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NOTES

WHO'S AFRAID OF THE SANCTION WOLF: IMPOSING SANCTIONS ON PRO SE LITIGANTS[1]

An empty head but a pure heart is no defense.[2]

Sanctioning[3] pro se petitioners under Federal Rule of Civil Procedure 11 ("Rule 11") and other statutes has recently become less a curiosity than a trend. This trend raises the spectre of impeding pro se litigants' access to the courts, against which the Supreme Court warned years before sanctioning became common.[4]

Prior to 1983, sanctions were rarely imposed for filing frivolous claims or other abuses of the court, such as bringing claims intended to harass or coerce settlements from innocent defendants. The expansion of Rule 11,[5] as amended and interpreted, has broadened statutory interpretation concerning the imposition of sanctions against pro se litigants under other federal and state statutes.[6] Today, pro se litigants regularly face threats of sanctions.[7]

An individual's right of access to the courts is guaranteed under the first, fifth, and fourteenth amendments to the Constitution.[8] So

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[1] "If attorneys insist upon approaching this court through the woods of obfuscation, they should beware of the sanction wolf." David v. United States, 820 F.2d 1038, 1044 (9th Cir. 1987) (Anderson, J.).

[2] Thornton v. Wahl, 787 F.2d 1151 (7th Cir.), cert. denied, 479 U.S. 851 (1986).

[3] The meaning of the word "sanction" is currently in flux. William Safire has suggested that the singular noun "sanction" means "permission" but the plural, "sanctions," means "penalty." W. Safire, On Language 97 (1980). In this Note, however, "sanction" is "something that gives binding force to a law, as the penalty for breaking it." Webster's New Twentieth Century Dictionary 1603 (2d ed. 1983). As used here, a sanction supports the law, not the behavior; the verb, "to sanction," is shorthand for "to enforce the law by imposing a sanction." This usage is not uncommon in the courts, and is supported by the dictionary meaning.

[4] The Supreme Court warned against overzealous sanctions rulings in Hughes v. Rowe, 449 U.S. 5, 15 (1980) (per curiam) ("[a]n unrepresented litigant should not be punished for his failure to recognize subtle factual or legal deficiencies in his claims").

[5] See infra notes 114-50 and accompanying text.

[6] See infra notes 151-202 and accompanying text; Braley v. Campbell, 832 F.2d 1504, 1512 (10th Cir. 1987) (rejecting subjective bad faith standard for imposing sanctions under court's inherent power, or pursuant to 28 U.S.C. § 1927 or Fed. R. App. P. 38).

[7] See Tables in Part II, section B.

[8] See, e.g., Bounds v. Smith, 430 U.S. 817, 821 (1977) (prisoners have a constitutional right to meaningful access to the courts); California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510, 513 (1972) (every citizen has the right, under the first amendment, to access to the courts); *In re* Green, 598 F.2d 1126, 1127 (8th Cir. 1979) (en banc) ("It is axiomatic that no petitioner or person shall ever be denied his right to the processes of the court.") This right,

that no person is forced to incur the high costs of hiring counsel,[9] a party to a civil or criminal action may proceed pro se, without an attorney to represent him in the action.[10] Access is further protected

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however, is limited in that "no one, rich or poor, is entitled to abuse the judicial process." Hardwick v. Brinson, 523 F.2d 798, 800 (5th Cir. 1975).

[9] While some statutes allow for fee-shifting, this is generally available only for the prevailing party. Since it is seldom clear who will be the prevailing party, these statutes affect an attorney's decision to accept cases in much the same way as do contingent-fee arrangements: a plaintiff needs a fairly good claim for an attorney to take the risk of expending the necessary labor and costs. The fee-shifting statute most applicable to this Note is 42 U.S.C. § 1988 (1982), which concerns civil rights actions.

A recent trend in which defense counsel offers to settle if the plaintiff waives attorney fees under the statutes has rendered statutory fee-shifting unreliable. See generally Note, Fee as the Wind Blows: Waivers of Attorney's Fees in Individual Civil Rights Actions Since *Evans v. Jeff D.*, 102 Harv. L. Rev. 1278 (1989) [hereinafter Note, Fee as the Wind Blows] (arguing that waiver of fees in settlement defeats the purpose of the fee-shifting statutes).

[10] See Faretta v. California, 422 U.S. 806, 819 (1975) (accused in a criminal case has constitutional right of self-representation); *Green*, 598 F.2d at 1126 (every person has the right to present a valid civil claim). See also 28 U.S.C. § 1654 (1982) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel."); O'Reilly v. New York Times Co., 692 F.2d 863, 867 (2d Cir. 1982) (section 1654 is a statute of "high purpose"). A corporation, however, is not typically considered a "person" for this purpose. A corporation cannot normally appear pro se through its principal officer. *In re* Victor Publishers, Inc., 545 F.2d 285, 286 (1st Cir. 1976); Ricci v. Key Bancshares of Maine, Inc., 111 F.R.D. 369, 372 (D. Me. 1986). But see, e.g., Cal. Civ. Proc. § 87 (West Supp. 1988) (corporation may appear through any director, officer, or employee in municipal or justice court).

States may enforce the right to appear pro se by statute. See, e.g., N.Y. Civ. Prac. L. & R. § 321 (McKinney 1972 & Supp. 1988) (a party, other than a corporation, voluntary association, infant, or incompetent person, may prosecute or defend a civil action in person); id. § 1201 (McKinney 1972 & Supp. 1988) (infant or incompetent person may be represented by spouse, guardian, parent, or other person with legal custody).

Although the attitudes behind criminal court processes parallel those in civil court, the special difficulties of the pro se criminal defendant are not the primary concern of this Note. See Powell v. Alabama, 287 U.S. 45, 60-65 (1932), for a historical overview of the right of an accused criminal to present his case either himself or by counsel. In England, this right did not originally exist. Id. at 60. In the United States, however, an accused's right to have counsel has been a fundamental principle. Id. at 63-65. This entitlement was based on the litigant's ability to afford counsel. If he could not afford counsel, he did not get it. In 1963, the Supreme Court held that assistance of counsel is a fundamental right, and that counsel must be appointed for the indigent at a criminal trial and on appeal. See Gideon v. Wainwright, 372 U.S. 335 (1963) (right to assistance of counsel at criminal trial); Douglas v. California, 372 U.S. 353 (1963) (right to assistance of counsel on criminal appeal as of right). This right to counsel does not extend to requiring states to appoint counsel for indigent death row inmates' state postconviction relief. Murray v. Giarratano, 109 S. Ct. 2765 (1989).

An accused does not have an absolute right to the attorney of his choice. See Wheat v. United States, 108 S. Ct. 1692, 1697-98 (1988) (defendant's right to choose counsel is circumscribed in several important respects); United States v. Ely, 719 F.2d 902, 904-905 (7th Cir. 1983), cert. denied, 465 U.S. 1037 (1984); Burney v. State, 244 Ga. 33, 257 S.E.2d 543, 546, cert. denied, 444 U.S. 970 (1979). Nor does the right to counsel or due process extend to exempting or withholding assets from forfeiture proceedings in order to have funds to pay a defense attorney. Caplin & Drysdale v. United States, 109 S. Ct. 2646 (1989) (withholding); United States v. Monsanto, 109 S. Ct. 2657 (1989) (exempting).

Some courts have held that prisoners have a limited right to assistance in other claims

by relieving potential litigants who are indigent from prepaying the minimal filing and service fees necessary to comply with court procedures.[11]

A pro se litigant's pleading is typically held to lower drafting standards than an attorney's because the pro se litigant is presumed to have little or no legal experience.[12] This lack of expertise typically shows in the subjectivity of a pro se litigant's complaint—many a pro se litigant's suit suffers from an inability to objectively and clearly communicate the facts, let alone formulate a legal argument to support the allegations in the complaint.[13] Pro se complaints may show so little basis in the law or facts that sanctions may be—and are—imposed for frivolousness or vexatiousness under Rule 11,[14] Rule 38 of the Federal Rules of Appellate Procedure ("Rule 38"),[15] and other rules and statutes.[16] The courts have yet to develop consistent and

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which does not extend beyond providing assistance for the preparation and filing of initial pleadings. Bee v. Utah State Prison, 823 F.2d 397, 398 (10th Cir. 1987).

The flip side of the right to assistance of counsel is *Faretta*, which holds that the accused has the right to self-representation, if he has made a knowing and intelligent waiver of his right to counsel. See *Faretta*, 422 U.S. at 835; see also Connecticut v. Holloway, 38 Conn. Supp. 581, 583-84, 455 A.2d 1347, 1349 (Super. Ct. 1982) (discussing proper inquiry into waiver of right to counsel). Courts may appoint standby counsel to assist or advise a pro se defendant. See McCaskle v. Wiggins, 465 U.S. 168, 183-85 (1984); People v. Doane, 200 Cal. App. 3d 852, 246 Cal. Rptr. 366, 370 (Ct. App. 1988) (court required defendant, charged with possession of amphetamines and attempted burglary, to have legal assistance in pro se defense). In a recent New York decision, the court held that defendants' pro se motions must be considered even when the defendant is represented by counsel. People v. Renaud, 145 A.D.2d 367, 370, 535 N.Y.S.2d 985, 988 (App. Div. 1988), appeal granted, 73 N.Y.2d 985, 540 N.Y.S.2d 1019 (1989).

After a judicial inquiry, a court may deny the defendant's application to proceed pro se due to incompetency. See People v. Spencer, 153 Cal. App. 3d 931, 943, 200 Cal. Rptr. 693, 700 (Ct. App. 1984). Courts may appoint counsel over defendant's protest when it appears that he is trying to avoid trial. See Williams v. State, 169 Ga. App. 812, 815, 315 S.E.2d 42, 45 (Ct. App. 1984) (finding no error where defendant refused to participate in trial which proceeded through appointed attorney with defendant in another room).

A prison sentence—or a death penalty—is harsher than the monetary sanctions imposed in civil cases. This penalty, however, is not merely for bringing meritless claims into court or for mounting a frivolous defense, but for committing a crime. Because of the defendant's knowing and intelligent waiver of his right to counsel, the court may require the defendant to blame only himself if his pro se defense was inadequate. See *Ex parte* Ford, 515 So. 2d 48, 51 (Sup. Ct. Ala. 1987) (upholding conviction in *habeas* action where defendant, acting pro se at trial, was convicted of murder and sentenced to death), cert. denied, 108 S. Ct. 1061 (1988).

[11] 28 U.S.C. § 1915 (1982), the *in forma pauperis* ("IFP") statute. See infra notes 174-89 and accompanying text.

[12] Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam).

[13] See, e.g., Blair v. United States Treas. Dep't, 596 F. Supp. 273, 281 (N.D. Ind. 1984) ("if the plaintiffs cannot specify the defendants' wrongful conduct, then the court will not take cognizance of their claims").

[14] See infra notes 114-50 and accompanying text.

[15] See infra notes 151-73 and accompanying text.

[16] See infra notes 174-202 and accompanying text.

appropriate standards for imposing sanctions on pro se petitioners that are in keeping with a pro se litigant's first amendment rights to petition the government for redress of grievances, to have the petition read liberally, and his right to prior notification and a hearing under the due process clauses of the fifth and fourteenth amendments. These rights must be balanced against the judiciary's need to protect the courts from abuse in the form of excessive filing of frivolous or improper claims, regardless of whether they are brought pro se.

This Note describes the legal atmosphere surrounding the pro se litigant, from pleading to postverdict remedies, and argues that the decision to impose sanctions must recognize the special, protected status of pro se litigants within the system and protect their right of access to the courts. Part I explores typical pro se legal actions and the policies specific to these actions which have been formulated concerning pro se petitioners. Part II examines the statutes under which sanctions are awarded, the policies behind sanctions, and the types of sanctions imposed on pro se litigants. Part III analyzes the balance between the policies concerning pro se actions and the policies encouraging the imposition of sanctions. Part III also argues that these policies are out of balance—pro se pleading policies are lenient while sanction policies tend to be harsh. This imbalance exposes a pro se litigant to unfair risks in pressing his suit—risks of which he is seldom aware. Part IV proposes guidelines for imposing sanctions against pro se litigants. This Note concludes that careful utilization of the proposed guidelines would protect both the pro se litigant's constitutional rights and the courts' interests in restricting abusive behavior. Appendix I suggests revisions of several statutes incorporating the policies of the guidelines.

I. PRO SE CLAIMS

A pro se litigant is one who represents himself in court. "Pro se" means, literally, "for himself."[17] A pro se litigant usually does not proceed on his own because he believes he can succeed where a lawyer cannot. Typically, a party files pro se because he cannot afford counsel, cannot find an attorney willing to pursue his claim, does not wish to pay counsel more than the case itself is worth, or some combination of these factors.

Actions are more likely to be pro se when minimal procedural requirements, simplified pleadings, and a comparatively small amount

[17] Black's Law Dictionary 638 (abr. 5th ed. 1983). In some courts, the term *in propria persona* ("in one's own proper person") is used, although this term originally concerned only jurisdictional issues. Black's Law Dictionary 712 (5th ed. 1979).

of money are involved. Such actions are primarily small claims, traffic, and landlord-tenant actions in state courts,[18] as well as small tax cases in the United States Tax Court,[19] where a litigant is encouraged to represent himself. Postconviction remedies, such as *habeas corpus*[20] and similar state actions, are often commenced pro se with the court reserving discretion to appoint counsel later.[21] In practice, counsel is appointed only when the *habeas* claim is likely to be meritorious[22] and covers such complex legal issues that an untrained litigant cannot adequately represent himself.[23]

Pro se litigation is also generated when claims are difficult to prosecute, costs are high, and damage awards tend to be minimal—

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18 See, e.g., Cal. Civ. Proc. § 117.4 (West Supp. 1988) (a party, including a corporation, in small claims court must represent himself, unless the party is incarcerated or cannot speak English, in which case a person other than an attorney at law may appear for the party).

19 "A petitioner in a small tax case may appear for himself without representation . . . ." T.C.R. 174 (1982). See also T.C.R. 24(b) (a party may represent himself in any tax case).

20 28 U.S.C. § 2255 (1982) regulates federal post-conviction practice; 28 U.S.C. § 2254 (1982) regulates federal *habeas* motions for those in state custody. State prisoners may avail themselves of the writ of *habeas corpus* as a procedural means to justify federal jurisdiction to review the validity of a state conviction. Most states provide post-conviction remedies, which must be exhausted before a prisoner is entitled to federal relief. See Morosco, State Post-Conviction Remedies, in 2 Criminal Defense Techniques § 43.01 [1][d] (S. Allen, I. Rosen, D. Winston & R. Belifore eds. 1989).

Sanctions are highly unusual in *habeas corpus* cases. The only published case to date in which a Rule 11 sanction—$2000—was imposed on an attorney in a *habeas* corpus case included a vigorous dissent as to whether sanctions were appropriate. United States v. Quin, 836 F.2d 654, 658 (1st Cir. 1988) (Coffin, J., dissenting).

21 Morosco, supra note 20, § 43.01 [3][b] (counsel may be assigned or retained after pro se application for postconviction relief); Erickson, ABA Standards for Criminal Justice, in 4 Criminal Defense Techniques App. 15 (1989) (ABA Standards, Remedies §§ 3.1-3.5 for post-conviction motions include recommendations regarding the needs of prisoners preparing applications for relief pro se).

22 Counsel need not be appointed in *habeas corpus* proceedings unless necessary to afford due process. See Norris v. Wainwright, 588 F.2d 130, 133 (5th Cir.), cert. denied, 444 U.S. 846 (1979); Hopkins v. Anderson, 507 F.2d 530, 533 (10th Cir.), cert. denied, 421 U.S. 920 (1975); Kreiling v. Field, 431 F.2d 638, 640 (9th Cir. 1970).

Death penalty cases lead to special *habeas* problems. See Justice Marshall's address to the 1985 Annual Judicial Conference, Second Judicial Circuit, 109 F.R.D. 441, 443-49 (1985) (lamenting the lack of expert counsel at trial level in capital cases and the shortage of volunteer attorneys to assist indigent death-row inmates on *habeas corpus* petitions). The Supreme Court, however, recently decided that neither the eighth amendment nor the due process clause requires states to appoint counsel for indigent death-row inmates seeking state postconviction relief. Murray v. Giarratano, 109 S. Ct. 2765 (1989).

23 D. Manville, Prisoners' Self-Help Litigation Manual 366-67 (J. Boston ed. rev. 2d ed. 1983). But see Bagwell, Procedural Aspects of Prisoner § 1983 and § 2254 Cases in the Fifth and Eleventh Circuits, 95 F.R.D. 435, 462 (1982) (if an evidentiary hearing is necessary, counsel must be appointed under the Criminal Justice Act if petitioner meets the test of Habeas Rule 8(c) requiring that the necessary factual determination is not fairly supported by the record).

typically, civil rights cases.[24] Attorneys are unwilling to handle these complaints on a contingent-fee basis, which is the only form of representation the less affluent potential plaintiffs can consider. Few parties who proceed pro se have any money, let alone the thousands of dollars many private attorneys require in advance.[25] Cases brought under the Civil Rights Acts[26] and title VII[27] are therefore often litigated by pro se plaintiffs;[28] whereas prosecutions under the Racketeer Influenced and Corrupt Organizations Act ("RICO")[29] and antitrust claims are seldom brought pro se except in tandem with civil rights claims.[30]

Because an overwhelming number of pro se litigants know little or nothing about legal procedures, case law, statutory interpretation, or phrasing pleadings and motions, courts are required to construe pro se petitions liberally.[31] For example, the court may substitute the

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[24] See, e.g., Committee Report, Representation of Pro Se Civil Litigants in the Federal District Court Through the Pro Bono Panels, 43 Rec. Ass'n B. City of N.Y. 933, 940-41 (1988) [hereinafter Committee Report] (noting difficulties in obtaining pro bono assistance for civil rights cases); Eisenberg, Section 1983: Doctrinal Foundations and an Empirical Study, 67 Cornell L. Rev. 482, 529 (1982) (pattern of little or no financial recovery for § 1983 plaintiffs had only two exceptions out of 276 cases); Project, Suing the Police in Federal Court, 88 Yale L.J. 781, 813 (1979) ("infrequent and diminutive" damage awards found in Connecticut study of § 1983 police cases).

[25] While public interest organizations, such as New York's Legal Aid Society, handle some civil cases for indigents—often with a lengthy waiting list—some organizations accept only a few test cases at a time or a very small number of obviously meritorious claims in certain areas of the law. Many of these organizations only take claims where a positive outcome might break ancient barriers to relief.

[26] 42 U.S.C. §§ 1981-1988 (1982).

[27] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1982).

[28] 1987 Annual Report of the Director of the Administrative Office of the U.S. Courts 182, tab. C-2A [hereinafter 1987 Annual Report] (prisoners, usually acting pro se, brought 23,697 civil rights suits in the federal district courts in 1987; nonprisoner civil rights cases totalled 19,785 in 1987); Turner, When Prisoners Sue: A Study of Prisoner § 1983 Suits in the Federal Courts, 92 Harv. L. Rev. 610, 624 (1979) (almost all of 664 sample prisoner cases in 1978 survey were brought pro se).

[29] 18 U.S.C. §§ 1961-1968 (1982 & Supp. V 1987).

[30] The scarcity of pro se RICO and antitrust claims might also be attributed to the potential for treble damage awards, which would make a claim more attractive to attorneys.

For some pro se RICO and antitrust cases brought with civil rights actions see, e.g., Farley v. Henderson, 875 F.2d 231 (9th Cir. 1989) (antitrust and civil rights claims); Lally v. Crawford County Trust & Sav. Bank, 863 F.2d 612 (8th Cir. 1988) (RICO and civil rights claims); McCormack v. NCAA, 845 F.2d 1338 (5th Cir.) (antitrust and civil rights claims); Carras v. Williams, 807 F.2d 1286 (6th Cir. 1986) (RICO and civil rights claims); Rivers v. Campbell, 791 F.2d 837 (11th Cir. 1986) (antitrust and civil rights claims); Nordgren v. Hafter, 789 F.2d 334 (5th Cir.) (antitrust and civil rights claims), cert. denied, 479 U.S. 850 (1986); Glick v. Gutbrod, 782 F.2d 754 (7th Cir. 1986) (RICO and civil rights claims); In re Martin-Trigona, 737 F.2d 1254 (2d Cir. 1984) (RICO and civil rights claims).

[31] Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam); accord Hughes v. Rowe, 449 U.S. 5, 15 (1980) (per curiam). This lack of expertise is rebuttable; where the litigant shows familiarity with case law and attempts to distinguish holdings, he may be held to understand

appropriate statute for an omitted or incorrect statute if the facts arguably support a claim under the law.[32] The court will generally read as much as possible into the petitioner's complaint, ignoring legal-sounding but conclusive and nonfactual comments that do not clarify the claims.[33] While a pleading should be short, plain, and simple, this is seldom the case with a pro se party's complaint.[34] Although some semblance of the proper format may be required, some courts do not rigorously enforce format rules.[35] This leniency, however, does not extend to purely procedural issues; for example, a pro se plaintiff must properly serve a defendant.[36]

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that his claim has little merit and that pressing frivolous claims is improper. Cheek v. Doe, 828 F.2d 395, 398 (7th Cir.), cert. denied, 108 S. Ct. 349 (1987). See infra note 135 and accompanying text, and Part IV, section B.

32 Foster v. Murphy, 686 F. Supp. 471, 474 (S.D.N.Y. 1988) (double jeopardy claim brought under § 1983 by pro se disbarred attorneys treated as petition for writ of habeas corpus); O'Connor v. United States, 669 F. Supp. 317, 324 (D. Nev. 1987) (where taxpayers alleged unlawful behavior by IRS Appeals officer but cited § 1983, court treated plaintiff's action as a federal law action brought under the *Bivens* doctrine, Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971)).

33 Some courts, however, require that prisoner pro se claims brought *in forma pauperis* state the salient facts rather than legal theories or case law. See, e.g., Green v. Garrott, 71 F.R.D. 680, 681 (W.D. Mo. 1976) (court order required plaintiff to state the facts only—"THE COMPLAINT AND AFFIDAVITS SHOULD NOT, UNDER ANY CIRCUMSTANCES, CONTAIN LEGAL ARGUMENTS OR CITATIONS TO AUTHORITY"). The pro se litigant in *Green* was denied leave to proceed *in forma pauperis* for failure to conform to the order. Id. at 684.

34 See, e.g., Pfeifer v. Valukas, 117 F.R.D. 420, 421-22 (N.D. Ill. 1987) (complaint "consisted of approximately 300 rambling and unintelligible pages," while response to motion for sanctions gave "new meaning to the legal phrase 'weight of authority' "); see Itz v. United States Tax Court, 60 A.F.T.R.2d (P-H) ¶ 87-5113, 5114 & n.1 (W.D. Tex. 1987) ("[b]ecause the Court has no earthly idea what the Plaintiff is talking about, the Court could use no words but the Plaintiff's" in case where petitioner claimed that "de jure" citizenship exempted him from income taxes). But see Ahmed v. Chesapeake Hosp. Auth., 803 F.2d 1180 (4th Cir. 1986) (table; text in WESTLAW, Allfeds file), in which the court affirmed dismissal of complaint based on pro se plaintiff's extremely short pleadings. The entire complaint, except for the prayer for relief, read: "Plaintiff moves to file antitrus [sic] violation by the defend(a)nts under 42 U.S.C. 1981 and 1985 and 15 U.S.C. 1 and 2 of the Sherman Act seeking injunction from the distt. [sic] court for undermining plaintiff's rights from seeking privileges at area health facilities by the defend(a)nts." Id.

35 Prisoners, for example, "commonly file suit in manuscript on strange paper, even toilet paper," which may be allowed if a local rule does not require a particular form. Bagwell, supra note 23, at 438.

36 See *O'Connor*, 669 F. Supp. at 324; Cheek v. Doe, 110 F.R.D. 420, 421-22 (N.D. Ill. 1986), aff'd in part, rev'd in part, 828 F.2d 395 (7th Cir.), cert. denied, 108 S. Ct. 349 (1987); Doyle v. United States, 58 A.F.T.R.2d (P-H) ¶ 86-5699 (S.D. Tex. 1985) (insufficient service renders pro se litigants' complaint subject to dismissal), aff'd, 817 F.2d 1235 (5th Cir.), cert. denied, 108 S. Ct. 159 (1987); Kiley v. Kurtz, 533 F. Supp. 465, 467 (D. Co. 1982). In most of the above cases, the service deficiency was technical. But see Cameron v. IRS, 593 F. Supp. 1540, 1549-50 (N.D. Ind. 1984) (refusing to decide that insufficient service on individual defendants was fatal to pro se complaint), aff'd, 773 F.2d 126 (7th Cir. 1985); cf. Kelly v. United States, 789 F.2d 94, 96 (1st Cir. 1986) (refusing to review Rule 11 award because pro se liti-

As most pro se litigants who have been sanctioned filed civil rights, tax, and conspiracy claims, these actions will be discussed in depth to explore both the necessity for pro se filing and the perception that abusive behavior is rampant and therefore must be actively deterred.

A. *Civil Rights Cases*

Pro se litigants often bring civil rights actions under title VII[37] and sections 1981, 1983, 1985, and 1988.[38] While a successful civil rights plaintiff may be awarded attorney's fees, many attorneys refuse these cases due to the difficulties involved.[39] Pro bono committees

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gants did not directly raise issue, and refusing to review one dismissal because notice of appeal filed late); Carver v. Casey, 669 F. Supp. 412, 414-16 (S.D. Fla. 1987) (pro se plaintiff's failure to name proper defendant held fatal to his title VII claims); Bell v. Veterans Admin. Hosp., 654 F. Supp. 69, 70-71 (W.D. La.) (pro se former VA employee not entitled to equitable relief for failure to name proper party defendant—and related delayed service—in employment discrimination action), aff'd, 826 F.2d 357, 361 (5th Cir. 1987).

Some courts, however, are reluctant to dismiss pro se claims on procedural grounds alone. See, e.g., Calloway v. Marvel Entertainment Group, 854 F.2d 1452, 1473-76 (2d Cir. 1988) (pro se appeal, originally dismissed for failure to prosecute, reinstated *sua sponte*, $100,000 sanctions vacated and case remanded); Maggelle v. Dalsheim, 709 F.2d 800, 802 (2d Cir. 1983) (pro se petition cannot be dismissed for failure to respond if petitioner is unaware of consequences of not answering); Bradley v. Coughlin, 671 F.2d 686, 689 (2d Cir. 1982) (prisoner's pro se notice of appeal sufficient although poorly denominated).

See generally Comment, Procedural Due Process Rights of Pro Se Litigants, 55 U. Chi. L. Rev. 659, 669-83 (1988).

[37] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (1982).

[38] 42 U.S.C. §§ 1981, 1983, 1985, 1988 (1982). See generally Rampacek, The Impact of Rule 11 on Civil Rights Litigation, 3 Lab. L.J. 93 (1987) (discussing the chilling effect of Rule 11 on civil rights claims, which often seek to extend current law) and Tobias, Rule 11 and Civil Rights Litigation, 37 Buffalo L. Rev. 485 (1989) (arguing that current guidelines for imposing Rule 11 sanctions impact more severely on civil rights plaintiffs and attorneys—and therefore on the poor).

The use of § 1983 to seek damages for official actions by states and state officials in federal courts has recently been disallowed on sovereign immunity grounds in Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989). The Court, in a 5-4 opinion, found that the State is not a "person" within the meaning of § 1983, id. at 2305, although a municipality is such a "person." Id. at 2307. The Court also held that a suit against a state official, acting in his or her official capacity, is a suit against the state and thus impermissible under the eleventh amendment. Id. This holding, however, does not bar suits against state officials for injunctive relief. Id. n.10. Nor does it bar § 1983 actions in state courts nor claims against the States on state constitutional grounds, which often echo the United States Constitution. The dissenting judges protested the breadth of the holding, id. at 2319 (Brennan, J. dissenting), adding that the ruling defeated the "purpose of § 1983" given that "under color of state law" should clearly include the State's and state officials' actions. Id. at 2318. The majority's decision will, no doubt, reduce the volume of successful § 1983 claims, as a good proportion of such claims are filed against state officials, especially state prison officials; permitting injunctive relief, however, will keep § 1983 a viable tool for combatting ongoing constitutional violations.

[39] Difficulties abound. Many prison claims face the problem of vanishing witnesses—even litigants. Inmate witnesses who can be found may not be allowed to appear at trial based on a

regularly request volunteers for civil rights cases, but few come forward.[40] Lawyers representing plaintiffs on civil rights cases tend to be from organizations devoted to serving these needs.[41] Because there

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variety of factors including cost and convenience, potential danger or security risk, substantiality of the matter tried, and the necessity of an early determination of the issue. Heidelberg v. Hammer, 577 F.2d 429, 431 (7th Cir. 1978); Stone v. Morris, 546 F.2d 730, 735-36 (7th Cir. 1976); *In re* Warden of Wis. State Prison, 541 F.2d 177, 181 (7th Cir. 1976). Some inmates, subjected to considerable pressure from the guards and facing parole, may refuse to testify or may change their testimony; others, expected to be good witnesses, may have been released and cannot be located. A prisoner plaintiff has no absolute right to appear at trial in a civil suit, Pell v. Procunier, 417 U.S. 817, 822 (1974), although a court has the discretion to order his production. Price v. Johnston, 334 U.S. 266, 278 (1948); *Stone*, 546 F.2d at 737 (citing 28 U.S.C. § 2241 (c)(5)).

The bureaucracy may be hard to move, for example, in the area of document production, but when faced with a lawsuit, it may change enough to make an eighth amendment claim moot by the time of trial or hearing. On the other hand, conditions may have worsened, but the defense may have a difficult time finding witnesses. See Sinclair & Wolin, Obtaining Witnesses in Prisoner Cases 12-3, in Prisoners & the Law (I. Robbins ed. 1988) [hereinafter Prisoners].

Expert testimony may be hard to obtain, as the expert must be knowledgeable on both the special problems of prison administration and the particular issue under attack; in addition, he must be willing to testify.

In many states, problems are compounded because the prisons are located at considerable distances from the courts and court-appointed lawyers, necessitating substantial travel expenses and aggravating the administrative difficulties of witness production.

In addition to these problems, obtaining attorney fees is not as definite as it used to be. See Note, Fee as the Wind Blows, supra note 9.

[40] Volunteer lawyers, through pro bono panels in some federal courts, seldom wish to represent prisoners in civil rights claims. Committee Report, supra note 24, at 938 (civil rights actions comprised 65.8% of the cases in which the Southern District of New York ordered counsel to be assigned but no volunteer could be found).

Several major law firms, however, actively encourage associates to perform some pro bono work. Among the large New York firms noted for this are: Paul, Weiss, Rifkind, Wharton & Garrison; Shearman & Sterling; LeBoeuf, Lamb, Leiby & MacRae; Milbank, Tweed, Hadley & McCloy; Davis Polk & Wardwell; Dewey, Ballantine, Bushby, Palmer & Wood; and Sullivan & Cromwell. All of these firms have estimated that four to seven percent of their attorneys' time is spent on pro bono work. See N.Y.L.J. (July 12, 1989) at 7, col. 3. Paul Weiss, in particular, was noted for taking on 55 pro se prisoner civil rights cases on a request from the Southern District of New York. Federal Court's Pro Se Cases to Paul Weiss, N.Y.L.J. (July 14, 1989) at 1, col. 5.

[41] For example, the American Civil Liberties Union ("ACLU") and state ACLU branches, ACLU's National Prison and Jail Projects, The Prisoners' Rights Project of the New York Legal Aid Society, Prisoners' Legal Services, NAACP Legal Defense and Educational Fund, Inc., Center for Constitutional Rights, Civil Rights Division of the U.S. Department of Justice, National Center for Youth Law, Southern Poverty Law Center, National Lawyers Guild Jail Project of Southern California, Southern Coalition Jails and Prisons, Lewisburg Prison Project, Inc., Prisoners' Legal Services of New York, Legal Assistance to Minnesota Prisoners. In addition, some law schools have clinical programs which provide some legal assistance for prisoners, e.g. Harvard Prison Legal Assistance Project and Cardozo Criminal Law and Appeals Clinics. See Prisoners Assistance Directory, National Prison Project (7th ed. 1986). Most of these organizations operate relatively small offices and their case loads are necessarily limited.

The problem of encouraging law students to enter public interest law has not gone unno-

are far too few attorneys willing and able to handle the increasing volume of civil rights cases, potential litigants must proceed pro se or not at all.

1. Prisoner Plaintiffs

Many critics of current trends in civil rights litigation have focused on the increased volume of prisoner litigation—often pro se constitutional claims under sections 1983[42] and 1331[43]—as a trend which should be halted.[44] The arguments are usually based either on the volume of prisoner complaints[45] or on the high percentage of meritless claims filed. Such critics tend to ignore the many court deci-

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ticed. Special programs have been implemented or are in the process of implementation at thirty law schools, including City University of New York Law School, Columbia University, New York University, Stanford University Law School, UCLA Law School, University of Virginia, and Yale Law School, to support public interest law by offering loan forgiveness programs or stipends for those students who accept these traditionally lower-paying jobs.

One major corporate law firm, Skadden, Arps, Slate, Meagher & Flom, has instituted a $10 million fellowship program offering a salary of $32,500 to approximately 25 graduating law students, annually, to serve as staff attorneys in the public interest sector. See press release to law school placement offices from Skadden (available at Cardozo Law Review). The firm was to be honored in August 1989 by the American Bar Association for its initiative in establishing this program. Today's News, N.Y.L.J. (July 6, 1989) at 1, col. 1.

42 42 U.S.C. § 1983 (1982) (contesting violations of constitutional rights inflicted under color of state law). See supra note 38 for an overview of the recent *Will* case, which is expected to impact strongly on what actions will be brought in the future under § 1983.

43 28 U.S.C. § 1331 (1982) (since federal district courts have original jurisdiction over federal questions, federal prisoners may sue based directly on the Constitution).

44 One of the more popular solutions—in the federal courts—is to transfer prisoner § 1983 cases to the state courts. This idea, however, has not been well received for a variety of reasons: first, state courts may be more overburdened than federal courts; second, in some states, limitations on class actions would result in thousands of state action claims rather than one federal case; and third, state courts do not adequately protect constitutional rights. Federal Courts Study Committee, CSPAN Network (March 26, 1989) (testimony of Robert Lehrer, Deputy Dir. of Legal Assistance Found. of Chicago). See also Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977) (contesting notion that state courts act the same as federal courts).

45 Most arguments based on volume alone ignore the rising population in the nation's prisons. Statistics from 1984—before the recent crackdown on drugs which has accelerated the increase—showed 234,500 persons in local jails, a five percent increase from the preceeding year. Jail Inmates 1984, Bureau of Justice Statistics, U.S. Dep't of Justice (1986), in Prisoners, supra note 39, at app. D-3. Added to these were 415,796 inmates in state prisons, three times the prison population in 1930, with two-thirds of the increase occurring between 1975 and 1984. Special Report: Population Density in State Prisons (1986), reprinted in Prisoners, supra note 39, at app. C-23. A new record was set at the end of 1985, when the overall federal and state prison population was 503,601. Prisoners in 1985, Bureau of Justice Statistics, Dep't of Justice (1986) in Prisoners, supra note 39.

The prison population figures should be compared to the prisoner civil rights cases commenced in those years: 18,477 cases in 1983 increased only 2 percent to 18,856 in 1984. 1987 Annual Report, supra note 28, at 182, tab. C-2A.

In addition, the statistics showing a rapidly increasing volume of civil rights actions generally look at the early 1960's for comparison. As Eisenberg pointed out, very few civil rights

sions recognizing that, while prisoners are more restricted in exercising their rights than free citizens, they nevertheless have certain rights, including adequate medical care,[46] freedom of religion,[47] equal protection,[48] and living conditions which do not "shock the conscience" of the court.[49] Prisoners are also afforded certain due

actions—either § 1983 or title VII—were brought at that time, and it is therefore inappropriate to use that period as a base. Eisenberg, supra note 24, at 535.

[46] See, e.g., Estelle v. Gamble, 429 U.S. 97, 104 (1976) (standard for an eighth amendment violation is the "deliberate indifference to serious medical needs"); Todaro v. Ward, 565 F.2d 48 (2d Cir. 1977) (court need not wait until someone dies to act); Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir. 1977) (medical care includes psychological treatment); Dean v. Coughlin, 623 F. Supp. 392 (S.D.N.Y. 1985) (medical care includes dental care), later opinion, 633 F. Supp. 308 (S.D.N.Y.), vacated on other grounds, 804 F.2d 207 (2d Cir. 1986).

[47] Cruz v. Beto, 405 U.S. 319, 322 (1972). But see Tisdale v. Dobbs, 807 F.2d 734, 738-39 (8th Cir. 1986) (prisoner contesting religious restrictions has burden of showing official safety concerns were unwarranted).

[48] *Cruz*, 405 U.S. 319, 321 (condemning racial segregation in prisons); Lee v. Washington, 390 U.S. 333, 334 (1968) (holding unconstitutional Alabama statutes requiring segregation of the races in prisons and jails); Taylor v. Perini, 413 F. Supp. 189, 252-60 (N.D. Ohio 1976) (job and housing assignments cannot be based on race); Battle v. Anderson, 376 F. Supp. 402, 421 (E.D. Okla. 1974) (privileges accorded to one race cannot be denied to others); Knuckles v. Prasse, 302 F. Supp. 1036, 1039 (E.D. Pa. 1969) (condemning racially discriminatory rules), aff'd, 435 F.2d 1255 (3d Cir. 1970), cert. denied, 403 U.S. 936 (1971);.

It is difficult to prove racial discrimination claims in prison because the burden of proof rests initially on the plaintiff to show that a pattern of racial separation exists. The situtation is analagous to school desegregation cases. See Thomas v. Pate, 493 F.2d 151 (7th Cir.), cert. denied, 419 U.S. 879 (1974), vacated on other grounds *sub nom.* Cannon v. Thomas, 419 U.S. 813 (1974). A statistical approach may be utilized, but the results must generally be striking for a court to recognize the claim. See, e.g., *Taylor*, 413 F. Supp. at 241-48, 259-60 (majority of desirable jobs and living quarters allocated to white prisoners proved racial discrimination); Lamar v. Kern, 349 F. Supp. 222, 224 (S.D. Tex. 1972) (one wing of otherwise integrated jail consistently filled with blacks and thus violated equal protection clause).

Sex discrimination claims are subjected to less judicial scrutiny than race or class-based discrimination and are therefore more difficult to prove in court. Because most prisons are segregated by sex, courts focus on the differences in prisoner treatment between male and female prisons. See, e.g., Glover v. Johnson, 478 F. Supp. 1075, 1079-1103 (E.D. Mich. 1979) (finding equal protection violation where female prisoners were afforded fewer vocational and educational opportunities than male prisoners).

Courts seldom recognize prisoners' claims as contrasted against nonprisoner rights. See Glouser v. Parratt, 605 F.2d 419, 420-21 (8th Cir. 1979) (no equal protection violation where prisoner received more severe punishment for marijuana possession than a nonprisoner would have); cf. O'Brien v. Skinner, 414 U.S. 524, 530 (1974) (pretrial detainees must be allowed to register or vote by absentee ballot on equal protection grounds).

Even when released, ex-convicts may be denied certain civil rights, such as voting or obtaining a license for certain professions. See, e.g., Richardson v. Ramirez, 418 U.S. 24, 41-56 (1974) (holding that the fourteenth amendment allows states to refuse the vote to ex-convicts, and equal protection clause does not override the express exemption); see also D. Rudenstine, The Rights of Ex-Offenders, 88-98, 171, 179 (1979) (noting the difficulties of ex-convicts in the areas of voting rights and obtaining licenses to practice certain trades). See generally Note, The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box", 102 Harv. L. Rev. 1300 (1989) (arguing that voting disenfranchisement's traditional rationales fail to justify the practice and run counter to rehabilitative policies).

[49] Palmigiano v. Garrahy, 443 F. Supp. 956, 979 (D.R.I. 1977), aff'd, 616 F.2d 598 (1st

process rights, especially where courts have recognized a liberty interest or property right within prison walls.[50] All prisoners' rights are balanced against legitimate institutional security concerns.[51] The prisoner's right of access to the courts[52] serves to protect and enforce his other constitutional rights.[53]

The unpopularity of prisoners' rights coupled with the usual difficulties of civil rights suits in general exacerbates the problem of the shortage of available lawyers.[54] Therefore, most of these claims are brought pro se by prisoners who may be barely literate. Even so, given the number of people in the nation's jails and prisons[55] and the

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Cir.), cert. denied, 449 U.S. 839 (1980); cf. Rhodes v. Chapman, 452 U.S. 337 (1981) (conditions of confinement may be harsh but may not include wanton or unnecessary infliction of pain grossly disproportionate to the crime committed); Bell v. Wolfish, 441 U.S. 520, 545-48 (1979) ("compelling necessity" is not required standard for corrections decisions); Battle v. Anderson, 788 F.2d 1421 (10th Cir. 1986) (denying claim of ongoing eighth amendment violations). See generally Note, Section 1983 and the Due Process Clause: Crossing the Constitutional Line, 10 Cardozo L. Rev. 789, 803-05 (1989) (discussing the shocks-the-conscience standard).

50 See, e.g., *Wolfish*, 441 U.S. at 535-40 (liberty interest triggered where conditions amount to punishment of prisoner); Vitek v. Jones, 445 U.S. 480 (1980) (potential transfer from prison to more restrictive mental institution triggers liberty interest). Property rights, however, are very limited; a § 1983 claim is not available where an adequate state remedy exists for deprivation of property. See Hudson v. Palmer, 468 U.S. 517, 533 (1984) (intentional deprivation); Parratt v. Taylor, 451 U.S. 527, 541 (1981) (negligent deprivation). Both of these cases deal with random and unauthorized deprivations of property, rather than those according to established policy, procedure, or custom. See Gillihan v. Schillinger, 872 F.2d 935, 941 (10th Cir. 1989) (pro se prisoner wins reversal of dismissal of claim of property deprivation without due process).

51 See, e.g., *Wolfish*, 441 U.S. at 545-48 (1979); *Palmigiano*, 443 F. Supp. at 982.

52 See, e.g., Bounds v. Smith, 430 U.S. 817 (1977) (*habeas corpus*); Wolff v. McDonnell, 418 U.S. 539, 579 (1974) (civil rights actions); Spates v. Manson, 644 F.2d 80, 84 (2d Cir. 1981) ("non-frivolous claims"); see also Smith v. Bounds, 813 F.2d 1299 (4th Cir. 1987) (affirming district court's order that the state must provide prisoners with legal assistance from trained attorneys because the prison law libraries remained inadequate), aff'd on rehearing, 841 F.2d 77 (4th Cir.) (en banc), cert. denied, 109 S. Ct. 176 (1988).

53 See DeMallory v. Cullen, 855 F.2d 442, 446 (7th Cir. 1988) (a prisoner's "right of access to the courts is the most fundamental right he or she holds"); Adams v. Carlson, 488 F.2d 619, 630 (7th Cir. 1973) ("All other rights of an inmate are illusory without [access to the courts], being entirely dependent for their existence on the whim or caprice of the prison warden.") (citing Stiltner v. Rhay, 322 F.2d 314, 316 (9th Cir. 1963) (access to courts is "basic to all other rights").

54 Committee Report, supra note 24, at 940.

55 A jail houses pretrial detainees and those serving short sentences; a prison generally houses inmates serving a year or longer. This may vary from state to state. The differences in the nature of the two populations have been a critical distinction in finding constitutional rights. See Note, Constitutional Limitations on the Conditions of Pretrial Detention, 79 Yale L.J. 941 (1970); see also Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 397 (2d Cir. 1975) (recognizing a difference in treatment of those confined prior to trial and those confined pursuant to a conviction); United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114, 124 (S.D.N.Y. 1977) (pretrial detainees may not be deprived of rights beyond those necessary for confinement absent compelling necessity), aff'd *sub nom.* Wolfish v. Levi, 573

very real hardships inflicted on them,[56] it is surprising how few prison lawsuits are successful.

A majority of complaints filed are found inadequate and dismissed *sua sponte* or after defendant's motion for dismissal.[57] It does not necessarily follow, however, that inmate lawsuits are frivolous.[58] That many claims were inarticulate and therefore dismissed does not mean that a constitutional violation has not occurred or that the violation had a *de minimis* effect.[59] In a penal system where an individual's rights, even though reduced to a bare minimum, are regularly ignored,[60] it is unreasonable to use the volume of cases filed as proof of the frivolousness of those cases.[61] It may well be proof of the prev-

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F.2d 118 (2d Cir. 1978), rev'd *sub nom.* Bell v. Wolfish, 441 U.S. 520 (1979) (due process, not eighth amendment, requires that pretrial detainees may not be punished); Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975) (pretrial detainees accorded freedom of religion); Wilkinson v. Skinner, 462 F.2d 670 (2d Cir. 1972) (pretrial detainees accorded the same right of free speech as unincarcerated individuals).

[56] It is well established that prisons need not be comfortable. Rhodes v. Chapman, 452 U.S. 337, 349 (1981); Martin v. White, 742 F.2d 469, 473 (8th Cir. 1984) ("While prison conditions need not amount to a reign of terror . . . to be unconstitutional, prisons need not be country clubs or even comfortable."); accord Williams v. Willitts, 853 F.2d 586 (8th Cir. 1988).

[57] Committee Report, supra note 24, at 939. See Turner, supra note 28, at 621 (many Northern District of California prisoner cases survived IFP screening only to be dismissed for failure to prosecute; in the Eastern District of California, many cases were dismissed because, after the U.S. marshall wrote the prisoner for "instructions" on service of process and threatening to collect fees for service, the prisoner failed to respond).

[58] See Neitzke v. Williams, 109 S. Ct. 1827, 1831 (1989) (a § 1915 dismissal requires either an inarguable legal conclusion or a fanciful factual allegation); Ruth v. Congress of the United States, 71 F.R.D. 676, 679 (D.N.J. 1976) ("frivolous" is essentially equivalent to "ridiculous").

[59] But see Lewis v. Woods, 848 F.2d 649, 651 (5th Cir. 1988) (reversing district court ruling that some violations of constitutional rights are *de minimis*, i.e., so trifling that the law takes no account of them). The court held that a constitutional violation is never *de minimis*, and that a plaintiff who proves a constitutional violation is entitled to nominal damages even when there is no actual injury. Id. at 651 n.7 (citing Memphis Community School Dist. v. Stachura, 477 U.S. 299, 305-310 (1986); Carey v. Piphus, 435 U.S. 247, 254 (1978); Mann v. Smith, 796 F.2d 79, 86 (5th Cir. 1986); Ryland v. Shapiro, 708 F.2d 967, 976 (5th Cir. 1983)).

An indigent prisoner owns little more than his constitutional rights. If these cannot be protected adequately, they cease to exist. A prisoner would effectively have no property, and liberty only in his mind. This state of affairs precludes rehabilitation and learning socialized behavior. By acknowledging, as the Supreme Court does, that a prisoner has some rights, i.e., some "property" and "liberty" which can be protected at law, courts reinforce a prisoner's perception of himself as a member of society—far more valuable in the long run than extending his punishment to treatment as an outcast.

[60] The great number of existing court decrees and pending litigation involving claims of overcrowding and total conditions of confinement suggest the prevalence of constitutional violations. See Status Report of the National Prison Project, The Courts and Prisons (March 1, 1987), in Prisoners, supra note 39, at app. B (listing cases in forty-eight states and United States territories).

[61] Turk, Foreword: Access to the Federal Courts by State Prisoners in Civil Rights Actions, 64 Va. L. Rev. 1349, 1351-58 (1978) (noting that many meritorious prisoner complaints are lost amidst the volume of frivolous pro se prisoner litigation); Turner, supra note 28, at 612

alence of serious problems in that stratum of society.[62]

("Many serious claims of mistreatment are doubtless lost in the sea of clumsy and prolix pro se pleadings, while legally meritless claims consume the time and erode the sympathy of court personnel.")

Inevitably, many cases will be frivolous given the nature of the inmate population. Studies have shown that prisoners tend to score higher on psychoticism, extraversion (with its facets of impulsivity and sociability), and neuroticism than non-criminals. Eysenck & Eysenck, Crime and Personality: Item Analysis of Questionnaire Responses, 11 Brit. J. Crim. 49 (1971). One might hypothesize that a population strong in such traits, given free rein, would submit a fair number of unsupportable claims.

62 The seriousness of successful prison claims indicates that prisons will not voluntarily perform the necessary remedial actions—hardly a prison in the country has not lost a major action—leaving the courts as the proper forum to apply for redress. Many prisons, in an attempt to avoid the courts, have set up grievance procedures. These have had limited success, first, because prisoners tend to regard prison officials as biased judges and, second, because prisons do not have to provide the same due process protections in dealing with grievance complaints as the courts. While this increases the prisoners' unhappiness with the procedures, prisoners cannot force the prison to establish promised grievance procedures. Mann v. Adams, 855 F.2d 639, 640 (9th Cir.) (unpublished policy statements created no protected liberty interest and no legitimate claim to entitlement), cert. denied, 109 S. Ct. 242 (1988); see also Shango v. Jurich, 681 F.2d 1091, 1100 (7th Cir. 1982) (no legitimate entitlement to grievance procedures); Azeez v. DeRobertis, 568 F. Supp. 8, 11 (N.D. Ill. 1982) (prison grievance procedure is a "procedural right only and does not confer any substantive" liberty interest requiring fourteenth amendment procedural protections).

Court procedures are, in fact, little more effective. A pro se prisoner litigant has little or no chance of success. See Turner, supra note 28, at 625; Committee Report, supra note 24, at 941. Nonetheless, the prisoner court cases which succeed have a much greater impact than a successful grievance claim. For one, other prisons are put on notice that they may face a difficult lawsuit if a similar situation arises. In addition, jailhouse lawyers and savvy prisoners become aware that the prison cannot constitutionally act in certain ways, thereby increasing the chances that a facility will face a legal claim.

A court-imposed injunction requires the state or facility to remedy the violation or face contempt sanctions—which are seldom imposed in reality. The injunction forces the state or city to raise or find the necessary money; most parties involved consider this a positive element. Prison administrators often note that they would not be able to raise the money without the court order. See Rhodes v. Chapman, 452 U.S. 337, 360 (1981) (Brennan, J., concurring). Nonetheless, even with an injunction in place, some facilities still fail to provide the constitutional minimum. See, e.g., Smith v. Bounds, 813 F.2d 1299 (4th Cir. 1987) (ten years after the Supreme Court affirmed that the prison law library was constitutionally inadequate, the library remained deficient), aff'd on rehearing, 841 F.2d 77 (4th Cir.) (en banc), cert. denied, 109 S. Ct. 176 (1988).

That an undereducated—almost certainly legally undereducated—prisoner may win a claim against people who exercise considerable power over him on a daily basis suggests that our court systems are functioning as they were intended.

The cases in which the prisoners proved violations may be the tip of the iceberg. Those who regularly handle prisoner complaints are struck by the continuing serious problems within the prison system. Even given the nature of the prison population—prisoners have a propensity for violence and tend to be considerably less educated and socialized than the nonprisoner population—the security needs of the jailers seldom account for the level of brutality, the intolerability of the conditions, the lack of medical care, or the inadequacy of existing rehabilitative programs. Prisons, while arguably more pleasant than in previous centuries, continue to be places to warehouse criminals—to keep them off the streets—not places in which people convicted of a crime can be rehabilitated. The so-called "country club" prisons are extremely

Of the thousands of constitutional claims brought each year by

rare. Prison conditions often exacerbate the psychological problems or sociopathic behavior that led many convicts to criminal activity in the first place.

Those prisoners who function well enough to protest prison conditions, rather than crumple under the pressures, tend to be the primary pro se litigants. Their failure to protest effectively or to recognize the difference between a meritorious complaint and a frivolous one is often due to their inexperience in framing an issue. For example, a complaint from a woman inmate that she asked for and did not get a brand of body lotion appears frivolous. It might, however, be a valid complaint if she was allergic to the regular institutional lotion, had developed a serious rash for which lotion was needed, a doctor had written her a prescription for a lotion to which she was not allergic, and the prison officials deliberately refused to supply it. As a prisoner, she cannot simply go to the drugstore and buy it; she is dependent on the prison to supply the needed medication. Framed with the full facts, this claim might arguably meet the constitutional standard of deliberate indifference to serious medical needs. Unfortunately, it is unlikely that she will be able to frame the issue well enough to withstand summary dismissal. There is no way of knowing how many of the thousands of prisoner complaints dismissed were potentially meritorious; a dismissal simply does not give the full picture.

Judicial insensitivity, brought on by the volume of prisoner complaints, may be a real problem. The Fifth Circuit, currently the harshest court concerning frivolous pro se prisoner complaints, emphasized years ago that "[a]n opportunity should be provided the prisoner to develop his case at least to the point where any merit it contains is brought to light." Hogan v. Midland County Comm'rs Court, 680 F.2d 1101, 1104 (5th Cir. 1982) (quoting Taylor v. Gibson, 529 F.2d 709, 713 (5th Cir. 1976)); see also Westling & Rasmussen, Prisoners' Access to the Courts: Legal Requirements and Practical Realities, 16 Loy. U. Chi. L.J. 273, 305 (1985) (noting judicial insensitivity in certain districts). In Neitzke v. Williams, 109 S. Ct. 1827 (1989), the Supreme Court also expressed concern about the overuse of summary dismissals of IFP complaints, because such dismissals did not provide the procedural protections afforded dismissals under Fed. R. Civ. P. 12(b)(6). Id. at 1834.

Further, some litigants train themselves in their less cognizable claims, with the result that their meritorious claims have a better chance at success. For example, a prisoner, nicknamed "Pro Se Palmigiano," filed a suit against the Rhode Island prison system for total conditions which violated the eighth amendment—and won. Palmigiano v. Garrahy, 443 F. Supp. 956 (D.R.I. 1977), aff'd, 616 F.2d 598 (1st Cir.), cert. denied, 449 U.S. 839 (1980). In *Palmigiano*, an injunction was placed on the entire Rhode Island prison system to eliminate the rats, roaches, and garbage, and to generally improve the overall conditions under which the inmates there had been suffering for years. Id. This was one of the first cases concerning prison conditions where the court was willing to intervene in a state controlled prison. As of 1986, the injunction remained in effect—and the totality of conditions continued to violate the eighth amendment. Palmigiano v. Garrahy, 639 F. Supp. 244 (D.R.I. 1986); see also Gettinger, "Cruel and Unusual" Prisons, 3 Corrections Mag. 3 (Dec. 1977) (noting that Palmigiano submitted over fifty pro se suits prior to this, including one that lost finally in the Supreme Court).

It may also be that litigation, far from supplying a mere pastime, provides a valuable rehabilitative function for prisoners, who are typically violent and impulsive, see Eysenck, supra note 61, in that they learn alternate channels for solving problems.

Not everyone is capable of improvement. One prolific prisoner litigant filed 176 claims—all meritless. Procup v. Strickland, 567 F. Supp. 146 (M.D. Fla. 1983) (sanctioning with an injunction requiring IFP prisoner to obtain an attorney prior to any future filings), rev'd, 760 F.2d 1107 (11th Cir. 1985) (injunction unduly burdensome, conflicting with prisoners' constitutional right of access to the courts), vacated, 792 F.2d 1069 (11th Cir. 1986) (en banc) (injunction vacated as overbroad; remanded for consideration of less restrictive injunction). Nonprisoner litigants may be equally adamant about pursuing claims. Note, Preserving *Pro Se* Representation in an Age of Rule 11 Sanctions, 67 Tex. L. Rev. 351, 368, 370 (1988) (following the saga of the Hilgefords) [hereinafter Note, Preserving *Pro Se*].

prisoners, the majority are filed pro se and *in forma pauperis* ("IFP") under section 1915.[63] Of these, many do not survive the built-in gauntlet of section 1915, whereby suits which do not state a valid claim, even when construed liberally, may be dismissed *sua sponte* even before the opposing party has been served.[64] Although some of these suits are clearly meritorious, others are less clear, mired in the petty details of prison life.[65] Critics argue that the increasing volume of prisoner litigation floods the courts and that most of the complaints are frivolous.[66] Nevertheless, studies show that since few of these

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[63] 28 U.S.C. § 1915 (1982). Almost all prisoners attempt to file their claims IFP. Turk, supra note 61, at 1352. Turk notes that "[t]here can be no doubt that the prosecution of a full civil action in a federal district is beyond the financial means of almost all prisoners." Id. See infra notes 174-89 and accompanying text (discussion of the IFP statute).

[64] See generally Ziegler & Hermann, The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts, 47 N.Y.U. L. Rev. 159 (1972) (two former pro se clerks in the New York courts explain procedures for handling pro se claims, with anecdotal remarks from clerks in other circuits).

In a recent decision concerning the validity of dismissing *in forma pauperis* filings *sua sponte* for failure to state a claim, the Supreme Court concluded that a showing sufficient to dismiss under Fed. R. Civ. P. 12(b)(6) is not necessarily enough to dismiss under the frivolousness clause of § 1915. Neitzke v. Williams, 109 S. Ct. 1827 (1989).

[65] In Russell v. Bodner, 489 F.2d 280 (3d Cir. 1973), an inmate protested when guards took seven packs of his cigarettes. The district court dismissed the case as frivolous, but the court of appeals reversed and remanded on the basis that misuse of state power is the determinative element, not the value of the cigarettes. This taking, without cause, is not per se frivolous. Id. at 281. The district court judge, when told of the remand, purportedly asked plaintively if he could not just buy the inmate seven packs of cigarettes or give him three dollars and dispose of the case. See Burger, Report on the Federal Judicial Branch—1973, 59 A.B.A. J. 1125, 1128 (1973).

Most prisoner cases concern conditions of incarceration, circumstances leading to incarceration, or proceedings related to terminating incarceration. Eisenberg, supra note 24, at 538. Most prisoner § 1983 complaints implicated federal interests; few were trivial. Id.

It is difficult in prisoner cases to separate the trivial from the important. As the Supreme Court has pointed out:

> For state prisoners, eating, sleeping, dressing, washing, working and playing are all done under the watchful eye of the State . . . . 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.

Preiser v. Rodriguez, 411 U.S. 475, 492 (1973). A dispute with the State could become a § 1983 claim. See Turk, supra note 61, at 1652 (because § 1983 is cast in broad terms, literally hundreds of controversies common to daily life in prison constitute legally cognizable claims).

This may all have changed after *Will v. Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989); see supra note 38. *Will* precludes federal damage claims under § 1983 against the State or its officials. Only the power to sue the state, through its officials, for injunctive relief in federal court, or for whatever claims are permitted in state courts, remains. Id. at 2307 n.10. Nevertheless, for state prisoners who wish to change how their prison is run, this may be sufficient to serve that purpose, however inadequate it may be in that it fails to compensate for past wrongs.

[66] See, e.g., Merritt v. Faulkner, 823 F.2d 1150 (7th Cir. 1987). Judge Posner, in a concurring opinion, sharply criticized frivolous prisoner litigation flooding the courts, characterizing the litigation as fun for the prisoners. Id. at 1157. The per curiam opinion was not

suits ever get to the discovery stage, let alone to trial, the courts' resources are not overburdened by this alleged flood of frivolous prisoner suits.[67]

> as concerned as Judge Posner about the time we have "wasted" on Merritt. His problems seem to me to carry as much weight on the social scales as the concerns, for example, of corporations caught in an unending and apparently sterile cycle of takeover, merger and break-up. The Merritts of this world are pikers indeed in their demands on the legal system in comparison with the corporate adventurers. Nor is lying a vice unique to prisons. Current reports suggest that Wall Street and the nation's capital also may have some experience with it.

Id. at 1154-55. *Merritt* concerned an inmate who claimed that the wrong eye had been operated on, leaving him completely blind. While not supported by the evidence, this claim was not facially frivolous, even under constitutional standards. Medical care claims under § 1983 require deliberate indifference to serious medical needs. This standard is stricter than that for mere negligence which must be brought in a state tort claim. See Estelle v. Gamble, 429 U.S. 97 (1976).

[67] See Eisenberg, supra note 24, at 531 (study of cases brought in Central District Court of California in 1975-76 indicated that § 1983 claims constituted fifteen cases—prisoner and non-prisoner—per judge per calendar year); Bailey, The Realities of Prisoners' Cases under 42 U.S.C. Section 1983: A Statistical Survey in the Northern District of Illinois, 6 Loy. U. Chi. L.J. 527 (1975) (16,267 prisoner petitions were filed in the federal courts in 1972, of which 5,346 were actions under § 1983). Of the 218 § 1983 cases filed in this district in 1971, 89.9% were summarily dismissed, and 56.4% of the dismissals were for failure to state a claim. Id. at 533. Over a third of the inmates' pleadings were dismissed without response from the state. Id. at 534. By 1973, while only 11.8% were dismissed in this manner, only 22 of the 36 cases which initially survived a motion to dismiss advanced to the hearing stage. Id. at 534. This change followed the ruling in Haines v. Kerner, 404 U.S. 519 (1972), that courts may dismiss prisoner complaints without a hearing only where it is "beyond doubt that the [prisoner] can prove no set of facts in support of his claims which would entitle him to relief." Id. at 521 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

See also Turner, supra note 28 (study of prisoner cases, in selected districts during 1976-78, showing that only 18 cases of 664-case sample had either an evidentiary hearing or a trial.) A grand total of forty-four court days over a two-and-a-half-year period were spent on the cases studied. Id. at 624. In the study district most inundated with prisoner cases, the Eastern District of Virginia with 395 cases, only nine were tried in 1976. Id. at 658. The number of court days, hearing or trial, totalled five. Id. at 662. Damages were obtained in only two cases. Id. at 663. The burden on the courts, says Turner, is in the initial screening of the merits, not in the trying of the claims. Id. at 619.

Pro se clerks or similar positions have been instituted in most of the inundated courts to screen pro se filings, especially those submitted *in forma pauperis*. While a magistrate or judge reviews the recommendations of the clerk, the burden is on the clerk rather than the judge. This further reduces the judicial time which must be spent in evaluating the claims. See Ziegler & Herman, supra note 65, and Committee Report, supra note 24. With a typical pro se clerk or staff attorney salary ranging from $27,000-$33,000, the cost of each claim to the system is considerably less than it would be if a judge, at a typical salary of $79,000, handled all claims personally. For example, in the Southern District of New York, approximately 700 pro se claims are filed per year, to be scrutinized by three pro se clerks. Therefore, the primary cost to the court would be approximately $130 per filing, for the initial recommendation under which over half the claims are dismissed. In the Eastern District of New York, with one pro se clerk and approximately a hundred filings per year, the court cost per filing would be about $300 for the initial work. See Committee Report, supra note 24, at 938 (numbers of pro se clerks and filings from July 1986 to June 1987).

2. Nonprisoner Civil Rights Plaintiffs

Prisoners are not the only people filing civil rights claims. Between 1961 and 1979, the number of nonprisoner civil rights cases filed in the federal courts increased from 296 to 13,168.[68] Pro se litigants may be members of respected groups, such as doctors, airline pilots, politicians, and firefighters.[69] Not surprisingly, lawyers, ex-lawyers, and law students are inclined to file pro se, and some of their claims are as bizarre or improper as those of any nonprofessional.[70]

A study of Los Angeles cases indicated that a large majority of

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[68] Eisenberg, supra note 24, at 523. Prisoner filing showed a similar jump, from 218 in 1966 to 11,195 in 1979. Id. Eisenberg notes that numerous factors contribute to this growth and suggests it may be a positive development. Id. In his Central District of California study, only 10 of 136 nonprisoner cases filed in 1976 resulted in a trial. Id. at 526.

Eisenberg's research for § 1983 cases uncovered at least as many title VII cases in the category "other Civil Rights" as § 1983 cases. Id. at 534. Because a title VII plaintiff need not prove intent to discriminate to establish a title VII violation, under Griggs v. Duke Power Co., 401 U.S. 424 (1971), as opposed to the intent that must be shown in § 1983 claims under Washington v. Davis, 426 U.S. 229 (1976), a title VII claim has become easier to win. Eisenberg, supra note 24, at 528. When litigants proceed under title VII and § 1983, the title VII claim exerts more pressure on defendants than § 1983. Id. at 528-29.

A federal employee may not use § 1983, which protects against violations under color of state law, so his exclusive remedy is title VII. See, e.g., Carver v. Casey, 669 F. Supp. 412 (S.D. Fla. 1987) (pro se former postal employee brought both title VII and § 1983 claims for employment discrimination).

[69] See, e.g., Stoecklin v. Commissioner, 865 F.2d 1221, 1226 (11th Cir. 1989) (CPA brought frivolous constitutional claims against the IRS, warranting sanctions); Garrett v. City of San Francisco, 818 F.2d 1515 (9th Cir. 1987) (reversing summary judgment and vacating award of attorney fees where black firefighter, who brought title VII action alleging discriminatory treatment in discharge, had been denied discovery); Ahmed v. Chesapeake Hosp. Auth., 803 F.2d 1180 (4th Cir. 1986) (table; text in WESTLAW, Allfeds file) (doctor claimed constitutional violation where hospitals refused to allow him use of facilities); Cheek v. Doe, 110 F.R.D. 420 (N.D. Ill. 1986) (airline pilot brought civil rights claims against the IRS, protesting that withholding of taxes was an unconstitutional taking of property), aff'd in part, rev'd in part, 828 F.2d 395 (7th Cir.), cert. denied, 108 S. Ct. 349 (1987); United States v. Tarver, 642 F. Supp. 1109, 1112 (D. Wyo. 1986) (pro se civil defendant, a primary election candidate who had not filed required financial disclosure statements, filed counterclaim barred by Federal Tort Claims Act, but was not sanctioned under Rule 11 because he was acting pro se).

[70] See, e.g., 225 Broadway Co. v. Sheridan, 807 F.2d 24, 25-26 (2d Cir. 1986) (per curiam) (tenant-attorney's claim that because an earlier judgment in favor of the previous owner had terminated his lease, he was entitled to withhold rent from the plaintiff held "patently absurd;" double costs and reasonable attorney fees imposed under Rule 38); Harbulak v. County of Suffolk, 654 F.2d 194, 198 (2d Cir. 1981) (pro se attorney's claim that policeman's placing of summons on his dashboard violated his civil rights held so frivolous as to warrant sanctions under § 1988); *In re* Tarasi & Tighe, 88 Bankr. 706, 710-13 (W.D. Pa. 1988) (sanctions imposed pursuant to Bankruptcy Rule 9011 and 11 U.S.C. § 303(i) where attorney acting pro se violated several court orders, neglected appearances and briefs, and raised improper and frivolous claims); Portnoy v. Wherehouse Entertainment Co., 120 F.R.D. 73, 74-77 (N.D. Ill. 1988) (imposing sanctions on both attorney, who had acted pro se in a previous case, and his client for establishing a "cottage industry" in filing frivolous complaints in the short-swing profit field of the securities industry).

nonprisoner section 1983 complaints asserted important interests, including unlawful arrest, assault or battery by the police, unlawful search and seizure,[71] first amendment violations,[72] and employment or other discrimination.[73] The trivial claims asserted were in a minority.[74] Nevertheless, nonprisoner civil rights claimants have presented their fair share of frivolous claims.[75]

Many disgruntled employees have gone to court under title VII or section 1983 to protest allegedly discriminatory treatment;[76] how-

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71 Eisenberg, supra note 24, at 536.

72 Id. at 537 (21 cases).

73 Id. (46 cases).

74 Id.

75 See, e.g., Hamill v. Wright, 870 F.2d 1032, 1938 (5th Cir. 1989) (father, jailed for contempt of court for failure to pay child custody, brought civil rights action against officials; appellate sanctions denied due to pro se status); Patterson v. Aiken, 841 F.2d 386, 386-88 (11th Cir. 1988) (affirming $4,947 in Rule 11 attorney fees against pro se litigant, after he alleged constitutional violations against immune parties for their participation in his prior, unsuccessful lawsuits); Clark v. Green, 814 F.2d 221, 222-23 (5th Cir. 1987) (pro se plaintiff's claim that traffic tickets issued to a third party violated his constitutional rights held "incomprehensible"; appellate court affirmed $2,500 Rule 11 sanctions and imposed $250 and double costs as sanction under Rule 38 for filing a frivolous appeal); Kirkland v. City of Peekskill Police Dep't, No. 87 Civ. 8112 (S.D.N.Y. Mar. 15, 1988) (WESTLAW, Allfeds file) (complaint of a conspiracy to deny plaintiff's civil rights in connection with litigant's employment and eventual discharge as Commissioner of Police held unfounded); Keno v. Davis, 669 F. Supp. 121, 121-22 (E.D. Pa. 1987) (dismissing plaintiff's § 1983 complaint, naming over 70 individuals including IRS agents, politicians, judges, and prosecutors, alleged that the defendants engaged in a widespread conspiracy to deprive her of her property and inheritance, and that, as part of the conspiracy, her previous complaints had been unfairly and unscrupulously dismissed as frivolous); Fiore v. Thornburgh, 658 F. Supp. 161 (W.D. Pa.) (sanctioning operator of garbage hauling business who filed pro se civil rights action against 44 named defendants—many of whom were immune from suit—for conspiracy to harm his business in violation of his fifth and fourteenth amendment rights), aff'd, 833 F.2d 304 (3d Cir. 1987); Robinson v. Moses, 644 F. Supp. 975, 976-81 (N.D. Ind. 1986) (pro se plaintiff failed to show constitutional violation during arrest and pretrial detention); Norman v. Reagan, 95 F.R.D. 476, 476-77 (D. Or. 1982) (pro se litigant alleged that Ronald Reagan, as both Governor and President, caused plaintiff's "civil death" without legislation); Gordon v. Secretary of State of N.J., 460 F. Supp. 1026, 1026-28 (D.N.J. 1978) (pro se complaint alleged that incarceration deprived him of the Presidency); Keno v. Doe, 74 F.R.D. 587, 588 (D.N.J. 1977) (supposed candidate for mayor protested party affiliation declaration requirement for voter's participation in primary, when there was no primary for municipal office and no voters were required to declare party affiliation to vote for municipal candidates), aff'd, 578 F.2d 1374 (3d Cir. 1978); United States *ex rel.* Mayo v. Satan, 54 F.R.D. 282 (W.D. Pa. 1971) (civil rights action against Satan, who allegedly placed deliberate obstacles in plaintiff's path, causing his downfall; application dismissed for probable lack of personal jurisdiction and for lack of directions to effect service of process).

76 Eisenberg, supra note 24, at 534. Compare with supra note 48 (overview of discrimination claims of prisoners). See generally Catania, Access to the Federal Courts for Title VII Claimants in the Post-*Kremer* Era: Keeping the Doors Open, 16 Loy. U. Chi. L.J. 209 (1985) (noting *res judicata* or collateral estoppel effect of administrative rejection of claimant's discrimination complaint); Mahoney, A Sword as Well as a Shield: The Offensive Use of Collateral Estoppel in Civil Rights Litigation, 69 Iowa L. Rev. 469, 479 (1984) (suggesting issue

ever, complaints are often based on the employee's subjective impression that he has been wronged rather than on an objective legal and factual analysis.[77] Where the pleadings have shown little investigation into the applicable law or facts, courts have dismissed the claims and imposed sanctions.[78]

B. *Actions Against the IRS*

The Internal Revenue Service ("IRS") requires all employers to withhold a portion of an employee's wages directly from his pay.[79] The IRS can remove funds directly from a reluctant taxpayer's bank account.[80] Further, it has power to levy all property on a ten day notice and demand for payment.[81] The IRS can also impose a penalty without a hearing.[82]

The taxpayer, however, cannot respond in any direct or immediate manner to these IRS actions in district courts,[83] although tax court[84] provides a litigate first, pay later forum. To proceed in district courts, he must first pay the amount demanded, and then file a claim

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preclusion be used offensively by going directly to the federal courts rather than appealing an administrative decision in state courts).

77 See, e.g., Shrock v. Altru Nurses Registry, 810 F.2d 658, 662 (7th Cir. 1987) (pro se nurse's personal knowledge found not sufficient to meet Rule 11 investigation requirement).

78 See, e.g., George v. Bethlehem Steel Corp., 116 F.R.D. 628 (N.D. Ind. 1987) (allegation that company failed to recall black male because of race and sex held without factual basis); Becker v. Dunkin' Donuts of Am., Inc., 665 F. Supp. 211 (S.D.N.Y. 1987) (age discrimination claims held unfounded where plaintiff repeatedly applied for and was refused employment from defendant); Johnson v. New York City Transit Auth., 639 F. Supp. 887 (E.D.N.Y. 1986) (race discrimination claim, after demotion, with less pay, related to new and permanent physical disability, held not supported by facts), aff'd in part and vacated in part, 823 F.2d 31 (2d Cir. 1987).

79 26 U.S.C. § 3402(a) (1982). Employers are not liable to taxpayer for any amount withheld. Id. § 3403 (1982).

80 See 26 U.S.C. § 6331(a) (1982).

81 Id.

82 Tax Equity and Fiscal Responsibility Act of 1982, 26 U.S.C. § 6702 (1982 & Supp. V 1987). See, e.g., Miller v. United States, 669 F. Supp. 906, 908 (N.D. Ind. 1987) (frivolous return penalty of $500 upheld), aff'd, 868 F.2d 236 (7th Cir. 1989).

83 Claims for injunctive relief are beyond the jurisdiction of federal district courts. 26 U.S.C. § 7421 (1982) (Anti-Injunction Act). There are a few exeptions to this rule for suits in the Tax Court to contest deficiency notices, 26 U.S.C. §§ 6212(a), (c) (1982 & Supp. V 1987); for a grace period after mailing of a deficiency notice, to permit suit in the Tax Court, 26 U.S.C. § 6213(a) (1982 & Supp. V 1987); for a thirty-day period, after filing of bond, to allow suit to contest assessment of a penalty, 26 U.S.C. § 6672(b) (1982); for an extension of time of collection, where the taxpayer pays 15 percent of an assessed penalty, 26 U.S.C. § 6694(c) (1982); for actions by persons other than the one against whom taxes are assessed, 26 U.S.C. §§ 7426(a), (b)(1) (1982); and for review of jeopardy assessments, 26 U.S.C. § 7429(b) (1982 & Supp. V 1987).

There is a judicially created exception to the Anti-Injunction Act. See infra note 88.

84 Tax Court has jurisdiction over all tax cases. T.C.R. 13. See procedural exceptions, supra note 83.

for a refund. No other entity may take a person's property without first going to court. Because most people think that the thrust of "due process" is notice and an opportunity to be heard prior to any seizure of property, much IRS collection activity appears to violate the fifth and fourteenth amendments by depriving taxpayers of property without due process of law. Had Congress and the courts not proclaimed otherwise, IRS action would be unconstitutional; by force of law, however, the governmental interest in collecting taxes outweighs the property interest of an individual taxpayer.[85]

In courts other than Tax Court, claims against the IRS are especially difficult for a pro se taxpayer to pursue because a considerable body of law suggests that such actions cannot succeed.[86] Even though the IRS must file a claim with the local district court to serve a sum-

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[85] Phillips v. Commissioner, 283 U.S. 589, 595 (1931). A taxpayer's due process rights have been held to be adequately protected by the refund claim procedure in 26 U.S.C. § 7422 (1982 & Supp. V 1987). *Phillips*, 283 U.S. at 589 (involving predecessor to § 7422); Zernial v. United States, 714 F.2d 431 (5th Cir. 1983).

[86] Among the points which cannot be successfully contested in court are the following: income taxes are constitutional. See Eisner v. Macomber, 252 U.S. 189, 207 (1920) (tax on income is constitutional and for the purposes of the sixteenth amendment, income includes "gain derived from capital, from labor, or from both combined"); see also Brushaber v. Union Pacific R.R., 240 U.S. 1 (1916) (income tax laws are constitutional); United States v. Thomas, 788 F.2d 1250 (7th Cir.) (income taxes are constitutional), cert. denied, 479 U.S. 853 (1986); Cheek v. Doe, 110 F.R.D. 420, 422 (N.D. Ill. 1986) (claims that withholding taxes is unconstitutional and that wages are not income is frivolous), aff'd in part, rev'd in part, 828 F.2d 395 (7th Cir.) (reversed on amount of sanction), cert. denied, 108 S. Ct. 349 (1987). Wages are taxable income. Granzow v. Commissioner, 739 F.2d 265, 267 (7th Cir. 1984); United States v. Koliboski, 732 F.2d 1328, 1329 n.1 (7th Cir. 1984). Claiming that wages are not income is frivolous. Granado v. Commissioner, 792 F.2d 91, 94 (7th Cir. 1986), cert. denied, 480 U.S. 920 (1987); Gattuso v. Pecorella, 733 F.2d 709, 710 (9th Cir. 1984).

The claim that the sixteenth amendment was not adequately ratified and is thus invalid has been held to be meritless. Miller v. United States, 868 F.2d 236 (7th Cir. 1989); Lysiak v. Commissioner, 816 F.2d 311, 312 (7th Cir. 1987); Sisk v. Commissioner, 791 F.2d 58, 60-61 (6th Cir. 1986); United States v. Ferguson, 793 F.2d 828, 831 (7th Cir.), cert. denied, 479 U.S. 933 (1986); United States v. Foster, 789 F.2d 457, 462-63 (7th Cir.), cert. denied, 479 U.S. 883 (1986); *Thomas*, 788 F.2d at 1253-54; Cook v. Spillman, 806 F.2d 948, 949 (9th Cir. 1986); Knoblauch v. Commissioner, 749 F.2d 200, 202 (5th Cir. 1984), cert. denied, 474 U.S. 830 (1985).

The Supreme Court has held that raising a fifth amendment self-incrimination claim "against every question on the tax return" would be frivolous. Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965). Tax returns asserting this right have been held frivolous and deserving of a penalty. See, e.g., Miller v. United States, 868 F.2d 236 (7th Cir. 1989); Jolly v. United States, 764 F.2d 642, 644 (9th Cir. 1985); Brennan v. Commissioner, 752 F.2d 187, 189 (6th Cir. 1984); Baskin v. United States, 738 F.2d 975, 977 (8th Cir. 1984); Martinez v. IRS, 744 F.2d 71, 72 (10th Cir. 1984).

"[R]eligious belief in conflict with the payment of taxes affords no basis for resisting the tax." United States v. Lee, 455 U.S. 252, 260 (1982); see also Larsen v. Commissioner, 765 F.2d 939 (9th Cir. 1985) (taxpayer protesting disallowance of contributions to the Universal Life Church refused to process his application correctly and was penalized $5000 for a frivo-

mons on a third party record-keeper,[87] the taxpayer may not move preemptively—by filing a counterclaim, an order to show cause, or a motion to quash the summons in that same district court—without a considerable burden of proof imposed at the pleading stage.[88]

As with RICO cases, the failure to prove the charge from the beginning may result in a finding of frivolity. If a taxpayer attempts to prevent the IRS from seizing his property by going to court, he may face sanctions.[89]

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lous petition; court held on appeal that it was no abuse of first amendment right to petition the government and sanctioned him and his attorney $1000 for a frivolous appeal).

A district court lacks jurisdiction to restrain collection of penalties. Farnum v. United States, 813 F.2d 114, 116 (7th Cir. 1986); Herring v. Moore, 735 F.2d 797, 798 (5th Cir. 1984); Hutchinson v. United States, 677 F.2d 1322, 1326 (9th Cir. 1982); see also Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981) (denying declaratory relief or damages when state taxpayer seeks federal protection by state remedies). This lack of jurisdiction is subject to the exception in 26 U.S.C. § 6213(a) (1982 & Supp. V 1987) which authorizes a court to restrain the assessment or collection of taxes if the Commissioner failed to issue the statutory notice of deficiency under 26 U.S.C. § 6212 (1982 & Supp. V 1987). See *Hutchinson*, 677 F.2d at 1326.

87 26 U.S.C. § 7609(a) (1982 & Supp. V 1987).

88 A taxpayer seeking injunctive relief must show that under no circumstances could the government ultimately prevail and that the taxpayer will sustain irreparable injury for which there is no adequate remedy at law. Alexander v. "Americans United" Inc., 416 U.S. 752, 758 (1974); Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962); Zernial v. United States, 714 F.2d 431, 434 (5th Cir. 1983); Trails End Motels, Inc. v. Commissioner, 532 F. Supp. 85, 89 (D. Kan. 1982); Rappaport v. United States, 419 F. Supp. 1236, 1238 (N.D. Ill. 1976), aff'd 583 F.2d 298 (7th Cir. 1978).

A party opposing an IRS summons must come forward with specific facts, under oath, from his own resources, demonstrating that a triable issue exists on a legally sufficient defense to justify an evidentiary hearing. Johnson v. United States, 607 F. Supp. 347, 348 (E.D. Pa. 1985); see also 26 U.S.C. § 7609(b)(2) (1982) (proceeding to quash).

89 In the following cases, sanctions were imposed on a pro se taxpayer for bringing a frivolous or improper claim or appeal: Miller v. United States, 868 F.2d 236, 242 (7th Cir. 1989) (asserting fifth amendment privilege to virtually every question on his tax form without making a colorable showing of criminal activity); Atkinson v. O'Neill, 867 F.2d 589, 590-91 (10th Cir. 1989) (claim against IRS officers dismissed on sovereign immunity grounds); Stoecklin v. Commissioner, 865 F.2d 1221, 1226 (11th Cir. 1989) (CPA claimed that federal reserve notes were not dollars, so not taxable); Lefebvre v. Commissioner, 830 F.2d 417, 420-21 (1st Cir. 1987) (seeking tax liability redetermination); *Cheek*, 828 F.2d at 396 (arguing that withholding income and social security taxes was unconstitutional); Doyle v. United States, 817 F.2d 1235, 1236-38 (5th Cir.) (employees, protesting $500 IRS penalty for claiming exemptions from all income tax withholding, were each sanctioned full amount of attorney fees under Rule 11), cert. denied, 108 S. Ct. 159 (1987); Kramer v. Commissioner, 816 F.2d 680 (6th Cir. 1987) (table; text in WESTLAW, Allfeds file) (appealing Tax Court ruling that charitable deductions to the Universal Life Church were improper); *Lysiak*, 816 F.2d at 312 (after plaintiff lost two other cases on same facts, seeking injunction to restrain officials from enforcing tax laws because the sixteenth amendment was not ratified); Zuger v. United States, 834 F.2d 1009, 1010 (Fed. Cir. 1987) (claiming that pay in Federal Reserve Notes was not "real money" because it was not gold-backed); Stites v. IRS, 793 F.2d 618, 621 (5th Cir. 1986) (attempting to quash IRS bank records summons; no sanction imposed for frivolous appeal); *Farnum*, 813 F.2d at 115 (seeking to restrain collection of penalties for frivolous tax return); Granado v. Commissioner, 792 F.2d 91, 94 (7th Cir. 1986) (protesting Tax Court penalties for false W-4 forms

Any preemptive suit filed by a taxpayer against the IRS is automatically deemed frivolous where the large body of relevant case law was presumably ignored.[90] A court may be likely to presume any pro se suit against the IRS is frivolous.[91]

Moreover, the IRS is immune from suit,[92] as are most federal

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after he had notified Commissioner of intent to continue evading taxes on constitutional grounds), cert. denied, 480 U.S. 920 (1987); Grimes v. Commissioner, 806 F.2d 1451, 1453 (9th Cir. 1986) (claiming deduction for cost of providing family with the "American Standard of 'good living' "); Cook v. Spillman, 806 F.2d 948, 949 (9th Cir. 1986) (claiming sixteenth amendment was not ratified, Federal Reserve notes were not taxable income and religious beliefs conflicted with the payment of tax); Casper v. Commissioner, 805 F.2d 902, 905-06 (10th Cir. 1986) (alleging Commissioner failed to follow proper procedures); McKeown v. LTV Steel Co., 117 F.R.D. 139, 142-43 (N.D. Ind. 1987) (challenging IRS levy against life insurance carrier); Pfeifer v. Valukas, 117 F.R.D. 420, 423-24 (N.D. Ill. 1987) (arguing, in an incomprehensible 300 page brief, that various federal income taxes were unconstitutional); Itz v. U.S. Tax Court, 60 A.F.T.R.2d (P-H) ¶ 87-5113 (W.D. Tex. 1987) (claiming "de jure" citizenship exemption); Johnson v. United States, 607 F. Supp. 347, 349-50 (E.D. Pa. 1985) (petitioning to quash summons after IRS agent established prima facie case for enforcement); Miller v. United States, 604 F. Supp. 804, 805-06 (E.D. Mo. 1985) (challenging penalty for filing "frivolous" tax return with asterisks on each line and objections under the first, fourth, fifth, seventh, eighth, ninth, and fourteenth amendments); Snyder v. IRS, 596 F. Supp. 240, 251-53 (N.D. Ind. 1984) (alleging taxes violated the civil rights acts and the constitution). In all the appellate cases above, except *Stites*, both Rule 11 sanctions for a frivolous claim and appellate sanctions for a frivolous appeal were imposed—and in *Stites*, the court considered imposing Rule 38 sanctions *sua sponte*. *Stites*, 793 F.2d at 621. But see Pryzina v. Ley, 813 F.2d 821, 824 (7th Cir. 1987) (pro se litigant bringing civil rights action protesting tax enforcement held not expected to be aware of "somewhat obscure" jurisdictional grounds for dismissal); Farrell v. United States Tax Court, 647 F. Supp. 944, 945-46 (D. Kan. 1985) (sanctions denied in view of complexities of Internal Revenue Code).

90 See Granzow v. Commissioner, 739 F.2d 265, 270 (7th Cir. 1984) ("[a]busers of the tax system have no license to make irresponsible demands on the Courts of Appeals to consider fanciful arguments put forward in bad faith"). In *Snyder*, the court cited footnote 4 in Cameron v. IRS, 593 F. Supp. 1540, 1558 (N.D. Ind. 1984), aff'd, 973 F.2d 126 (7th Cir. 1985), and, although noting that the plaintiff was unaware of the warning to future litigants in *Cameron*, held that a verbal warning in open court was sufficient and imposed a $500 sanction. *Snyder*, 596 F. Supp. at 252. Cf. Blair v. United States Treasury Dep't, 596 F. Supp. 273, 282 (N.D. Ind. 1984) (denying sanctions because plaintiffs did not make "specious arguments long ago rejected by the courts," even though the court had no jurisdiction, the defendants were immune and the complaints meritless).

91 In one case, the Tenth Circuit reversed a Rule 11 sanction against a pro se plaintiff who had sued the IRS for witness fees when the court found that the IRS had forced the plaintiff to go to court. The district court was found to have assumed frivolousness where there was none. Conklin v. United States, 812 F.2d 1318, 1319 (10th Cir. 1987).

92 See 28 U.S.C. §§ 2671-80 (1982) (the federal government has specifically reserved its immunity in respect to claims arising out of tax collection and assessment, which immunity extends to the IRS). See *Snyder*, 596 F. Supp. at 246-47 (a specific exception to Federal Tort Claims Act ["FTCA"], 28 U.S.C. §§ 2671-80, is immunity for collection and assessment of taxes); Morris v. United States, 521 F.2d 872, 874 (9th Cir. 1975).

Most pro se claims against the IRS, or against IRS officers operating in good faith within the scope of their duties, are dismissed under a sovereign immunity rationale or the FTCA exception or both. See, e.g., *Atkinson*, 867 F.2d at 590-91 (claims against IRS agents dismissed under sovereign immunity); Bothke v. Fluor Engineers & Constructors, Inc., 834 F.2d 804,

governmental entities,[93] and injunctions against IRS and state tax agency actions are barred by statute.[94] Therefore, when a party attempts to pursue a claim against such an entity, immunity is raised as one defense and the court is more likely to impose sanctions.[95] A pro

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810-12 (9th Cir. 1987) (pro se taxpayer's *Bivens* action against IRS official dismissed on immunity grounds); Hutchinson v. United States, 677 F.2d 1322, 1327-28 (9th Cir. 1982) (dismissal under both immunity and FTCA); Berman v. United States Treasury Dep't, 63 A.F.T.R.2d (P-H) ¶ 89-538 (E.D.N.Y. 1988); Johnson v. United States, 680 F. Supp. 508, 514 (E.D.N.Y. 1987) (dismissal under both immunity and FTCA); Flank v. Sellers, 661 F. Supp. 952, 954 (S.D.N.Y. 1987) (dismissal based on qualified immunity).

For a general discussion of sovereign immunity, see both the majority and dissenting opinions in Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989) (in context of § 1983 claims against state officials).

93 The doctrine of sovereign immunity bars suits against the United States government or its agencies without specific statutory consent, such as that afforded by the FTCA. See United States v. Testan, 424 U.S. 392, 399 (1976); United States v. Shaw, 309 U.S. 495, 500-01 (1940). Absent such permission, dismissal is required. Hutchinson v. United States, 677 F.2d 1322, 1327 (9th Cir. 1982). Further, IRS officials acting within the scope of their duties have been held by some courts to have absolute immunity. See Stankevitz v. IRS, 640 F.2d 205, 206 (9th Cir. 1981) (IRS agents absolutely immune); Krzyske v. Commissioner, 548 F. Supp. 101, 103 (E.D. Mich. 1982), aff'd, 740 F.2d 968 (6th Cir. 1983); White v. Commissioner, 537 F. Supp. 679, 684 (D. Colo. 1982). Few courts will find IRS agents to be absolutely immune, but qualified immunity for agents is regularly granted because their actions are essential for the conduct of the public business. *Hutchinson*, 677 F.2d at 1328 (citing Butz v. Economou, 438 U.S. 478, 507 (1978) (concerning the parameters of immunity of federal officials)); Young v. IRS, 596 F. Supp. 141, 148 (N.D. Ind. 1984); Cameron v. IRS, 593 F. Supp. 1540, 1549-51 (N.D. Inc. 1984), aff'd, 773 F.2d 126 (7th Cir. 1985).

Sovereign immunity has been waived under 28 U.S.C. § 1346(a)(1) (1982) to allow a taxpayer to contest any internal revenue tax alleged to have been erroneously collected or assessed, but the taxpayer must first have filed a refund claim with the Secretary. 26 U.S.C. § 7422(a) (1982) (no suit permitted in any court prior to filing a claim for a refund); Fidelity Bank, N.A. v. United States, 616 F.2d 1181, 1182 n.1 (10th Cir. 1980) (generally, tax payer must pay full tax or penalty assessment before challenging validity in district court); Poretto v. Usry, 295 F.2d 499, 501 (5th Cir. 1961), cert. denied, 369 U.S. 810 (1962) ("pay and sue" procedure of § 7422). Noncompliance with a statutory prerequisite deprives the court of jurisdiction. Hampton v. United States, 513 F.2d 1234 (Ct. Cl.), cert. denied, 423 U.S. 837 (1975).

The Federal Tort Claims Act is expressly not applicable to claims relating to the assessment or collection of taxes. 28 U.S.C. § 2680(c) (1982).

94 Anti-Injunction Act, 26 U.S.C. § 7421(a) (1982) (bars lawsuits for the purpose of restraining the assessment or collection of any tax). See, e.g., Farnum v. United States, 813 F.2d 114 (7th Cir. 1986) (Anti-Injunction Act prohibited remedy sought by plaintiff). Tax Injunction Act of 1937, 28 U.S.C. § 1341 (1982) ("district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State"). See Pryzina v. Ley, 813 F.2d 821 (7th Cir. 1987) (Tax Injunction Act barred the injunctive relief sought by the plaintiff).

Under 28 U.S.C. § 1340 (1982), however, district courts have original jurisdiction over any civil action concerning internal revenue.

95 Rule 38 sanctions have been imposed on pro se plaintiffs after the case was dismissed on immunity grounds. See, e.g., *Atkinson*, 867 F.2d at 590-91; *Cameron*, 773 F.2d at 128-29; Ryan v. Bilby, 764 F.2d 1325, 1328-29 (9th Cir. 1985). Sanctions have also been imposed under Rule 11. See, e.g., Richmond v. United States, 57 A.F.T.R.2d (P-H) ¶ 86-992 (N.D. Fla. 1986) (Rule 11 sanctions considered after dismissal on immunity grounds); Snyder v. IRS, 596 F. Supp. 240, 251-53 (N.D. Ind. 1984) (Rule 11 sanctions of $500 fine and $500 attorney

se litigant—a legal neophyte who believes that the fifth amendment should apply to IRS practices and is unaware of the statutes granting immunity—may face sanctions.[96]

The scarcity of attorneys who are willing to represent litigants with these claims rivals the civil rights arena, especially when petitioners wish to pursue constitutional claims against governmental bodies which have vast resources at their disposal and most of the legal cards in their hands.[97]

C. *RICO and Antitrust Actions*

Pro se litigants regularly attempt to bring a variety of claims under RICO[98] and the antitrust statutes.[99] Even though experienced attorneys and judges find these cases convoluted, imposing, and often

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fees imposed on pro se taxpayer after case dismissed on grounds of immunity); Young v. IRS, 596 F. Supp. 141, 146-48, 150-52 (N.D. Ind. 1984). But see Blair v. United States Treasury Dep't, 596 F. Supp. 273, 282 (N.D. Ind. 1984) (sanctions denied because pro se arguments were not outrageous or in disregard of well-established law).

[96] But see *Pryzina*, 813 F.2d 821, in which a pro se litigant was not sanctioned because he was not expected to be aware of the various grounds for immunity nor the Tax Injunction Act of 1937, 28 U.S.C. 1341 (1982). Id. at 823.

[97] Sections 1981, 1983, and 1986 of the Civil Rights Act cannot provide jurisdiction in IRS cases. Section 1981 is restricted to discrimination based on race or color. Virginia v. Rives, 100 U.S. (10 Otto) 313, 317-18 (1880); *Snyder*, 596 F. Supp. at 245. The plain language of § 1981 defeats any such claim because it provides that "all persons" shall be subject to taxes. Id.

Section 1983 is inapplicable because it only concerns state actions—IRS actions are federal. Seibert v. Baptist, 594 F.2d 423, 429 (5th Cir. 1979), cert. denied, 446 U.S. 918 (1980); *Snyder*, 596 F. Supp. at 245. Section 1986, which creates a cause of action for failure to prevent a § 1985 conspiracy, is also inapplicable: first, no official has been prevented from discharging his duties, so there is no § 1985(1) violation; second, justice has not been obstructed, so there is no § 1985(2) violation; and, third, no racial or class-based discrimination is evident. *Snyder*, 596 F. Supp. at 245. A claim under § 1985 requires an allegation of conspiracy based on some class-based discriminatory animus. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971); Dunn v. Tennessee, 697 F.2d 121, 124 (6th Cir. 1982), cert. denied, 460 U.S. 1086 (1983); Askew v. Bloemker, 548 F.2d 673, 678 (7th Cir. 1976); Richcreek v. Grecu, 612 F. Supp. 111, 114 (S.D. Ind. 1985).

[98] 18 U.S.C. §§ 1961-1968 (1982 & Supp. V 1987). Under RICO, a private plaintiff must prove injury caused by defendant's involvement in a pattern of racketeering activity. Id. § 1964(c). A pattern may be established if two predicate acts of racketeering are proven. Id. § 1961(5). See Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985).

[99] Sherman Act, 15 U.S.C. §§ 1-11 (1982) (restraint of trade); Clayton Act, 15 U.S.C. §§ 12, 13, 14-19, 20-27 (1982) (price discrimination); Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13, 13a, 13b, 21a (1982); Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified at 15 U.S.C. §§ 15c-15h, 18a, 66 (1982)); Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1982) (unfair competition). Pro se litigants, however, bring a very small percentage of antitrust cases—so small that a recent article did not include them in a breakdown of plaintiff identities. The breakdown showed that 5.3 percent of plaintiffs were individuals. Salop & White, Economic Analysis of Private Antitrust Litigation, 74 Geo. L.J. 1001, 1004 (1986).

extremely lengthy, a pro se petitioner may undertake them because he believes that some group of people or companies is acting illegally.[100] Pleading requirements are an initial stumbling block.[101] Discovery is the next crucial step in proving the conspiracy which is a key element under most of these statutes, but because a pro se litigant has little or no idea of how to proceed with discovery,[102] few of these cases are prosecuted past the filing stage. The plaintiff has the burden of moving the case forward. Few pro se plaintiffs, however, can accomplish this without assistance, so the complaint eventually dies from neglect. When the defendant moves for dismissal for failure to prosecute, if he has not already moved for dismissal for failure to allege the necessary facts, he may also move for sanctions against the importunate pro se litigant. In many cases, the opposing party and the court may assume that the plaintiff was unable to prove the charge and therefore the suit was frivolous or improper. A pro se plaintiff, however, may have met

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100 For claims in which pro se litigants faced sanctions after dismissal, see, e.g., Patterson v. Aiken, 841 F.2d 386 (11th Cir. 1988) (pro se litigant alleged antitrust and civil rights claims against judges and lawyers based on claims which had been decided against him in prior litigation); Cory v. Lang, 843 F.2d 1386 (table; text in WESTLAW, Allfeds file) (4th Cir. 1988) (pro se RICO claims against bank dismissed); Gates v. Central States Teamster Pension Fund, 788 F.2d 1341 (8th Cir. 1986) (pro se claim of conspiracy by union in violation of the RICO Act); Ahmed v. Chesapeake Hosp. Auth., 803 F.2d 1180 (4th Cir. 1986) (table; text in WESTLAW, Allfeds file) (doctor alleged conspiracy by five hospitals to prevent him from practicing); Fiore v. Thornburgh, 658 F. Supp. 161 (W.D. Pa.) (alleged conspiracy to harm plaintiff's business), aff'd mem., 833 F.2d 304 (3d Cir. 1987); Damiani v. Adams, 657 F. Supp. 1409 (S.D. Cal. 1987) (RICO suit by vendor and prospective purchaser of mining property against numerous defendants, alleging conspiracy to deprive plaintiffs of property held to have been brought for improper purpose of harassment). See also Dillard v. Security Pac. Brokers, Inc., 835 F.2d 607 (5th Cir. 1988) (securities customer's RICO claim not dismissed as *res judicata* by prior judgment against him for submitting worthless checks to the defendant).

In one case, an unsuccessful bar applicant pursued his pro se Sherman Act claim into the Supreme Court. Hoover v. Ronwin, 466 U.S. 558 (1984). After a lengthy state action immunity analysis, the Court affirmed the district court's dismissal for failure to state a claim. Id. at 582. The dissent, after noting that a state agency should not be granted absolute immunity if an abuse of public trust could be shown, warned of the possible impropriety of making precedent-setting rulings on the merits, when frivolous or vexatious claims may be dealt with more simply through § 1927 sanctions. Id. at 601 n.27 (Stevens, J., dissenting).

101 See Elliott v. Foufas, 867 F.2d 877 (5th Cir. 1989) (discussing particularity of pleading requirement in affirming 12(b) dismissal of RICO complaint filed by attorneys). See generally Note, Excepting Civil RICO Claims from Rule 9(b), 10 Cardozo L. Rev. 359 (1988) (arguing that civil RICO claims should not be subject to pleading with particularity).

102 The court also may decide not to issue a *subpoena duces tecum* requested by a pro se litigant. Murrell v. Bennett, 615 F.2d 306, 310 (5th Cir. 1980) (reversing summary judgment in civil rights case where court denied indigent prisoner's request for medical records necessary to ward off summary judgment); Garrett v. City of San Francisco, 818 F.2d 1515 (9th Cir. 1987) (reversing summary judgment and vacating award of attorney fees where black firefighter, who brought title VII action alleging discriminatory treatment in discharge, had been denied discovery). Pro se RICO claimants, indeed most pro se litigants, face similar judicial resistance.

the criteria of reasonable belief of a basis in law and facts without being able to move his claim beyond the pleading stage.

D. *Miscellaneous Claims*

Many governmental bodies face suits from pro se petitioners who believe that the bureaucracy has wronged them and who are determined to fight back. For example, many pro se litigants file claims against the VA in an attempt to procure denied benefits.[103] VA decisions, however, are considered beyond the court's jurisdiction to review.[104] As with the IRS, most of these bodies have sovereign immunity—they cannot be sued without their permission.[105] Therefore, most of these claims are doomed from the start.[106]

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[103] Administrative VA decisions refusing to award benefits are not subject to judicial review. See Higgins v. Kelley, 824 F.2d 690 (8th Cir. 1987); Pappanikoloaou v. Administrator of VA, 762 F.2d 8 (2d Cir.), cert. denied, 474 U.S. 851 (1985); Love v. Walters, 754 F.2d 804 (8th Cir. 1985); Taylor v. United States, 642 F.2d 1118 (8th Cir. 1981); see also Roberts v. Walters, 792 F.2d 1109 (Fed. Cir. 1986) (constitutional challenge remains sole exception to statute barring judicial review of VA decisions). But see Evans v. Marsh, 835 F.2d 609 (5th Cir. 1988) (pro se litigant may obtain judicial review of Army Board of Correction decision even though it may affect VA decision); Mathes v. Hornbarger, 821 F.2d 439 (7th Cir. 1987) (termination of previously earned VA educational benefits raised a "property interest" protected by due process clause and thus falls under federal question exception to statute).

Most veterans filing claims against the VA proceed pro se due to the statutory limitation of $10 per claim on attorney's fees payable by a veteran for representation before the VA on a disability claim. 38 U.S.C. §§ 3404(c) (1982); id. § 3405 (Supp. IV 1986). Although veterans have claimed that this limitation violates their rights to due process, courts hold otherwise. Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 319-34 (1985); Demarest v. United States, 718 F.2d 964, 966-67 (9th Cir. 1983), cert. denied, 466 U.S. 950 (1984).

[104] *Higgins*, 824 F.2d 690; *Roberts*, 792 F.2d 1109; *Pappanikoloaou*, 762 F.2d 8; *Love*, 754 F.2d 804; *Taylor*, 642 F.2d 1118; Johnson v. Veterans Admin., 107 F.R.D. 626 (N.D. Miss. 1985); see 38 U.S.C. § 211(a) (1984) (decisions of the Administrator concerning benefits for veterans are final and conclusive and no court has the power or jurisdiction to review the decisions).

However, in a recent line of cases, this problem is circumvented by attacking the constitutionality of the procedures themselves. See Marozsan v. United States, 852 F.2d 1469 (7th Cir. 1988) (en banc) (judicial review on constitutionality is not precluded); Winslow v. Walters, 815 F.2d 1114 (7th Cir. 1987) (due process claim); Tietjen v. United States VA, 692 F. Supp. 1106 (D. Ariz. 1988). The court may also recognize a protected property interest in terminated benefits. *Mathes*, 821 F.2d 439 (educational benefits).

[105] That is, the power of the sovereign, the United States government, is vested in its regulatory agencies, and immunity from suit may be a part of this vested power. See, e.g., Liffiton v. Keuker, 850 F.2d 73, 77 (2d Cir. 1988) (claims of targets of criminal investigation dismissed under sovereign immunity).

[106] One of the first pro se litigants to face Rule 11 sanctions had continued to press the same baseless claims against the Veterans Administration in over 100 lawsuits for over thirty years. A short list of his claims follows: Di Silvestro v. United States, 742 F.2d 1436 (2d Cir.), cert. denied, 466 U.S. 931, reh'g denied, 466 U.S. 994 (1984); Di Silvestro v. United States, 633 F.2d 203 (2d Cir.), cert. denied, 449 U.S. 903, reh'g denied, 449 U.S. 1026 (1980); Di Silvestro v. United States VA, 556 F.2d 555 (2d Cir.), cert. denied, 434 U.S. 840, reh'g denied, 434 U.S. 960 (1977); Di Silvestro v. United States, 268 F. Supp. 516 (E.D.N.Y. 1966), rev'd, 405 F.2d

Other pro se litigants attempt to file claims against judges, prosecutors, and other officials with absolute immunity.[107] Pro se litigants have attempted to proceed in court after an arbitrator has found against them, a move not unheard of by parties represented by attorneys but apparently considered frivolous if undertaken pro se.[108] Some pro se claims involving novel actions or theories of law are not readily categorizable, and therefore are found frivolous.[109]

Any cognizable complaint may be brought or defended pro se.

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150 (2d Cir. 1968); Di Silvestro v. United States, 181 F. Supp. 860 (E.D.N.Y. 1960), cert. denied, 364 U.S. 825 (1960); Di Silvestro v. United States VA, 151 F. Supp. 337 (E.D.N.Y. 1957), cert. denied, 355 U.S. 935, reh'g denied, 355 U.S. 968 (1958); Di Silvestro v. United States VA, 132 F. Supp. 692 (E.D.N.Y. 1955), aff'd, 228 F.2d 516 (2d Cir.), cert. denied, 350 U.S. 1009 (1956); Di Silvestro v. United States VA, 173 F.2d 933 (2d Cir. 1949).

Finally, after yet another dismissal—and the amendment of Rule 11—the court awarded attorney's fees against the petitioner. This award was affirmed by the Second Circuit. Di Silvestro v. United States, 767 F.2d 30 (2d Cir.), cert. denied, 474 U.S. 862, reh'g denied, 474 U.S. 990 (1985). For an analysis of this case, see Note, Ask Questions First and Shoot Later: Constraining Frivolity in Litigation Under Rule 11, 40 U. Miami L. Rev. 1267, 1282-83 (1986).

107 See Note, Preserving *Pro Se*, supra note 62, at 368, 370 (following the saga of the Hilgefords, who attempted to keep a lawsuit alive by suing everyone who had anything to do with their previous cases).

108 Verone v. Taconic Tel. Corp., No. 85 Civ. 8574 (S.D.N.Y. Feb. 9, 1988) (WESTLAW, Allfeds file) (case dismissed after pro se plaintiff failed to comply with court order to post $10,000 bond against possible Rule 11 sanctions in labor grievance action after plaintiff lost in arbitration); but see Fort Hill Builders, Inc. v. National Grange Mut. Ins. Co., 866 F.2d 11 (1st Cir. 1989) (reversing sanctions imposed under Fed. R. Civ. P. 56(g) against pro se partnership where no bad faith shown in affadavits). For other pro se cases related to arbitration, see Kile v. North Pac. Constr. Co., 827 F.2d 1363 (9th Cir. 1987); Bergman v. Bowling Green State Univ., 820 F.2d 1224 (6th Cir. 1987) (table; text in LEXIS, Genfed library); Branch v. Detroit Fed'n of Teachers Local 231, 810 F.2d 199 (6th Cir. 1986) (table; text in LEXIS, Genfed library); Rodriguez v. Merit Systems Protection Bd., 804 F.2d 673 (Fed. Cir. 1986); Huey v. Department of Health and Hum. Servs., 782 F.2d 1575 (Fed. Cir. 1986); Bottini v. Sadore Management Corp., 764 F.2d 116 (2d Cir. 1985); Zerman v. Jacobs, 751 F.2d 82 (2d Cir. 1984), cert. denied *sub nom.* Zerman v. Melton, 474 U.S. 845 (1985); Zeviar v. Local No. 2747, 733 F.2d 556 (8th Cir. 1984).

Contesting arbitration is not without hazards for attorneys either. See $25,000 Sanction for Wilson, Elser: Contest of Brokerage Arbitration Award found 'Totally Without Merit', N.Y.L.J., May 26, 1989, at 1, col. 3.

109 There are numerous claims that defy categorization. See, e.g., Zaidi v. Edwards, 829 F.2d 1121 (4th Cir. 1987) (table; text in WESTLAW, Allfeds file) (affirming imposition of $831.20 Rule 11 sanction against plaintiff who sought damages and injunction to bar closing of school from which he had graduated), aff'd, 787 F.2d 595 (7th Cir. 1986); Nixon v. Individual Head of St. Joseph Mortgage Co., 612 F. Supp. 253 (N.D. Ind. 1985) (sanction of $500 imposed upon plaintiff who drafted "land patent" and then sought declaratory judgment of property right), aff'd, 787 F.2d 595 (7th Cir. 1986). In Bigalk v. Federal Land Bank Ass'n, 107 F.R.D. 210 (D. Minn. 1985), the court refused to impose sanctions on pro se farmers who alleged various violations of federal and state constitutional and statutory provisions concerning a mortgage-secured loan of $85,000. Id. at 212-13. The court found that the only applicable law was the Truth in Lending Act, which exempted agricultural loans in excess of $25,000. Id. at 212. Sanctions were not imposed because litigants were sincere and had unsuccessfully attempted to obtain counsel. Id. at 213.

The seriousness of the claim, the amount of money at risk, the value of the property involved, or even the possibility of loss of liberty or life[110] does not deter certain people from acting as their own counsel. Although an objective attorney would see that a claim has no chance of success on the merits and might be able to dissuade his client from that approach,[111] a pro se litigant may feel strongly about a legally meritless argument.[112] Sanctions are unlikely to reduce the number of pro se actions because they do not solve the problem of the pro se litigant's inability to find or afford an attorney.

II. SANCTIONS IMPOSED ON PRO SE LITIGANTS UNDER VARIOUS RULES AND STATUTES

Sanctions have been imposed on pro se litigants under numerous rules and statutes. These sanctions are often imposed under a Rule 11 analysis, whether applied under that rule, Rule 38, section 1915, or other powers.[113] This section analyzes the stated policies behind imposing sanctions under these laws, and determining the nature of the sanction.

A. *Rule 11 Sanctions*

Rule 11 was originally promulgated to check abuses in the submission of pleadings.[114] The original Rule 11 was seldom applied by courts;[115] problem pro se litigants were sanctioned under other

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110 See supra note 10 (pro se criminal defendants).

111 "Telling would-be litigants that the law is against them is an essential part of a lawyer's job." Bailey v. Bicknell Minerals, Inc., 819 F.2d 690, 693 (7th Cir. 1987).

112 See, e.g., Calesnick v. Redevelopment Auth., 696 F. Supp. 1053 (E.D. Pa. 1988) (pro se plaintiffs continue to assert claim of unlawful deprivation of title to property after losing numerous claims in state courts), aff'd, No. 88-1834 (3d Cir. Aug. 4, 1989) (LEXIS, Genfed library, Courts file); Thiel v. First Fed. Sav. & Loan Ass'n, 646 F. Supp. 592, 596 (N.D. Ind. 1986) (pro se "paralegal" contested mortgage foreclosure under RICO and National Bank Act, utilizing a unique economic theory suggesting that checks are not legal tender and that the bank was involved in a "gigantic check kiting scheme"; in addition to substantive frivolousness, the court found that the plaintiffs lacked standing in the case), aff'd in part and appeal dismissed in part, 828 F.2d 21 (7th Cir. 1987).

113 See generally Note, Preserving Pro Se, supra note 62 (discussing Rule 11 sanctions on pro se litigants). But see Oliveri v. Thompson, 803 F.2d 1265, 1273-75 (2d Cir. 1986), cert. denied, 480 U.S. 918 (1987) (sanctions under 28 U.S.C. § 1927 and court's inherent powers require a showing of subjective "bad faith" unnecessary under Rule 11).

114 Schwarzer, Sanctions Under the New Federal Rule 11—A Closer Look, 104 F.R.D. 181, 182-83 (1985) [hereinafter Schwarzer, New Rule 11]; Vairo, Rule 11: A Critical Analysis, 118 F.R.D. 189, 190-91 (1988).

115 Judge Schwarzer suggests Rule 11 was rarely invoked because the striking of a pleading was an ineffective penalty. Schwarzer, New Rule 11, supra note 114, at 183. Professor Vairo attributes the lack of use of Rule 11 to confusion and lack of clarity as to the standard of conduct required, and to the reluctance of attorneys to use the rule against each other for

rules.[116] In 1983, however, Rule 11 was amended to provide that "the party," as well as counsel, must have a reasonable belief that the papers filed are well grounded in law and fact, and are not brought for an improper purpose.[117] Rule 11 requires a signature on the papers to certify this belief. The amended Rule 11 requires a reasonable inquiry by parties and attorneys into the facts and the law prior to filing;[118] failure to do so triggers the imposition of sanctions against the attorney or party who signed the pleading, motion, or other paper.[119] "Party" is definitely meant to include pro se litigants.[120] The crucial moment is the time of the signing: if the party or attorney has a reasonable belief in the merit of the case at that point, sanctions are unlikely to be imposed later.[121]

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tactics they themselves used. Vairo, supra note 114, at 191. See also S. Kassin, An Empirical Study of Rule 11 Sanctions 3-4 (1985) (problems included judicicial confusion over standard and ambiguous enforcement mechanism).

116 See infra notes 190-202 and accompanying text.

117 Fed. R. Civ. P. 11; see also The Advisory Committee Note to Rule 11, 97 F.R.D. 167, 198 (1983) (the revised Rule 11 is "intended to reduce the reluctance of courts to impose sanctions by emphasizing the responsibilities of the attorney" (citation omitted)). The Rule provides in relevant part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . .

Fed. R. Civ. P. 11.

For a discussion of the original promulgation and amendment of Rule 11, see Vairo, supra note 114, at 190-97; Cavanaugh, Developing Standards under Amended Rule 11 of the Federal Rules of Civil Procedure, 14 Hofstra L. Rev. 499, 503-506 (1986); Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 869-71 (5th Cir. 1988) (en banc) (decision intending to resolve circuit inconsistencies in applying Rule 11).

Other federal courts have promulgated rules based on Rule 11. Bankr. R. 9011 is generally considered to be the same as Rule 11, and has been used to impose sanctions on pro se litigants in the bankruptcy courts. See *In re* Sheret, 76 Bankr. 935, 937 (W.D.N.Y. 1987) (overturning sanctions); *In re* Graves, 70 Bankr. 535, 539-42 (N.D. Ind. 1987) (imposing sanctions); *In re* Usoskin, 61 Bankr. 869, 878 (Bankr. E.D.N.Y. 1986) (imposing sanctions). The Tax Court also has a counterpart to Rule 11. See T.C.R. 33(b). For the purposes of this note, both of the above will be treated as Rule 11, unless the court imposes different standards.

118 The Fifth Circuit, *en banc*, has held that Rule 11 imposes three affirmative duties: reasonable inquiry into the underlying facts, reasonable inquiry into the law, and not signing a document for an improper purpose. *Thomas*, 836 F.2d at 873-74.

119 See Vairo, supra note 114, at 194.

120 Fed. R. Civ. P. 11 Advisory Committee notes.

121 See, e.g., *Thomas*, 836 F.2d at 874 (focus is on the "instant when the picture is taken—when the signature is placed on the document"); Pantry Queen Foods, Inc. v. Lifschultz Fast

The Rule 11 amendments have been interpreted as changing the original subjective good faith formula[122] to a more stringent objective standard of reasonableness under the circumstances,[123] which is applied to the grounding in law or fact. Nevertheless, critics and judges have noted that subjective elements remain: in "good faith argument" for the extension or change of established law, in the subjective intent implied by "improper purpose," and in the subjective effect of deterrence as a purpose of the Rule.[124]

Rule 11 contains two independent grounds for sanctions: frivolous claims[125] and claims brought for improper purposes.[126] Each

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Freight, Inc., 809 F.2d 451, 454 (7th Cir. 1987) (Rule 11 does not require ongoing revisions of pleadings or other papers to conform with subsequently discovered information); Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986), cert. denied, 480 U.S. 918 (1987) (signer's conduct must be judged as of the time the signature was affixed); see also Schwarzer, New Rule 11, supra note 114, at 189 (noting that the Advisory Committee warns against the use of hindsight, and that the signer's conduct should be tested according to the circumstances at the time the paper was submitted). Some courts, however, have held that Rule 11 imposes a continuing obligation on the signer. Robinson v. National Cash Register Co., 808 F.2d 1119, 1127 (5th Cir. 1987), overruled by *Thomas*, 836 F.2d at 874.

122 See Note, The Demise of a Subjective Bad Faith Standard under Amended Rule 11, 59 Temp. L.Q. 107 (1986).

123 See *Thomas*, 836 F.2d at 873; *Robinson*, 808 F.2d at 1127; Davis v. Veslan Enters., 765 F.2d 494, 497 (5th Cir. 1985); Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253-54 (2d Cir. 1985) ("Eastway I"), on remand, 637 F. Supp. 558 (E.D.N.Y. 1986) ("Eastway II"), modified, 821 F.2d 121 (2d Cir.) cert. denied, 108 S.Ct. 269 (1987); see also Cabell v. Petty, 810 F.2d 463 (4th Cir. 1987) (reversing district court's use of subjective test); Burkhart *ex rel.* Meeks v. Kinsley Bank, 804 F.2d 588 (10th Cir. 1986) (reversing lower court's subjective bad faith standard); Thornton v. Wahl, 787 F.2d 1151, 1154 (7th. Cir.) ("An empty head but a pure heart is no defense."), cert. denied, 479 U.S. 851 (1986); Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535, 540 (3d Cir. 1985) (attorney's subjective good faith no longer protects him from sanctions). But see Lieb v. Topstone Indus., Inc., 788 F.2d 151, 157-58 (3d Cir. 1986) (attorney's good faith may be considered as a mitigating factor when determining the amount and type of sanction). While the signing attorney's subjective good faith is not considered in determining whether sanctions are appropriate, the subjective good faith of a nonsigning party may be cause for denial of sanctions against the party. Greenberg v. Hilton Int'l Co., 870 F.2d 926, 934 (2d Cir. 1989).

The objective standard itself is subject to differing judicial opinions. American Bar Association, Sanctions: Rule 11 and Other Powers 2-9 (2d ed. 1988) [hereinafter Sanctions].

124 See, e.g., Mars Steel Corp. v. Continental Bank, N.A., No. 88-1554 (7th Cir. July 20, 1989) (en banc) (LEXIS, Genfed library, Courts file) ("improper purpose" is subjective, and "sanctionable whether or not it is supported by the facts and the law"); Local 232, Allied Indus. Workers v. Briggs & Stratton Corp., 837 F.2d 782, 789 n.5 (7th Cir. 1988) (subjective element in improper purpose prohibition); *Eastway II*, 637 F. Supp. at 566-67 (objective and subjective elements); *Whittington*, 115 F.R.D. at 208 ("improper purpose" is a subjective requirement); *In re* Ronco, Inc., 105 F.R.D. 493, 495 (N.D. Ill. 1985), appeal dismissed, 793 F.2d 1295 (7th Cir. 1986).

See generally Nelken, Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment, 74 Geo. L.J. 1313, 1320 (1986); Sanctions, supra note 123.

125 Zaldivar v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986); see United Food & Commercial Workers Union Local No. 115 v. Armour and Co., 106 F.R.D. 345, 348-49 (N.D.

serves and clarifies the original Rule 11 concern of eliminating abuses in the federal courts.[127] The sanctions themselves may serve three purposes: deterring or punishing the abusive party and compensating the opposing party.[128]

Cal. 1985). See generally Nelken, supra note 124, at 1336 (1986) (Rule 11 chilling of advocacy).

Nobody is quite sure what "frivolous" means. Schwarzer, Rule 11 Revisited, 101 Harv. L. Rev. 1013, 1016 (1988) [hereinafter Schwarzer, Revisited]. One definition is that the claim has no likelihood of success on the facts or the law. See Adamsons v. Wharton, 771 F.2d 41 (2d Cir. 1985); Anderson v. Coughlin, 700 F.2d 37, 42-43 (2d Cir. 1983) (IFP standard).

"Frivolous" has numerous definitions, adding to the confusion:

> The First Circuit calls an appeal frivolous where there is no doubt, no reasonable doubt, as to the correctness of the lower court's opinion. The Second Circuit says it's frivolous if the conduct of the appellant is grossly outrageous and if the appeal has no merit whatsoever. The Fifth Circuit recently found an appeal frivolous because it was "unreasonable and without foundation." Of that case, it was unreasonable and without foundation and therefore frivolous even though it was decided by a divided panel. Needless to say, the dissenting judge also dissented on the question of whether or not it was frivolous. . . . The Sixth Circuit uses similar terms. It says "totally without merit, groundless on its face." The Ninth Circuit says it's frivolous if the result is obvious or if it is wholly without merit.

Banner, Dunner, Markey, Re & Kozinsky, Unnecessary and Frivolous Appeals, 108 F.R.D. 476, 478 (1985). The Federal Circuit uses several touchstones: the zero probability of success before the court, failing to address the merits, using misleading selective quotations in briefs, and overstating what was in the record. Id. at 478-480. "[F]rivolity . . . is hard to define but we know it when we see it." Id. at 481. The Fourth Circuit decided that a "glimmer of a chance" is sufficient to defeat Rule 11. Hoover Universal, Inc. v. Brockway Imco, Inc., 809 F.2d 1039 (4th Cir. 1987).

Courts may suggest that a claim is objectively frivolous. See Hudson v. Moore Business Forms, 827 F.2d 450, 453 (9th Cir. 1987); Szabo Food Serv. v. Canteen Corp., 823 F.2d 1073, 1082, 1085 (7th Cir. 1987) ("wacky" claims merit sanctions), cert. dismissed, 108 S. Ct. 1101 (1988); EBI, Inc. v. Gator Indus., Inc., 807 F.2d 1, 5-6 (1st Cir. 1986); *Eastway II*, 637 F. Supp. at 565 ("frivolous" is of the same magnitude as "less than a scintilla").

Compare the idea that the appeal must be completely frivolous with those court decisions imposing sanctions for the parts of the appeal which the court holds frivolous. See *Eastway II*, 821 F.2d 121, 124 (2d Cir.) (requiring reasonable sanctions for frivolous civil rights and antitrust claims, according to actual time allocated by attorneys for defending these particular claims), cert. denied, 108 S. Ct. 269 (1987).

Judge Schwarzer supports a shifting of focus away from the merits to that of a reasonable prefiling inquiry—a procedural rather than substantive analysis. Schwarzer, Revisited, supra, at 1021-25.

126 *Zaldivar*, 780 F.2d at 831.

127 Harris v. Marsh, 679 F. Supp. 1204, 1385 (E.D.N.C. 1987); see also Portnoy v. Wherehouse Entertainment Co., 120 F.R.D. 73, 76 (N.D. Ill. 1988) ("[a]n award under Rule 11 is a sanction for violating a rule of court"); Schwarzer, New Rule 11, supra note 114, at 181-83.

128 Brown v. Federation of State Medical Bds. of United States, 830 F.2d 1429, 1437-38 (7th Cir. 1987); Taylor v. Prudential-Bache Secs., Inc., 594 F. Supp. 226, 229 (N.D.N.Y. 1984), aff'd, 751 F.2d 371 (2d Cir. 1984). When a court's "*primary* purpose in imposing sanctions is to deter, not to compensate, . . . the relevant considerations become the conduct and resources of the party to be sanctioned." *Thomas*, 836 F.2d at 881. See also Cavanaugh, supra note 117, at 527 ("[t]o the extent that deterrence is a goal, subjective intent is important[,] but where compensation is a goal, subjective intent is irrelevant").

Punishment, i.e., sanctions intended to penalize the offender for violating the rule, is sel-

The impact of mandatory sanctions[129] for filing claims or defending with frivolous arguments or counterclaims or presenting meritless arguments for an improper purpose has provoked controversy throughout the legal community.[130] Much of the literature discusses the possible chilling effects the amended Rule might have on litigation seeking to extend or redefine existing law.[131] Another concern was that Rule 11 itself would foster extended satellite litigation—a fear that has materialized.[132] Commentary has focused on how attorneys

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dom suggested as the primary reason for a sanction. But see Gagliardi v. McWilliams, 834 F.2d 81 (3d Cir. 1987) (Rule 11 sanction as punishment). Of the three reasons, punishment is viewed as a harsher rationale than deterrence or compensation, even when the end result is the same. See 1985 Annual Judicial Conference, Second Judicial Circuit, 109 F.R.D. 441, 514 (1985) (committee found that judges favoring compensation purpose were more likely to impose sanctions). See also Kassin, supra note 115, at 30-31 (judges favored deterrence rationale for Rule 11 sanctions over compensation and punishment rationales; those who favored a punishment rationale were less likely to award fees).

129 See *Thomas*, 836 F.2d at 876-78; Robinson v. National Cash Register, 808 F.2d 1119, 1130 (5th Cir. 1987) (the plain language of Rule 11—"shall impose . . . an appropriate sanction"—stresses mandatory imposition of sanction); *Eastway I*, 762 F.2d 243, 254 n.7 (2d Cir. 1985) (sanctions are mandatory if Rule 11 violation is found); Albright v. Upjohn Co., 788 F.2d 1217, 1222 (6th Cir. 1986); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174-75 (D.C. Cir. 1985); *Whittington*, 115 F.R.D. at 208. Although a sanction is mandatory, judges have broad discretion in choosing the appropriate penalty, which may involve "a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances," whatever is the least severe sanction adequate to the purpose of enforcing the rule. *Thomas*, 836 F.2d at 878.

130 *Thomas*, 836 F.2d at 869.

131 See, e.g., Nelken, supra note 124; Snyder, The Chill of Rule 11, 11 Litigation 16 (1985); Note, Plausible Pleadings: Developing Standards for Rule 11 Sanctions, 100 Harv. L. Rev. 630, 652 (1987) (proposing that only "unthinkable" cases be sanctioned); Note, Ask Questions First, supra note 106, at 1288-89; Note, The 1983 Amendments to Rule 11: Answering the Critics' Concern with Judicial Self-Restraint, 61 Notre Dame L. Rev. 798 (1986). See generally Tobias, Rule 11 and Civil Rights Litigation, 37 Buffalo L. Rev. 485 (1989) (arguing that Rule 11 has been applied disproportionately to civil rights claims and that this has a chilling effect contrary to the purpose of the Civil Rights Acts). But see Schwarzer, New Rule 11, supra note 114, at 184 ("That the threat of sanctions for misuse or abuse may tend somewhat to inhibit attorneys is not equivalent to chilling vigorous advocacy.")

The judiciary has also voiced concern over the chilling effect. See, e.g., Higgins v. United States Postal Serv., 655 F. Supp. 739, 744 (D. Me. 1987) (Rule 11 sanctions denied because "[s]uch a use of Rule 11 would serve only to chill innovations in advocacy."); *Whittington*, 115 F.R.D. at 210 (noting that the chilling effect on an attorney's "enthusiasm and creativity" is a significant factor militating against the imposition of sanctions).

132 Sanctions, supra note 123, at 2; Schwarzer, Revisited, supra note 125, at 1017-18; see also *Eastway* cases: Eastway Constr. Corp. v. City of New York, 762 F.2d 243 (2d Cir. 1985) ("*Eastway I*"), on remand, 637 F. Supp. 558 (E.D.N.Y. 1986), modified, 821 F.2d 121 (2d. Cir.) ("*Eastway II*"), cert. denied, 108 S. Ct. 269 (1987); Golden Eagle Distrib. Corp. v. Burroughs Corp., 103 F.R.D. 124 (N.D. Cal. 1984), rev'd, 801 F.2d 1531 (9th Cir. 1986), reh'g en banc denied, 809 F.2d 584 (9th Cir. 1987) (lengthy dissent).

See, e.g., *Whittington*, 115 F.R.D. at 205, 210 observing that "time saved by deterring frivolous litigation tends to be offset in hearings on Rule 11 motions and countermotions" results in "Rule 11 overkill").

may avoid sanctions.[133]

To determine the amount or form of the Rule 11 sanction, courts may consider the extent of the frivolousness or impropriety of the claims,[134] the litigant's experience with the law,[135] and the party's ability to pay.[136] These criteria are not systematically applied, however, and the weight given to each factor varies considerably from court to court.[137] Pro se litigants are generally held responsible for a reasonable pre-filing inquiry into the facts,[138] but few courts have spelled out how much inquiry into the law is reasonable for a pro se litigant.[139] Courts also differ on whether there should be notice and hearing requirements prior to the imposition of sanctions and, if so, what procedure is necessary.[140]

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133 See, e.g., Joseph, The Trouble with Rule 11: Uncertain Standards and Mandatory Sanctions, 73 A.B.A. J. 87 (Aug. 1, 1987); Schwarzer, Revisited, supra note 125; Sutton & Luck, Federal Rule 11: Basic Guidelines for Avoiding Sanctions, 50 Tex. B.J. 379 (1987); Note, Avoiding Sanctions under Federal Rule 11: A Lawyer's Guide to the "New" Rule, 15 Wm. Mitchell L. Rev. 607 (1989); Note, The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility, 61 N.Y.U. L. Rev. 300 (1986).

134 *Eastway II*, 637 F. Supp. 558; see also Richcreek v. Grecu, 612 F. Supp. 111 (S.D. Ind. 1985) (pro se plaintiff's behavior merited sanctions of both attorney fees and injunction); Miller v. United States, 604 F. Supp. 804 (E.D. Mo. 1985) (sanctioning where plaintiff filed frivolous suit protesting penalty for frivolous tax return).

135 Under the amended Rule 11, the objective standard effectively eliminates the need for courts to analyze the legal expertise of attorneys when deciding whether to impose sanctions. See, e.g., Brown v. Federation of State Medical Bds. of the United States, 830 F.2d 1429, 1439 (7th Cir. 1987) (attorney's inexperience in particular area of law may be taken into account as an equitable factor in determining the amount of sanction but is not relevant to the initial decision whether to impose sanctions). Nevertheless, a pro se litigant's level of expertise, which may range from non-existent to that of a practicing attorney, may affect the decision to impose a sanction at all. See, e.g., Pryzina v. Ley, 813 F.2d 821, 823-24 (7th Cir. 1987) (no sanction for pro se litigant due to somewhat obscure ground for dismissal); Cheek v. Doe, 828 F.2d 395, 397 (7th Cir.) (per curiam) (imposing sanction on experienced pro se litigant), cert. denied, 108 S. Ct. 349 (1987); Reis v. Morrison, 807 F.2d 112, 113 (7th Cir. 1986) (per curiam) (imposing sanction under Rule 38 against pro se litigant due to frivolousness of claim and maliciousness of purpose, although general leniency toward pro se litigants noted).

136 See, e.g., *Brown*, 830 F.2d at 1439 (sanctioned party's assets are equitable consideration in determining the amount of sanction); Oliveri v. Thompson, 803 F.2d 1265, 1281 (2d Cir. 1986) (collection of cases considering ability to pay), cert. denied, 480 U.S. 918 (1987); *In re* Yagman, 796 F.2d 1165, 1185 (9th Cir. 1986) (party's or attorney's assets may help determine sanction), cert. denied *sub nom.* Real v. Yagman, 108 S. Ct. 450 (1987).

137 Schwarzer, Revisited, supra note 125, at 1015-17.

138 See, e.g., Schaffer v. Chicago Police Officers, 120 F.R.D. 514 (N.D. Ill. 1988).

139 Pro se parties are regularly expected to know the applicable law. See, e.g., supra notes 79-96 (pro se taxpayer cases).

140 See Ray A. Scharer & Co. v. Plabell Rubber Prods., Inc., 858 F.2d 317, 321-22 (6th Cir. 1988) (imposition of a fine under Rule 11 without procedural protections is inadvisable); Tom Growney Equip., Inc. v. Shelley Irrig. Dev., Inc. 834 F.2d 833, 835-37 (9th Cir. 1987) (imposition of Rule 11 sanctions without prior notice and meaningful opportunity to be heard violates due process); Gagliardi v. McWilliams, 834 F.2d 81, 83 (3d Cir. 1987) (imposition of Rule 11 injunction required notice and opportunity to be heard); Cotner v. Hopkins, 795 F.2d 900, 903

Rule 11 sanctions against pro se parties have varied widely:[141] courts may issue a warning of future monetary sanctions,[142] impose a

(10th Cir. 1986) (when a Rule 11 fine is imposed as punishment, the trial court must follow criminal contempt proceedings of Fed. R. Crim. P. 42(b)); Schwarzer, New Rule 11, supra note 114, at 198 ("Due process requires that the offending party be given notice and an opportunity to oppose the imposition of sanctions."). Compare these with *In re* Yagman, 796 F.2d 1165, 1183-84 (9th Cir. 1986) ("the court should *at a minimum* provide notice to certifying attorney that Rule 11 sanctions will be assessed at the end of trial if appropriate"). But see Harmony Drilling Co. v. Kreutter, 846 F.2d 17, 19 (5th Cir. 1988) (no notice requirement before sanctions); Donaldson v. Clark, 819 F.2d 1551, 1559-61 (11th Cir. 1987) (en banc) (Rule 11 itself constitutes sufficient notice if attorney submits a complaint without any basis in fact; however, an allegation of an unreasonable argument may require specific notice and an opportunity to respond); Lepucki v. Van Wormer, 765 F.2d 86, 88 (7th Cir.) (attorney's awareneess that sanction could be imposed is sufficient notice), cert. denied, 474 U.S. 827 (1985); Rowland v. Fayed, 115 F.R.D. 605, 608 (D.D.C. 1987) (where record is sufficient to decide Rule 11 issue, no hearing is necessary or required).

In analagous situations, the Supreme Court has held that "[l]ike other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980).

[141] Although sanctions are mandatory, the judge has broad discretion in choosing the appropriate penalty. Thomas v. Capital Sec. Servs., 836 F.2d 866, 877 (5th Cir. 1988); see also Cavanaugh, supra note 117. A district court may take into account various mitigating factors bearing on the degree of sanction. See Johnson v. New York City Transit Auth., 823 F.2d 31, 32-33 (2d Cir. 1987) (ability to pay); Eastway Constr. Corp. v. City of New York, 821 F.2d 121 (2d Cir.) (judge has broad discretion concerning the amount of sanction—which need not be the full lodestar amount) ("*Eastway II*"), cert. denied, 108 S. Ct. 269 (1987). The litigant's conduct, if harassing and vexatious, may be an aggravating factor. See Taylor v. Prudential-Bache Sec., Inc., 594 F. Supp. 226, 226-29 (N.D.N.Y. 1984) ($35,000 sanction imposed on pro se plaintiff). In deciding to impose sanctions, pro se statutes may be a crucial factor. See Maduakolam v. Columbia Univ., 866 F.2d 53 (2d Cir. 1989) (reversing Rule 11 sanctions against pro se engineering student because nothing indicated he had known or should have known claim was time-barred); Pryzina v. Ley, 813 F.2d 821, 823-24 (7th Cir. 1987) (pro se litigant not expected to know obscure jurisdictional grounds for dismissal).

The ability to pay is to be appropriately considered. *Johnson*, 823 F.2d at 33; Faraci v. Hickey-Freeman Co., 607 F.2d 1025, 1028-29 (2d Cir. 1979).

[142] See, e.g., Kirkland v. City of Peekskill Police Dep't, No. 87 Civ. 8112 (S.D.N.Y. Mar. 15, 1988) (WESTLAW, Allfeds database) (court declined to impose monetary sanction on pro se litigant because of no prior formal warning concerning possible imposition of sanctions, but this was to be warning for future claims); Baldwin v. Boone, 812 F.2d 1400 (4th Cir. 1987) (table; test in WESTLAW, Allfeds database) (Rule 11 sanction of warning that possible monetary sanctions would be taken from prison trust account affirmed); Richcreek v. Grecu, 612 F. Supp. 111, 113 (S.D. Ind. 1985) (monetary and injunctive sanctions imposed where plaintiff had been warned in previous claim of possibility of sanctions).

Sanctions have followed a warning occurring in earlier hearings of the same case. See, e.g., Calesnick v. Redevelopment Auth., 696 F. Supp. 1053, 1054-55 (E.D. Pa. 1988) (judge gave pro se plaintiffs a copy of Rule 11, explained it to them, gave them an opportunity to drop the claim—and finally imposed both monetary and injunctive sanctions); Granado v. Commissioner, 792 F.2d 91, 94 (7th Cir. 1986) ($5,000 Rule 11 sanction and double costs plus $1,500 as Rule 38 sanction imposed where government had sent plaintiff copy of another tax case in which sanctions had been imposed), cert. denied, 480 U.S. 920 (1987); Snyder v. IRS, 596 F. Supp. 240, 252 (N.D. Ind. 1984) (after verbal warning in open court, $500 fine plus $500 attorney fee sanctions imposed).

flat monetary sanction,[143] or order pro se litigants to pay attorney's fees and costs,[144] which are now traditional sanctions against attorneys.[145] In tax cases, some district courts award a flat $5000 as a Rule

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[143] In Clark v. Green, 814 F.2d 221 (5th Cir. 1987), a claim of a civil rights violation based on the issuance of traffic tickets to a third party was found "totally without merit and completely frivolous". Id. at 223. The court affirmed the imposition of a $2,500 Rule 11 sanction without noting any history of previous frivolous claims, where litigant's brief was "singularly ineffective". Id. at 222-23. The court also imposed Rule 38 sanctions of double costs and $250 attorney fees on the basis that the litigant was alerted to the frivolousness of his claims by the district court's opinion. Id. at 223.

Flat-fee sanctions are most common in pro se tax protestor cases. See infra note 146 for a list of such cases in which a $5000 fine was found appropriate. The amount, however, may vary from case to case. See, e.g., Miller v. United States, 868 F.2d 236, 237 (7th Cir. 1989) (Rule 11 sanctions of $1500 imposed by district court).

[144] See, e.g., Patterson v. Aiken, 841 F.2d 386, 387-88 (11th Cir. 1988) (affirming $4,947 attorney fees sanction against pro se plaintiff who had filed *in forma pauperis*); Doyle v. United States, 817 F.2d 1235, 1237-38 (5th Cir.) (affirming sanction of $1,552.88—the full amount of the attorney fees claimed by the government—against each of 25 pro se plaintiffs for a total award to defendants of $38,872), cert. denied *sub nom.* Vanya v. United States, 108 S. Ct. 159 (1987); Kelly v. United States, 789 F.2d 94, 96 n.2 (1st Cir. 1986) (refusing to review Rule 11 sanctions because pro se litigants did not raise issue in brief); *Calesnick*, 696 F. Supp. at 1056 ($8,102.44 sanction of attorney fees imposed where pro se litigants proceeded with previously litigated claims after judge explained Rule 11 risk); Fiore v. Thornburgh, 658 F. Supp. 161, 165 (W.D. Pa. 1987) (imposing Rule 11 sanction of $975 attorney fees against pro se civil rights plaintiff for bringing action solely to harass); Johnson v. United States, 607 F. Supp. 347, 349 (E.D. Pa. 1985) (sanctions of attorney fees and costs imposed where pro se taxpayers sought to quash IRS summons based on a "laundry list" of conclusory assertions, all of which had been decisively rejected by the courts); Nixon v. Individual Head of St. Joseph Mortgage Co., 612 F. Supp. 253, 256 (N.D. Ind. 1985) (imposing sanction of $500 attorney fees on pro se plaintiff who sought enforcement of self-drafted "land patent"); *Richcreek*, 612 F. Supp. at 116-17 (imposing sanction of attorney fees on pro se taxpayer who brought "repetitive vexatious filings" with the purpose of harassing his employer, the IRS, and the judicial system); Miller v. United States, 604 F. Supp. 804, 806 (E.D. Mo. 1985) (imposing $200 attorney fees plus costs on pro se litigants who protested penalty for filing frivolous tax return); *Taylor*, 594 F. Supp. at 229 (imposing $35,000 sanction of attorney fees—an "overly conservative award"—on pro se litigant after series of harassing lawsuits).

[145] See, e.g., Nemeroff v. Abelson, 704 F.2d 652, 660 (2d Cir. 1983) (prevailing defendant entitled to award of attorney fees if plaintiff brings or maintains action without adequate factual basis or in bad faith); Gordon v. Heimann, 715 F.2d 531, 539 (11th Cir. 1983) (groundless suit defeats American Rule that attorney fees are not awarded to victor in lawsuit); Ellingson v. Burlington Northern, Inc., 653 F.2d 1327, 1332 (9th Cir. 1981) (attorney fees may be awarded where action is filed in bad faith). See generally Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245-71 (1975) (supporting American Rule that parties pay their own expenses). Some courts, however, have become uncomfortable with the use of Rule 11 as a fee-shifting device. See Gaiardo v. Ethyl Corp., 835 F.2d 479, 482-83 (3rd Cir. 1987) (monetary Rule 11 sanctions are not automatically an award of counsel fees); see also Schwarzer, New Rule 11, supra note 114, at 185 (cautioning that Rule 11 provides for reasonable sanctions, not fee shifting); Schwarzer, Revisited, supra note 125, at 1020 (reiterating caution, suggesting that when rule drafters want to shift fees, they know how to word it—and did not do so in Rule 11).

Several cases have been remanded to the district court for clarification of the reasons why a particular sanction was imposed. See, e.g., *Johnson*, 823 F.2d at 33 (although $3450 was not

11 sanction based on the maximum penalty in Tax Court.[146] A few courts add punitive damages or fines;[147] one court has imposed a Rule 11 sanction which included a $3600 fine to cover the amount of judicial resources expended in addition to attorney's fees and costs.[148] A court may sanction a pro se litigant by imposing a prohibition on him: he may file further lawsuits only with the express prior permission of the court.[149] Injunctions, however, are considered by some courts to

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necessarily an excessive sanction, it might not reflect time spent and might be inappropriate for a discharged transit employee).

[146] One court imposed $11,500 as a Rule 11 sanction where a pro se taxpayer protested withholding of social security and income taxes under a fifth amendment argument. Cheek v. Doe, 110 F.R.D. 420, 421-22 (N.D. Ill. 1986), aff'd in part, rev'd in part, 828 F.2d 395 (7th Cir.) (affirmed sanction but reduced amount), cert. denied, 108 S. Ct. 349 (1987). This was not the litigant's first attempt to raise such claims. 110 F.R.D. at 422. On appeal, the sanction was reduced to $5,000 but, notwithstanding the reduction, the court imposed an additional sanction of $1500 for a frivolous appeal because the sanctions issue was the only one of many issues raised which was not frivolous. *Cheek*, 828 F.2d at 398. See also 26 U.S.C. § 6673 (1982 & Supp. V 1987) ($5,000 fine may be imposed in Tax Court for pressing of frivolous claims); Granado v. Commissioner, 792 F.2d 91, 94 (7th Cir. 1986) (affirming $5,000 Rule 11 sanctions and imposing $1500 plus double costs under Rule 38 against pro se litigant although one non-frivolous issue was raised in Tax Court and on appeal), cert. denied, 480 U.S. 920 (1987); Grimes v. Commissioner, 806 F.2d 1451, 1454 (9th Cir. 1986) ($5,000 sanction not abuse of discretion where taxpayer claimed nonexistent deduction). But see Miller v. United States, 669 F. Supp. 906, 911 (N.D. Ind. 1987) ($1,500 monetary sanction plus injunction imposed on pro se tax protestor), aff'd, 868 F.2d 236 (7th Cir. 1989); Snyder v. IRS, 596 F. Supp. 240, 251-52 (N.D. Ind. 1984) (pro se litigant, held to have brought frivolous claim in bad faith, sanctioned $500 attorney fees and $500 fine).

[147] See, e.g., Mays v. Chicago Sun-Times, 865 F.2d 134 (7th Cir.) (imposing $1000 Rule 11 fine through application of Fed. R. App. P. 46(c)), amended, 49 Fair Empl. Prac. Cas. (BNA) 288 (1989); Ray A. Scharer & Co. v. Plabell Rubber Prods., Inc., 858 F.2d 317 (6th Cir. 1988) (remanding for due process hearing after district court imposed $19,200 court costs plus $4800 attorney fees as Rule 11 sanctions).

[148] Robinson v. Moses, 644 F. Supp. 975, 983 (N.D. Ind. 1986); Thiel v. First Fed. Sav. & Loan Ass'n, 646 F. Supp. 592, 598 (N.D. Ind. 1986), aff'd in part and appeal dismissed in part, 828 F.2d 21 (7th Cir. 1987).

[149] See Becker v. Dunkin' Donuts of Am., Inc., 665 F. Supp. 211 (S.D.N.Y. 1987). The *Becker* court extended an injunction previously imposed by another court after evidence was introduced showing plaintiff's lengthy history of similar claims against the same defendant. Id. at 216. An additional injunction was imposed by the court prohibiting plaintiff from applying again to defendant for a job. Id. at 218. Richard Becker has had similar injunctions imposed on him by other courts. Becker v. Sherwin Williams, No. 88-3863 (D.N.J. July 17, 1989) (LEXIS, Genfed library, Courts file); Becker v. Adams Drug Co., 819 F.2d 32 (2d Cir. 1987), cert. denied 108 S. Ct. 719 (1988); Becker v. Record World, No. 82-2058 (E.D.N.Y. August 6, 1985) (Mishler, J.).

See also English v. Cowell, 117 F.R.D. 128, 129 (C.D. Ill. 1987) (injunction imposed where pro se plaintiff had inundated court for eleven years "with a plethora of procedural garbage" and "meritless trash" after sua sponte dismissal); *Miller*, 669 F. Supp. at 911 (injunction imposed because previous monetary sanctions had not deterred pro se litigant from pursuing identical suit for the third time), aff'd, 868 F.2d 236 (7th Cir. 1989); Goad v. United States, 661 F. Supp. 1073, 1081-82 (S.D. Tex.) (pro se plaintiff barred from filing further actions until $4,748.40 in sanctions paid in full), aff'd, 837 F.2d 1096 (Fed. Cir. 1987), cert. denied, 108 S. Ct. 1079 (1988); Daniels v. Stovall, 660 F. Supp. 301, 306 (S.D. Tex. 1987) (pro se plaintiff

be so unusual as to be applied only in exigent circumstances.[150]

B. *Rule 38 Sanctions and Appellate Rulings*

Appellate courts regularly impose sanctions on pro se litigants under Rule 38 of the Appellate Rules of Civil Procedure,[151] as well as under other rules and statutes.[152] The Tables reflect pro se sanction

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barred from future filing until $3,721.56 attorney fees and costs paid); Elmore v. McCammon, 640 F. Supp. 905, 912 (S.D. Tex. 1986) (after imposing $12,700 attorney fees and a $2000 fine under Rule 11, ordering all future complaints by pro se plaintiff reviewed by court prior to summons or service); Richcreek v. Grecu, 612 F. Supp. 111, 116-17 (S.D. Ind. 1985) (permanent injunction imposed on "vexatious" taxpayer with warning of possible contempt proceedings if violated).

In one case where the lawyer-husband of a would-be medical college attendee had filed suits against each college that had refused to admit his wife, he was prohibited from representing her further in these matters, including the case in which she was charged with contempt of court. Cannon v. Loyola Univ. of Chicago, 676 F. Supp. 823 (N.D. Ill. 1987) (this may be viewed as a pro se case due to the lack of arm's length relationship between the litigant and counsel). Contempt proceedings might be viewed as an additional sanction.

[150] See Gagliardi v. McWilliams, 834 F.2d 81, 82-83 (3d Cir. 1987) (injunction vacated due to insufficient notice to plaintiff); Pfeifer v. Valukas, 117 F.R.D. 420, 424 (N.D. Ill. 1987) (drastic remedy of permanent injunction not justified); see also Thomas v. Capital Sec. Servs., 836 F.2d 866, 878 (5th Cir. 1988) (least severe sanction adequate to serve purpose of Rule 11 should be imposed); Brown v. Federation of State Medical Bds. of the United States, 830 F.2d 1429, 1438 (7th Cir. 1987). But see Kirkland v. City of Peekskill Police Dep't, No. 87 Civ. 8112 (S.D.N.Y. Mar. 15, 1988) (WESTLAW, Allfeds file) (general injunction found overbroad but pro se litigant enjoined to the extent that, in any further proceedings, he must notify the court of past litigation).

[151] Fed. R. App. P. 38. Rule 38 provides that: "If a court of appeals shall determine an appeal is frivolous, it may award just damages and single or double costs to the appellee." Id. For cases in which Rule 38 sanctions have been imposed on pro se litigants, see, e.g., Lozano v. Banco Cent. Y. Economias, 865 F.2d 15, 15-16 (1st Cir. 1989) (Rule 38 sanctions imposed on attorney pro se); Miller v. United States, 868 F.2d 236, 239-42 (7th Cir. 1989) (Rule 38 sanctions and injunction imposed on pro se tax protester); Atkinson v. O'Neill, 867 F.2d 589, 590-91 (10th Cir. 1989) (sanctions imposed under Rule 38, § 1912, and inherent power); Stoecklin v. Commissioner, 865 F.2d 1221, 1226 (11th Cir. 1989) ($3000 sanction imposed under Rule 38 and § 1912); DeLuca v. Long Island Lighting Co., 862 F.2d 427, 430 (2d Cir. 1988) (Rule 38 sanctions considered *sua sponte* against attorney appearing pro se to contest Rule 11 sanctions below); Madison v. Martin, 838 F.2d 467 (4th Cir. 1988) (table; text in WESTLAW, Allfeds database); Mullen v. Galati, 843 F.2d 293, 294 (8th Cir. 1988) (pro se litigant must show cause why Rule 38 sanctions should not be imposed); Constant v. Wilson, 856 F.2d 202 (Fed. Cir. 1988); Lefebvre v. Commissioner, 830 F.2d 417 (1st Cir. 1987); Clark v. Green, 814 F.2d 221 (5th Cir. 1987); Taylor v. Hummel, 831 F.2d 297 (6th Cir. 1987); Cheek v. Doe, 828 F.2d 395 (7th Cir. 1987), cert. denied, 108 S. Ct. 349 (1987).

Supreme Court Rule 49.2 (award of appropriate damages may be imposed for frivolous application for writ of certiorari or appeal) has the same effect as Rule 38, but it has not been used. See Clark v. Florida, 475 U.S. 1134, 1134-38 (1986) (Chief Justice Burger's comment, on denial for certiorari, that extremely frivolous claim brought by pro se lawyer deserved sanctions).

See Tables 1 and 2 for a statistical overview of appellate court sanctions cases and decisions, and Table 3 for appellate decisions on Rule 11.

[152] There is a split in the circuits on whether Rule 11 may be used to sanction litigants for frivolous appellate claims, and how this may be accomplished. The Second Circuit regularly

decisions as compared to decisions concerning attorney sanction. Table 1 provides an overview of the sanctions cases covered in Tables 2 and 3; Table 2 shows an empirical breakdown of appellate decisions.[153] Appellate sanctions rulings are often imposed in tandem with Rule 11 issues. While Rule 38 has not been revised, the theory behind the extensions of Rule 11[154] has led to an increased application of sanctions under Rule 38, because appellate judges are also anxious to discourage meritless filings in their courts.[155]

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considers imposing appellate sanctions pursuant to Rule 11. See Four Keys Leasing & Maint. Corp v. Simithis, 849 F.2d 770 (2d Cir. 1988) (Rule 11 and § 1441 sanctions imposed on attorney for frivolous appeal); Terrydale Liquidating Trust v. Barness, 846 F.2d 845 (2d Cir. 1988) (Rule 11 sanctions against attorney for frivolous appeal denied), cert. denied, 109 S. Ct. 312 (1988). But see DeLuca v. Long Island Lighting Co., 862 F.2d 427. The Fourth Circuit has held that Rule 11 sanctions may not be imposed for a frivolous appeal, but only in unpublished opinions to date. See Electric Supplies, Inc. v. Travelers Ins. Cos., 859 F.2d 149 (4th Cir. 1988) (table; text in WESTLAW, CTA4 database); Allen E. by Cheek v. Spartanburg County Dept. of Soc. Serv., 849 F.2d 504 (4th Cir. 1988) (table; text in WESTLAW, CTA4 database). The Seventh Circuit has also found that Rule 11 is not applicable to an appeal. Leigh v. Engle, 858 F.2d 361, 370 n.5 (7th Cir. 1988), cert. denied, 109 S. Ct. 1528 (1989). The Tenth Circuit has ruled for sanctions for frivolous appeals pursuant to Rule 11 and § 1912, but remanded to the district court to determine the amount under Rule 11 guidelines. Mullen v. Household Bank, 867 F.2d 586 (10th Cir. 1989); Atkinson v. O'Neill, 867 F.2d 589, 590-91 (10th Cir. 1989).

Appellate sanctions may also be imposed pursuant to 28 U.S.C. § 1912 (1982), 28 U.S.C. § 1927 (1982), and as an exercise of the court's inherent authority. See Flumenbaum & Karp, Sanctions for Frivolous Appeals, N.Y.L.J. (Jan. 25, 1989) (Second Circuit sanction cases); see also *Atkinson*, 867 F.2d at 590-91 (imposing double costs and damages as appellate sanctions under inherent power, § 1912, and Rule 38 against a pro se tax protestor); Stoecklin v. Commissioner, 865 F.2d 1221, 1226 (11th Cir. 1989) (sanctions imposed on pro se tax protestor under Rule 38 and § 1912).

Occasionally, appellate sanctions are imposed on pro se litigants without reference to a statute or rule. See Stelly v. Commissioner, 808 F.2d 442, 443 (5th Cir. 1987) ($2000 appellate sanctions plus injunction barring any new filings until previous sanctions are paid). The *Stelly* court, however, cited a previous ruling against the Stellys in which both Rule 38 and § 1912 were cited as authority for the sanctions imposed in that case. *Stelly*, 808 F.2d at 443 (citing Stelly v. Commissioner, 804 F.2d 868 (5th Cir. 1986)).

In another baffling ruling, a court found an appeal not groundless, but imposed appellate costs on the pro se litigant anyway, citing Rules 38 and 11 and § 1988. Schucker v. Rockwood, 846 F.2d 1202, 1205 (9th Cir.), cert. denied, 109 S. Ct. 561 (1988).

153 A list of the cases used to formulate the tables is available on request from Cardozo Law Review.

154 See, e.g., *Atkinson*, 867 F.2d 589; *Mullen*, 867 F.2d 586; Sparks v. NLRB, 835 F.2d 705, 707 (7th Cir. 1987) (Rule 11 principles are looked to for interpretation of Rule 38, although Rule 11 is not applicable to the appellate court); Hill v. Norfolk & Western Ry., 814 F.2d 1192, 1200 (7th Cir. 1987) (using Rule 11 standards in imposing a Rule 38 sanction on attorney).

155 A frivolous appeal is one in which "the claim advanced is unreasonable, or . . . is not brought with a reasonable good faith belief that it is justified." Stelly v. Commissioner, 761 F.2d 1113, 1116 (5th Cir.), cert. denied, 474 U.S. 851 (1985). Note that a subjective analysis is still applied—"good faith belief" is not an objective standard, unlike "reasonableness." For more definitions of "frivolousness", see supra note 125.

A pro se litigant is not held to professional standards, yet is not granted unrestrained

TABLE 1 — SANCTIONS CASES IN APPELLATE COURTS (January 1987-August 1989)

	Published	Unpublished (on LEXIS or WESTLAW)	Total Cases	Atty (for client)	Pro Se (incl. atty pro se)	Pro Se Cases				
						Plaintiff	Defendant	Atty	On App.	Below
1st Cir.	16	0	16	12	4	4	0	2	4	3
2d Cir.	29	0	29	21	8	8	0	6	7	3
3rd Cir.	16	0	16	10	6	6	0	3	6	4
4th Cir.										
Pro se	1	11								
Atty	16	14								
Total	17	25	41	30	12	10	2	3	11	9
5th Cir.	55	0	55	43	12	12	0	2	10	10
6th Cir.										
Pro se	2	12								
Atty	23	20								
Total	25	32	56	43	14	15	0	6	14	11
7th Cir.	60	0	60	51	9	9	0	4	8	6
8th Cir.	22	0	22	18	4	4	0	0	3	4
9th Cir.										
Pro se	11	1								
Atty	49	10								
Total	60	11	71	59	12	10	2	4	10	7
10th Cir.	14	0	14	12	2	2	0	0	2	2
11th Cir.	26	0	26	19	7	7	0	2	7	6
Fed. Cir.										
Pro se	0	2								
Atty	4	4								
Total	4	6	10	8	2	2	0	0	2	1
D.C. Cir.	9	5	14	14	1	1	0	1	1	0
Total	353	79	432	340	93	90	4	33	85	66

Appellate courts only review errors of law, not fact, barring extreme misuses of judicial discretion. Alleged errors of fact or procedure,[156] including the imposition of sanctions, are subject to review under a variety of standards: the clearly erroneous standard applies when the court below did not perceive the facts correctly, the abuse of discretion standard is activated when the court below made a discretionary decision that is ultimately found unjust, or the appellate court may review a decision of law *de novo*, ignoring the ruling of the lower court.[157] A decision on sanctions, which may be a fact-based determination of frivolity, a discretionary setting of the amount or type of sanction, or a legal conclusion on whether the action brought is without basis in law, may require a multi-tiered review.[158]

Appellate courts may modify or reverse orders imposing sanctions,[159] or remand the case to the district court for an articulation of the reasons why sanctions were imposed or denied.[160] Table 3 offers an empirical breakdown of appellate decisions concerning Rule 11 holdings in lower courts.

To merit the imposition of appellate sanctions, an appeal must generally be found to be without any possible basis in law.[161] This has not been true for pro se cases; sanctions have been imposed against pro se litigants even where a court has addressed at least one argu-

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license to pursue totally frivolous claims. Id.; see also Clark v. Green, 814 F.2d 221, 223 (5th Cir. 1987) (double costs and $250 Rule 38 fine imposed on pro se appellant who "was alerted to the fact that his claim was frivolous by the district court's opinion").

For a now rather outdated survey, see Martineau & Davidson, Frivolous Appeals in the Federal Courts: The Ways of the Circuits, 34 Am. U. L. Rev. 603 (1985).

156 Pro se litigants rarely argue substantive law effectively.

157 But see Mars Steel Corp. v. Continental Bank N.A., No. 88-1554 (7th Cir. July 20, 1989) (en banc) (LEXIS, Genfed library) (criticizing *de novo* review as not appropriate in Rule 11 cases where a district court has more access to the facts than the court of appeals).

158 See generally Sanctions, supra note 123, at 14-15, *passim* (clarifying standards of review in different appellate courts). The Ninth Circuit uses a three-tiered standard for review of Rule 11 decisions—(1) factual: review under clearly erroneous standard; (2) legal sufficiency of motion: *de novo*; and (3) amount and type of sanction: abuse of discretion. The Second, Seventh, Eleventh, and District of Columbia Circuits employ versions of the tiered standard. Still others apply only the abuse of discretion standard. The primary difference is the *de novo* review of the determination to impose sanctions. Id. at 14-15.

159 See Glaser v. Cincinnati Milacron, Inc., 808 F.2d 285 (3d Cir. 1986) (reversing imposition of sanctions, in part because counsel did not show subjective bad faith); Eavenson, Auchmuty & Greenwald v. Holtzman, 775 F.2d 535 (3d Cir. 1985) (sanctions reversed because trial court failed to indicate reasons for imposing sanctions).

160 See Lieb v. Topstone Indus., Inc., 788 F.2d 151 (3d Cir. 1986) (case remanded where record provided no basis for reviewing denial of sanctions).

161 See supra note 125. An alternate appellate standard is that sanctions are merited when the appeal's result is "obvious" or the argument is "wholly without merit." Ross-Berger Cos. v. Equitable Assurance Soc'y, 872 F.2d 1331, 1341 (7th Cir. 1989); Mackey v. Pioneer Nat. Bank, 867 F.2d 520, 526-27 (9th Cir. 1987).

TABLE 2
RULE 38 OR OTHER APPELLATE SANCTIONS*
(JANUARY 1987-AUGUST 1989)

		Imposed	Denied	Show Cause	Other
1st Cir.	Pro se	2	1	0	0
	Atty	4	2	0	0
2d Cir.	Pro se	0	2	1	0
	Atty	2	3	0	1
3rd Cir.	Pro se	0	0	0	0
	Atty	0	0	0	0
4th Cir.	Pro se	1	1	0	0
	Atty	1	3	0	1
5th Cir.	Pro se	2	2	0	0
	Atty	4	4	0	0
6th Cir.	Pro se	1	1	0	0
	Atty	2	3	0	1
7th Cir.	Pro se	2	2	0	0
	Atty	12	13	1	2
8th Cir.	Pro se	1	0	1	0
	Atty	2	2	0	0
9th Cir.	Pro se	2	3	0	0
	Atty	5	8	0	0
10th Cir.	Pro se	1	0	0	0
	Atty	0	4	0	1
11th Cir.	Pro se	2	0	0	0
	Atty	1	2	0	0
Fed. Cir.	Pro se	1	0	0	0
	Atty	2	1	0	0
D.C. Cir.	Pro se	1	0	0	0
	Atty	0	4	0	0

*includes Rule 38, Rule 11, § 1912, § 1927, § 1988, and other sanctions.

ment in an extended fashion.[162] This suggests that had the argument been presented by a more experienced person, it might have been arguable and therefore not sanctionable.[163] It also suggests that if a court believes a pro se litigant requires a lengthy explanation to un-

[162] See Cheek v. Doe, 828 F.2d 395 (7th Cir.), cert. denied, 108 S. Ct. 349 (1987). The *Cheek* ruling suggests that all issues raised must have merit if sanctions are to be avoided; the court imposed a $1500 appellate sanction although one nonfrivolous issue—that of sanction amount in court below—was raised, under the rationale that the bulk of the brief on appeal was devoted to frivolous issues. Id. See also Granado v. Commissioner, 792 F.2d 91, 94 (7th Cir. 1986), cert. denied, 480 U.S. 920 (1987) (imposing sanctions for argument that wages are not income although one nonfrivolous issue was raised).

[163] The time and attention given a supposedly frivolous claim suggest that, even though

derstand why he was wrong, the reasoning is obvious. Courts are unlikely to consider a good faith extension of established law where the litigant appears pro se.[164] An apparent *post facto* analysis is too often used: if the judge ultimately says the claim is without merit, he may also find it frivolous for the purpose of sanctions. A two-step analysis may be required: the court must first determine if the appeal is in fact frivolous and, second, whether a sanction is appropriate.[165]

Sanctions under Rule 38 range from warnings of future sanctions,[166] nominal fines,[167] injunctions,[168] court costs with attorney's fees[169] to damages plus double costs.[170] In some tax cases, a flat $1500 fine has been imposed for a frivolous appeal;[171] one court im-

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established law was in opposition, the claim was not obviously frivolous. If the opinion must discuss the claim in depth to dispose of it, then the claim is not frivolous.

Judges should resist the temptation to wax eloquent when faced with pro se claims clearly adverse to established law, particularly when part of the purpose of publishing is to warn other pro se litigants. Another pro se litigant reading the case might not understand that the claim was baseless.

164 Practicing attorneys are seldom successful at convincing judges to extend or reverse case law, either; such claims are an uphill battle. See, e.g., Gaste v. Kaiserman, 669 F. Supp. 583, 584 (S.D.N.Y. 1987) (plaintiff unsuccessfully asked a court to rule in accordance with another circuit and disregard relevant authority in the Second Circuit). It is unclear whether pro se litigants face stricter rulings based on *stare decisis* than do attorneys; it is clear, however, that a pro se litigant is less equipped to argue his point.

165 Ross-Berger Cos. v. Equitable Assurance Soc'y, 872 F.2d 1331, 1340 (7th Cir. 1989).

166 See Reis v. Morrison, 807 F.2d 112 (7th Cir. 1986) (awarding costs and attorney fees to defendants, and publishing opinion to warn attorneys and parties against bringing similar malicious and frivolous legal malpractice suits).

167 Zuger v. United States, 834 F.2d 1009, 1010 (Fed. Cir. 1987) (taxpayer claiming that federal reserve notes were not "real money" subject to taxation fined $500; court warned of future sanctions in "tax protester" cases).

168 Lysiak v. Commisioner, 816 F.2d 311, 313 (7th Cir. 1987) (enjoining taxpayer from further action in his claim for injunctive relief from IRS, after he had failed to pay previous sanction of $1500, because "obviously monetary penalties are bound to be more effective if they are paid").

169 Kramer v. Commissioner, 816 F.2d 680 (6th Cir. 1987) (table; text in WESTLAW, Allfeds file) (taxpayer claiming illegitimate charitable contributions sanctioned $1,500 costs and attorney's fees for frivolous appeal); Grosse v. Commissioner, 816 F.2d 680 (6th Cir. 1987) (table; text in WESTLAW, Allfeds file) ($1,500 sanction for frivolous appeal); Grimes v. Commissioner, 806 F.2d 1451 (9th Cir. 1986) (taxpayer who sought reassessment of tax deficiency but failed to state a claim upon which relief could be based, appealed dismissal and imposition of sanctions, and was sanctioned $1,500 for a frivolous appeal).

170 Lefebvre v. Commissioner, 830 F.2d 417 (1st Cir. 1987) ($600 damages and double costs awarded against pro se appellant plus warning of harsher sanctions in the future); Clark v. Green, 814 F.2d 221, 222-23 (5th Cir. 1987) ($250 plus double costs imposed on pro se litigant for frivolous appeal where district court's opinion and $2,500 Rule 11 sanction warned that the claim was frivolous); Day v. Allstate Ins. Co., 788 F.2d 1110 (5th Cir. 1986) (double costs and attorney fees imposed on pro se IFP plaintiff with meritless case after he was sanctioned for discovery abuse in the court below); Kelly v. United States, 789 F.2d 94 (1st Cir. 1986) (double costs assessed against pro se taxpayers).

171 See, e.g., Cheek v. Doe, 828 F.2d 395 (7th Cir.), cert. denied, 108 S. Ct. 349 (1987); Casper v. Commissioner, 805 F.2d 902 (10th Cir. 1986).

TABLE 3 — RULINGS ON RULE 11 LOWER COURT SANCTIONS*
(January 1987-August 1989)

		Rule 11 sanctions imposed					Denial of Rule 11 Sanctions				Other Rule 11	
		Aff'd	Rev'd/ Vacated	Remand for Reconsider	Remand for Clarification	Modify	Aff'd	Rev'd/ Vacated	Remand for Reconsider	Remand for Clarification	Rule 11 mentioned	No Decision re Rule 11 (e.g. not ripe)
1st Cir.	Pro se	2	0	0	0	0	1	0	0	0	0	0
	Atty	5	0	0	0	0	3	0	0	0	5	0
2d Cir.	Pro se	1	1	2	0	0	1	0	0	0	2	1
	Atty	4	6	2	0	0	4	1	0	0	3	1
3rd Cir.	Pro se	2	2	2	0	0	0	0	0	0	1	1
	Atty	2	3	1	1	0	4	0	0	0	2	0
4th Cir.	Pro se	5	2	0	0	0	0	0	0	0	1	3
	Atty	6	4	5	0	1	10	4	2	0	1	0
5th Cir.	Pro se	8	0	0	0	0	0	0	0	0	2	0
	Atty	6	7	4	2	0	8	1	2	2	8	6
6th Cir.	Pro se	8	2	0	0	0	0	0	0	0	3	0
	Atty	8	8	6	1	1	10	0	0	1	4	6
7th Cir.	Pro se	2	2	2	0	1	0	0	1	0	1	1
	Atty	7	5	6	1	0	15	3	1	0	9	0
8th Cir.	Pro se	3	0	0	0	0	0	0	0	0	0	0
	Atty	4	1	1	0	0	7	0	0	0	3	1
9th Cir.	Pro se	4	4	1	0	0	1	0	1	0	0	1
	Atty	15	21	2	0	0	9	1	0	0	5	3
10th Cir.	Pro se	0	1	0	0	0	0	0	0	0	0	0
	Atty	1	0	0	0	0	2	0	0	0	4	1
11th Cir.	Pro se	3	1	0	1	0	1	0	0	0	0	0
	Atty	6	4	2	0	0	4	0	0	0	3	1
Fed. Cir.	Pro se	2	0	0	0	0	0	0	0	0	0	0
	Atty	1	1	0	0	0	3	0	0	0	2	0
D.C. Cir.	Pro se	1	0	0	0	0	0	0	0	0	0	0
	Atty	5	1	0	0	0	2	0	1	1	2	1

*includes sanctions for frivolousness imposed on pro se litigants under § 1915, ERISA, and other statutes; does not include § 1988 fee awards standing alone.

posed a flat fee to be divided equally among co-litigants.[172] As at trial level, an appellate panel may consider a pro se litigant's status as an inexperienced layman, especially where the case turns not on the merits but on an obscure procedural point, and may deny sanctions in such cases, but this is unusual in the published cases.[173]

C. *In Forma Pauperis Sanctions*

When a litigant is indigent, whether he is a prisoner or simply does not have money, he may file a lawsuit under section 1915, the *in forma pauperis* ("IFP") statute, with permission from the court.[174] This statute is primarily an enabling device; to take advantage of it, the would-be litigant must submit an affidavit stating his financial condition and showing a severe lack of resources.[175] If an IFP appli-

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[172] In a case where twenty-five pro se litigants together protested an IRS penalty, the court imposed sanctions of full attorney fees of $1,554.88 against each litigant, for a total of $38,872. The court reasoned that litigants ought not be protected from sanctions of attorney's fees by "huddl[ing] together." Doyle v. United States, 817 F.2d 1235, 1238 (5th Cir.), cert. denied *sub nom.* Vanya v. United States, 108 S. Ct. 159 (1987).

[173] Pryzina v. Ley, 813 F.2d 821 (7th Cir. 1987). In *Pryzina*, a doctor appealed dismissal of his civil rights action protesting his forced payment of taxes after state tax authority received a warrant to seize his residence for nonpayment of $148.51. Id. at 822. Sanctions were not imposed because the pro se applicant was not likely to recognize decision's somewhat obscure jurisdictional grounds of comity, Tax Injunction Act, and absolute immunity of officials, which left the merits of the plaintiff's claim unexplored. Id. at 823-24.

[174] 28 U.S.C. § 1915 (1982).

In forma pauperis is a Latin term which literally means "in the style of the poor." The statute provides, in relevant part:

> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith. . . .
>
> (d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.
>
> (e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases . . . .

Id. Compare 28 U.S.C. § 1927 (1982) (counsel—but not party—is liable for excessive costs, including costs, expenses, and attorney's fees, reasonably incurred after he has multiplied proceedings in any case unreasonably and vexatiously).

The IFP relief from prepayment does not mean that the petitioner is relieved of all fees, nor does it preclude courts from initiating partial payment plans requiring indigents, even prisoners, to pay a reduced fee before claims will be filed. See Westling, supra note 62, at 291-305 (discussion of actual difficulties—which statutes and case law do not suggest—faced by prisoners).

[175] See, e.g., Adkins v. Dupont, 335 U.S. 331, 339 (1948) (litigants need not give up their "last dollar" to be granted IFP status); Souder v. McGuire, 516 F.2d 820 (3d Cir. 1975) (pris-

cant has any resources available, he may be required to pay reduced fees.[176] If a litigant wins, he may be required to reimburse the court, as the statute covers only prepayment of fees.[177] Prepayment does not usually cover such items as mandatory witness fees[178] and discovery costs;[179]the IFP litigant must specially request the judge for payment of these by the court and payment is at the judge's discretion. These expenses can prove to be a serious stumbling block when an indigent litigant has moved his case to the point where such fees are required.[180] Although the statute does not cover all expenses, the intent is to avoid the possibility that a meritorious claim will not be filed merely because the litigant is poor.

The IFP statute grants the court the power to summarily dismiss—usually without prejudice—frivolous claims. This dismissal may occur before the defendant has been served with process.[181] As of June 1989, the test for frivolousness resulting in dismissal under the IFP statute requires either an inarguable legal conclusion or a fanciful factual allegation.[182] One court has held that a decision on frivolous-

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oner's account of $50.07 need not be surrendered). But see Ward v. Werner, 61 F.R.D. 639 (M.D. Pa. 1974) (prisoners with accounts of $50 and $65 were not entitled to proceed IFP); Shimabuku v. Britton, 357 F. Supp. 825 (D. Kan. 1973) (prisoners with $315.31, $45, $51.27 and $61.41 in prison accounts were not indigent and would not be allowed to file IFP), aff'd, 503 F.2d 38 (10th Cir. 1974).

176 Braden v. Estelle, 428 F. Supp. 595, 596 (S.D. Tex. 1977) (purpose of partial payment was to curb indiscriminate filing by forcing prisoners to decide if the claim was worth the costs of pursuing it, a decision faced by regular litigants).

177 28 U.S.C. § 1915(e) (1982). Courts have interpreted § 1915 to delay payment of fees and costs until final determination of a case. Marks v. Calendine, 80 F.R.D. 24, 27 (N.D. W.Va. 1978) (fees and costs can be imposed against non-prevailing prisoner proceeding IFP), aff'd *sub nom.* Flint v. Haynes, 651 F.2d 970 (4th Cir. 1981), cert. denied, 454 U.S. 1151 (1982).

178 See Sales v. Marshall, 873 F.2d 115 (6th Cir. 1989) (remanding for determination of whether IFP prisoner, with income of $3.00 per month from state, has ability to pay deposition costs of $901.51 as taxable costs under § 1920); Morrow v. Igleburger, 584 F.2d 767, 772 n.7 (6th Cir. 1978), cert. denied, 439 U.S. 1118 (1979) (IFP plaintiff did not request payment of witness fees); Newson v. Harrison, 687 F. Supp. 360 (W.D. Tenn. 1988) (IFP plaintiff not entitled to payment of witness fees or issuance of subpoenas at government expense).

179 Some courts have held that an attorney must be appointed to aid pro se plaintiffs with discovery. See, e.g., Murrell v. Bennett, 615 F.2d 306, 311 (5th Cir. 1980). An appointed attorney usually pays discovery costs—and hopes the claim is finally successful so that he may recover fees and costs.

180 Certain costs may be avoided with the court's permission and some ingenuity. For example, a tape recorder may be allowed in place of an expensive court stenographer for depositions. But the plaintiff would still have to pay to transcribe it. D. Manville, supra note 23, at 249.

181 See Neitzke v. Williams, 109 S. Ct. 1827, 1831 (1989) (dismissals *sua sponte* are often made prior to service of process "so as to spare the prospective defendants the inconvenience and expense of answering [meritless] complaints").

182 *Neitzke*, 109 S. Ct. at 1831, 1833. This test is considerably more lenient than the old test of "whether the plaintiff can make a rational argument on the law or facts in support of his

ness should precede IFP leave or demand for payment of filing fees.[183]

The most common IFP sanction is dismissal.[184] The status of pro se litigants filing IFP has not, however, protected litigants from monetary sanctions. IFP litigants have "no right to prostitute the processes of the court by bringing a frivolous . . . action."[185] Even a pro se litigant has a duty to inquire into whether his claim is viable.[186] A court has the power under the IFP statute to assess costs in the same manner as other cases.[187] One court, for example, imposed double costs under this statute for filing and appealing a frivolous

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claim." See Bennett v. Passic, 545 F.2d 1260, 1261 (10th Cir. 1976). The former test was a restatement of the Fed. R. Civ. P. 12(b)(6) dismissal standard—failure to state a claim—which is now not necessarily enough to dismiss under the frivolousness clause of § 1915. *Neitzke*, 109 S. Ct. at 1832-33.

183 *In re* Funkhouser, 873 F.2d 1076 (8th Cir. 1989).

184 See Turner, supra note 28, at 617 (a high percentage of cases studied were disposed of at the pleading stage; in the Eastern Distrcit of California, 80.4 percent were terminated without any response by the defendants, while nationally 68 percent of the complaints were terminated at this early stage).

While a dismissal without prejudice supposedly permits resubmission if the pro se litigant can state a claim, it is unlikely that he will understand what was missing from the original complaint. In addition, because of delays in filing and processing the claim, the statute of limitations may have run, locking the courthouse doors forever. Unlike a dismissal with leave to amend after a motion by the opposing party, IFP dismissal may occur even before the other party was served; the defendant would have had no notice of the action. This becomes important where the statute of limitations has run; a Rule 12(b) dismissal has been "commenced," but an IFP dismissal without service has not.

Although the Supreme Court did not explicitly mention these arguments, the recent decision in *Neitzke* mandates a higher standard for § 1915 dismissal and thus suggests that *sua sponte* dismissal is an extreme solution to a borderline complaint. It is far better to provide a Rule 12(b)(6) notice and permit the litigants to "crystalliz[e] the pertinent issues and facilitat[e] appellate review of a trial court dismissal by creating a more complete record of the case." *Neitzke*, 109 S. Ct. 1834.

185 Galvan v. Cameron Mut. Ins. Co., 831 F.2d 804, 805 (8th Cir. 1987) (quoting Duhart v. Carlson, 469 F.2d 471, 478 (10th Cir. 1972), cert. denied, 410 U.S. 958 (1973)).

186 *Galvan*, 831 F.2d at 805; Harris v. Forsyth, 742 F.2d 1277, 1278 (11th Cir. 1984).

187 28 U.S.C. § 1915(e) (1982) ("Judgment may be rendered for costs at the conclusion of the suit or action as in other cases."). See, e.g., Lay v. Anderson, 837 F.2d 231, 233 (5th Cir. 1988) (appeal costs of $105 taxed against inmate who disobeyed court order to exhaust prison remedies before bringing suit, and injunction issued against his filing further IFP appeals until cost paid or District Court certifies appeal to be in good faith); Marks v. Calendine, 80 F.R.D. 24, 31 (N.D. W.Va. 1978) (awards restricted to cases where there is a "complete absence of merit, coupled with the intent to use the Court as a vehicle for harassment"), aff'd *sub nom.* Flint v. Haynes, 651 F.2d 970, 971-74 (4th Cir. 1981) (holding imposition of costs of $289 against IFP litigant with disposable monthly income of $20 not abuse of discretion), cert. denied, 454 U.S. 1151 (1982). See also Perkins v. Cingliano, 296 F.2d 567, 569 (4th Cir. 1961) (plain intent of § 1915 is that costs may be adjudged against litigant); Fletcher v. Young, 222 F.2d 222, 224 (4th Cir. 1955) (§ 1915 provides no shield from costs of subjecting defendants to vexatious and frivolous litigation); accord Duhart v. Carlson, 469 F.2d 471, 478 (10th Cir. 1972); Pasquarella v. Santos, 416 F.2d 436, 437 ns. 2, 3 (1st Cir. 1969); Moss v. Ward, 434 F. Supp. 69, 72 (S.D.N.Y. 1977); Carter v. Telectron, Inc., 452 F. Supp. 939, 943-44 (S.D. Tex. 1976).

claim.[188] Another court has attached indigent inmates' prison accounts to pay sanctions.[189]

D. *Sanctions Under Other Statutes*

Before Rule 11 was amended, the courts experienced considerable frustration when faced with purposefully abusive litigants. To "curb the litigiousness of a particularly notorious contributor to the backlog of this and other circuits,"[190] the Seventh Circuit called on the authority of the All-Writs Act[191] to issue an injunction requiring that all of the prisoner litigant's future claims be "original,"[192] that is, "claims never before raised and disposed of on the merits by any federal court."[193] District courts in Florida and Texas also used the All-Writs Act to provide relief from the abuses of other prisoner career plaintiffs.[194] The All-Writs Act is still used occasionally as the basis for injunctive relief.[195] The fee-shifting capabilities of the civil rights

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188 *Galvan*, 831 F.2d at 806 (action brought under § 1983 for insurance company's refusal to pay claim).

189 See *Lay*, 837 F.2d at 232-33 n.1 (funds to be drawn from prison account until $105 sanction paid); Gabel v. Lynaugh, 835 F.2d 124, 125 (5th Cir. 1988) (sanctioning indigent prisoners $10 each from prison trust fund after they submitted appellate brief raising issues not presented to trial court); Martinez v. Griffin, 840 F.2d 314, 315 (5th Cir. 1988) (court would have imposed monetary sanction on IFP prisoner, but "prisoner has no money at all in a prison account"). The *Gabel* court noted that appeals of prisoner § 1983 suits was the largest category of cases which survived long enough to be briefed. *Gabel*, 835 F.2d at 125 n.1.

190 Green v. Warden, 699 F.2d 364, 365 (7th Cir.), cert. denied, 461 U.S. 960 (1983). Green was the founder and sole "reverend" of the Human Awareness Universal Life Church, whose members were apparently all prisoners. As the sole spokesman for the "church," and as a prisoner contesting other matters, Green initiated over 500 cases. See Green v. Camper, 477 F. Supp. 758, 759-69 (W.D. Mo. 1979) (list of cases brought by Green). He had been described as the "most prolific prisoner litigant in recorded history." *In re* Green, 669 F.2d 779, 781 (D.C. Cir. 1981). It was his apparent purpose—and a policy of his church—to overburden the courts by bringing numerous complaints. Green v. Warden, 699 F.2d at 365.

191 28 U.S.C. § 1651(a) (1982).

192 Green v. Warden, 699 F.2d at 370.

193 Id. at 367.

194 Procup v. Strickland, 567 F. Supp. 146 (M.D. Fla. 1983) (imposing injunction barring IFP prisoner from courts without representation by attorney), rev'd, 760 F.2d 1107 (11th Cir. 1985), vacated, 792 F.2d 1069 (11th Cir. 1986) (injunction must be less restrictive); Carter v. Telectron, Inc., 452 F. Supp. 944, 1002-03 (S.D. Tex. 1977).

195 See, e.g., Becker v. Sherwin Williams, No. 88-3863 (D.N.J. July 17, 1989) (LEXIS, Genfed library, Courts file) (imposing injunction on employment discrimination claimant who had generated at least eighteen reported decisions and had filed 321 individual charges of discrimination with fifteen different Equal Employment Opportunity Commission districts of which the vast majority were dismissed); Calesnick v. Redevelopment Auth., 696 F. Supp. 1053, 1055 (E.D. Pa. 1988) (court "convinced that nothing short of injunction will prevent [pro se plaintiff] from continuing to litigate" claims barred by *res judicata*); Cook v. Peter Kiewit Sons Co., 775 F.2d 1030, 1035-37 (9th Cir. 1985) (after dismissing pro se claim because the question presented was too insubstantial to consider, the court used the All Writs Act to

statutes have also been used against pro se litigants,[196] as have the inherent powers of the court.[197] The Tax Code also statutorily provides for sanctions against taxpayers presenting frivolous claims.[198]

Other statutes under which sanctions have been imposed on attorneys are either inapplicable on their face to pro se litigants or have seldom been utilized against pro se parties.[199] Discovery sanctions under Federal Rule of Civil Procedure 37(b)(2) ("Rule 37") hold few dangers for pro se litigants since they rarely reach this stage. Discov-

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enjoin plaintiff from repetitive and vexatious litigation, and Rule 11 to impose attorney's fees), cert. denied, 476 U.S. 1183 (1986).

196 42 U.S.C. § 1988 (1982); Civil Rights Act of 1964, § 706(k) (codified as 42 U.S.C. § 2000e-5(k) (1982) (title VII). See, e.g., Shrock v. Altru Nurses Registry, 810 F.2d 658, 661-62 (7th Cir. 1987) (denying sanctions under title VII and § 1988 against pro se claimant because claims not utterly frivolous, but remanded for reconsideration of Rule 11 sanctions); Nesmith v. Martin Marietta Aerospace, 833 F.2d 1489 (11th Cir. 1987) (attorney fees imposed against pro se plaintiff under title VII but not under Rule 11 because he did not show bad faith or improper purpose).

The Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(g)(1) (1982), has also provided a source of sanctioning power. See Monkelis v. Mobay Chemical, 827 F.2d 935, 936-37 (3d Cir. 1987) (sanctioning a pro se litigant $5,167.75 under ERISA, not Rule 11; affirmed under "bad faith" analysis).

197 See, e.g., Becker v. Sherwin Williams, No. 88-3863; *Green*, 699 F.2d at 367-68 (viewing the All-Writs Act as activating the inherent powers of the court "to effectuate what seems . . . to be the manifest ends of justice") (quoting Texaco, Inc. v. Chandler, 354 F.2d 655, 657 (10th Cir. 1965), cert. denied, 383 U.S. 936 (1966)). See also Atkinson v. O'Neill, 867 F.2d 589, 590-91 (10th Cir. 1989) (imposing double costs and damages as appellate sanctions under inherent power, § 1912, and Rule 38 against a pro se tax protestor).

198 26 U.S.C. § 6673 (1982 & Supp. V 1988) (permitting a maximum $5000 penalty for frivolous or groundless claims by taxpayer, or proceedings instituted primarily for delay). Section 6673 is generally cited in tandem with Rule 38 or other rules to impose sanctions on pro se taxpayers. See, e.g., Lefebvre v. Commissioner, 830 F.2d 417 (1st Cir. 1987); Casper v. Commissioner, 805 F.2d 902 (10th Cir. 1986). Outside of Tax Court, this statute is generally used where the behavior of the offending taxpayer was egregious. See McLaughlin v. Commissioner, 832 F.2d 986 (7th Cir. 1987) (reducing penalty from $5000 to $3500 because pro se taxpayer's conduct was not so egregious as to warrant imposing maximum sanction).

199 28 U.S.C. § 1912 (1982) (costs and damages may be imposed on losing appellant due to delay engendered by appeal); 28 U.S.C. § 1927 (1982) (costs may be assessed against attorney for failure to comply with court rules); Fed. R. Civ. P. 16(f) (sanctions may be imposed whether or not attorney has signed papers); 28 U.S.C. §§ 2412 (a), (b) (1982) (prevailing party in suit by or against United States may be awarded costs and reasonable attorney fees); see Doyle v. United States, 58 A.F.T.R.2d (P-H) ¶ 86-5699 (S.D. Tex. 1985), aff'd, 817 F.2d 1235 (5th Cir.), cert. denied, 108 S. Ct. 159 (1987); Fed. R. Civ. P. 54(d) ("Rule 54(d)") (prevailing party may be awarded costs unless the court directs otherwise).

Section 1927 has been used once, in conjunction with Rule 11, against a pro se litigant in Wheeling v. Michigan Nat. Bank-Oakland, 840 F.2d 19 (6th Cir. 1988). The appellate court did not mention, however, that § 1927 specifically covers only attorneys. Section 1912 was cited in *Atkinson*, 867 F.2d at 590-91, as one of the bases for imposing double costs and damages as appellate sanctions against a pro se tax protestor. See also Stoecklin v. Commissioner, 865 F.2d 1221, 1226 (11th Cir. 1989) (sanctions imposed on pro se tax protestor under Rule 38 and § 1912). Used in conjunction with the IFP statute, Rule 54(d) has provided a basis for sanctioning indigent pro se litigants. See, e.g. Flint v. Haynes, 651 F.2d 970, 973 (4th Cir. 1981), cert. denied, 454 U.S. 1151 (1982).

ery abuse is more typical of lawyers.[200] It is, however, not unheard of for a pro se litigant to be sanctioned under Rule 37.[201]

The federal courts are not the only danger zones for pro se litigants. Many states also have statutes or rules—some modelled after Rule 11—under which sanctions may be imposed, and these have been used against pro se litigants.[202]

III. BALANCING PRO SE POLICIES AGAINST SANCTION POLICIES

Whenever pro se litigants face sanctions, the issue of access to the courts must be explored. Imposing sanctions on pro se litigants is problematic first because the standards of pleading imposed on them are so lenient: they may submit papers which would be highly improper if submitted by an attorney and may proceed with complaints that originally did not state a valid claim. This initial leniency is not always extended to the question of whether to sanction pro se litigants for bringing frivolous or improper claims. Some courts have resorted to extreme language before eventually imposing sanctions on a pro se plaintiff, possibly to assuage the sense that imposition of sanctions

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200 See, e.g., Note, Monetary Sanctions Against Attorneys for Discovery Abuse in Federal Court, 9 Cardozo L. Rev. 1021, 1022 (1988) ("attorneys can manipulate the discovery process to cause extensive delays, harass adversaries, and add unnecessary costs, including increased legal fees").

201 See Moon v. Newsome, 863 F.2d 835 (11th Cir. 1989) (pro se IFP prisoner claim dismissed as Rule 37 sanction after prisoner failed to pay monetary Rule 37 sanction); Toner v. Wilson, 102 F.R.D. 275, 276 (M.D. Pa 1984) ($250 Rule 37 sanction imposed on prisoner proceeding IFP and pro se for failure to cooperate in discovery and for violation of court discovery order).

202 *California*: Cal. Civ. Proc. Code § 907 (West 1980) and Cal. R. Ct. 26(a); see generally Eisenberg, Sanctions on Appeal: A Survey and a Proposal for Computation Guidelines, 20 U.S.F. L. Rev. 1, 13-34 (1985) (California sanctions).

Florida: Fla. Stat. § 57.105 (1985) (award of fees for bringing non-justiciable issue).

Iowa: Iowa R. Civ. P. 80(a); see Knoepfler, Divining an Approach to Attorney Sanctions and Iowa Rule 80(a) Through an Analysis of Federal and State Civil Procedure Rules, 72 Iowa L. Rev. 701 *passim* (1987).

Maine: Me. R. Civ. P. 76(f) (gives court authority to impose attorney fees and treble costs for frivolous appeal or appeal instituted primarily for the purpose of delay); see Walker v. Heber, 534 A.2d 969 (Me. 1987) ($500 toward attorney fees plus treble costs imposed on pro se litigant who failed to attempt to contradict defendant's position on sole issue); Gurschick v. Clark, 511 A.2d 36 (Me. 1986) (pro se appellant subject to sanctions for bringing frivolous appeal).

New York: N.Y. R. of Ch. Admin., Part 130 (effective Jan. 1, 1989) (sanctions of up to $10,000 for "frivolous conduct" in litigation); Civ. Prac. L. & R. § 8303-a (McKinney's Supp. 1989) (sanctions for frivolous tort claims). For clarification of Part 130 and how this rule interrelates with CPLR § 8303-a, see 350 N.Y. St. L. Dig. 4 (Feb. 1989); 347 N.Y. St. L. Dig. 1 (Nov. 1988).

Pennsylvania: 42 Pa. Cons. Stat. § 2503 (7) (1981) (allowing sanction of attorney fees against a party for "dilatory, obdurate or vexatious conduct"); see Martin v. Perezous, No. 85 Civ. 4090 (E.D. Pa. 1986) (WESTLAW, Allfeds file) (sanctions denied against pro se litigant).

may be inappropriate in these cases.[203]

A. *Sanctions for Frivolous Claims*

It is inconsistent for courts to freely admit pro se litigants, accord them liberal reading of their pleas, and then punish them for not vigorously investigating their claims beforehand. Where the presumption is that the pro se complainant is ignorant of the law, it is incongruous that he later be held accountable for lack of knowledge of it. Because he is ignorant of the law, he is incapable of applying the facts of his case to the appropriate law.

This is not true for the few pro se litigants who are blatant, consistent, and knowing abusers of the court system ("career plaintiffs").[204] Leniency may be curtailed when a pro se litigant has filed and lost dozens of claims on the same or similar facts against the same defendant; a court is then justified in imposing harsh sanctions to deter a career plaintiff from pursuing a clearly abusive course.

The inexperienced pro se litigant ("novice") is in a substantially different position. He may reasonably believe that he has been treated in an unfair manner, that the Constitution would protect him,[205] and that he should have his day in court.

Another presumption should be that the novice has neither the legal knowledge nor the ability to perform effective legal research, and therefore the standard should be whether a reasonable layperson would recognize that the argument had no merit. A reasonable layperson standard flows appropriately from the amended Rule 11 reasonableness-under-the-circumstances standard; it is objective and clarifies what reasonableness is when a party acts pro se.[206]

Where a novice litigant must proceed pro se, unaware that his

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203 Pro se status does not offer a plaintiff an "impenetrable shield, for one acting pro se has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets." Farguson v. MBank Houston, N.A., 808 F.2d 358, 359 (5th Cir. 1986); accord, Patterson v. Aiken, 841 F.2d 386 (11th Cir. 1988); Itz v. United States Tax Court, 60 A.F.T.R.2d (P-H) ¶ 87-5113 (W.D. Tex. 1987).

204 See, e.g., *In re* Martin-Trigona, 573 F. Supp. 1245 (D. Conn. 1983), aff'd in part and vacated in part, 732 F.2d 1254 (2d Cir. 1984). See generally Note, Abusive Pro Se Plaintiffs in the Federal Courts: Proposals for Judicial Control, 18 U. Mich. J.L. Ref. 93 (1984-85) (arguing that extremely abusive pro se litigants, "career plaintiffs," deserved to be sanctioned). This proposal, however, was written before courts had extended the effects of amended Rule 11 to cover these clearly outrageous petitioners.

205 Few pro se claims in the federal courts do not include contitutional claims. One hypothesis for this is that pro se litigants may believe that the Constitution, as supreme law of the land, was framed to be read plainly—and when they read it plainly, they believe their rights were violated. Another hypothesis is that the Constitution may be the only law the pro se litigant has read, has access to, or believes he can understand.

206 Critics have noted that the amended Rule 11 is only partly objective. The "good faith

claim cannot be supported by case law or statutory interpretation, sanctions are hardly appropriate. Where a pro se litigant's argument is novel, even where it is unlikely to succeed, the claim is not necessarily so frivolous or improper, from a reasonable layman's point of view, as to require a sanction. Where a judge needs to resort to extensive research—more than a couple of easily found cases— or original statutory interpretation, legislative history, any sophisticated legal analysis, then a sanction against a pro se litigant who could not perform such tasks is inappropriate. The pro se litigant's personal advocacy, like an attorney's professional advocacy, should not be chilled. Where, as a layman, he reasonably believes his claim has basis in law and fact, sanctions should not be considered.

Each claim filed may increase the pro se litigant's legal knowledge. For example, in prisoner litigation, some pro se litigants file a number of actions before they learn enough about the workings of the law and the courts to phrase their pleadings sufficiently well to be permitted to proceed beyond the IFP frivolousness hurdle. This increased legal knowledge may be taken into account as evidence of the ability to perform a reasonable investigation into the law when sanctions are considered. Where a pro se litigant indicates his awareness of relevant case law and shows he understands how to apply it to the facts of his claim, he may be held to a higher standard than that of a reasonable layman. It may, however, still be inappropriate to judge him based on a reasonably competent attorney standard. The key remains reasonableness under the circumstances.

No reasonable person could find fault with sanctions against the career plaintiff who has been warned against further pursuit of certain claims.[207] The problem is where the line should be drawn. Where a novice may have filed a frivolous or improper complaint without understanding the doctrines of *stare decisis*, *res judicata*, or collateral estoppel,[208] a sanction is inappropriate. While attorneys are expected to know better—and therefore attorneys acting pro se should be held to the standard of attorneys representing a client[209]—a novice pro se

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argument" language suggests a continuing subjective analysis. See supra note 124 and accompanying text.

207 See Becker v. Dunkin' Donuts of Am., Inc., 665 F. Supp. 211 (S.D.N.Y. 1987); Di Silvestro v. United States, 767 F.2d 30 (2d Cir.), cert. denied, 474 U.S. 862 (1985); *In re* Martin-Trigona, 573 F. Supp. 1245.

208 McClure v. Santos, 669 F. Supp. 344 (D. Or. 1987) (pro se prisoner collaterally estopped from proceeding with § 1983 action to challenge the results of disciplinary proceedings which he had already appealed in state courts, as he had already received a full and fair opportunity to litigate his due process claim).

209 See, e.g., Harbulak v. County of Suffolk, 654 F.2d 194, 198 (2d Cir. 1981) (attorney cannot claim the special considerations granted to pro se parties).

litigant, like many paying clients, does not understand how the law works. To the untrained, the law appears to be a free-for-all where either side may try to convince by any logic whatsoever. Although the rules of civil procedure impose some order on this chaos, they also are subject to interpretation and discretion. The vagueness and unusual terminology of most legal points make it difficult for a layperson to understand what a proposition, rule, statute, or case stands for. Moreover, because a clever attorney can manipulate law to his advantage to present at least a colorable claim, the rules and standards of legal argument are not clear to many an intelligent layman. A pro se litigant might believe that any moderately clever person could do what an attorney does.

B. *Sanctions for Improper Purpose*

A career litigant, after numerous lawsuits on the same issue, should know that he has no chance of success, and therefore is proceeding for the improper purpose of harassing the defendant. The novice, however, may be presumed to have no expectation of losing and is not generally more intent on harassment than any other plaintiff bringing a civil suit. A represented party may be advised by his attorney that the courtroom is not the place for revenge but for restitution; the distinction, however, is far from obvious.

The presumption should be that a novice pro se litigant, with few or no prior lawsuits on the issue, is proceeding for proper motives. This presumption, of course, is rebuttable—but to what effect? Some courts have suggested that a meritorious suit may be brought for an improper purpose—and sanctions are not appropriate in such a case.[210]

The merits of a case are seldom considered in a vacuum when the question of sanctions arises; a prisoner complaint is treated as one of a flood of similar complaints,[211] as is a tax protester claim. A litigious party's past record of lost cases is held against him. This is not necessarily improper, because his record can prove a litigant's knowledge or awareness that his claim might be found meritless;[212] however, where the previous case is unconnected, either as to the facts, the law,

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210 See Hudson v. Moore Business Forms, Inc., 836 F.2d 1156 (9th Cir. 1987) (attorney's subjective intent was not sanctionable as harassing where complaint states arguable claim; the amount of damages claimed, however, warranted Rule 11 sanction); accord Rachel v. Banana Republic, Inc., 831 F.2d 1503 (9th Cir. 1987).

211 Judges and their clerks often expect prisoner civil rights cases to be frivolous. Eisenberg, supra note 24, at 544-46. Some commentators caution judges to avoid this preconception. Westling & Rasmussen, supra note 62.

212 Kirkland v. City of Peekskill Police Dep't, No. 87 Civ. 8112 (S.D.N.Y. Mar. 15, 1988)

or the defendants, it may be irrelevant. Except where the issue is barred by *res judicata* or the claim is shown to have been brought for an improper purpose, a pro se litigant's claim should be considered individually, as are the claims of an attorney or a represented litigant.[213]

C. *Sanctions Under Various Rationales*

Sanctions are usually ostensibly imposed on pro se litigants to deter that particular litigant from filing further similar actions, although sometimes the stated purpose is partly to deter litigants in general from filing frivolous claims.[214] Nevertheless, as few pro se litigants are aware of case law, these sanctions cannot have the general deterrent effect desired.[215] To have a deterrent effect on future litigants, a sanction must be foreseeable to a litigant who pursues a course he knows is doomed to fail.[216] If a pro se litigant is aware that he will face sanctions if he proceeds with a frivolous claim, and knows that the contemplated action has previously been deemed frivolous and sanctioned, he might be deterred. The problem is that a pro se litigant is often unaware of the risk of sanctions; he may be equally unaware that his claim is frivolous, or that, because it has no chance of success due to adverse precedent, it may be viewed as brought solely for the purpose of harassment.

Some courts have decided that sanctions are to be used as punishment; this rationale, however, is most likely to provoke due process requirements: notice and opportunity to be heard.[217] Seldom is compensation to the opposing party raised as a rationale in pro se cases; this may be due, in part, to the often obvious frivolousness of the

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(WESTLAW, Allfeds file) (ex-commissioner of police held to understand the principle of res judicata suffiently that sanctions may be imposed).

213 See Foster v. Murphy, 686 F. Supp. 471 (S.D.N.Y. 1988) (denying sanctions against disbarred attorneys in *habeas corpus* action where Supreme Court had not decided issue raised, even though litigants had previously brought numerous related frivolous actions).

214 See Note, Preserving Pro Se, supra note 62, 367-374; see also Patterson v. Aiken, 111 F.R.D. 354, 357 (N.D. Ga. 1986) ("If people know that action 'A' will result in adverse consequence 'B,' it will make them less likely to take action 'A' in the first place.").

215 See Coleman v. Commissioner, 791 F.2d 68, 72 (7th Cir. 1986) ("The routine use of sanctions does not deter unless people know what lies in store.").

216 Compare Maduokolam v. Columbia University, 866 F.2d 53 (2d Cir. 1989) (reversing imposition of Rule 11 sanctions against pro se engineering student who did not know motion to reopen was time-barred) with *Coleman*, 791 F.2d at 71 (noting that the ambiguities lurking within the law, and the fuzziness of the lines drawn, mean that a litigant who knows that his position is near or over the line should accept the risk of sanctions). Judge Easterbrook, in *Coleman*, did not take his line of reasoning far enough, failing to recognize that a pro se litigant might not understand how tenuous his position is.

217 See supra note 140 (notice and hearing decisions).

claim, which a competent attorney can oppose without wasting considerable time or because the most effective sanction against indigent pro se litigants is injunctive relief.

D. *Sanctions for Particular Types of Litigation*

Unlike civil rights cases—which ordinarily require known documents and expert testimony as evidence—the conspiracy element in RICO and some antitrust claims[218] is more difficult to prove, as is the economic power element in price-fixing complaints.[219] The information needed may only be obtainable through the use of informants or electronic eavesdropping, neither of which is readily available outside of criminal trials. Evidence may be hidden in account books which seem innocent or in difficult-to-obtain documents such as credit card slips, hotel registers, and telephone records. Market research or economic analysis may be required to determine the effect of certain practices. It requires considerable resources to do the job right: investigatory talent to decide what to look for, persuasive talent to convince a judge to allow discovery, expertise to recognize important documents, time and money. It could be that a pro se petitioner has so little chance of proving such a claim that he should be prohibited from proceeding. Such a prohibition, however, could defeat one aim of the relevant statutes,[220] which is to allow parties to act as private attorneys general to police organizations.[221] If the point of these statutes is to encourage citizens to police their fellows, it is inconsistent to bar a person from bringing a claim without legal assistance; a prosecutor and a private attorney are similar in that neither allows an injured citizen to make his own decisions. Allowing a party to proceed pro se broadens the effect of the statutes and bolsters their intent. Alternatively, if the purpose of the statutes is to prevent the stated evils, appointment of counsel could be mandated where the claim appears meritorious or arguable on the pleadings.

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218 See 15 U.S.C. § 1 (1982) (Sherman Act's conspiracy in restraint of trade); 15 U.S.C. § 14 (1982) (Clayton Act's conspiracy element for price fixing).

219 See 15 U.S.C. § 14 (1982) (Clayton Act's economic power element for price fixing).

220 See supra notes 98-99.

221 See generally Salop & White, supra note 99. This article explores antitrust litigation as a financial proposition involving stakes and costs—neither of which are serious factors in pro se litigation, which is not considered in the article. The authors note that Rule 11 sanctions are rarely imposed in antitrust litigation, thus litigants should not consider this when figuring their potential costs. Id. at 1023 n.78. Additionally, litigants are warned that absolutely frivolous suits are unlikely to force a settlement, irrespective of the costs of a successful defense, if the defendant does not want to succumb to bluff or blackmail. Id. at 1029.

E. *Sanctioning the Poor Person*

The intent of the IFP statute is to provide limited access to the courts for the impoverished litigant;[222] the legislature could not have intended that the litigant would be further impoverished by his attempt. A pro se litigant who has filed a colorable complaint and passed the initial hurdle should not later be sanctioned for pressing a frivolous suit. His original pleading has already passed what should be considered as a reasonable-layman frivolity test. Had the court reasonably and properly refused his claim, little or no expense would have been incurred; by allowing him to proceed, a presumption of possible merit has been raised. Given the volume of claims refused under this statute's frivolity clause,[223] and given that a law clerk, magistrate, or judge decides whether a claim may proceed,[224] the IFP litigant has not presented a facially frivolous suit.

After this point, he should face sanctions only if he intentionally misstated the facts,[225] thus violating the Rule 11 prong of reasonable grounding in the facts, or if he files further motions which are themselves frivolous.

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222 Limited in the sense that frivolousness is a reason for denying entry to the court under the IFP statute.

223 28 U.S.C. § 1915(d) (1982). See Turk, supra note 61, at 1352 (almost all prisoners attempt to file their complaints IFP); Turner, supra note 28, at 617 (an overwhelming number of prisoner cases were filed IFP).

224 The judicial guidelines for allowing an IFP claim to proceed are liberal, see supra note 12 and accompanying text, and supposedly broadly construed. That comparatively few claims are passed through the procedure, and that some of these dismissals are reversed on appeal, suggests that some judges view the opening as the eye of a needle rather than a gateway to the courts. Many claims filed may not have any merit, but it is difficult to ascertain this from the pleadings.

An IFP dismissal is generally without prejudice, i.e., the litigant may file again if he can rephrase his pleadings to state a claim. Nevertheless, since most IFP dismissals occur prior to service, the plaintiff may be barred by the applicable statute of limitations.

Given that comparatively few claims are allowed to proceed and those are potentially meritorious or at least arguable claims, the only remaining possibility is that the plaintiff did not present the facts honestly and accurately. A gross distortion would generally become apparent fairly early in discovery, and the court is well protected by its inherent powers of contempt and by perjury laws.

Rule 11 protects the courts, in essence, from negligent as well as intentional misbehavior. See Hays v. Sony Corp. of Am., 847 F.2d 412, 418 (7th Cir. 1988) (Judge Posner suggests that Rule 11, in effect, imposes a negligence standard, a new version of legal malpractice); Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987) ("Rule 11 does not prohibit merely intentional conduct. Inexperience, incompetence, willfulness or deliberate choice may all contribute to a violation."); Kassin, supra note 115, at 18-23.

225 A litigant may also face perjury charges if he changes his story between one court proceeding and another. See, e.g., United States v. Stassi, 583 F.2d 122 (3d Cir. 1978) (IFP *habeas* petitioner convicted of perjury for inconsistent statements in his *habeas* affadavit compared to statements made in his guilty plea hearing).

IV. A PROPOSAL FOR PRO SE SANCTION GUIDELINES

A balancing test should be applied where a pro se litigant faces a sanction for a Rule 11 or other statutory violation for frivolousness. Where a litigant proceeding pro se has filed a meritless suit and faces sanctions for bringing a frivolous or improper claim, whether upon motion of the opposing party or upon the court's own initiative, the court must balance: (1) the level of frivolousness; (2) the amount of the pro se litigant's legal experience; (3) whether the claim was brought for an improper purpose; (4) whether the litigant has brought similar suits before, either on the same set of facts or against the same defendant; and (5) the deterrent value of each possible sanction as applied to the particuler pro se litigant.

A. *How Frivolous Is It?*

The level of frivolity should be determined by whether a reasonable layperson would consider the claim impossible to win. This impossibility standard is necessary because many claims which a reasonable person might find implausible are legally valid and could be successful. A reasonable layman focuses on whether the outcome, if the argument is successful, would be objectively fair or just. If a reasonable person would believe an argument to be silly or stupid and a positive outcome laughable, a claim would be clearly frivolous. While it might appear that few pro se litigants would submit such claims, a quick perusal of published cases suggests otherwise. For example, a made-up income tax exemption would be found frivolous. While a reasonable man might wish it were a good argument, he knows better.

B. *How Experienced Is the Litigant?*

The pro se litigant's level of legal experience is a crucial factor in imposing sanctions. His knowledge of that particular area of law is less important than his ability to do legal research. An attorney is presumed to be able to know how to look up what he does not know. A paralegal or law secretary may also possess the necessary research skills to effectively locate the relevant case law to have a good basis for belief that the claim rests on an arguable legal foundation. A prisoner having taken a course in legal research may be presumed to have some rudimentary knowledge, although he may show that the necessary sources were not available to him or that he was not accorded a reasonable amount of time in the prison library to adequately research the issue.

As attorneys know, the latest case on point may be the most im-

portant; a prison law library may not provide recent reporters. A pro se litigant with no experience in legal research and only a grade school understanding of the Constitution should not be presumed conversant with the law; his pleadings should make such ignorance apparent. Such a litigant should be held to a reasonable layman standard regarding the legal basis of his claims. This standard applies only where the pro se litigant has little or no experience in dealing with the legal points; it echoes the good faith standard of the pre-amended Rule 11, but is not subjective.

A practicing attorney may have difficulty explaining his good faith reason for extension or change of precedent, but it is outrageous for courts to require such reasoning from a person who cannot be expected to know what precedent is. The reasonable layman standard would solve this problem; good faith belief would not cover a ridiculous extension or change.

C. *How Improper Is the Claim?*

To determine whether the claim was brought for an improper purpose, absent a history of attempting similar lawsuits which were lost for the same reasons as the instant case, the movant must demonstrate to the court that the opponent intended to harass or was in possession of knowledge that the facts claimed were not true and failed to so inform the court. The burden of proof should appropriately fall upon the party seeking sanctions.

D. *How Often Has He Tried This?*

Where the pro se litigant has a history of bringing similar claims into various courts and losing each of them on grounds similar to those in the instant case, the litigant may be presumed to know that his claims are meritless. Where he has attempted several times to sue the same party on the same or similar facts and lost on the merits, he may be presumed to be proceeding for an improper purpose such as harassing that particular defendant. A combination of these factors would trigger consideration of sanctions to deter him from bringing further meritless claims or from continuing his harassment.

E. *How Well Will a Sanction Deter Him?*

Once the other factors are weighed under the balancing test and the pro se litigant is found to have been abusing the court system, a judge should first enter a warning that any subsequent attempts to pursue this claim would lead to imposition of a sanction. A second abuse would trigger a further balancing test to determine an appropri-

ate sanction. The factors here are (1) deterrence value, (2) compensation value, and (3) ability to pay. In most cases, a second abuse would mandate imposition of a modest fine for deterrent purposes after weighing the litigant's ability to pay even a modest amount. Imposing such burdensome sanctions as attorney's fees and damages should be considered appropriate only if it is clear that the litigant understood from the beginning that he had no case but proceeded anyway. Where pro se litigants are concerned, such clarity is only possible after the lesser deterrents have been applied. A reasonable litigant, after that point, would be presumed to have heard the message. Even then, a determination must be made whether imposition of a large monetary sanction would be unjust or impossible to collect; either injustice or impossibility would defeat the deterrent value of the imposition of sanctions. For an indigent, a modest amount would have little deterrent effect—once his pittance is gone, there is nothing to deter him from future filings. Such a sanction is a punishment, not a deterrent. Certainly, the opponent is not compensated. Compensatory value to the opponent may be presumed to be minimal, except where the pro se plaintiff is wealthy—which is rare. Therefore, a judge should consider carefully imposing monetary sanctions on indigent litigants, as neither of the accepted reasons for such sanctions are likely to be served.

The sanction should not be expected to deter other pro se litigants because, presumably, they are unaware of the case. Even where a pro se litigant is shown the previous case, his subjectivity may prevent him from recognizing the weakness of his own claims. Therefore, evaluation of the sanction as deterrent must be based on the particular abusive litigant.

Injunctive remedies should be granted only in those cases of persistent abuse; the terms of the injunction should be as narrow as possible to minimize the danger that the litigant will be denied access to the courts for legitimate claims.

CONCLUSION

Pro se litigants hold an important place within the American justice system. The Constitution and the Bill of Rights support this claim; indeed one of the fundamental beliefs in this country is that every individual is free to speak out and to petition the courts. It is imperative to avoid stifling this free person by imposing sanctions for actions which he had no reason to believe improper. Rule 11 and other sanctions are inappropriate when applied to pro se litigants who reasonably believe that they have presented a valid claim if a reason-

able layman might agree with them. This does not mean that a factually or legally meritless claim may not be dismissed. But dismissal does not mean that a pro se litigant violated Rule 11 or any other rule. Where sanctions against a pro se litigant are considered, different standards are appropriate.

The sanction's appropriateness under the circumstances of the case may be determined by balancing the level of frivolousness against the legal experience of the litigant and factoring in the level of the claim's impropriety and the likelihood that the litigant knew it was improper. Where a sanction is appropriate, the deterrent value of a potential sanction as applied to the particular litigant becomes crucial. As there is seldom any likelihood of compensation for the opponent to a pro se litigant, that reason for sanctions—so crucial to cases in which wealthy attorneys represent affluent clients—is absent.

By utilizing a graduated sanction system, judges may effectively prevent career plaintiffs from thriving without penalizing novice litigants for the faults of their black sheep cousins. This promotes the access to the courts that is vital to the success of democratic government.

Donalda Gillies

APPENDIX
PROPOSED REVISIONS OF RULE 11, RULE 38, AND THE IFP STATUTE

The pro se litigant, as distinguished from attorneys and represented parties, must be protected from the possibility of sanctions until and unless he is fully aware that he is at risk; the litigant's due process rights should be spelled out. Not only is it necessary for Rule 11 to be amended to reflect the particular interests of the pro se litigant, but Congress should codify the existing law that pro se petitions are to be read liberally, and specifically extend these liberal standards to petitioners facing sanctions under any rule or law. As the IFP statute is most directly concerned with pro se applicants, this is a primary target for such codification. The standards should eventually be independently codified to apply to all federal courts; states, as always, might follow suit on their own initiative.

A. *Revised Rule 11*

In relevant part, the amended statute should read as follows:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. *An unrepresented party may be sanctioned if a reasonable layperson would have been aware of the frivolous nature of the claim or if it is proven that the party knew at the time of signing that the claim was improper, but a sanction is not to be imposed without due warning. This rule may be considered sufficient warning for attorneys or other legally knowledgeable parties.*

B. *Revised Rule 38*

The amended statute should read as follows:

Sanctions for Frivolousness or Improper Purpose

If a court of appeals shall determine an appeal is frivolous, it may award *appropriate sanctions*, just damages, *or* single or double costs to the appellee. *If appellant has proceeded without counsel and reasonably believed the appeal had merit in the law, a sanction may be imposed only with due warning which may not be issued by the court below.*

C. *Revised 28 U.S.C. § 1915*

In relevant part, the amended statute should read as follows:

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious. *The court may consider a sanction other than dismissal only if the claim is completely without basis in law or fact, and no reasonable person would believe otherwise, or if the claim is brought solely for an improper purpose such as harassment. A sanction may not be imposed without due warning.*

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, *except that the person filing in forma pauperis should not be further impoverished as a result of such costs without a showing of extreme abuse of the court. The* United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.