

1985

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Recommended Citation

Stephen M. Feldman, *Indigents in the Federal Courts: The in Forma Pauperis Statute - Equality and Frivolity*, 54 Fordham L. Rev. 413 (1985).

Available at: <https://ir.lawnet.fordham.edu/flr/vol54/iss3/3>

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INDIGENTS IN THE FEDERAL COURTS: THE IN FORMA PAUPERIS STATUTE— EQUALITY AND FRIVOLITY

STEPHEN M. FELDMAN*

INTRODUCTION

THROUGHOUT history, poverty has often been equated with immorality.¹ Nonetheless, the idea that the poor should have access to the courts can be traced as far back as the Magna Carta in England.² Early in this country's history, states began to enact statutes to allow the poor access to the courts.³ Congress, however, did not pass a statute until 1892 to enable indigents to institute actions in the federal courts.⁴ The House Report struck the keynote for that first federal in forma pauperis statute: "Will the Government allow its courts to be practically closed to its own citizens, who are conceded to have valid and just rights, because they happen to be without the money to advance pay to the tribunals of

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1. See Catz & Guyer, *Federal In Forma Pauperis Litigation: In Search of Judicial Standards*, 31 Rutgers L. Rev. 655, 657 (1978). This belief is sometimes still expressed today. See L. Tribe, *American Constitutional Law* § 16-49, at 1120-21 (1978).

2. Magna Carta § 40, at 327 (J.C. Holt trans. 1965). For historical discussions of in forma pauperis legislation, see Catz & Guyer, *supra* note 1, at 656-57; Duniway, *The Poor Man in the Federal Courts*, 18 Stan. L. Rev. 1270, 1271-73 (1966); Maguire, *Poverty and Civil Litigation*, 36 Harv. L. Rev. 361, 363-81, 391-98 (1923).

3. For a detailed discussion of these state in forma pauperis statutes, see Maguire, *supra* note 2, at 381-90.

4. Act of July 20, 1892, ch. 209, 27 Stat. 252 (codified as amended at 28 U.S.C. § 1915 (1982)). The relevant parts of the statute now read:

(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.

....
(d) The court . . . may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

Id. § 1915(a), (d). Today's in forma pauperis statute remains essentially unchanged from the 1892 statute. For a detailed discussion of the amendments that have been made in the in forma pauperis statute since 1892, see Catz & Guyer, *supra* note 1, at 657-59; Duniway, *supra* note 2, at 1271-77. This Article does not discuss when a complaint is "malicious" under § 1915(d) because district courts rarely rely on this ground to dismiss a complaint. In *Crisafi v. Holland*, 655 F.2d 1305, 1306-10 (D.C. Cir. 1981) (*per curiam*), the D.C. Circuit discussed the § 1915(d) maliciousness standard. The court observed that complaints that threaten violence, make "disrespectful references to the court" or are "plainly abusive of the judicial process" could be classified as malicious. *Id.* at 1309.

justice?"⁵

The main provision of the modern federal in forma pauperis statute, 28 U.S.C. § 1915(a), enables indigents to file civil actions in the federal courts without paying a filing fee.⁶ Thus, the federal courts are at least theoretically open to even the most impoverished litigants. The in forma pauperis statute, however, is conditional: under section 1915(d), a court may dismiss an in forma pauperis complaint "if satisfied that the action is frivolous."⁷ This nebulous condition has spurred considerable disagreement: can an in forma pauperis complaint be dismissed even though an identical paid complaint cannot be similarly dismissed?⁸

This disagreement has gained new significance as the contemporary use of the in forma pauperis statute has evolved. Many in forma pauperis plaintiffs are state prisoners proceeding pro se against prison officials and guards.⁹ In 1983, for example, state prisoners filed over 17,000 civil rights complaints.¹⁰ Most of these prisoner complaints are unquestion-

5. H.R. Rep. No. 1079, 52d Cong., 1st Sess. 2 (1892).

6. A person ordinarily must pay a filing fee of sixty dollars before filing a civil action. 28 U.S.C. § 1914(a) (1982). See *infra* note 75 and accompanying text.

7. 28 U.S.C. § 1915(d) (1982).

8. See, e.g., Catz & Guyer, *supra* note 1, at 672-79 (describing conflict between view that only extreme circumstances may justify denying leave to file and view that § 1915(d) is designed to protect the courts from abuse by indigents); Duniway, *supra* note 2, at 1279 (the fact that litigants have the privilege but not the right to proceed in forma pauperis has allowed courts to "deny relief more easily in cases not clearly within the statute"); Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 618-21 (1979) (discussing problems with complaint screening process in which judge involvement is limited).

9. In 1983, 255,546 civil cases were commenced in the federal district courts. Of those, 18,350 were civil rights petitions filed by state and federal prisoners. See Administrative Office of the United States, Federal Judicial Workload Statistics A-10 to -11 (1983). Also during 1983, 17,660 prisoner civil rights actions were terminated. Of those, 15,951 cases ended before any pretrial proceeding had begun. See *id.* at A-24. In 1970, state prisoners filed 2657 civil rights petitions; by 1982, the number had ballooned to 16,741. See Administrative Office of the United States Courts, Annual Report of the Director 102-04 (1982). Most prisoners proceed pro se and in forma pauperis. See Turner, *supra* note 8, at 617; Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. Rev. 159, 159-60, 187 & n.112 (1972).

10. Administrative Office of the United States, *supra* note 9, at A-11. Prisoners file an enormous number of civil rights complaints because it costs them nothing. See Franklin v. Murphy, 745 F.2d 1221, 1226 (9th Cir. 1984); Anderson v. Coughlin, 700 F.2d 37, 42 (2d Cir. 1982) (plurality opinion); Boyce v. Alizaduh, 595 F.2d 948, 951 n.6 (4th Cir. 1979); Jones v. Bales, 58 F.R.D. 453, 463 (N.D. Ga. 1972), *aff'd per curiam*, 480 F.2d 805 (5th Cir. 1973); Turner, *supra* note 8, at 646-47; Note, *Petitions to Sue In Forma Pauperis in Federal Courts: Standards and Procedures for the Exercise of Judicial Discretion*, 56 B.U.L. Rev. 745, 751 (1976) [hereinafter cited as *Petitions to Sue*]. Other reasons exist for the large number of prisoner petitions:

The relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private citizen. For state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State, and so the possibilities for litigation under the Fourteenth Amendment are boundless. What for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State.

ably meritless.¹¹

This Article explores the restrictions and controls that district courts can legitimately place on unpaid actions.¹² The ambiguous language and the unhelpful legislative history of the statute have created four problems for the courts. First, how should the courts define "frivolous" in section 1915(d)? Second, should the courts allow any financially eligible person to proceed in forma pauperis under section 1915(a), or should the courts also examine the merits of an action under section 1915(d) before granting in forma pauperis status? Third, should the courts require issuance and service of process whenever an in forma pauperis complaint is filed? Fourth, when should the courts allow an in forma pauperis plaintiff to amend a frivolous complaint? This Article discusses each of these four problems. The last part of the Article explores the constitutional ramifications of treating in forma pauperis plaintiffs differently from paying plaintiffs.

I. THE DEFINITION OF "FRIVOLOUS"

Section 1915(d) allows a district court to dismiss an in forma pauperis action if it is "frivolous." Neither section 1915 nor its legislative history, however, suggests a definition for "frivolous."¹³ While the federal circuit courts of appeals have not agreed on one definition,¹⁴ they have referred

Preiser v. Rodriguez, 411 U.S. 475, 492 (1973); see Turner, *supra* note 8, at 625-37.

11. See Duniway, *supra* note 2, at 1277 n.61; Federal Judicial Center Prisoner Civil Rights Committee, Recommended Procedures for Handling Prisoner Civil Rights Cases in the Federal Courts 9 (1980) [hereinafter cited as Federal Judicial Center]. See *supra* note 9.

12. Although not deciding whether the practice is acceptable, the Supreme Court has noted that under the statute courts have pronounced a claim frivolous and then dismissed it before allowing the plaintiff to file in forma pauperis. See *Bounds v. Smith*, 430 U.S. 817, 826 & n.15 (1977).

13. See 28 U.S.C. § 1915 (1982); H.R. Rep. No. 1079, 52d Cong., 1st Sess. (1892). See generally *Petitions to Sue*, *supra* note 10, at 747-53 (discussing possible definitions of frivolous).

14. Compare *Boyce v. Alizaduh*, 595 F.2d 948, 951-52 (4th Cir. 1979) (action is frivolous if it is "beyond doubt" and under any 'arguable' construction, 'both in law and in fact' of the substance of the plaintiff's claim that he would not be entitled to relief") (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)) with *Malone v. Colyer*, 710 F.2d 258, 261 (6th Cir. 1983) (action is frivolous "if it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief"). One circuit has approved two definitions that appear to be inconsistent. Compare *Watson v. Ault*, 525 F.2d 886, 892 (5th Cir. 1976) (complaint is frivolous if it has no arguable substance either in law or fact) with *Jones v. Bales*, 480 F.2d 805 (5th Cir. 1973) (per curiam) (citing *Jones v. Bales*, 58 F.R.D. 453, 464 (N.D. Ga. 1972) (frivolous actions are those "in which the plaintiff's realistic chances of ultimate success are slight"). The Ninth Circuit expressly refused to define "frivolous" until October 1984. See *Franklin v. Murphy*, 745 F.2d 1221, 1227-29 (9th Cir. 1984); *Gifford v. Tiernan*, 670 F.2d 882, 885 n.7 (9th Cir.), *cert. denied*, 459 U.S. 804 (1982). In *Murphy*, the court adopted the Fifth Circuit's approach in *Watson*. 745 F.2d at 1227-28. Some circuit courts will find particular complaints frivolous, but will not announce a general definition of frivolousness. See, e.g., *Green v. White*, 616 F.2d 1054, 1055 (8th Cir. 1980) (per curiam); *Van Meter v. Morgan*, 518 F.2d 366, 367 (8th Cir.) (per curiam), *cert. denied*, 423 U.S. 896 (1975).

to the tests for federal question jurisdiction¹⁵ and for statement of a claim for relief¹⁶ when defining frivolousness in section 1915(d). Thus, this part of the Article begins with a discussion of the tests for federal question jurisdiction and statement of a claim.¹⁷ This discussion is then used as a foundation for exploring the parameters of a sound definition of frivolousness.

A. Federal Question Jurisdiction and Statement of a Claim

The test for determining whether allegations are sufficient to confer federal question jurisdiction has two prongs. First, pursuant to statute, the plaintiff must present a federal question—a claim “arising under the Constitution, laws, or treaties of the United States.”¹⁸ Second, courts have added the requirement that the federal question must be “substantial.”¹⁹ Jurisdiction is lacking, however, only if the insubstantiality of the federal claim is “very plain,”²⁰ or, as it is more commonly stated, if the claim is wholly insubstantial.²¹ Thus, both prongs of the test for federal question jurisdiction are legal inquiries;²² the factual allegations of the complaint are accepted as true.²³

15. See *Franklin v. Murphy*, 745 F.2d 1221, 1227 & n.6 (9th Cir. 1984); *Reece v. Washington*, 310 F.2d 139, 140 (9th Cir. 1962) (per curiam).

16. See, e.g., *Malone v. Colyer*, 710 F.2d 258, 260-61 (6th Cir. 1983); *Montana v. Commissioners' Court*, 659 F.2d 19, 21 (5th Cir. 1981), cert. denied, 455 U.S. 1026 (1982); *Crisafi v. Holland*, 655 F.2d 1305, 1308 (D.C. Cir. 1981) (per curiam); *Boyce v. Alizaduh*, 595 F.2d 948, 951-52 (4th Cir. 1979).

17. The tests for federal question jurisdiction and statement of a claim are also often compared with each other. See, e.g., *Baker v. Carr*, 369 U.S. 186, 199-200 (1962); *Keniston v. Roberts*, 717 F.2d 1295, 1297-1300 (9th Cir. 1983); *Franklin v. Oregon*, 662 F.2d 1337, 1340-43 (9th Cir. 1981); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1350, at 543 (1969).

18. 28 U.S.C. § 1331 (1982). This statutory requirement is grounded in the Constitution. See U.S. Const. art. III, § 2.

19. See *Hagans v. Lavine*, 415 U.S. 528, 536-38 (1974); *Bell v. Hood*, 327 U.S. 678, 682-83 (1946); 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3564, at 66-77 (1984).

20. *Baker v. Carr*, 369 U.S. 186, 199 (1962) (quoting *Hart v. Keith Vaudeville Exchange*, 262 U.S. 271, 274 (1923)).

21. See *Franklin v. Oregon*, 662 F.2d 1337, 1342 (9th Cir. 1981). Frequently, the courts state that jurisdiction is lacking if the claims are “wholly insubstantial and frivolous.” *Bell v. Hood*, 327 U.S. 678, 682-83 (1946). The text of this Article does not mention this phrasing of the standard because it could confuse the judicially created concept of frivolousness for federal question jurisdiction with the statutory concept of frivolousness in 28 U.S.C. § 1915(d).

If a defendant is absolutely immune from liability, then the claim is wholly insubstantial. See *Franklin*, 662 F.2d at 1345. Likewise, if “prior decisions inescapably render the claims frivolous,” then they are wholly insubstantial. See *Hagans v. Lavine*, 415 U.S. 528, 537-38 (1974); *Bell v. Hood*, 327 U.S. 678, 683-85 (1946). And similarly, if the plaintiff's action is brought under 42 U.S.C. § 1983 against a private party so that there is no state action, then the claim is wholly insubstantial. See, e.g., *Franklin*, 662 F.2d at 1345; *Howard v. Lemmons*, 547 F.2d 290, 290 n.1 (5th Cir. 1977) (per curiam).

22. See *Baker v. Carr*, 369 U.S. 186, 199-200 (1962); 13B C. Wright, A. Miller & E. Cooper, *supra* note 19, § 3564, at 66-68.

23. See *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Sun Valley Gasoline, Inc. v.*

To test whether the plaintiff has stated a claim for which relief can be granted, a court must ask if the plaintiff can prove any set of facts in support of the claim that would entitle him or her to relief.²⁴ Thus, this test also inquires into the legal sufficiency of the complaint; the factual allegations are again accepted as true.²⁵

The relationship between the tests for federal question jurisdiction and statement of a claim can thus be identified. Although both tests assume the factual allegations to be true and inquire into the legal sufficiency of the complaint, their degree of inquiry differs. The test for federal question jurisdiction is a threshold legal inquiry, while the test for statement of a claim is a searching examination.

For example, if a plaintiff were to allege a novel cause of action based on the Constitution, a federal question would exist, and because the issue would be novel, the question would not be wholly insubstantial. Therefore, the allegations would be sufficient to confer federal question jurisdiction.²⁶ Nevertheless, a court might decide that this novel cause of action should not be allowed. If so, the court would then hold that the plaintiff had failed to state a claim for relief.

Nonetheless, determining whether a particular claim fails the threshold test for jurisdiction or, instead, fails the more searching test for statement of a claim is sometimes difficult. The distinction is one of degree, not of bright lines.²⁷ The difficulty arises from the substantiality doc-

Ernst Enters., Inc., 711 F.2d 138, 139-40 (9th Cir. 1983); *Franklin v. Oregon*, 662 F.2d 1337, 1347 (9th Cir. 1981).

Sometimes, the court must inquire into jurisdictional facts; this inquiry, however, is not directed towards the substance of the actual claim, though the jurisdictional facts and the merits may be intertwined. See *Berardinelli v. Castle & Cooke, Inc.*, 587 F.2d 37, 38-39 (9th Cir. 1978) (per curiam); 5 C. Wright & A. Miller, *supra*, note 17, § 1350, at 559. Because federal question jurisdiction can now be invoked without a minimum amount at issue, see 28 U.S.C. § 1331 (1982), jurisdictional facts will most often relate to questions of timeliness and exhaustion of administrative remedies. See, e.g., *Avila v. Immigration and Naturalization Serv.*, 731 F.2d 616, 617-18 (9th Cir. 1984) (Federal Tort Claims Act claims will be dismissed if a proper administrative claim is not filed); *Cooper v. Bell*, 628 F.2d 1208, 1213 (9th Cir. 1980) (timely filing of district court complaint in employment discrimination case is jurisdictional prerequisite but subject to equitable extension in appropriate cases).

24. See *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Keniston v. Roberts*, 717 F.2d 1295, 1300 (9th Cir. 1983); *Franklin v. Oregon*, 662 F.2d 1337, 1343 (9th Cir. 1981); *Watson v. Ault*, 525 F.2d 886, 891 (5th Cir. 1976); Fed. R. Civ. P. 12(b)(6). This test is more often stated in the negative: the court asks if the plaintiff has failed to state a claim. See *Conley*, 355 U.S. at 45-46; Fed. R. Civ. P. 12(b)(6).

25. See *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969); *Keniston v. Roberts*, 717 F.2d 1295, 1300 (9th Cir. 1983); *Watson v. Ault*, 525 F.2d 886, 891 (5th Cir. 1976). See *supra* note 23.

26. See 13B C. Wright, A. Miller & E. Cooper, *supra* note 19, § 3564, at 68-72; see, e.g., *Bell v. Hood*, 327 U.S. 678, 682, 684-85 (1946) (jurisdiction upheld where right of petitioner to recover depended on the construction given the Constitution and applicable federal statute by the district court).

27. See *Keniston v. Roberts*, 717 F.2d 1295, 1298 (9th Cir. 1983); *Franklin v. Oregon*, 662 F.2d 1337, 1348-49 (9th Cir. 1981) (Sneed, J., concurring).

trine—the second prong of the test for federal question jurisdiction. Unlike the first prong—whether there is a federal claim—the substantiality doctrine, though still a threshold test, strays into the bounds of the more searching test for statement of a claim.²⁸

The relationship between the tests for federal question jurisdiction and statement of a claim has additional consequences. If a court lacks jurisdiction, it lacks the power to reach the question of whether the plaintiff has stated a claim. The court must dismiss for lack of jurisdiction: a dismissal not on the merits and not *res judicata* to future claims; similarly, if a court properly reaches the issue of whether the plaintiff has stated a claim, then it must have jurisdiction, and its ultimate decision can be on the merits.²⁹

28. See *Loux v. Rhay*, 375 F.2d 55, 61 (9th Cir. 1967) (Hamley, J., dissenting).

Whether the substantiality of a claim should be a jurisdictional issue has been questioned. See *Bell v. Hood*, 327 U.S. 678, 682-83 (1946); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). The Supreme Court has stated that "the view that an insubstantial federal question does not confer jurisdiction [is] a maxim more ancient than analytically sound." *Rosado v. Wyman*, 397 U.S. 397, 404 (1970). But see *Franklin v. Oregon*, 662 F.2d 1337, 1342 n.5 (9th Cir. 1981) (reasoning that statutory history supports the substantiality doctrine). Nonetheless, the substantiality doctrine remains the rule. *Hagans v. Lavine*, 415 U.S. 528, 536-38 (1974). One reason advanced in support of the doctrine is that it limits pendent jurisdiction claims; insubstantial federal claims cannot be used to gain jurisdiction over pendent state claims. See 13B C. Wright, A. Miller & E. Cooper, *supra* note 19, § 3564, at 75; Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 168 (1953). This rationale, however, has been undermined by the recent Supreme Court case of *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), which significantly limits pendent jurisdiction. *Id.* at 117-201. There, the Court held that the eleventh amendment's bar to suits against a state applied to pendent state claims. *Id.* at 120. In addition, it has been suggested that *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), stands for the proposition that a pendent state claim must be dismissed "if the federal claim, though substantial enough to confer jurisdiction, were dismissed before trial." C. Wright, *The Law of Federal Courts* 106 (4th ed. 1983).

29. See *Baker v. Carr*, 369 U.S. 186, 199-200 (1962); *Bell v. Hood*, 327 U.S. 678, 682 (1946); *Franklin v. Oregon*, 662 F.2d 1337, 1343 (9th Cir. 1981); *Black v. Payne*, 591 F.2d 83, 86 n.1 (9th Cir.), *cert. denied*, 444 U.S. 867 (1979); 5 C. Wright & A. Miller, *supra* note 17, § 1357, at 611-12.

Courts can conceivably use the test for statement of a claim as an expedient to determine if jurisdiction exists. See *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). This judicial substitution of one test for another suggests that an examination of the logical relationship between the tests would be profitable. Four logical relations between the tests for federal question jurisdiction and statement of a claim can be identified. First, if a complaint would pass the test for statement of a claim, then it must also pass the test for jurisdiction. See *Franklin v. Oregon*, 662 F.2d 1337, 1342-43 (9th Cir. 1981); *cf. Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974) (reversed dismissal for lack of jurisdiction because the complaint passed the test for statement of a claim). Second, if a complaint would fail the test for statement of a claim, then it may or may not logically pass the test for jurisdiction. See *Bell v. Hood*, 327 U.S. 678, 682 (1946). Third, if a complaint would pass the test for jurisdiction, then it may or may not pass the test for statement of a claim. See *Baker v. Carr*, 369 U.S. 186, 199-200 (1962); *Bell*, 327 U.S. at 682; *Franklin*, 662 F.2d at 1341; *id.* at 1349 (Sneed, J., concurring). Finally, if a complaint would fail the test for jurisdiction, then it must logically fail the test for statement of a claim. This logical relationship is the logical transposition of the first relationship. See I. Copi, *Introduction to Logic* 319 (5th ed. 1978).

The interrelationships between the tests for federal question jurisdiction and statement of a claim suggest that each test may be likened to a fishing net. The mesh of the net for jurisdiction is larger than the mesh of the net for statement of a claim. When a complaint is filed, it must first swim through the net for jurisdiction; if the complaint gets caught in the net, then it stops—jurisdiction is lacking and the action ends. Even if it swims through the net for jurisdiction, however, it might still get caught in the tighter mesh for statement of a claim. If the complaint gets caught in this latter net, the plaintiff has failed to state a claim, and the action ends. If the complaint passes through both nets, the action continues.

B. *Frivolousness*

How does frivolousness in section 1915(d) relate to federal question jurisdiction and statement of a claim? Returning to the metaphor of the fishing nets, the question is how large is the mesh of the net for frivolousness. The answer will largely determine how much control district courts can exercise over the processing of in forma pauperis claims. Thus, the advantages of granting extensive control to the district courts must be balanced against the dangers of dismissing meritorious claims prematurely.

Several policy factors bear on this issue. Four factors weigh in favor of a narrow definition of frivolous, which would permit more complaints to escape dismissal under section 1915(d). First, the clear purpose of section 1915(a) should not be obscured. It is intended to allow indigents to use the courts.³⁰ Second, common sense and reality dictate that the courts must be sensitive to the great potential for abuses in the prisons.³¹ This factor merits great weight because so many in forma pauperis plaintiffs are prisoners.³² Third, most in forma pauperis plaintiffs lack experience and skill in legal pleading; thus they often submit awkward and confusing complaints.³³ Finally, related to the previous factors, some claims *are* meritorious; if frivolous is defined too broadly, then these meritorious claims might be prematurely dismissed.³⁴

Nonetheless, six policy factors favor a broad definition.³⁵ First, an

30. See *Adkins v. E.I. du Pont de Nemours & Co.*, 335 U.S. 331, 342 (1948); *Crisafi v. Holland*, 655 F.2d 1305, 1306 (D.C. Cir. 1981) (per curiam); *McTeague v. Sosnowski*, 617 F.2d 1016, 1019 (3d Cir. 1980).

31. See *Taylor v. Gibson*, 529 F.2d 709, 713 (5th Cir. 1976).

32. See *supra* notes 9-10 and accompanying text.

33. See *supra* notes 9-10, *infra* note 123 and accompanying text.

34. See *Taylor v. Gibson*, 529 F.2d 709, 713 (5th Cir. 1976). See generally *Bounds v. Smith*, 430 U.S. 817, 832 (1977) (policy cannot justify the failure to recognize valid constitutional claims). As stated by the Fifth Circuit: "The difficult task facing the courts is to winnow out the wheat from the unusual amount of chaff necessarily presented in a system which fosters pro se litigation." *Watson v. Ault*, 525 F.2d 886, 890 (5th Cir. 1976).

35. Some of these policy factors are only applicable to in forma pauperis plaintiffs

enormous number of in forma pauperis complaints are filed, and the vast majority of these are meritless.³⁶ Second, unlike paying plaintiffs, in forma pauperis plaintiffs have no economic disincentives to filing meritless claims.³⁷ Third, in forma pauperis claims are a drain on public funds and judicial resources.³⁸ Fourth, in forma pauperis plaintiffs who are also prisoners arguably have an incentive to file meritless claims: they might get a trip to the courthouse.³⁹ Fifth, allowing the meritless claims of prisoners to progress through the judicial system is likely to undermine the authority of prison officials and interfere with prison discipline.⁴⁰ Finally, as a matter of comity, the federal courts should avoid conflicts with state authorities by minimizing the instances where they tell state authorities how to manage state prisons.⁴¹

In light of these policy factors, a plurality of the circuit courts have defined frivolous broadly.⁴² The Fourth, Fifth and Ninth Circuits have stated that a frivolous claim is one without arguable substance in law or fact.⁴³ The Fifth Circuit has also approved the often mentioned standard that a complaint is frivolous if the plaintiff's realistic chances of ultimate success are slight.⁴⁴ The District of Columbia Circuit has held that a

who are prisoners. This supports the notion of two in forma pauperis statutes with one geared exclusively towards prisoners. See *infra* Conclusion.

36. See Duniway, *supra* note 2, at 1277 n.61. See *supra* notes 9-11 and accompanying text.

37. See *Anderson v. Coughlin*, 700 F.2d 37, 42 (2d Cir. 1983); *Jones v. Bales*, 58 F.R.D. 453, 463 (N.D. Ga. 1972), *aff'd per curiam*, 480 F.2d 805 (5th Cir. 1973).

38. See *Anderson v. Coughlin*, 700 F.2d 37, 42 (2d Cir. 1983); *Collins v. Cundy*, 603 F.2d 825, 828 (10th Cir. 1979) (*per curiam*); *Weller v. Dickson*, 314 F.2d 598, 601 (9th Cir.), *cert. denied*, 375 U.S. 845 (1963); Duniway, *supra* note 2, at 1281. It has been argued that the public does not bear a substantial cost in in forma pauperis actions because the statute only covers "the most minor costs of litigation." See Ziegler & Hermann, *supra* note 9, at 189. However, this argument fails to account for the judicial resources expended on in forma pauperis cases as well as the costs that government defendants must bear when complaints are not dismissed *sua sponte* as frivolous.

39. See *Cruz v. Beto*, 405 U.S. 319, 326-27 (1972) (Rehnquist, J., dissenting); *Anderson v. Coughlin*, 700 F.2d 37, 42 (2d Cir. 1983). A prisoner, however, is not entitled, as a matter of right, to appear at a hearing in a civil rights action. *Armstrong v. Rushing*, 352 F.2d 836, 837 (9th Cir. 1965).

40. *Weller v. Dickson*, 314 F.2d 598, 601 (9th Cir.), *cert. denied*, 375 U.S. 845 (1963); *id.* at 604 (Duniway, J., concurring).

41. See Preiser v. Rodriguez, 411 U.S. 475, 492 (1973). See *supra* notes 35-41 and accompanying text.

42. See *infra* notes 43-46 and accompanying text. Some courts have stated that a district court's discretion is especially broad if the plaintiff is a prisoner. See, e.g., *Torres v. Garcia*, 444 F.2d 537, 537 (9th Cir. 1971) (*per curiam*); *Shobe v. California*, 362 F.2d 545, 546 (9th Cir.) (*per curiam*), *cert. denied*, 385 U.S. 887 (1966).

43. See *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir. 1984); *Woodall v. Foti*, 648 F.2d 268, 271 (5th Cir. 1981); *Boyce v. Alizaduh*, 595 F.2d 948, 951-52 (4th Cir. 1979); *Watson v. Ault*, 525 F.2d 886, 891-92 (5th Cir. 1976).

44. *Jones v. Bales*, 58 F.R.D. 453, 463-64 (N.D. Ga. 1972), *aff'd per curiam*, 480 F.2d 805 (5th Cir. 1973). Although the Ninth Circuit acknowledged this standard, the court did not adopt it. See *Smart v. Heinze*, 347 F.2d 114, 116 & n.2 (9th Cir.), *cert. denied*, 382 U.S. 896 (1965); *Weller v. Dickson*, 314 F.2d 598, 604 (9th Cir.) (Duniway, J., concurring), *cert. denied*, 375 U.S. 845 (1963). The Fourth Circuit has questioned whether

complaint is frivolous if there is no factual or legal basis for remedy of the asserted wrong,⁴⁵ and the Tenth Circuit has held that a complaint is frivolous if it cannot be supported by a rational argument on the law and facts.⁴⁶ Of the circuits that have defined frivolous, only the Sixth Circuit has chosen a narrow definition, equating frivolous with a failure to state a claim. Thus, a complaint can be dismissed for frivolousness only if the plaintiff can prove no set of facts in support of the claims.⁴⁷

These definitions reveal that the courts have identified two components of frivolousness. All of the circuits require an examination of the legal sufficiency of an *in forma pauperis* complaint. Except for the Sixth Circuit, they all also require some inquiry into the factual basis of a complaint.

The best definition would thus emphasize a dual inquiry—into the law and into the facts—and would also incorporate a reasonableness factor. Thus, a complaint should be held to be frivolous only if it lacks reasonable basis in law or fact. This recommended standard is essentially the same as “without arguable substance in law or fact” and “without rational argument on the law or facts,”⁴⁸ and is superior to a finding of frivolousness based on a plaintiff’s “realistic chances of ultimate success.”⁴⁹ Unlike this latter standard, the recommended standard isolates and therefore emphasizes the two components of law and fact, as well as a reasonableness standard. Moreover, almost all *in forma pauperis* plaintiffs are *pro se*, and a *pro se* litigant’s realistic chances of ultimate success are always slight.⁵⁰

The legal inquiry of frivolousness should be the same as the test for failure to state a claim—a complaint is legally frivolous only if the plaintiff can prove no set of facts in support of the claims.⁵¹ This legal inquiry is therefore more searching than the inquiry into federal question juris-

the “ultimate success” standard is consistent with the Supreme Court’s statements in *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (*per curiam*), and *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), that *pro se* complaints should be held to a more lenient standard than pleadings drafted by attorneys. See *Boyce v. Alizaduh*, 595 F.2d 948, 951, 952 n.8 (4th Cir. 1979).

45. See *Crisafi v. Holland*, 655 F.2d 1305, 1307-08 (D.C. Cir. 1981).

46. See *Wiggins v. New Mexico State Supreme Court Clerk*, 664 F.2d 812, 815 (10th Cir. 1981), *cert. denied*, 459 U.S. 840 (1982); *Collins v. Cundy*, 603 F.2d 825, 828 (10th Cir. 1979).

47. See *Malone v. Colyer*, 710 F.2d 258, 260-61 (6th Cir. 1983). A case from the Eighth Circuit suggests that circuit may also adopt a narrow definition yet recognizes that *pro se* complaints should be considered under less stringent standards. See *Wilson v. Iowa*, 636 F.2d 1166, 1167-68 (8th Cir. 1981).

48. See *supra* notes 43, 46 and accompanying text.

49. See *supra* note 44 and accompanying text.

50. See *supra* note 44 and accompanying text. Cf. *Franklin v. Murphy*, 745 F.2d 1221, 1227 (9th Cir. 1984) (rejecting district court’s definition of nonfrivolous as reasonable probability of success on the merits as too broad).

51. See *Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984); *Crisafi v. Holland*, 655 F.2d 1305, 1308 (D.C. Cir. 1981); *Boyce v. Alizaduh*, 595 F.2d 948, 951 (4th Cir. 1979); *Watson v. Ault*, 525 F.2d 886, 891-92 (5th Cir. 1976).

diction. Thus, any complaint that would fail either the test for statement of a claim or the test for jurisdiction would logically also be legally frivolous.⁵²

The factual inquiry of frivolousness should ask whether the plaintiff has presented reasonable facts in support of the claims. A similar approach has been used in the First Circuit in the context of civil rights violations.⁵³ This factual inquiry should be a threshold inquiry and not a fact-finding process for the resolution of disputed facts.⁵⁴ Nonetheless, the district courts could dismiss many claims pursuant to this factual component. For example, courts could dismiss claims based on "wholly fanciful" factual allegations.⁵⁵ Likewise, if the factual allegations were vague and conclusory,⁵⁶ or if the plaintiff were unable to clarify and particularize his complaint after a request by the court,⁵⁷ then the claim could be dismissed as factually frivolous.⁵⁸ This factual inquiry distinguishes the test for frivolousness from the tests for federal question jurisdiction and statement of a claim. Thus, a complaint that confers jurisdiction and states a claim might nonetheless fail the test for

52. Thus, cases stating that frivolous claims are often wholly insubstantial are understandable. See, e.g., *Wright v. Rhay*, 310 F.2d 687, 687-88 (9th Cir. 1962) (per curiam), cert. denied, 373 U.S. 918 (1963); *Reece v. Washington*, 310 F.2d 139, 140 (9th Cir. 1962) (per curiam). Likewise, those cases that equate failure to state a claim with frivolousness are also understandable. See *United States ex rel. Walker v. Fayette County*, 599 F.2d 573, 574-75 (3d Cir. 1979) (per curiam); *Boyce v. Alizaduh*, 595 F.2d 948, 951 (4th Cir. 1979); *Watson v. Ault*, 525 F.2d 886, 891-92 (5th Cir. 1976). As a practical matter, however, if a complaint is wholly insubstantial and thus insufficient to confer jurisdiction, then the court lacks the power to dismiss the complaint on the merits as frivolous under § 1915(d). See *infra* note 91.

53. See *Pavilonis v. King*, 626 F.2d 1075, 1078 (1st Cir. 1980); *Fisher v. Flynn*, 598 F.2d 663, 665 (1st Cir. 1979). But see *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (pro se complaints should be tested by "less stringent standards than formal pleadings by lawyers").

54. See *Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984).

55. *Id.* at 1228; see *Anderson v. Coughlin*, 700 F.2d 37, 43 (2d Cir. 1983) (dismissal is appropriate where the complaint's allegations were "beyond credulity") (quoting *Boruski v. Stewart*, 381 F. Supp. 529, 533 (S.D.N.Y. 1974)). In one case, the Ninth Circuit noted that the plaintiff's factual allegations "stretch one's credulity." *Allison v. California Adult Auth.*, 419 F.2d 822, 823 (9th Cir. 1969). Although the court reversed the district court's Rule 12(b)(6) dismissal, it remanded the case for further proceedings to explore the plaintiff's allegations because of its skepticism that the plaintiff had, in fact, been physically abused by the correctional authorities. See *id.* at 823-24.

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

57. See *Allison v. California Adult Auth.*, 419 F.2d 822, 823-24 (9th Cir. 1969); see, e.g., *Harris v. United States Dep't of Justice*, 680 F.2d 1109, 1110-11 (5th Cir. 1982) (per curiam) (violation of Fed. R. Civ. P. 8(a), which requires a short and plain statement of the claim), cert. denied, 459 U.S. 1209 (1983); cf. *Gillibeau v. City of Richmond*, 417 F.2d 426, 431 (9th Cir. 1969) (failure to comply with Fed. R. Civ. P. 8(a) can also be basis for finding complaint to be legally insufficient because of a failure to state a claim). A district court can consult its own records to determine if a complaint is frivolous. See *Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984); *Van Meter v. Morgan*, 518 F.2d 366, 368 (8th Cir.) (per curiam), cert. denied, 423 U.S. 896 (1975).

58. The "ultimate success" standard appears to be based on an overly expansive reading of this factual prong of frivolousness. See *supra* note 44 and accompanying text.

frivolousness.⁵⁹

Returning to the metaphor of a fishing net,⁶⁰ if the mesh of the net for statement of a claim is smaller than the mesh for federal question jurisdiction, then the mesh of the net for frivolousness is smaller than the mesh of both federal question jurisdiction and statement of a claim. Thus, for an *in forma pauperis* plaintiff, a complaint must first swim through the net for jurisdiction, then through the net for statement of a claim, and then still through the net for frivolousness. This final net—testing for frivolousness—is a significant additional screening process applicable only to *in forma pauperis* complaints. It gives the district courts the needed discretion to prevent abuse of the *in forma pauperis* process, yet it allows possibly meritorious claims to continue.⁶¹

II. ONE STEP OR TWO STEP

Some federal courts of appeals have stated that section 1915 requires a federal district court to perform two distinct steps whenever a person applies to proceed *in forma pauperis*.⁶² In the first step, taken pursuant to section 1915(a), the district court determines whether the applicant is financially eligible to proceed without paying. If the person is financially eligible, the district court must grant *in forma pauperis* status and file the complaint. Then, in the second step, the court examines the complaint to determine if it is frivolous under section 1915(d). If frivolous, the action may then be dismissed. Other circuit courts have either explicitly or implicitly approved this two step procedure, but have not required it.⁶³

59. See *Allison v. California Adult Auth.*, 419 F.2d 822, 823-24 (9th Cir. 1969); *Stiltner v. Rhay*, 322 F.2d 314, 316 (9th Cir. 1963), *cert. denied*, 376 U.S. 920 (1964); *Weller v. Dickson*, 314 F.2d 598, 604 (9th Cir.) (Duniway, J., concurring), *cert. denied*, 375 U.S. 845 (1963).

60. See *supra* text following note 29.

61. See *Petitions to Sue*, *supra* note 10, at 747-53. But see *Catz & Guyer*, *supra* note 1, at 675-79 (argues that courts should have no more power over *in forma pauperis* plaintiffs than over paying plaintiffs); cf. *Draper v. Washington*, 372 U.S. 487, 498-99 (1963) (trial judge could not refuse a free trial transcript to an indigent *criminal* appellant even if the appeal appeared frivolous); *Lane v. Brown*, 372 U.S. 477, 481-82, 484-85 (1963) (state court could not refuse defendant appellate review because of requirement that a trial transcript be filed with the court where only a public defender could obtain transcripts for indigents).

62. See, e.g., *Franklin v. Murphy*, 745 F.2d 1221, 1225-26 n.5 (9th Cir. 1984); *Woodall v. Foti*, 648 F.2d 268, 271 (5th Cir. 1981) (*per curiam*); *Dugan v. Lumpkin*, 640 F.2d 189, 189-90 (9th Cir. 1979) (Ely, J., dissenting); *Boyce v. Alizaduh*, 595 F.2d 948, 950 (4th Cir. 1979); *Sinwell v. Shapp*, 536 F.2d 15, 18-19 (3d Cir. 1976); *Taylor v. Gibson*, 529 F.2d 709, 714 & n.6 (5th Cir. 1976); *Watson v. Ault*, 525 F.2d 886, 891-92 (5th Cir. 1976); *Campbell v. Beto*, 460 F.2d 765, 768 (5th Cir. 1972).

63. See *Anderson v. Coughlin*, 700 F.2d 37, 41 (2d Cir. 1983); *Martin-Trigona v. Stewart*, 691 F.2d 856, 857 (8th Cir. 1982); *Wiggins v. New Mexico State Supreme Court Clerk*, 664 F.2d 812, 814-15 (10th Cir. 1981), *cert. denied*, 459 U.S. 840 (1982); *Crisafi v. Holland*, 655 F.2d 1305, 1306-10 (D.C. Cir. 1981) (*per curiam*); *Collins v. Hladky*, 603 F.2d 824, 825 (10th Cir. 1979) (*per curiam*); *Cline v. Herman*, 601 F.2d 374, 375 (8th Cir. 1979); *Van Meter v. Morgan*, 518 F.2d 366, 367 (8th Cir.) (*per curiam*), *cert. denied*, 423 U.S. 896 (1975); *Duhart v. Carlson*, 469 F.2d 471, 473 (10th Cir. 1972), *cert. denied*,

One circuit has required its district courts to follow a one step procedure: the courts must determine whether a complaint is frivolous before granting in forma pauperis status.⁶⁴ Thus, even if an applicant is financially eligible, a court can deny in forma pauperis status because of frivolousness and can consequently refuse to file the complaint. This one step procedure apparently merges sections 1915(a) and 1915(d). Other circuits have allowed this one step procedure,⁶⁵ while two circuits have allowed it but expressed a preference for the two step procedure.⁶⁶ One circuit has allowed both the one step and two step procedures without stating a preference for either.⁶⁷

Several reasons suggest that the one step procedure should be allowed.⁶⁸ Most significant, the statutory language, read literally, at least allows the one step procedure.⁶⁹ Section 1915(a) states that a court "may," not "shall," authorize an applicant to proceed in forma pauperis if he or she is financially eligible.⁷⁰ Section 1915(a) also requires the applicant to state the nature of the action, suggesting that the court may appropriately examine the merits of the action before granting in forma pauperis status.⁷¹ Finally, section 1915(d) expressly permits a court to dismiss an in forma pauperis action not only if it finds the action to be frivolous but also if it finds that the allegation of poverty were untrue.⁷² This power further suggests that financial eligibility and frivolousness are intertwined.

Other reasons have also been presented in support of the one step procedure. Some have argued that the history of in forma pauperis proceedings suggests that one step is proper.⁷³ It has also been reasoned that the one step procedure protects defendants from the time and expense of re-

410 U.S. 958 (1973); *Brown v. Schneekloth*, 421 F.2d 1402, 1403 (9th Cir.) (per curiam), cert. denied, 400 U.S. 847 (1970).

64. See *Wartman v. Branch 7, Civil Div., County Court*, 510 F.2d 130, 132-34 (7th Cir. 1975).

65. See *Evans v. Tennessee Dep't of Corrections*, 514 F.2d 283, 284 (6th Cir. 1975) (per curiam) (dictum); *Boag v. Boies*, 455 F.2d 467, 468 (9th Cir.), cert. denied, 408 U.S. 926 (1972); see also *Shobe v. California*, 362 F.2d 545 (9th Cir.) (district court has especially wide latitude under § 1915 to dismiss civil suits brought by prisoners against correctional authorities), cert. denied, 385 U.S. 887 (1966).

66. See *Dughan v. Lumpkin*, 640 F.2d 189, 189 (9th Cir. 1979); *Forester v. California Adult Auth.*, 510 F.2d 58, 60 (8th Cir. 1975); *West v. Procunier*, 452 F.2d 645, 646 & n.2 (9th Cir. 1971) (per curiam).

67. *Graham v. Riddle*, 554 F.2d 133, 134-35 (4th Cir. 1977).

68. See *Catz & Guyer, supra*, note 1, at 672-75; *Petitions to Sue, supra* note 10, at 755-57.

69. See, e.g., *Kinney v. Plymouth Rock Squab Co.*, 236 U.S. 43, 45-46 (1915).

70. 28 U.S.C. § 1915(a) (1982). See *Wartman v. Branch 7, Civil Div., County Court*, 510 F.2d 130, 132 (7th Cir. 1975); *Wright v. Rhay*, 310 F.2d 687 (9th Cir. 1962), cert. denied, 373 U.S. 918 (1963); *Reece v. Washington*, 310 F.2d 139, 140 (9th Cir. 1962).

71. See *Wartman v. Branch 7, Civil Div., County Court*, 510 F.2d 130, 132 (7th Cir. 1975).

72. See *id.*

73. See *id.* at 132-33; *Catz & Guyer, supra* note 1, at 673; *Petitions to Sue, supra* note 10, at 756.

sponding to frivolous actions.⁷⁴ Moreover, the one step procedure helps minimize the drain on public funds and judicial resources that in forma pauperis litigants might otherwise cause.⁷⁵ Also, it has been noted that a Supreme Court case from the year 1915 allowed the one step procedure.⁷⁶ Finally, some maintain that the one step approach is the only way to avoid a conflict with the Federal Rules of Civil Procedure.⁷⁷

On the other hand, several reasons support the use of the two step procedure. This approach assures the creation of an adequate record for appeal—if an applicant is financially eligible, then in forma pauperis status is granted, the complaint is filed, and a docket number is necessarily assigned.⁷⁸ Furthermore, if the complaint is filed under the two step procedure, then a dismissal for frivolousness can be on the merits, and res judicata can bar future similar actions.⁷⁹ Some also argue that the two step procedure minimizes wealth discrimination: an indigent person can file a complaint as easily as a paying plaintiff.⁸⁰ Finally, some judges have considered and relied on a 1980 report from the Federal Judicial Center.⁸¹ Based on the statutory language, that report recommended that courts follow the two step procedure. It reasoned that because sections 1915(a) and 1915(d) are separate subsections, the focus of section 1915(a)—financial eligibility—and the focus of section 1915(d)—frivolousness—should be considered distinctly; the one step procedure blurs that distinction.⁸²

The best resolution of this problem is to allow district courts to use either the one step or two step procedures, but to recommend the two step as the preferred method. The two step procedure is the better approach for three reasons. First, the construction of section 1915—with

74. See *Forester v. California Adult Auth.*, 510 F.2d 58, 60 (8th Cir. 1975).

75. See *McTeague v. Sosnowski*, 617 F.2d 1016, 1019 (3d Cir. 1980); *Weller v. Dickson*, 314 F.2d 598, 601 (9th Cir.), cert. denied, 375 U.S. 845 (1963); *Duniway*, *supra* note 2, at 1281-82. For a discussion of the types of costs entailed by a civil action and the costs to the federal government of an in forma pauperis action, see *Catz & Guyer*, *supra* note 1, at 659-62; *Maguire*, *supra* note 2, at 362.

76. See *Wartman v. Branch 7, Civil Div., County Court*, 510 F.2d 130, 133 (7th Cir. 1975) (citing *Kinney v. Plymouth Rock Squab Co.*, 236 U.S. 43, 45 (1915)).

77. The Seventh Circuit expressed concern that the two step procedure would conflict with its holding in *Nichols v. Schubert*, 499 F.2d 946, 947 (7th Cir. 1974) (per curiam), that Rule 4(a) requires issuance of a summons despite the complaint's frivolousness. See *Wartman v. Branch 7, Civil Div., County Court*, 510 F.2d 130, 132, 134 (7th Cir. 1975). One author has also noted this problem. See *Petitions to Sue*, *supra* note 10, at 756-57 n.95.

78. See *Forester v. California Adult Auth.*, 510 F.2d 58, 60 (8th Cir. 1975); *Duhart v. Carlson*, 469 F.2d 471, 473 (10th Cir. 1972), cert. denied, 410 U.S. 958 (1973); *Stiltner v. Rhay*, 322 F.2d 314, 317 (9th Cir. 1963), cert. denied, 376 U.S. 920 (1964).

79. See *Campbell v. Beto*, 460 F.2d 765, 768 (5th Cir. 1972).

80. *Id.*

81. Federal Judicial Center, *supra* note 11; see *Martin-Trigona v. Stewart*, 691 F.2d 856, 857 (8th Cir. 1982) (per curiam); *Dugan v. Lumpkin*, 640 F.2d 189, 190 (9th Cir. 1979) (Ely, J., dissenting); *Boyce v. Alizaduh*, 595 F.2d 948, 950 (4th Cir. 1979); *Sinwell v. Shapp*, 536 F.2d 15, 18 n.9 (3d Cir. 1976).

82. See Federal Judicial Center, *supra* note 11, at 57.

the separate subsections—does at least suggest that financial eligibility and frivolity should be considered separately.⁸³ Second, although the one step procedure does not preclude a district court from assigning a docket number and creating a record for appeal,⁸⁴ the two step procedure guarantees that a court will create a record.⁸⁵ Finally, the two step procedure will enhance finality by causing more decisions to be made on the merits for res judicata purposes.⁸⁶

Nonetheless, the one and two step procedures should both be permitted. The nebulous statutory language apparently allows for either.⁸⁷ Further, if, as discussed below, the mere filing of an in forma pauperis complaint does not require the issuance and service of process,⁸⁸ then either the one step or the two step method adequately protects defendants and the public from too many frivolous claims.⁸⁹ Most important, if either the one step or two step procedure is not allowed, then there will be a technical impediment to the rapid resolution of cases. The apparent purpose of section 1915(d) is to speed the resolution of clearly meritless claims brought in forma pauperis.⁹⁰ Thus, section 1915 should not be construed to create a procedural stumbling block. This conclusion is reinforced by the realization that if the mere filing of an in forma pauperis complaint does not trigger the issuance and service of process, then the differences between the one step and two step procedures are minimal and insignificant.⁹¹

83. See *supra* notes 4, 82 and accompanying text.

84. See *Wartman v. Branch 7, Civil Div., County Court*, 510 F.2d 130, 133 (7th Cir. 1975); *Petitions to Sue, supra* note 10, at 757.

85. See *supra* note 78 and accompanying text.

86. See *supra* note 79 and accompanying text. The doctrine of res judicata can be used to dispatch repetitive complaints promptly. Some prisoners file so many repetitive complaints that the courts impose "gag orders" limiting the number of complaints that may be filed in the future. See *Franklin v. Murphy*, 745 F.2d 1221, 1231-32 (9th Cir. 1984).

87. See *supra* notes 4, 69-72 and accompanying text. The legislative history is also ambiguous. If anything, it suggests that both the one step and two step procedures are permissible: "The court may dismiss the suit at any time." H.R. Rep. No. 1079, 52d Cong., 1st Sess. 2 (1892).

88. See *infra* text accompanying notes 92-114.

89. See *Forester v. California Adult Auth.*, 510 F.2d 58, 60 (8th Cir. 1975); *Dawson v. Lynch*, 423 F.2d 1136, 1136 (9th Cir. 1970).

90. See *Dawson v. Lynch*, 423 F.2d 1136, 1136 (9th Cir. 1970); H.R. Rep. No. 1079, 52d Cong., 1st Sess. 1-2 (1892).

91. See *Sinwell v. Shapp*, 536 F.2d 15, 18-19 (3d Cir. 1976). See *supra* note 67 and accompanying text.

A remaining issue is to determine when a dismissal under section 1915(d) is on the merits. If the court follows the one step procedure, then the complaint is not filed and the dismissal thus cannot be on the merits. If the court, however, follows the two step procedure, the dismissal should be on the merits because the complaint has been filed and the court has judged the docketed case. An exception would be if the court relied on § 1915(d), but the complaint was actually wholly insubstantial and thus failed to confer jurisdiction. If the court lacked jurisdiction, it could not dismiss on the merits.

See *supra* text accompanying note 29.

III. ISSUANCE OF PROCESS

If a plaintiff pays the district court filing fee, then issuance and service of process is required unless the complaint is insufficient to confer subject matter jurisdiction.⁹² The most obvious basis for this requirement is Federal Rule of Civil Procedure 4(a). Some courts, however, have relied on more general policy considerations to impose this requirement.⁹³

If a plaintiff proceeds in forma pauperis, the district court can dismiss without issuance of process for a lack of subject matter jurisdiction, just as the court can dismiss the complaint of a paying plaintiff. The difficult question is whether an in forma pauperis complaint that confers jurisdiction can nonetheless be dismissed as frivolous under section 1915(d) without issuance of process.

Section 1915(d) does not outline the procedures that the courts should accord in forma pauperis plaintiffs.⁹⁴ The legislative history is likewise uninformative.⁹⁵ Thus, the analysis must focus on Federal Rule of Civil Procedure 4(a). Rule 4(a) states: "Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint."⁹⁶ Thus, if a plaintiff pays the filing fee and the complaint is filed, then the clerk must immediately issue a summons for service of process.⁹⁷

If a district court dismisses an in forma pauperis complaint pursuant to the one step procedure, then the complaint is never filed and Rule 4(a) clearly does not require issuance of process.⁹⁸ Difficulties arise, however, if the court follows the preferred two step procedure: does the granting of in forma pauperis status based on financial eligibility and the consequent filing of the complaint trigger immediate issuance and service of process, even if the complaint is frivolous?

Rule 4(a) read along with Rule 4(c)(2)(B)(i) and section 1915(c) suggests that in forma pauperis plaintiffs may be treated differently from paying plaintiffs. Rule 4(a) requires the clerk to issue the summons to the plaintiff or the plaintiff's attorney, who then arranges for service of

92. See *Franklin v. Oregon*, 662 F.2d 1337, 1342 (9th Cir. 1981); *Howard v. Lemmons*, 547 F.2d 290, 290 n.1 (5th Cir. 1977); Fed. R. Civ. P. 12(h)(3).

93. In *Tingler v. Marshall*, 716 F.2d 1109 (6th Cir. 1983), the court relied on its supervisory powers to require service of process. See *id.* at 1112. In *Armstrong v. Rushing*, 352 F.2d 836, 837 (9th Cir. 1965), the court suggested that service of process and a hearing on the merits are the essence of the judicial system.

94. See 28 U.S.C. § 1915(d) (1982).

95. See H.R. Rep. No. 1079, 52d Cong., 1st Sess. 1-2 (1892). If anything, the House Report suggests that Congress was concerned only with providing indigents with access to the federal courts, and thus did not consider whether in forma pauperis plaintiffs should have the same procedural rights as those of paying plaintiffs. See *id.*

96. Fed. R. Civ. P. 4(a).

97. See *Franklin v. Oregon*, 662 F.2d 1337, 1340-42 (9th Cir. 1981).

98. See Fed. R. Civ. P. 4(a); see, e.g., *Wartman v. Branch 7, Civil Div., County Court*, 510 F.2d 130, 132-34 (7th Cir. 1975); *Boag v. Boies*, 455 F.2d 467, 468 (9th Cir.) (per curiam), cert. denied, 408 U.S. 926 (1972).

process.⁹⁹ In forma pauperis plaintiffs, however, are not responsible for service of process. Rule 4(c)(2)(B)(i) and section 1915(c) provide instead that officers of the court, such as United States marshals, shall serve the process.¹⁰⁰ Thus, Rule 4(a) cannot be complied with literally if the plaintiff proceeds in forma pauperis. Consequently, one can reasonably argue that the Rule 4(a) requirement of immediate issuance and service of process does not necessarily apply to in forma pauperis cases—that is, Rule 4(c)(2)(B)(i) and section 1915(c) effectively create an exception to Rule 4(a).¹⁰¹

Considering policy factors would therefore be appropriate. Essentially, the same policy factors that were relevant to the definition of “frivolous” are also relevant to deciding whether issuance of process should be required.¹⁰² Two related factors stand out and weigh in favor of not requiring issuance of process. In forma pauperis plaintiffs have little to lose by bringing numerous meritless actions. No economic disincentives temper their enthusiasm for filing complaints.¹⁰³ Further, if issuance,

99. See Fed. R. Civ. P. 4(a).

100. Rule 4(c)(2)(B)(i) provides:

A summons and complaint shall, at the request of the party seeking service or such party's attorney, be served by a United States marshal or deputy United States marshal, or by a person specially appointed by the court for that purpose, only—

(i) on behalf of a party authorized to proceed in forma pauperis pursuant to Title 28, U.S.C. § 1915

Fed. R. Civ. P. 4(c)(2)(B)(i).

Section 1915(c) provides: “The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.” 28 U.S.C. § 1915(d) (1982).

Section 1915(c) has not been meaningfully amended since its original enactment as the Act of July 20, 1892, ch. 209, 27 Stat. 252. Compare 28 U.S.C. § 1915(c) (1982) with Act of July 20, 1892, ch. 209, 27 Stat. 252.

101. The originally promulgated Rule 4(a) contained the “forthwith” requirement that the present Rule 4(a) contains. See Fed. R. Civ. P. 4(a), 308 U.S. 664 (1940). Rules 4(a) and 4(c) were not amended until 1980, and those amendments were irrelevant to the issues surrounding in forma pauperis actions. See 2 J. Moore, J. Lucas, H. Fink & C. Thompson, *Moore's Federal Practice* ¶ 4.01[1], [28]-[31] (2d ed. 1984). The Rules were, however, significantly amended in 1983. The language concerning issuance of the summons to the plaintiff or the plaintiff's attorney was added to Rule 4(a), and the language expressly designating in forma pauperis plaintiffs for special attention was added to Rule 4(c). See Act of Jan. 12, 1983, Pub. L. No. 97-462, § 2, 96 Stat. 2527. The purpose of the 1983 amendments was to relieve the United States marshals of the burden of serving process in all cases; instead the Rules now designate limited and specific cases, such as in forma pauperis actions, where the marshals must still accomplish service. See 128 Cong. Rec. H 9848 (1982) (letter endorsing the amendments from the U.S. Dep't. of Justice, Office of Legislative Affairs, produced by Rep. Edwards), reprinted in 1982 U.S. Code Cong. & Ad. News 4434, 4435-36. However the analysis of whether there must be issuance and service of process for in forma pauperis actions might have differed before the 1983 amendments, the current analysis must be governed by the plain language of the Rules as they now stand.

102. See *supra* text accompanying notes 30-41.

103. See *Franklin v. Murphy*, 745 F.2d 1221, 1226 (9th Cir. 1984). See *supra* note 10 and accompanying text.

and hence service, of process is required, then beleaguered defendants, usually prison officials, must bear the expense and inconvenience of responding to and defending frivolous claims.¹⁰⁴

When the plaintiff has paid the filing fee, three policy factors have been identified as weighing in favor of immediate issuance of process: the traditional adversary relationship is maintained, inefficiencies in the judicial process are minimized, and the judiciary avoids the appearance of acting as a proponent instead of as an independent entity.¹⁰⁵

When the plaintiff proceeds in forma pauperis, however, these factors are largely undermined. First, because most in forma pauperis plaintiffs are also pro se, a true adversary relationship rarely exists. Inevitably, pro se plaintiffs are unable to represent themselves adequately against defendants who have attorneys.¹⁰⁶

Second, allowing district courts to dismiss frivolous in forma pauperis complaints without issuance of process should impel, not inhibit, judicial efficiency. Early dismissals will spare judicial resources¹⁰⁷ as well as ease the burden on frequently targeted defendants.¹⁰⁸ The proper definition of "frivolous" will prevent inefficient remands due to premature dismissals of possibly meritorious claims. Currently, the lack of clear guidance to the district courts for dealing with in forma pauperis complaints presents a major obstacle to judicial efficiency.¹⁰⁹

104. See *Anderson v. Coughlin*, 700 F.2d 37, 41-43 (2d Cir. 1983).

105. See *id.* at 41; *Franklin v. Oregon*, 662 F.2d 1337, 1341-42 (9th Cir. 1981).

106. Furthermore, the adversary relationship, for whatever it may be worth in a pro se action, can exist when an in forma pauperis plaintiff appeals a sua sponte dismissal; a defendant can participate in the appeal even if there had been no service of process in the district court. See, e.g., *Franklin v. Oregon*, 662 F.2d 1337, 1341 (9th Cir. 1981); *Williams v. Field*, 394 F.2d 329, 330 (9th Cir.), *cert. denied*, 393 U.S. 891 (1968); *Bauers v. Heisel*, 361 F.2d 581, 584 n.2 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967). Clearly, if the in forma pauperis plaintiff has an attorney in the district court proceedings, an adversary relationship will exist. The presence of an attorney, however, is rare. See *infra* note 159.

107. See *supra* note 38 and accompanying text. Furthermore, the purpose of the 1983 Amendments to Fed. R. Civ. P. 4 was to relieve some of the burden of service of process from the United States marshals. See 128 Cong. Rec. H 9848 (1982) (letter endorsing the amendments from the U.S. Dep't. of Justice Office of Legislative Affairs, produced by Rep. Edwards), reprinted in 1982 U.S. Code Cong. & Ad. News 4434, 4435-36. Dismissing in forma pauperis actions before service of process will further that goal.

108. See *Anderson v. Coughlin*, 700 F.2d 37, 41 (2d Cir. 1983); *Weller v. Dickson*, 314 F.2d 598, 604 (9th Cir. 1983) (Duniway, J., concurring); Federal Judicial Center, *supra* note 11, at 59.

109. See, e.g., *McRorie v. Sunn*, No. 81-4619, slip op. (9th Cir. Nov. 18, 1983) (mem.) (reversing a § 1915(d) dismissal because the complaint was sufficient to state a claim); *Copeland v. Spalding*, No. 81-3309, slip op. (9th Cir. July 26, 1983) (mem.) (reversing a section 1915(d) dismissal because there had been no service of process); see also *Smith v. Barnhart*, No. 82-3154, slip op. (9th Cir. Dec. 27, 1983) (mem.) (affirming a § 1915(d) dismissal because the complaint was insufficient to confer subject matter jurisdiction; the court did not distinguish between frivolousness and lack of jurisdiction). The Ninth Circuit attempted to address some in forma pauperis issues in *Franklin v. Murphy*, 745 F.2d 1221 (9th Cir. 1984). The court held that in forma pauperis actions may be dismissed before there has been service of process on the defendants. *Id.* at 1225-26. The court

Third, clear standards for in forma pauperis cases will undermine the appearance that the judiciary may be acting as a proponent for the defendant. Moreover, the courts have an interest in conserving sparse judicial resources. Because in forma pauperis plaintiffs lack disincentives for filing frivolous claims, the courts act appropriately by disposing of frivolous claims as efficiently as is statutorily and constitutionally permissible.¹¹⁰

Finally, case law weighs heavily in favor of allowing the dismissal of frivolous in forma pauperis complaints without issuance of process. Six circuit courts do not require issuance.¹¹¹ One circuit court has inconsistent decisions,¹¹² while only one circuit expressly requires issuance of process.¹¹³

In conclusion, policy factors and case law suggest that even after an in forma pauperis complaint is filed, if the complaint is frivolous under section 1915(d), then immediate issuance and service of process should not be required. Federal Rule of Civil Procedure 4(a) does not dictate otherwise.¹¹⁴ Thus, if issuance is not required, circuit courts will not be constrained to reverse district courts on a mere procedural technicality—the failure to issue and serve process in a frivolous action.

IV. OPPORTUNITY TO AMEND

In some cases, an in forma pauperis complaint might be frivolous be-

noted the absence of economic deterrents to in forma pauperis plaintiffs from bringing frivolous lawsuits. *Id.* at 1226. In addition, the court adopted the *Watson v. Ault*, 525 F.2d 886, 892 (5th Cir. 1970), definition of frivolous that provides an in forma pauperis action must have "arguable substance in law and fact." *Murphy*, 745 F.2d at 1227-28.

110. See *supra* notes 38, 107 and accompanying text.

111. See *Franklin v. Murphy*, 745 F.2d 1221, 1225-27 (9th Cir. 1984); *Collins v. Cundy*, 603 F.2d 825, 828 (10th Cir. 1979); *Boyce v. Alizaduh*, 595 F.2d 948, 950 (4th Cir. 1979); *Sinwell v. Shapp*, 536 F.2d 15, 18-19 (3d Cir. 1976); *Watson v. Ault*, 525 F.2d 886, 893 (5th Cir. 1976); *Forester v. California Adult Auth.*, 510 F.2d 58, 60 (8th Cir. 1975).

The Ninth Circuit had inconsistent decisions until October 1984 when it decided *Franklin v. Murphy*, 745 F.2d 1221 (9th Cir. 1984). Compare *Dodd v. Spokane County, Washington*, 393 F.2d 330, 333 n.3 (9th Cir. 1968) (dictum) (noting that procedural protections are required) and *Armstrong v. Rushing*, 352 F.2d 836, 837 (9th Cir. 1965) (procedural protections required) with *Williams v. Field*, 394 F.2d 329, 330 (9th Cir.) (affirming district court decision withholding service), *cert. denied*, 393 U.S. 891 (1968).

112. The Second Circuit clearly does not require service but has recommended and disfavored dismissals before service. Compare *Anderson v. Coughlin*, 700 F.2d 37, 41 (2d Cir. 1983) (favoring dismissal prior to service) with *Bayron v. Trudeau*, 702 F.2d 43, 45 (2d Cir. 1983) (expressing opposition to dismissal before service) and *Moorish Science Temple of Am., Inc. v. Smith*, 693 F.2d 987, 990 (2d Cir. 1982) (same).

113. See *Wartman v. Branch 7, Civil Div., County Court*, 510 F.2d 130, 134 (7th Cir. 1975); see also *Catz & Guyer*, *supra* note 1, at 672-79 (arguing that in forma pauperis plaintiffs should be treated the same way as paying plaintiffs under the Federal Rules of Civil Procedure).

114. See *supra* notes 99-101 and accompanying text. But see *Wartman v. Branch 7, Civil Div., County Court*, 510 F.2d 130, 134 (7th Cir. 1975); *Petitions to Sue*, *supra* note 10, at 756-57.

cause it technically fails to state a claim, yet it will present facts sufficient to notify a district court that an amendment to the complaint could easily cure the deficiency. For example, a pro se prisoner might clearly present a claim for deliberate indifference to medical needs,¹¹⁵ yet the prisoner might mistakenly denominate the claim as one for equal protection instead of as one for cruel and unusual punishment. Also, a plaintiff might clearly set forth a legitimate claim but name the wrong party as the defendant. Similarly, in other cases, a plaintiff might adequately state a claim, but nonetheless present only vague and conclusory factual allegations.¹¹⁶ A district court could dismiss such an *in forma pauperis* complaint as factually frivolous,¹¹⁷ but an amendment to the complaint, merely adding additional facts, might easily cure the deficiencies.¹¹⁸

Consequently, before dismissing at least some *in forma pauperis* complaints, a district court should notify the plaintiff of the deficiencies in the complaint and should afford the plaintiff an opportunity to cure those deficiencies by amending the complaint.¹¹⁹ These procedural protections should be required as a matter of policy pursuant to the supervisory powers of the circuit courts.¹²⁰

The difficult problem is to determine when these procedural protections should be required. Two solutions are possible. One would require the district courts to give an opportunity to amend the complaint in all cases except when an amendment could not cure the deficiency.¹²¹ The other possibility would be to require the district court to allow amendment only when an amendment could clearly save the complaint.¹²² The former possibility would create a presumption that an amendment should be allowed, while the latter would create a presumption that an amendment should not be allowed.

The better method is to presume that an amendment should be al-

115. See *Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976).

116. See, e.g., *Keniston v. Roberts*, 717 F.2d 1295, 1300 (9th Cir. 1983).

117. See *supra* notes 55-58 and accompanying text.

118. As previously stated, many *in forma pauperis* litigants appear pro se. Complaints by such plaintiffs should be construed liberally. See *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam); *Franklin v. Oregon*, 662 F.2d 1337, 1346 n.11 (9th Cir. 1981).

119. *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980); *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980); *Potter v. McCall*, 433 F.2d 1087, 1088 (9th Cir. 1970); *Armstrong v. Rushing*, 352 F.2d 836, 837 (9th Cir. 1965).

Furthermore, Fed. R. Civ. P. 15(a) grants a plaintiff a right to amend until either the defendant files a responsive pleading or the district court dismisses the action. See *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1520 (9th Cir. 1983), *cert. denied*, 465 U.S. 1081 (1984); *Worldwide Church of God, Inc. v. California*, 623 F.2d 613, 616 (9th Cir. 1980). If the dismissal precedes the defendant's answer, the plaintiff retains his right of amendment. *Wood*, 705 F.2d at 1520.

120. See *supra* note 93 and accompanying text.

121. *Franklin v. Murphy*, 745 F.2d 1221, 1228 n.9 (9th Cir. 1984); *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980); *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980).

122. The Supreme Court has noted that district courts need not allow amendments that would be futile. See *Foman v. Davis*, 371 U.S. 178, 182 (1962).

lowed: a district court should allow an opportunity to amend unless an amendment could not cure the deficiencies of the complaint. This method has one major advantage. Most in forma pauperis plaintiffs proceed pro se and are typically inexperienced and unskilled in pleading.¹²³ Though they might have legitimate claims, many pro se plaintiffs present their complaints so ineptly that they obscure the legitimacy of their claims.¹²⁴ Thus, if the district courts are required to notify these plaintiffs of the deficiencies in their complaints and to allow them an opportunity to amend, those plaintiffs with legitimate claims will be more likely to proceed successfully.¹²⁵

Of course, this more liberal approach has disadvantages. Plaintiffs with clearly meritless claims will have an additional opportunity to evade early dismissal through artful pleading. Moreover, requiring amendments in more cases will probably increase the workload of the district courts; whenever a plaintiff in a frivolous case files an amended complaint, a district court will have to spend time reviewing that amended complaint.¹²⁶

However, these disadvantages may be offset. District courts will likely allow an amendment as a matter of course because allowing an opportunity to amend will be the rule rather than the exception under the approach urged in this Article.¹²⁷ Having a district court initially allow an opportunity to amend is more efficient than having the district court dismiss the complaint without amendment, the circuit court reverse to allow an amendment, and then the district court allow an amendment on remand. Further, few pro se litigants will be capable of disguising frivolous claims through artful pleading. Thus, a district court should notify a plaintiff of the deficiencies in a complaint and afford an opportunity to amend unless an amendment could not cure the deficiencies.¹²⁸

V. CONSTITUTIONAL ISSUES

Concluding that section 1915 and the Federal Rules of Civil Procedure allow the courts to treat in forma pauperis plaintiffs differently from pay-

123. See *supra* notes 9-10 and accompanying text. Prisoners can get aid from other prisoners, but these "writ writers" are frequently not too helpful. See *Johnson v. Avery*, 393 U.S. 483, 488 (1969); *id.* at 498-500 (White, J., dissenting).

124. See Federal Judicial Center, *supra* note 11, at 3, 11-12.

125. This requirement is also consistent with the requirement that courts construe pro se complaints liberally. See *supra* note 118.

126. See *supra* note 38 and accompanying text.

127. Thus, the courts would be complying with the spirit of Fed. R. Civ. P. 15(a). See *supra* note 119.

128. The District of Columbia and Tenth Circuits have recommended that district courts issue statements of reasons whenever they dismiss frivolous complaints. See *Crisafi v. Holland*, 655 F.2d 1305, 1310 (D.C. Cir. 1981); *Collins v. Cundy*, 603 F.2d 825, 828 (10th Cir. 1979). These statements of reasons would expedite appellate review. Often, if a district court has issued an order that notifies the plaintiff of a complaint's deficiencies to afford the plaintiff an opportunity to amend, that order could also serve as a statement of reasons if the case were eventually appealed.

ing plaintiffs raises constitutional issues in three areas: substantive due process, equal protection and procedural due process. Examination of these areas reveals, however, that the recommended construction of section 1915 does not entail any constitutional violation under current constitutional standards.

The Supreme Court has recognized a fundamental right of meaningful access to the courts for prisoners in civil rights cases.¹²⁹ Although the Court has discussed this right only in cases involving prisoners, all civil rights litigants should be afforded this same right; the right of meaningful access for prisoners is not based on their confinement, but on the fundamental rights at stake.¹³⁰ Other *in forma pauperis* litigants—those not protecting their civil rights—might have no constitutional right of access to the courts.¹³¹

The touchstone of this recognized fundamental right is that court access be “meaningful.”¹³² Recognition of this limited fundamental right facilitates resolution of the constitutional questions raised above.

A. Substantive Due Process

The fundamental right of meaningful access is a substantive due process right.¹³³ District courts do not deny this right either by denying in

129. See *Bounds v. Smith*, 430 U.S. 817, 821-23, 828 (1977); *Wolff v. McDonnell*, 418 U.S. 539, 577-80 (1974); see also *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (recognizing the “fundamental importance of the writ of habeas corpus in our constitutional scheme”).

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

131. The Supreme Court has recognized a fundamental right of meaningful access for civil actions in only one case other than the cases involving prisoners. Compare *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (“due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages”) with *Ortwein v. Schwab*, 410 U.S. 656, 659 (1973) (no recognition of right to access; welfare benefits have less constitutional significance than marriage and thus no fundamental interest is gained or lost depending on court access) and *United States v. Kras*, 409 U.S. 434, 445 (1973) (no right of court access because eliminating one’s debts through bankruptcy proceeding does not rise to the same constitutional level as marriage and divorce). The evisceration of *Boddie* by *Kras* and *Ortwein* has been extensively discussed and criticized. See, e.g., Houseman, *Equal Protection and the Poor*, 30 Rutgers L. Rev. 887, 889-91 (1977) (cases indicate that the rights involved must be of “high priority” in order for litigant to be assured access to court); Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights—Part I*, 1973 Duke L.J. 1153, 1162-63 (Supreme Court should have recognized a general constitutional right of judicial access instead of focusing on what is at stake in a particular litigation).

132. See *Bounds v. Smith*, 430 U.S. 817, 822-23 (1977).

133. “No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .” U.S. Const. amend. V.

The Supreme Court, though calling the right of access a due process right, see *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974), has not expressly identified it as either a procedural or substantive right. Two reasons indicate that it is a substantive due process right. First, the Court calls it a “fundamental” right. See *Bounds v. Smith*, 430 U.S. 817, 828 (1977). Second, in both *Bounds* and *Wolff*, state prisoners were complaining about their treatment in prison. Procedural due process is not triggered unless a person is deprived of “life, liberty, or property.” See *infra* text accompanying note 149. Thus, if any gov-

forma pauperis status based on frivolousness (one step procedure)¹³⁴ or by granting in forma pauperis status, filing the complaint and then dismissing the action without service of process (two step procedure).¹³⁵

The key to this analysis is the significance of "meaningfulness" in the fundamental right.¹³⁶ By allowing indigent prisoners to lodge their complaints and applications for in forma pauperis status, Congress has clearly provided some access to the courts. Furthermore, cases reasonably based in law and fact are allowed to proceed further. Only "frivolous" complaints are not allowed to proceed. Thus, this access is meaningful: allowing a frivolous complaint to proceed further before dismissal would not significantly or "meaningfully" increase the access of indigents to the courts.

Underlying this analysis is a fair definition of "frivolous."¹³⁷ For example, if courts were able to resolve disputed issues of fact when testing for frivolousness, then the access would not be meaningful. In addition, affording the opportunity to amend the complaint suggests that only claims that are actually frivolous will be dismissed.¹³⁸ Thus, an indigent prisoner can present a claim to the courts. If it might be meritorious, the case continues; if it is frivolous, the case ends. The fundamental right of meaningful access requires nothing more.¹³⁹

B. *Equal Protection*

Equal protection has two strands: fundamental rights and suspect classifications. If a legislative classification interferes with the exercise of a fundamental right or if the legislation is based on a suspect classification, then the courts must test the legislation with strict scrutiny.¹⁴⁰ To pass the strict scrutiny test, a law must be necessary to promote a compelling

ernment owed the prisoners procedural due process, it would have been the government that had allegedly denied them their civil rights by mistreating them. Thus, any procedural due process claims of the prisoners would have to have been directed at the *state* governments. Therefore, the fundamental right of access to the *federal* courts must be a substantive due process right.

134. See *supra* text accompanying note 64.

135. See *supra* text accompanying notes 62-63.

136. See *supra* note 132 and accompanying text.

137. See *supra* text accompanying notes 48-59.

138. See *supra* text accompanying notes 115-28.

139. The analysis has focused on the concept of "meaningfulness" as a limiting factor in the definition of the fundamental right of access to the courts. Usually, however, the concept of "meaningfulness" is used as an expanding factor. See, e.g., *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (prison authorities must assist inmates in the preparation and filing of legal papers by providing adequate law libraries or assistance from trained people). Nonetheless, the trend of Supreme Court decisions strongly suggests that the Court also views "meaningful" as a limiting factor. See *supra* note 131, *infra* notes 153-58 and accompanying text.

140. See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); *Maher v. Roe*, 432 U.S. 464, 470-71 (1977); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973); *Graham v. Richardson*, 403 U.S. 365, 375-76 (1971).

governmental interest.¹⁴¹ If strict scrutiny is not required, then the courts apply a rational basis test under which the law must be rationally related to a legitimate governmental purpose.¹⁴² In the special cases of discrimination based on gender or a child's legitimacy, the courts apply an intermediate test under which the law must be substantially related to the achievement of an important governmental objective.¹⁴³

Treating in forma pauperis plaintiffs differently from paying plaintiffs does not violate equal protection. As discussed above, this differential treatment does not violate the fundamental right of meaningful access to the courts.¹⁴⁴ Further, indigency is not a suspect classification, and it obviously does not involve discrimination based on gender or legitimacy.¹⁴⁵ Thus, the rational basis test must be applied and it is easily satisfied. The different treatment of indigent in forma pauperis plaintiffs is rationally related to several legitimate governmental interests. Allowing courts to dismiss in forma pauperis complaints without service of process saves money for the government,¹⁴⁶ avoids conflicts between the federal judiciary and state prison authorities,¹⁴⁷ and eases congestion of the federal courts.¹⁴⁸ Thus, equal protection is not violated.

C. *Procedural Due Process*

The constitutional requirement of procedural due process is not triggered unless a person is deprived of "life, liberty, or property."¹⁴⁹ Because the present Supreme Court has narrowed the meaning of "life, liberty, or property" to only those rights created by the states or enumerated in the Constitution,¹⁵⁰ the only right that could possibly be deprived in this situation is the fundamental right of meaningful access to the courts.¹⁵¹ But as discussed above, the different treatment of in forma

141. See *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *Maher v. Roe*, 432 U.S. 464, 471 (1977); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

142. See *Maher v. Roe*, 432 U.S. 464, 478 (1977); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

143. This test has been applied to laws which discriminate on the basis of gender, see *Craig v. Boren*, 429 U.S. 190, 197 (1977), and on the basis of a child's legitimacy, see *Pickett v. Brown*, 462 U.S. 1, 8 (1983) (quoting *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982)).

144. See *supra* text accompanying notes 133-39.

145. See *Harris v. McRae*, 448 U.S. 297, 323 (1980); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

146. See *supra* note 38 and accompanying text.

147. See *supra* notes 40-41 and accompanying text.

148. See *supra* notes 9-11, 36 and accompanying text.

149. U.S. Const. amend. V; *id.* amend. XIV; see *Meachum v. Fano*, 427 U.S. 215, 223-24 (1976). See *supra* note 133.

150. See *Meachum v. Fano*, 427 U.S. 215, 223-29 (1976); L. Tribe, *supra* note 1, §§ 10-10 to -11; Glennon, *Constitutional Liberty and Property: Federal Common Law and Section 1983*, 51 S. Cal. L. Rev. 355, 359-63 (1978); Monaghan, *Of "Liberty" and "Property,"* 62 Cornell L. Rev. 405, 429-34, 442-43 (1977). Justice Stevens criticized the majority in *Meachum* for unduly limiting the concept of liberty and recommended a natural law approach. See *Meachum*, 427 U.S. at 230 (Stevens, J., dissenting).

151. See *supra* note 129 and accompanying text.

pauperis prisoners does not interfere with this fundamental right.¹⁵² Therefore, no procedural due process rights are triggered.

D. *Explanation*

The simple resolution of the three constitutional issues is disturbing—indeed, the issues were almost trivial. This result is not due to happenstance. In cases involving unequal treatment, the Supreme Court has focused on a fundamental rights approach, not a suspect classification approach. Had the Court recognized indigency as a suspect classification, different treatment of in forma pauperis plaintiffs would probably violate equal protection, and the problem of how to define a fundamental right of access to the courts would be bypassed.¹⁵³ But because indigency is not recognized as a suspect classification,¹⁵⁴ the search for equality focuses on the identification of fundamental rights, whether under equal protection or substantive due process.¹⁵⁵

The present Supreme Court, however, does not adhere to an egalitarian approach in its definition of fundamental rights—the Court is willing to grant minimal protection, not equal protection, to indigents.¹⁵⁶ Therefore, the Court has defined the fundamental right of access narrowly, focusing on the “meaningfulness” of the access and has refused to recognize a fundamental right of equal treatment in the courts, even in criminal cases.¹⁵⁷ Consequently, the three constitutional issues were easily resolved.¹⁵⁸

CONCLUSION

The federal in forma pauperis statute allows indigent persons to proceed in the federal courts, yet further provides that courts can dismiss “frivolous” actions. A “frivolous” action lacks reasonable basis in law or fact. A district court may follow either a one step or two step procedure when processing an in forma pauperis complaint. Under the one step procedure, the court considers both financial eligibility and the frivolous-

152. See *supra* text accompanying notes 133-39.

153. See generally Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972) (discussing the evolution of equal protection analysis from the Warren Court to the Burger Court).

154. See *supra* note 145.

155. See generally Ely, *Foreward: On Discovering Fundamental Values*, 92 Harv. L. Rev. 5 (1978) (discussing the possible sources of fundamental rights).

156. See *Harris v. McRae*, 448 U.S. 297, 322-23 (1980); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973). Professor Tribe has extensively developed and discussed this concept in his treatise on constitutional law. L. Tribe, *supra* note 1, §§ 16-33, -50, -56 to -57. For a discussion of the transition from the Warren Court to the Burger Court and the consequent problem of the intertwining of suspect classifications and fundamental rights, see Porter, *Rodriguez, The “Poor” and the Burger Court: A Prudent Prognosis*, 29 Baylor L. Rev. 199, 210-14 (1977).

157. See *Ross v. Moffitt*, 417 U.S. 600, 608-16 (1974); *Douglas v. California*, 372 U.S. 353, 356-57 (1963).

158. See *supra* text accompanying notes 129-52.

ness of the complaint before granting in forma pauperis status and filing the complaint. Under the preferred two step procedure, a court grants in forma pauperis status based solely on financial eligibility. The court considers the frivolousness of the complaint only after it grants in forma pauperis status and files the complaint. Further, a court can sua sponte dismiss a frivolous complaint without issuing and serving process on the defendant. Before dismissal, however, the court should notify the plaintiff of the deficiencies of the complaint and should allow the plaintiff to amend the complaint, unless its deficiencies cannot be cured.

By following these suggestions, district courts will lessen the burden caused by the enormous number of frivolous in forma pauperis complaints. Yet, the courts will be forced to examine the complaints sufficiently to assure that meritorious claims will not be prematurely dismissed. Any further solution of the in forma pauperis problem must be legislative. The recognition that many of the policy factors discussed in this Article are especially relevant to prisoners suggests a possible legislative approach: the enactment of two in forma pauperis statutes—one for prisoners and one for all other indigent plaintiffs. The prisoners statute could grant the district courts the discretion necessary to maintain control over the burgeoning prisoner civil rights caseload of the federal courts. The other statute could grant other indigent plaintiffs the same procedural rights as paying plaintiffs. Ideally, Congress should provide for mandatory appointed counsel for any in forma pauperis plaintiff—whether a prisoner or not—whose complaint is not frivolous.¹⁵⁹ Thus, an indigent plaintiff would actually have a reasonable chance for success on the merits of a meritorious claim. Moreover, any appearance of judicial impropriety would be undermined. The initial screening of frivolous complaints would not appear merely as a means for district courts to sweep the poor from their dockets. Rather, the screening would be a means of identifying those complaints worthy of further serious consideration. Only then would the federal courts be truly open to the poor.

159. This solution has been suggested by others. See Duniway, *supra* note 2, at 1284-87; Turner, *supra* note 8, at 652. Section 1915(d) already provides for the discretionary appointment of counsel, 28 U.S.C. § 1915(d) (1982), but this power is rarely used. Cf. *United States v. McQuade*, 647 F.2d 938, 940 (9th Cir. 1981) ("Motions for appointment of counsel under section 1915 are addressed to the sound discretion of the trial court and are granted only in exceptional circumstances."), *cert. denied*, 455 U.S. 958 (1982).

