative agencies; incoming mail from same sources may be opened in prisoner's presence but not read); *cf.* Conklin v. Hancock, 334 F. Supp. 1119, 1123 (D.N.H. 1971) (prison must deliver incoming mail from attorneys and public officials promptly and unopened); Palmigiano v. Travisono, 317 F. Supp. 776, 788-89 (D.R.I. 1970) (prison not allowed to open or inspect any incoming or outgoing mail between prisoners and elected officials, judges, courts, and attorneys licensed in state). *But see* Sostre v. McGinnis, 442 F.2d 178, 201 (2d Cir. 1971) (permissible for prison officials to open and read incoming and outgoing mail to and from courts, public officials, and attorneys), *cert. denied*, 405 U.S. 978 (1972); *cf.* Tyree v. Fitzpatrick, 445 F.2d 627, 628-29 (1st Cir. 1971) (prison officials may open and read incoming mail from courts and attorneys unless prisoner shows irreparable injury). The court in *Sostre* did hold, however, that the prison could not withhold, delete passages from, or refuse to forward mail between inmates and attorneys. *See* Sostre v. McGinnis, 442 F.2d 178, 201 (2d Cir. 1971), *cert. denied*, 405 U.S. 978 (1972). The Second Circuit's ruling in *Sostre*, allowing officials to read prisoners' mail to and from courts, public officials, and attorneys, should be read with the more recent case of Pickett v. Schaefer, 503 F. Supp. 27, 28 (S.D.N.Y. 1980). The court in *Pickett* held that a prisoner's right of access was not denied where only a single interference or delay in forwarding his mail to the courts was shown. *See id.* at 28. The court did state, however, that a "denial of free and unfettered communication between inmates and courts *may* constitute a denial of access . . . ." *Id.* at 28 (emphasis added).

159. *See* Wolff v. McDonnell, 418 U.S. 539, 576-77 (1974).

without the prisoner's presence.[160] While a few early cases held that it was permissible for prison officials to restrict entirely a prisoner's delivery and receipt of mail while he is in punitive isolation,[161] a contrary rule obtains today.[162] Finally, the prisons may require a lawyer to identify himself and his prisoner client so that the prison authorities know that correspondence marked "privileged" is actually from an attorney.[163]

Prisons may not unduly restrict their inmates' personal communications with their attorneys. The prison or jail is typically required to maintain an area sufficient to allow private[164] attorney-client consultations,[165] and normally these consultations are to go unmonitored.[166] The right to communicate with counsel is generally extended to apply to law students

160. *See* Jensen v. Klecker, 648 F.2d 1179, 1182-83 (8th Cir. 1981); Dawson v. Kendrick, 527 F. Supp. 1252, 1311 (S.D. W. Va. 1981). Inspection and reading of non-privileged mail, however, must be related to significant government interests, and such acts must not exceed the degree necessary to protect those interests. *See* Procunier v. Martinez, 416 U.S. 396, 413-14 (1974). "[F]reedom from censorship is not equivalent to freedom from inspection or perusal." Wolff v. McDonnell, 418 U.S. 539, 576 (1974). These inspections, therefore, do not entail civil rights violations. *See* Guajardo v. Estelle, 580 F.2d 748, 760-61 (5th Cir. 1978); Hopkins v. Collins, 548 F.2d 503, 504 (4th Cir. 1977) (per curiam).

161. *See* Knell v. Bensinger, 522 F.2d 720, 725-27 (7th Cir. 1975) (prison authorities, who deprived plaintiff of mail and access to counsel during 15 day isolation, furthering legitimate penal interests in good faith); Hatfield v. Bailleaux, 290 F.2d 632, 638-39 (9th Cir.) (inmates placed in isolation for 5 to 27 days not deprived of access to courts where denied communications to and from courts and attorneys not related to pending cases), *cert. denied*, 368 U.S. 862 (1961). The court in *Knell*, however, pointed out that its affirmation of the district court's ruling was based on the state of the law as it existed at the time of the alleged violation. *See* Knell v. Bensinger, 522 F.2d 720, 727 (7th Cir. 1975). The court also noted that the law as ennunciated in *Hatfield* had changed and that the Seventh Circuit had previously disagreed with the Ninth Circuit's rule in *Hatfield*. *See id.* at 727.

162. *See* Sykes v. Kreiger, 451 F. Supp. 421, 429 (N.D. Ohio 1975) (right of access to courts requires "undelayed, uncensored, unlimited use of the mails"; rule holds true even where prisoners in isolation), *remanded on other grounds*, 551 F.2d 689, 694 (6th Cir. 1976); McCray v. Sullivan, 399 F. Supp. 271, 273 (S.D. Ala. 1975) (prison may not in any way restrict or interfere with communications of prisoners in punitive isolation to and from courts and attorneys).

163. *See* Wolff v. McDonnell, 418 U.S. 539, 576 (1974); Guajardo v. Estelle, 580 F.2d 748, 759-61 (5th Cir. 1978).

164. *See* United States *ex rel.* Roberson v. Roth, 448 F. Supp. 1359, 1362 (E.D. Pa. 1978) (no violation of sixth amendment where prisoner consulted with attorney on several occasions in interview room in guard's presence and no formal complaint taken out).

165. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 425 (1974) (Marshall, J., concurring) (common practice is to provide rooms wherein prisoners can have unmonitored conversation with attorney and others); Dreher v. Sielaff, 636 F.2d 1141, 1145 (7th Cir. 1980) (prison required to submit plans for adequate attorney-client interview rooms taking into account both quantity and privacy); Owens-El v. Robinson, 442 F. Supp. 1368, 1389 (W.D. Pa. 1978) (unpartitioned, unmonitored, often crowded, 15 by 25 foot room sufficient to provide attorney-client consultations).

166. *See* Taylor v. Sterrett, 532 F.2d 462, 477 (5th Cir. 1976).

and paralegals working for attorneys or legal aid programs.[167] Finally, denying prisoners the opportunity to communicate with their attorneys by telephone has been held to be an impermissible interference with their right of access to the courts.[168]

IV. CONCLUSION

Thus,

> [a]ccess to courts entails not only freedom to file pleadings but also freedom to employ, without retaliation or harassment, those accessories without which legal claims cannot be effectively asserted: a law library containing basic legal materials; legal assistance both from lawyers and from other inmates; and the ability to communicate with courts, attorneys, and public officials.[169]

While the courts and legislatures have apparently embarked on a trend to curb the flood[170] of section 1983 litigation,[171] this posture will surely not limit the effect of the "well established" right of access to the courts; it

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167. *See* Procunier v. Martinez, 416 U.S. 396, 420 (1974). The Court in *Procunier* affirmed a district court's injunction of a prison rule limiting attorney-client interviews to attorneys and licensed private investigators. *See id.* at 420-21. The district court reasoned that due to the remoteness of the facility, allowing students and paraprofessionals to perform the interviews would save prisoners money and lawyers time. *See id.* at 420. Weighing the burden placed on prisoners' right of access with the legitimate interests of the prison, the Court found the regulation to be absolute, arbitrary, and susceptible to a less restrictive construction. *See id.* at 420-21. Thus, it was held that law students and paraprofessionals employed by attorneys can conduct interviews with their employers' clients. *See id.* at 421; *cf.* Reed v. Evans, 455 F. Supp. 1139, 1142-43 (S.D. Ga. 1978) (regulation requiring paralegal be employed by attorney prior to interviewing prisoners during non-visitation hours was reasonable), *aff'd*, 592 F.2d 1189 (5th Cir. 1979).

168. *Compare* Wycoff v. Brewer, 572 F.2d 1260, 1265 (8th Cir. 1978) (discontinuing phone conversation between plaintiff and attorney after twenty minutes not unreasonable restriction on right of access) *with* Dawson v. Kendrick, 527 F. Supp. 1252, 1314 (S.D. W. Va. 1981) (failure to provide regular telephone service deprives inmates of right to seek assistance of attorneys) *and* Moore v. Janing, 427 F. Supp. 567, 576-77 (D. Neb. 1976) (right of access does not require pretrial detainees be provided unlimited use of telephone) *and* Berch v. Stahl, 373 F. Supp. 412, 423 (W.D.N.C. 1974) (regardless of how confined, prisoners may not be denied telephone calls with attorneys as rudiment of right to petition for redress of grievances).

169. Ruiz v. Estelle, 679 F.2d 1115, 1153 (5th Cir. 1982).

170. *See* PRISONER CIVIL RIGHTS COMM., FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 8 n.14 (1980) [hereinafter referred to as Aldisert Report after the chairman of the center's civil rights committee, Judge Ruggero J. Aldisert]. From 1970 to 1979, state prisoner civil rights filings increased by 451.5%. *See id.* at 8 n.14.

171. *See id.* at 30-43. The Supreme Court in relatively recent cases has begun to reevaluate the extent of federal court involvement in section 1983 causes challenging conditions of confinement. *See id.* at 31.

may, however, indirectly limit the reach of the right. Of the various proposed and adopted methods to make the disposition of section 1983 claims more efficient and to lessen the burden of such claims on the federal judiciary,[172] the farthest reaching is the Civil Rights Act of 1980.[173] Section 1997e,[174] which is the pertinent part of the codification of the Act, empowers federal courts to require state prisoners filing section 1983 actions to exhaust administrative remedies first.[175] Section 1997e, then, stands in contradistinction from the Supreme Court's posture since *Monroe* that state prisoners need not exhaust state administrative remedies prior to bringing a section 1983 action.[176] Exhaustion of administra-

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172. *See id.* at 45-86. The Aldisert Report prepared a number of methods to facilitate the processing of prisoner civil rights petitions. Included among these proposed procedures is a requirement that the prisoner-complainant submit a complaint form to the court to aid in determining whether the case has merit. *See id.* at 54. This form would not require an answer from the defendant and should aid both the defendant and the court by requiring a standardized method of alleging facts sufficient to maintain a cause. *See id.* at 54-58. The report notes that section 1915 of title 28 of the United States Code provides a procedure to limit prisoner civil rights cases in that it permits dismissal of complaints which are frivolous or malicious. *See id.* at 71-73. The Report, furthermore, suggests the use of a "special report from defendant" to facilitate out-of-court settlements and to aid in discovery of defendant's allegation of facts. *See id.* at 79-81. The other procedures suggested by the Aldisert Report include the following: centralized processing of section 1983 complaints; procedures for service of prisoners' complaints; guidelines for handling the causes, providing counsel, dismissing claims due to failure to prosecute, and handling pretrial conferences and evidentiary hearings; and procedural guidelines upon the filing of defendant's answer. *See id.* at 45-86. District courts of the Fifth Circuit, among others, have adopted at least four of the Aldisert Report procedures. *See* Comment, *Disposition and Reduction of 42 U.S.C. § 1983 Prisoner Petitions—A Fifth Circuit Approach*, 11 CUM. L. REV. 369, 374-75 (1980). Various district courts in the Fifth Circuit have implemented the use of the complaint form, centralized processing, procedures dealing with in forma pauperis pleadings, and the "special report from defendant." *See id.* at 374-82.

173. Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, §§ 2-12, 94 Stat. 349, 349-54 (1980) (codified as amended at 42 U.S.C. § 1997, 1997a to 1997j).

174. 42 U.S.C. § 1997e (Supp. IV 1980).

175. *See id.* § 1997e(a)(1), (2). These paragraphs read as follows:

> (a)(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.
>
> (2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section.

Id.

176. *See, e.g.*, Steffel v. Thompson, 415 U.S. 452, 472-73 (1974) (exhaustion of state administrative or judicial remedies not required due to federal courts' role of preeminence

tive remedies is not, however, required in all section 1983 cases; before a federal court can order a continuance of the action requiring exhaustion of such remedies, the court must decide that this course would be "appropriate and in the interest of justice."[177] The courts, therefore, reserve the power to hear cases involving serious infringements upon federal statutory or constitutional rights without having to relegate them to state administrative disposition. Furthermore, a court cannot require a prisoner to resort to a grievance resolution system unless the system has been certified by the Attorney General[178] or the court is satisfied that the remedies comply with the minimum standards set forth in section 1997e.[179] Finally, one court has held that the statute does not authorize dismissal of a section 1983 action, rather only a continuance to seek administrative resolution.[180] Thus in the future, it is unlikely that prisoners will gain

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in protecting constitutional rights); Houghton v. Schafer, 392 U.S. 639, 640 (1968) (per curiam) (resort to administrative remedies not necessary prior to prisoner's filing section 1983 action); Monroe v. Pape, 365 U.S. 167, 183 (1961) (not necessary to exhaust state judicial or administrative remedies). Section 1997e is, however, consistent with the federal habeas corpus statute. *See* 28 U.S.C. § 2254(b) (1976). This section provides that:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

Id.

177. *See* 42 U.S.C. § 1997e(a)(1) (Supp. IV. 1980).

178. *See id.* § 1997e(a)(2).

179. *See id.* § 1997e(b)(2). The section stipulates that these minimum standards shall provide the following:

> (A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;
>
> (B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;
>
> (C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;
>
> (D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and
>
> (E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

Id. Pursuant to § 1997e(b)(1), the Attorney General has set forth the minimum standards which correctional systems must adhere to in establishing grievance resolution systems. *See* 28 C.F.R. §§ 40.1- .22 (1982). For a grievance procedure conforming with the requisites of section 1997e(b)(2), see Tex. Dep't of Corrections, 37 TEX. ADMIN. CODE ANN. §§ 61.101-.106 (Shepard's Sept. 1, 1982) (administrative remedy of inmate complaints).

180. *See* Kennedy v. Herschler, 655 F.2d 210, 212 (10th Cir. 1981) (per curiam).

access to the federal courts concerning "matters that would ordinarily be encountered at the level of a small claims court."[181]

181. See PRISONER CIVIL RIGHTS COMM., FEDERAL JUDICIAL CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 31 (1980).