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PRISONERS' RIGHTS

Estelle v. Gamble, 97 S. Ct. 285 (1976).
Jones v. North Carolina Prisoners Labor Union Inc., 97 S. Ct. 2532 (1977).
Bounds v. Smith, 430 U.S. 817 (1977).

The United States Supreme Court last Term added *Estelle v. Gamble*,[1] *Jones v. North Carolina Prisoners' Labor Union, Inc.*,[2] and *Bounds v. Smith*[3] to the growing body of case law dealing with prisoners' rights. While those cases raised diverse issues and were analytically distinct, as a group they indicate that the Court is becoming less willing to intervene between prisoners and prison administration to vindicate inmate claims of constitutional violations. The rights examined in the prison context included freedom of speech and association, freedom from cruel and unusual punishment, and the right of access to the courts. Ironically, access to the courts has been greatly expanded while the other rights have suffered.

CRUEL AND UNUSUAL PUNISHMENT

In *Estelle v. Gamble*, an inmate of a Texas penitentiary filed a *pro se* complaint under 42 U.S.C. § 1983[4] claiming that inadequate medical care he received at the institution constituted cruel and unusual punishment in violation of the eighth amendment.[5] The complaint named the director of the Texas Department of Correction, the warden of the prison, and the chief prison medical officer as defendants. The Supreme Court, in an opinion by Justice Marshall, held that deliberate indifference to the serious medical needs of prisoners violates the eighth amendment. However, the Court did not find Gamble's allegations sufficient to state a claim of such a violation.

Gamble allegedly suffered a serious back injury while on his prison job. Several doctors examined him at various times over a three-month period. The doctors failed to adequately diagnose Gamble's back injury and responded to his complaints by prescribing pain pills and muscle relaxants. The doctors also failed to detect his high blood pressure, although he was eventually treated for that condition. Despite continuing pain, Gamble was ordered back to work. When he refused, prison officials imposed various disciplinary measures including solitary confinement. He also alleged that prison officers interfered with the treatment he did receive.[6]

The District Court for the Southern District of Texas in an unpublished opinion dismissed the complaint for failure to state a claim upon which relief could be granted.[7] The Court of Appeals for the Fifth Circuit reinstated the complaint[8] on the grounds that the treatment

[1] 429 U.S. 97 (1976).
[2] 97 S. Ct. 2532 (1977).
[3] 430 U.S. 817 (1977).
[4] 429 U.S. at 98. 42 U.S.C. § 1983 (1970) provides:
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[5] The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The ban against cruel and unusual punishments was held to be applicable to the states through the due process clause of the fourteenth amendment in Robinson v. California, 370 U.S. 660 (1962).

[6] Gamble alleged that during one period of solitary confinement he complained of chest pains and "blank outs" and requested to see a doctor. This request was not granted for almost 12 hours. He was then examined and hospitalized. A doctor diagnosed an irregular heart rhythm and placed him on medication. Gamble returned to administrative segregation two days later. The next day he again had chest pains and requested to see a doctor. His request was denied. He repeated his request the next day and was again denied medical attention. 429 U.S. at 101.

Gamble waived all claims with regard to the treatment received for his heart and high blood pressure conditions: "[H]is complaint is 'based solely on the lack of diagnosis and inadequate treatment of his back injury.'" *Id.* at 107 (quoting Response to Petition for Certiorari at 4).

[7] 516 F.2d 937, 938 (5th Cir. 1975).

[8] *Id.*

was so wholly inadequate that it amounted to cruel and unusual punishment. The court found the treatment inadequate because it was aimed only at relieving pain instead of curing the injury.[9] It noted the absence of basic diagnostic techniques such as X-ray examination to support its conclusion that no effort had been made to determine the nature and severity of Gamble's injury.[10]

Prison authorities appealed, and the Supreme Court granted certiorari.[11] The Supreme Court reversed the court of appeals decision pertaining to the medical personnel. It vacated that portion of the decision directed to correctional officials and remanded the case to the court of appeals with instructions to determine whether a claim had been stated against them.

The Court briefly reviewed the history of the constitutional ban of cruel and unusual punishments. Although originally intended to proscribe only such "barbarous" forms of punishment as death by torture,[12] the ban has more recently been held to proscribe all punishments which "involve the unnecessary and wanton infliction of pain."[13] The Court concluded that failure to provide adequate medical care might fall under this definition since even minor cases "may result in pain and suffering which no one suggests would serve any penological purposes."[14] The Court elaborated:

> [D]eliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain" . . . proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.[15]

The Court emphasized that "deliberate indifference" does not encompass medical malpractice and mere negligence. These do not become "constitutional violation(s) merely because the victim is a prisoner."[16]

The Court referred to *Louisiana ex rel. Francis v. Resweber*[17] where it held that it was not cruel and unusual punishment to subject a condemned prisoner to a second attempt at electrocution after an accidental power failure had miscarried the first.[18] By analogy, the *Gamble* Court concluded, "in the medical context, an inadvertent failure to provide medical care cannot be said to constitute a 'wanton infliction of unnecessary pain.' "[19] The reference to *Resweber* clearly indicates that "deliberate indifference" describes a degree of misconduct well beyond accidental mistreatment.

The Court noted that the allegations of Gamble's *pro se* complaints were to be construed liberally, as required by *Haines v. Kerner*.[20] In *Haines*, the Court held unanimously that such allegations, "however inartfully pleaded,"[21] were to be held to "less stringent standards than formal pleadings drafted by lawyers."[22] Dismissal of a *pro se* complaint was held proper only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[23]

The Court ruled that Gamble's allegations concerning medical personnel were insufficient to state a constitutional claim. Since Gamble had been examined and treated frequently by medical officers, his complaint raised at most a claim of medical malpractice not cognizable under § 1983.[24] The Court did not rule on the sufficiency of the allegations against the correctional officials.[25]

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[9] *Id.* at 941.

[10] *Id.*

[11] 424 U.S. 907 (1976).

[12] 429 U.S. at 102 (quoting Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839, 842 (1969)).

[13] 429 U.S. at 103 (quoting Gregg v. Georgia, 428 U.S. 153, 172-73 (1976) (plurality opinion)).

[14] 429 U.S. at 103.

[15] *Id.* at 104-05 (footnotes and citation omitted) (quoting Gregg v. Georgia). The Court illustrated the "deliberate indifference" standard in footnote references to various cases in which the allegations of the complaint were sufficient to raise a constitutional claim for inadequate medical care. *Id.* at 103-04 nn.10-12.

[16] 429 U.S. at 106.

[17] 329 U.S. 459 (1947).

[18] In a plurality opinion, the Court in *Resweber* ruled that a second attempt to execute the condemned man would not be cruel and unusual punishment because the miscarriage of the first had been an "unforeseeable accident." *Id.* at 464.

[19] 429 U.S. at 105 (quoting Gregg v. Georgia).

[20] 404 U.S. 519 (1972).

[21] *Id.* at 520.

[22] *Id.*

[23] *Id.* at 520-21.

[24] 429 U.S. at 107. For text of § 1983, see note 4 *supra*.

[25] The Court's reasons for remanding rather than deciding the case on the merits are open to speculation. However, the decision to remand significantly

Justice Stevens filed the only dissenting opinion in *Gamble*.[26] He did not quarrel with either "the way this area of the law has developed thus far, or with the probable impact of this opinion."[27] Rather, he objected to the Court's application of *Haines* and to the formulation of the "deliberate indifference" standard.[28]

Justice Stevens accused the Court of paying lip service to *Haines* while abandoning its principle. He maintained that *Haines* required the Court to draw the inference that the health care delivery system which spawned Gamble's treatment might be wholly inadequate to meet prisoners' needs.[29] Prison officials should be required to produce some evidence that Gamble had not been a victim of that system.[30]

Stevens objected to the "deliberate indifference" standard because "the Court improperly attach[ed] significance to the subjective motivation of the defendant as a criterion for determining whether cruel and unusual punishment has been inflicted."[31] He concluded that subjective motivation might determine the appropriate remedy in a case, but that violation of the constitutional standard must turn on the character of the punishment inflicted.[32]

The Supreme Court clearly indicated in *Gamble* that the liberal construction requirements of *Haines* will not be adhered to in the prison context. A prisoner's *pro se* complaint will not always be given the benefit of every doubt. By establishing the high standard of "deliberate indifference" the Court has ensured that few prisoners will be able to claim that inadequate medical care constitutes cruel and unusual punishment.

Prisoners' First and Fourteenth Amendment Rights

In *Jones v. North Carolina Prisoners' Labor Union, Inc.*, prison inmates brought suit under 42 U.S.C. § 1983[33] challenging North Carolina Department of Correction regulations which prohibited the activities of an inmate labor union. The United States Supreme Court, in an opinion written by Justice Rehnquist, held that the regulations did not violate the prisoners' first or fourteenth amendment rights.

The North Carolina Prisoners' Labor Union [the Union] was incorporated in 1974 for the purpose of establishing a union at every prison facility in the state. The Union sought to improve working conditions through collective bargaining and to resolve inmate grievances.[34] Within four months over two thousand inmates from forty separate facilities had become members.[35]

Although the State permitted individual membership in the Union, it sought to prohibit organized Union activities. The Department of Correction promulgated regulations barring Union meetings, bulk mailings of Union materials to inmates and membership solicitation.[36]

undermined any potential for the Court's ruling to establish a definitive standard for the lower courts to apply in weighing claims of deprivation of medical care against guards and other non-medical personnel. The cases cited to illustrate the "deliberate indifference" standard for prison officials involve conduct so outrageous as to border on malice, and in each case serious bodily injury was inflicted. *See* 429 U.S. at 103-04 nn.10-12 for list of cases. Whether the Court meant to limit claims to such extreme situations is unclear.

[26] 429 U.S. at 108-17.

[27] *Id.* at 108.

[28] Justice Stevens also questioned the wisdom of the grant of certiorari. He noted that by the Court's own admission the circuits were in general agreement as to the constitutional standard to be applied. *Id.* at 115.

[29] *Id.* at 110-12.

[30] Justice Stevens noted that this might be "another instance of judicial haste which in the long run makes waste." *Id.* at 113 (quoting Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944)). He observed:

> Presumably, the Court's remand does not bar Gamble from pursuing these charges [stemming from his months in solitary confinement without medical care], if necessary through filing a new complaint or formal amendment of the present complaint. The original complaint also alleged that prison officials failed to comply with a doctor's order. . . . Gamble's medical condition is relevant to all these allegations. It is therefore probable that the medical records will be produced and that testimony will be elicited about Gamble's medical care. If the evidence should show that he in fact sustained a serious injury and received only *pro forma* care, he would surely be allowed to amend his pleading to reassert a claim against one or more of the prison doctors.

Id. at 114 n.8.

[31] *Id.* at 116.

[32] *Id.*

[33] 97 S. Ct. 2532. For text of § 1983, see note 4 *supra*.

[34] *Id.* at 2536 n.1. North Carolina law prohibits collective bargaining with prison inmates with respect to pay, hours of employment and terms of incarceration under N.C. Gen. Stat. § 95-98 (1975).

[35] 97 S. Ct. at 2536.

[36] *Id.*

The Union brought suit in the District Court for the Eastern District of North Carolina[37] to enjoin enforcement of the regulations. It also sought declaratory relief and damages. The Union claimed that the regulations violated its members' and its own rights of free speech and association.[38] It also charged that the regulations denied them equal protection of the law.[39]

The district court held the regulations unconstitutional. It relied on *Pell v. Procunier*,[40] where the Supreme Court stated that "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."[41] The district court reasoned that if the penal system did not find individual membership to be a threat to institutional objectives, prohibiting inmate solicitation for membership "borders on the irrational."[42]

Using the traditional balancing approach to first amendment questions the court held that prison officials had failed to justify the restrictions on inmate speech and association. It relied on *Procunier v. Martinez*[43] for the standard of review of first amendment questions in the prison context. In *Martinez* the Supreme Court stated, "[T]he limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved."[44] The court found that prison authorities failed to demonstrate that the Union constituted a present or imminent danger to any legitimate objectives of the prison system. It noted that the corrections authorities:

> [S]incerely believe that the very existence of the Union will increase the burdens of administration and constitute a threat of essential discipline and control. They are apprehensive that inmates may use the Union to establish a power bloc within the inmate population which could be utilized to cause work slowdowns or stoppages or other undesirable concerted activity.[45]

However, the court found that there was enough authority[46] indicating the beneficial nature of such organizations that it could form "no firm conviction that an association of inmates is necessarily good or bad."[47] The court concluded that the prison administrators' undifferentiated fear of prisoners' unions was insufficient justification for the restriction on prisoners' rights of speech and association.

The prohibitions against meetings and bulk mailings were invalidated on equal protection grounds. Since the Jaycees and Alcoholics Anonymous received such privileges, prison authorities could not deny them to the Union without demonstrating that the Union posed a threat to prison objectives.[48] The court ob-

[37] 409 F. Supp. 937 (E.D.N.C. 1976). A three-judge panel was convened pursuant to 28 U.S.C. §§ 2281 & 2284 (1970).

[38] *Id.* at 2537.

[39] *Id.*

[40] 417 U.S. 817 (1974). In *Pell*, prison inmates and news media challenged a California Department of Correction regulation which prohibited media interviews with individually named inmates. The Court upheld the dismissal of the media plaintiffs' complaint and held that the regulation did not violate inmate first amendment rights because it only affected the mode of communication and not the content.

[41] *Id.* at 822.

[42] 409 F. Supp. at 943.

[43] 416 U.S. 396 (1974). In *Martinez*, inmates challenged a mail censorship regulation which forbade inmates to send letters which "unduly complain" or "magnify grievances." *Id.* at 399 & n.2. The Court held that the regulation was overly broad and did not further any legitimate governmental objective. *Id.* at 415.

[44] *Id.* at 413.

[45] 409 F. Supp. at 942.

[46] The court referred to P. KEVE, PRISON LIFE AND HUMAN WORTH (1974), and to affidavits by Fred Morrison, Jr. and James W. Mullen. Keve is Director of Adult Corrections for the State of Delaware and served as Commissioner of Corrections for Minnesota. Morrison is Executive Director of the North Carolina Inmate Grievance Commission as well as being a member of the Legislative Commission on Sentencing, Criminal Punishment, and Rehabilitation. Mullen is warden of the Rhode Island Adult Correctional Institution, where an inmate association is active.

[47] *Id.* at 943.

[48] The district court said:

> In a free society, outside the walls, it is clear that government may not pick and choose depending upon its approval or disapproval of the message or purpose of the group. . . .
>
> The question is more difficult in the prison context, but we are inclined to think that the same principle applies except where the activity proscribed is shown to be detrimental to proper penological objectives, subversive to good discipline, or otherwise harmful. . . . [T]here is nothing in this record to support a finding of present danger to security and order. Absent such an indication, we hold that the defendants must accord to the Union and the inmate mem-

served that the authorities could, of course, regulate the time, place, and manner of Union activities, as well as monitor meetings. Moreover, if the Union should prove a threat to security, prison officials could "put down the Union and its adherents to whatever extent may be necessary . . . ."[49]

The Supreme Court granted direct review on appeal by the North Carolina prison authorities. In a six–three decision,[50] the Court reversed the district court and held that the regulations did not violate the first and fourteenth amendment rights of the Union or its members. The Court criticized the district court for failing to give "appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement."[51] The Court noted that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."[52] Emphasizing the traditional "hands-off" attitude of the federal judiciary,[53] the Court said that any such limitations must be considered in the context of the "wide-ranging deference to be accorded the decisions of prison administrators."[54] It strongly disagreed with the district court's belief that prison authorities undermined the credibility of their fears by permitting individual membership in the Union. The lower court had

> considerably overstate[d] what appellants' concession as to pure membership entails. Appellants permitted membership because of the reasonable assumption that each individual prisoner could believe what he chose to believe, and that outside individuals should be able to communicate ideas and beliefs to individual inmates. Since a member *qua* member incurs no dues or obligations—a prisoner apparently may become a member simply by considering himself a member—this position simply reflects the concept that thought control, by means of prohibiting beliefs, would not only be undesirable but impossible.[55]

The toleration of individual membership, therefore, did not "border on the irrational." Prison authorities' reasonable belief that the Union posed a threat to security justified the restrictions on inmates' first amendment rights and the different treatment accorded the Union and other groups operating in the prisons.

Addressing the specific claims presented, the Court stated that "First Amendment free speech rights [were] barely implicated in this case,"[56] and that "[a]n examination of the potential restrictions on speech or association that have been imposed by the regulations under challenge, demonstrate [*sic*] that the restrictions imposed are reasonable, and are consistent with the inmates' status as prisoners and with the legitimate operational considerations of the institution."[57]

The Court held that the prohibition on membership solicitation did not violate the first amendment. It concluded that solicitation involved "more than the simple expression of . . . the advantages or disadvantages of a Union or its views; it is an invitation to collectively engage in a legitimately prohibited activity."[58] Therefore, the control of solicitation was seen to be a reasonable and necessary means of controlling organized activity of the Union.

Since only *bulk* mailings were prohibited, there was no significant infringement on inmate free speech.[59] Material sent first class to

bers the same privileges accorded other organizations of inmates—neither more nor less. 409 F. Supp. at 944–45 (citation omitted).

[49] *Id.* at 944.

[50] Chief Justice Burger and Justices Stewart, White, Blackmun, and Powell joined in the opinion written by Mr. Justice Rehnquist. Chief Justice Burger filed a concurring opinion. Justice Stevens filed an opinion concurring in part and dissenting in part. Justice Marshall filed a dissenting opinion in which Justice Brennan joined.

[51] 97 S. Ct. at 2538.

[52] *Id.* (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)).

[53] The Court's recent decisions prompted speculation that the "hands-off" attitude was no longer viable. *See, e.g.*, Fox, *The First Amendment Rights of Prisoners*, 63 J. CRIM. L.C. & P.S. 162 (1972), noted by Justice Marshall, 97 S. Ct. at 2545 (Marshall, J., joined by Brennan, J. dissenting).

[54] 97 S. Ct. at 2538.

[55] *Id.* at 2539–40.

[56] *Id.* at 2540.

[57] *Id.*

[58] *Id.* at 2541.

[59] The Court said that "[w]hile the District Court relied on the cheaper bulk mailing rates in finding an equal protection violation . . . , it is clear that losing these cost advantages does not fundamentally implicate *free speech* values." *Id.* at 2541 (emphasis in original, citation omitted). The Court relied on the availability of "other avenues of outside informational flow by the Union." *Id.*

individual inmates was not prohibited.[60] However, if prison authorities had sought to forbid individual mailings of Union materials on the basis of the "no solicitation" rule, they would be acting within permissible bounds. As the Court stated, "[C]learly, if the appellants are permitted to prohibit solicitation activities, they may prohibit solicitation activities by means which use the mails."[61]

The Court recognized that the right of association was "more directly implicated"[62] than that of free speech, but ruled that the prison authorities' fears justified the restriction. Moreover, the Court held that the right of association "may be curtailed whenever the institution's officials, in the exercise of their informed discretion, reasonably conclude that such associations . . . possess the likelihood of disruption to prison order or stability, or otherwise interfere with the legitimate penological objectives of the prison environment."[63]

Most importantly, with respect to all the first amendment claims, the Court emphasized that the burden was *not* on the prison authorities to prove that their perception of danger was correct. "It is enough to say that they have not been conclusively shown to be wrong in this view."[64] The Court found that the prison officials' fears were reasonable and that the challenged regulations were sufficiently narrow. It did not consider the district court's suggestion that a less onerous means of protecting prison interests was available through time, place, and manner regulations.

The Court rejected the equal protection claims on the basis of *Greer v. Spock*.[65] There the Court held that a military base's refusal to allow political groups to conduct activities did not violate equal protection even though the base allowed other civilian groups to sponsor programs. Since a military base is not a "public forum," authorities could make reasonable distinctions among groups insofar as their activities affected military objectives. In *Jones* the Court declared that a prison was no more a "public forum" than a military base. Thus, prison officials "need only demonstrate a rational basis for their distinctions between organizational groups."[66]

Justice Marshall, in a dissenting opinion,[67] criticized the Court for abandoning traditional first amendment analysis. By subjecting restrictions on inmates' first amendment privileges to minimal scrutiny, the Court doomed prisoners to a gradual erosion of all constitutional rights. He concluded that, even in the prison context, restrictions on such rights must be justified as a necessary means of furthering an important state interest. The prison authorities had not met that burden.[68]

Jones marks a significant shift in the Court's attitude toward the judiciary's role in prison reform. The Court has re-established a "hands-off" policy in prison affairs. The degree of deference given to prison administrators and

[60] The Court noted that the district court believed that the Union materials could not be mailed to individual inmates if the materials solicited membership. *Id.* at n.8.

[61] *Id.*

[62] *Id.* at 2541.

[63] *Id.*

[64] *Id.* at 2542.

[65] 424 U.S. 828 (1976).

[66] 97 S. Ct. at 2543. The Court thus established minimal rationality as the standard of review for prison regulations claimed to violate inmates' first and fourteenth amendment rights.

[67] *Id.* at 2545. (Marshall, J., joined by Brennan, J., dissenting).

[68] Marshall sharply criticized the Court's twisting of the *Pell* standard, pointing out that few, if any, restrictions would fail to be "consistent with the inmates' status as prisoners." *Id.* at 2546 (quoting 97 S. Ct. at 2540 (majority opinion)). *Pell* said that prisoners retained all rights consistent with their status, 417 U.S. at 822. Marshall also questioned the degree of deference which should be accorded the decisions of prison administrators. He pointed out that the political nature of prison administration would lead inevitably toward more restrictions instead of less:

> A warden seldom will find himself subject to public criticism or dismissal because he needlessly repressed free speech; indeed, neither the public nor the warden will have any way of knowing when repression was unnecessary. But a warden's job can be jeopardized and public criticism is sure to come should disorder occur. Consequently, prison officials inevitably will err on the side of too little freedom.

97 S. Ct. at 2546 (Marshall, J., dissenting).

In support of his assertion that the Court must regard prison administrators as no more than an important source of expert information, Marshall noted that the Court had adopted precisely that stance in other cases in the last decade. *E.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974); Cruz v. Beto, 405 U.S. 319 (1972); Johnson v. Avery, 393 U.S. 483 (1969); Lee v. Washington, 390 U.S. 333 (1968). In his opinion, the Court's decision in *Jones* effectively closed the door to all possible prison reform through judicial intervention.

minimal scrutiny of their decisions bodes ill for future prisoner claims of constitutional violations.

Access to the Courts

In *Bounds v. Smith* prison inmates in North Carolina brought suit under 42 U.S.C. § 1983[69] claiming that the State's failure to provide adequate access to legal materials and assistance violated their first and fourteenth amendment right of access to the courts.[70] The Supreme Court, in an opinion by Justice Marshall, held that the constitutional right of meaningful access to the courts[71] required prison authorities to establish prison law libraries for inmate use or to provide an alternate form of legal assistance.

The District Court for the Eastern District of North Carolina, in an unpublished opinion, granted summary judgment[72] for the plaintiffs on the basis of *Younger v. Gilmore*.[73] In *Gilmore*, the Supreme Court held *per curiam* that the constitution required prison authorities to provide inmates with access to legal materials or assistance. The district court in *Bounds* found that the State's only prison law library was "severely inadequate" and that no other form of legal assistance was provided to inmates.[74] The court ordered the North Carolina Department of Correction to design a plan which would meet the legal needs of its inmates. The court explicitly declined to mandate the provision of law libraries, noting that an alternative plan utilizing legal assistance workers would also be acceptable. The Department of Correction developed a library plan geared toward its de-centralized prison system. Inmates would be transported to seven centrally-located law libraries to do their legal research. Approximately 350 inmates would be able to use the libraries each week. The plan established an appointment system so that the maximum waiting period for use of the libraries would be no more than three or four weeks. Inmates under court deadlines apparently would receive special consideration. In addition, the State planned to train inmates to assist others with research and typing. The proposed libraries included legal reference works suggested by the American Correctional Association, American Bar Association, and the American Association of Law Libraries.[75]

The district court approved the plan with only minor changes.[76] The State then applied

[69] 430 U.S. at 817. For text of § 1983, see note 4 *supra*. This action was a consolidation of three suits.

[70] 538 F.2d 541, 542 (4th Cir. 1975).

[71] The Supreme Court based this right on the fourteenth amendment and did not consider the first amendment claim.

[72] 430 U.S. at 818.

[73] 404 U.S. 15 (1971). In *Younger v. Gilmore*, the Supreme Court affirmed per curiam the decision of the District Court for the Northern District of California in *Gilmore v. Lynch*, 319 F. Supp. 105 (D.C.N. Cal. 1970). Prison inmates in *Gilmore* challenged the sufficiency of law libraries provided for inmate use claiming that the resources were so inadequate that the inmates' right of access to the courts was substantially impaired. The prison authorities maintained that they were under no obligation to furnish any legal materials and that resources made available were not subject to judicial criticism. The district court rejected this assertion and found the legal materials completely inadequate to meet the legal needs of the prisoners. California, in an effort to establish uniformity among its prison libraries, had promulgated a list of materials which were to be kept at each facility. All other law books were to be destroyed. The list included various California codes, none of them annotated, and the rules of various courts. However, no state or federal digests or reporters were included, nor were there any volumes of the United States Code. No sources of current information, such as U.S. Law Week, were included. The plan called for the resources of the prison libraries to be supplemented by the California State Library. However, the state library reserved only one set of state and federal reporters for inmate use, and many volumes had been stolen.

The district court reasoned that, even though a petition for relief from a federal court did not require citations or sophisticated legal arguments, it was nonetheless important for inmates to have a current source of information. Such information would allow the inmate to determine whether he had a claim, what facts he must allege, and to what court he must address his petition. To deny access to this information impermissibly abridged the right of access to the courts. The court was astute to point out that law libraries were not the only solution to the problem and suggested that California might implement a program utilizing public defenders, law students, or other legal workers to assist inmates. 319 F. Supp. at 110–11.

[74] 430 U.S. at 818.

[75] *Id.* at 819–20 n.4. The Supreme Court noted that some significant works had been omitted. The prisoners urged the Court to require that the list of materials be expanded and that a circulating library be established.

[76] 430 U.S. at 820. The Court ordered that more copies of the U.S.C.A. Habeas Corpus and Civil Rights Act volumes be made available and that advance sheets to reporters should be retained to build up a duplicate set of each.

for a grant from the Law Enforcement Assistance Agency (LEAA) to implement its proposal and simultaneously appealed the district court ruling. The inmates also appealed the ruling insofar as the State was not required to furnish a law library at each prison or legal assistance to inmates. The Court of Appeals for the Fourth Circuit affirmed the district court decision.[77]

The Supreme Court granted certiorari on the State's petition for review.[78] In a six–three[79] decision, the Court affirmed the court of appeals decision, declining to overrule *Younger v. Gilmore*.

The Court based its decision on *Ex parte Hull*,[80] which established beyond doubt that there was a federal constitutional right of access to the courts.[81] It also noted that recent decisions have reaffirmed that right and have imposed substantial financial burdens on the states to protect it. States have been required to provide free transcripts,[82] waive docket fees,[83] and, in some instances, provide counsel.[84] The Court concluded that these decisions guaranteed not only a naked right of access to the courts but also a right of meaningful access.

The Department of Correction argued that allowing prisoners to assist one another in the preparation of legal documents, as required by *Johnson v. Avery*[85] and *Wolff v. McDonnell*,[86] fulfilled its obligation to ensure inmate access to the courts. The Supreme Court rejected this argument declaring that in *Johnson* and *Wolff* "we did not attempt to set forth the full breadth of the right of access."[87] The question of legal

[77] 538 F.2d 541 (4th Cir. 1975). The court of appeals found that the plan discriminated against women inmates and ordered that the discrimination be eliminated. 538 F.2d at 545. The court did not cite any specific authority for its affirmance. However, it did say that *Younger v. Gilmore* did not require prisons to furnish counsel to inmates at the complaint-writing stage of their litigation.

[78] 425 U.S. 910 (1976). The grant of certiorari was apparently based on the Court's desire to clarify *Younger v. Gilmore*, where it issued only a two-paragraph per curiam opinion. The Court in *Bounds* noted, however, that the decision in *Gilmore* was unanimous and rendered after full briefing and oral argument. 430 U.S. at 829.

[79] Justices White, Blackmun, Powell, Brennan, and Stevens joined in the opinion of Justice Marshall. Justice Powell also filed a concurring opinion. Chief Justice Burger filed a dissenting opinion. Justices Stewart and Rehnquist filed dissenting opinions in which Chief Justice Burger joined.

[80] 312 U.S. 546 (1941).

[81] 430 U.S. at 821–22. In *Hull*, the Court held unconstitutional a prison regulation that required all legal documents to be submitted to the "legal investigator" of the Parole Board. The regulation provided that the investigator determine that a petition was "well-drawn" before it could be submitted to the appropriate court. The Court held that:

> [T]he state and its officers may not abridge or impair petitioners' right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone.

312 U.S. at 549.

[82] Gardner v. California, 393 U.S. 367 (1969); Draper v. Washington, 372 U.S. 487 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[83] Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959).

[84] Argersinger v. Hamlin, 407 U.S. 25 (1972); Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963).

[85] 393 U.S. 483 (1969). In *Johnson*, an inmate of a Tennessee correctional facility challenged a prison regulation which prohibited inmates from assisting one another in the preparation of legal documents. No other form of legal assistance was provided to inmates at the initial stage of preparing their claims. Johnson asserted that the rule impaired the right of access to the courts. Prison authorities attempted to justify the regulation on the basis of their interest in maintaining prison discipline and the State's interest in regulating the practice of law. The Supreme Court struck down the regulation, holding that it impermissibly impaired the right of access to the courts by illiterate and functionally illiterate inmates. The Court further held that while it was not necessary to allow "jail-house lawyers" to function, if the State provided no alternative means of legal assistance to inmates unable to prepare their own claims, it could not prohibit inmates from assisting one another. Prison authorities remained free to regulate such assistance with regard to time, place, and manner.

[86] 418 U.S. 539 (1974). In *Wolff*, inmates challenged regulations which provided for an inmate Legal Assistant to help inmates prepare petitions for writs of habeas corpus and prohibited other inmates from functioning as "jail-house lawyers." The inmates argued that *Johnson v. Avery* prevented the State from imposing such a ban. The inmates further argued that, if the ban is to be upheld, the inmate Legal Assistant must also be able to help prepare civil rights claims. The Court held the ban would be permissible with that proviso under the "alternative" approach of *Johnson*, and remanded the case to the district court for findings as to whether the Legal Assistant would be available to inmates for the preparation of both habeas corpus and civil rights actions.

[87] 430 U.S. at 824.

materials was not before the Court in either of those cases.[88]

The Department of Correction further argued that since Rule 8 of the Federal Rules of Civil Procedure[89] only required that a pleading contain a brief statement of the claim and its basis, legal reference materials were totally unnecessary. The Court summarily rejected this argument, stating that the realities of the legal system impose burdens on *pro se* plaintiffs which make the right a mere formality if access to legal resources is denied:

> Although it is essentially true, as petitioners argue, that a habeas corpus petition or civil rights complaint need only set forth facts giving rise to the cause of action . . . it hardly follows that a law library or other legal assistance is not essential to frame such documents. It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant and types of relief available. Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action.
>
> If a lawyer must perform such preliminary research, it is no less vital for a *pro se* prisoner.[90]

Although the allegations of a *pro se* pleading are construed more liberally than an attorney-prepared petition, it is necessary for the plaintiff to "set forth a nonfrivolous claim meeting all procedural prerequisites, since the court may pass on the complaint's sufficiency before allowing filing *in forma pauperis* and may dismiss the case if it is deemed frivolous."[91] Moreover, the Court deemed it important that a *pro se* plaintiff be able to respond to any citations and legal arguments which may be contained in the State's answer to his complaint.

The State argued that *Ross v. Moffitt*,[92] should be applied to limit the obligation of the State to ensure inmate access to the courts. There, the Court held that the appointment of counsel to inmates seeking discretionary appeal from their convictions was not constitutionally required. The Supreme Court, however, distinguished *Moffitt* on the grounds that an inmate seeking discretionary appeal would usually have access to pertinent transcripts and briefs filed in earlier appeals of right. Thus, he would be able to present his claims well enough for an appellate court to determine whether such an appeal should be granted. Here the Court was "concerned in large part with original actions seeking new trials, release from confinement or vindication of fundamental civil rights. Rather than presenting claims that have been passed on by two courts, they frequently raise heretofore unlitigated issues."[93] The Court concluded that the provision of law libraries or some alternate form of legal assistance for inmates was constitutionally required.

Three Justices dissented[94] on the grounds

[88] The Court also noted that its decision was supported by another right of access case, Procunier v. Martinez, 416 U.S. 396 (1974). In addition to invalidating a mail censorship regulation, the Court held that a prison regulation which barred access to prisoners by paralegals and other non-attorney legal workers unless these workers were associated with legal assistance clinics was unconstitutional. The Court reasoned that requiring attorneys to attend to every detail of an inmate's case might adversely affect the attorneys' willingness to represent inmate clients.

[89] FED. R. CIV. P. 8(a).

[90] 430 U.S. at 825-26.

[91] *Id.* at 826.

[92] 417 U.S. 600 (1974).

[93] 430 U.S. at 827.

[94] Chief Justice Burger, *id.* at 833, dissented on the grounds that there was in fact no constitutional right of access to the courts. He found at most a statutory right to collateral review of a state conviction. *See* Swain v. Pressley, 430 U.S. 384 (1977); Stone v. Powell, 428 U.S. 465 (1976). He concluded that, since the right was purely statutory in nature, "the duty of the State is merely negative; it may not act in such a manner as to interfere with the individual exercise of such federal rights. . . . [This] is, however, materially different from requiring it to provide affirmative assistance for their exercise." *Id.* at 835.

Justice Rehnquist, *id.* at 837, also found no more than a statutory right to attack a state conviction in federal court. However, his treatment of *Johnson v. Avery*, *Wolff v. McDonnell* and *Procunier v. Martinez* indicated that he recognized that the Court was concerned with something more than the federally-created right of collateral review. However, his reading of those cases differed substantially from that of the majority. He found them to:

> [D]epend on the principle that the State, having already incarcerated the convict and thereby virtually eliminated his contact with people outside the prison walls, may not further limit contacts which would otherwise be permitted simply because such contacts would aid the incarcerated prisoner in preparation of a petition seeking judicial relief from the conditions or terms of his confinement.

Id. at 838.

This is a highly questionable reading of the princi-

that the right of access was not constitutional but statutory in nature. Therefore, they insisted that there was no affirmative duty on the part of the states to assist the prisoner in asserting his statutory right to collaterally attack his conviction in federal court. None of the dissenters, however, squarely faced the problem of the indigent, *pro se* petitioner seeking to vindicate constitutional rights infringed by the correctional system.[95]

The Court's reaffirmation of the right of meaningful access to the courts guarantees prisoners the right to legal resources in preparing their claims of constitutional violations. However, the decision announced may have a serious and detrimental impact on the future treatment of *pro se* petitions. Although the Court's opinion suggests that counsel is unnecessary, it held that legal reference materials were vital for an inmate to state his claim effectively. It is disturbing to note that the Court arrived at this conclusion by drawing an analogy to what would be required of an attorney filing the same petition. It is entirely possible that, because of the increased availability to inmates of legal materials and assistance, *pro se* petitions will be held to a higher standard than in the past.

Conclusion

Gamble, *Jones*, and *Bounds* will greatly alter the relationship between prisons, prisoners, and the courts. Prisoners will have greater access to the courts to air their claims but may have no "substantive rights to assert once they get there."[96] It appears that the *pro se* petition will be held to a higher standard of sufficiency of pleadings than has traditionally been required under *Haines v. Kerner*. At the very least, the Court has effectively removed many areas of prison life from judicial scrutiny. By using the minimal scrutiny standard to judge prison regulations, the Court has turned its back on prison reform through the judiciary. In leaving the task to the legislature, the Court has abdicated its responsibility to prisoners and has reneged on its assertion that "[t]here is no iron curtain drawn between the Constitution and the prisoners of this country."[97]

ple of those cases. There was no indication that the regulations challenged there were motivated by any intent to cut prisoners off from the courts by making it more difficult for them to prepare their petitions. The Court noted that, in each case, institutional security was offered as the justification for the restrictions placed on inmates.

Justice Stewart, *id.* at 836, was less certain that the right was not constitutional, but said that in any event the remedy was inappropriate. He foresaw "the filing of pleadings heavily larded with irrelevant legalisms—possessing the veneer but lacking the substance of professional competence." *Id.*

[95] Justice Powell's concurring opinion, *id.* at 833, emphasized that the Court's decision in no way affected the types of claims which could be heard in federal court.

[96] Jones v. N.C. Prisoners' Labor Union, Inc., 97 S. Ct. at 2549 (Marshall, J., dissenting).

[97] *Id.* (quoting Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974)).