

“The Power of the Pen”: Jailhouse Lawyers, Literacy, and Civic Engagement

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The history of federal law on jailhouse lawyers reveals a Supreme Court grappling to define access to the courts in the context of a prisoner population with limited literacy skills. Most prisoners are indigent and must represent themselves pro se in both civil suits and habeas petitions.¹ As a result, prisoners with low literacy levels often face significant practical obstacles to court access. As Chris O’Bryant’s article in this issue vividly conveys,² these obstacles have been magnified in recent years by the Antiterrorism and Effective Death Penalty Act (“AEDPA”).³ Barriers to prisoner court access have simultaneously been severely restricted by the Prison Litigation Reform Act (“PLRA”)⁴ and the Supreme Court’s decision in *Lewis v. Casey*.⁵

This problem is not unique to prisoners: in a variety of contexts, individuals seeking legal redress for civil claims face significant, and often insurmountable, financial barriers to court access.⁶ When the potential litigant has limited literacy skills, these barriers can be even more difficult to

* The author wishes to thank Mitu Gulati, David Vladeck, Justin Mixon, Steven Feierman, Jennifer Mueller, Sarah Leavitt, Larry Caldwell, and members of the editorial staff of the *Harvard Civil Rights-Civil Liberties Law Review* for their insightful comments on earlier versions of this Essay and interesting conversations about jailhouse lawyering.

¹ JIM THOMAS, PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER 156 (1988); Lisa Bellamy, *Playing for Time: The Need for Equitable Tolling of the Habeas Corpus Statute of Limitations*, 32 AM. J. CRIM. L. 1, 46 (2004); Julie B. Nobel, Note, *Ensuring Meaningful Jailhouse Legal Assistance: The Need for a Jailhouse Lawyer-Inmate Privilege*, 18 CARDOZO L. REV. 1569, 1575–77 (1997).

² Thomas C. O’Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299 (2006).

³ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending 28 U.S.C. §§ 2244, 2253–2255 (1994) and adding 28 U.S.C. §§ 2261–2266 (2000)).

⁴ Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321–77 (1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; 42 U.S.C. §§ 1997–1997h (2000)).

⁵ 518 U.S. 343 (1996).

⁶ See, e.g., David C. Vladeck, *In re Arons: The Plight of the “Unrich” in Obtaining Legal Services*, in LEGAL ETHICS STORIES 255 (Deborah L. Rhode & David Luban eds., 2006) (describing the challenges faced by parents in IDEA proceedings who cannot find lawyers and in at least one state are forbidden from having non-lawyer advocates represent them); see also *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305 (1985) (upholding \$10 attorney-fee limits under the Veterans Act).

overcome. Incarceration does, however, pose unique challenges to court access. Prisoners are dependent on the prison system for access to law books, legal resources, and often also for their education about the law. Moreover, because correctional facilities are closed-off from the public and therefore difficult to monitor, litigation is one of the few means by which prisoners can bring public attention to serious health and safety risks, including inadequate health care, widespread violence, sexual assault, and unsafe environmental conditions. Litigation is also generally the only avenue available to a prisoner seeking to overturn a wrongful sentence of incarceration or even death.

Within the past ten years, Congress has passed, and continues to propose, a variety of procedural obstacles to prisoner lawsuits.⁷ This legislation has rested primarily on the assertion—repeatedly touted by tough-on-crime politicians and echoed widely in the press—that courts are overburdened by frivolous prisoner lawsuits.⁸ Although the congressional emphasis on procedure has reduced the federal docket of prisoner cases, including frivolous cases,⁹ it has done so at a serious cost: the exclusion of important meritorious lawsuits from the courts. As O’Bryant’s article makes clear, this concern applies with particular force to prisoners with low literacy levels.¹⁰

This Essay explores the possibility that increasing prisoners’ access to legal education and information could strike a better balance between judicial efficiency and court access. With legal training, prisoners could submit better and more informed pleadings and comply more consistently with procedural requirements, increasing the likelihood of fair hearings for meritorious cases. At the same time, preliminary research suggests that prisoners with increased legal knowledge are more likely to filter out frivolous cases than those without, reducing the burden on the courts. Increasing prisoner access to legal information could also foster literacy and civic engagement while allowing prisoners to contribute to the public discourse on matters of social justice.

Part I of this Essay provides a background on jailhouse lawyering. Part II briefly reviews the Supreme Court’s early decisions regarding the right of prisoners to act as advocates in the courts, with particular attention to the connection between literacy and court access. Part III reviews some of the recent changes in the legal landscape that restrict prisoner access to the courts, and their effects on prisoners with low literacy levels. Fi-

⁷ Such obstacles are central to both the AEDPA and the PLRA.

⁸ This characterization of the problem played a significant role in the passage of the PLRA and the AEDPA and has already been raised in testimony on the Streamlined Procedures Act currently before Congress. S. 1088, 109th Cong. (2005); H.R. 3035, 109th Cong. (2005).

⁹ See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1557 (2003) (“[T]he PLRA has shrunk the number of new federal filings by inmates by over forty percent.”).

¹⁰ O’Bryant, *supra* note 2, at 309–10.

nally, Part IV explores the benefits of increased access to legal education and information for prisoners engaged in jailhouse lawyering.

I. JAILHOUSE LAWYERING

A variety of definitions exist for the term “jailhouse lawyer.” To some, jailhouse lawyers are only those prisoners “who are recognized and sought out by others because of their competency,” and who have filed numerous federal suits.¹¹ To others, the term encompasses prisoners who assist other prisoners with legal work, with or without a fee.¹² I will use the concept broadly here, to include all prisoners who submit legal work to the courts on behalf of themselves or others. I choose this expansive definition because it allows me to explore comprehensively the connection between legal advocacy, literacy, and civic engagement.

While jailhouse lawyers may file suit on any number of issues, the vast majority of lawsuits brought by prisoners are either civil suits regarding prison conditions or habeas corpus petitions challenging their underlying criminal convictions.¹³ Because there is no constitutional right to the provision of counsel for these cases,¹⁴ prisoners’ access to the courts frequently depends on the abilities of jailhouse lawyers. In fact, many of the seminal prisoners’ rights cases—including those defining the scope of the right to protection from abuse by other prisoners,¹⁵ the right to be free of exces-

¹¹ THOMAS, *supra* note 1, at 192.

¹² See, e.g., Nobel, *supra* note 1, at 1573 n.28 (defining a jailhouse lawyer as a “convict who possessed or claimed to possess some knowledge of law and procedure in fields of interest to convicts and who held himself out as being ready, willing and able to write writs to the courts on behalf of other inmates of the institution” (quoting *Watts v. Brewer*, 588 F.2d 646, 647–48 (8th Cir. 1978)), and noting that the term has been used to refer to “(1) an indigent person confined in a prison or jail under judgment of a court of law who prepares and files with a court those pleadings that he believes will void such judgment. (2) a person who acts as his own lawyer while in prison. (3) . . . a person who repeatedly files frivolous actions in a court of law to harass his jailers. (4) a ‘jailhouse lawyer’ is a writ-writer who does legal work for other prisoners for a fee.” (quoting Charles Larsen, *A Prisoner Looks at Writ-Writing*, 56 CAL. L. REV. 343, 344 (1968))).

¹³ Roger Roots, *Of Prisoners and Plaintiffs’ Lawyers: A Tale of Two Litigation Reform Efforts*, 38 WILLAMETTE L. REV. 210, 221–22 (2002) (“Although unrepresented inmates have filed a sizeable number of comedic, spiteful, and utterly meritless claims, the majority of inmate civil rights claims involve the identical types of grievances that prompted bloody and destructive prison uprisings during the 1970s: unsanitary and dilapidated prison facilities, lack of medical care, poor food quality, lack of treatment, and brutality.”); see also Nobel, *supra* note 1, at 1575–76.

¹⁴ See, e.g., *Murray v. Giarratano*, 492 U.S. 1 (1989) (holding that the Constitution does not require assistance of counsel for death row inmates wishing to file habeas petitions); *Pennsylvania v. Finley*, 481 U.S. 551 (1987) (holding that prisoners do not have a constitutional right to appointed counsel in post-conviction proceedings); see also *DiAngelo v. Ill. Dep’t of Pub. Aid*, 891 F.2d 1260, 1262 (7th Cir. 1989) (holding that prisoners have no constitutional right to counsel for civil cases).

¹⁵ *Farmer v. Brennan*, 511 U.S. 825 (1994).

sive force by correctional officers,¹⁶ and the right to adequate medical care¹⁷—were initially filed by prisoners acting pro se.¹⁸

The level of legal work submitted by jailhouse lawyers varies widely. Some prisoners are extremely able legal advocates. They may have been lawyers before being incarcerated, or, more commonly, acquired a great amount of legal knowledge in prison.¹⁹ On average, however, prisoners have much lower literacy levels than those on the outside. Almost half of the imprisoned individuals in the United States do not have a high school diploma or its equivalent.²⁰ Fourteen percent have education levels below the eighth grade.²¹ Given that the typical twenty-five-year-old prisoner functions at two or three grades below the level actually completed in school,²² this leaves a large number of prisoners without the literacy skills to present their cases adequately, let alone to confront the procedural requirements of prison grievance systems and the federal courts.

Departments of Corrections do not uniformly provide legal education or law clerk training programs. One researcher has determined that at least six states currently run well-established and respected legal education programs that assist prisoners in becoming qualified and effective jailhouse lawyers.²³ Other states that once experimented with similar programs have since eliminated them, either as a result of budget cuts, a lack of political support, or modifications in the legal decrees that initially required them.²⁴ General education programs are more common than legal education programs. Nonetheless, a number of correctional facilities, particularly private prisons, lack such programs entirely.²⁵ According to the Bureau of Justice Statistics, in 2000, basic adult education was offered in 61.6% of

¹⁶ *Hudson v. McMillian*, 503 U.S. 1 (1992).

¹⁷ *Helling v. McKinney*, 509 U.S. 25 (1993).

¹⁸ *Lewis v. Casey*, 518 U.S. 343, 403 (1996) (Souter, J., dissenting).

¹⁹ See Nobel, *supra* note 1, at 1574.

²⁰ See KARL C. HAIGLER ET AL., NAT'L CTR. FOR EDUC. STATISTICS, LITERACY BEHIND PRISON WALLS: PROFILES OF THE PRISON POPULATION FROM THE NATIONAL ADULT LITERACY SURVEY 17 (1994); see also BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 511 (Kathleen Maguire & Ann L. Pastore eds., 2003) (referring to a study suggesting that through the mid-1990s, among those entering state prisons, over 70% had not completed high school and 12% had no high school education at all.).

²¹ IRWIN S. KIRSCH ET AL., NAT'L CTR. FOR EDUC. STATISTICS, ADULT LITERACY IN AMERICA 49 tbl.1.10 (1993).

²² John Matosky, Note, *Illiterate Inmates and the Right of Meaningful Access to the Courts*, 7 B.U. PUB. INT. L.J. 295, 302 (1998) (citing DONNA BELLORADO, U.S. DEP'T OF JUSTICE, MAKING LITERACY PROGRAMS WORK: A PRACTICAL GUIDE FOR CORRECTIONAL EDUCATORS I (1986)).

²³ Evan R. Seamone, *Fahrenheit 451 on Cell Block D: A Bar Examination to Safeguard America's Jailhouse Lawyers from the Post-Lewis Blaze Consuming their Law Libraries*, 24 YALE L. & POL'Y REV. 91, 125 (2006).

²⁴ *Id.*

²⁵ CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, EDUCATION AND CORRECTIONAL POPULATIONS 4 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf>.

private prisons, 80.4% of state prisons, and 97.4% of federal prisons. Secondary education followed a similar trend, while college courses were relatively rare.²⁶ Jails were significantly less likely to have educational programs than prisons; in 1999, only 24.7% of jail jurisdictions provided a basic adult education program, 54.8% provided secondary education, and 3.4% provided a college program.²⁷

Another serious obstacle for prisoners seeking legal redress is the fear of retaliation from prison employees. While it is difficult to quantify the amount of retaliation faced by prisoners engaging in litigation, a 1989 study found that jailhouse lawyers constituted the largest number by far of prisoners confined to control units, and that solitary confinement was the most common disciplining strategy used against jailhouse lawyers.²⁸ Prisoner litigants also risk having grievances and legal papers intercepted, read, confiscated or destroyed, receiving threats of discipline from prison officials, and facing threats of violence from fellow prisoners.²⁹ Nevertheless, jailhouse lawyers continue to file suits, bringing a wide variety of issues affecting prisoners to the attention of the courts.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *The Prison Discipline Study: Exposing the Myth of Humane Imprisonment in the U.S.*, in *CRIMINAL INJUSTICE: CONFRONTING THE PRISON CRISIS* 92, 96 tbl.5, 97 tbl.7 (Elihu Rosenblatt ed., 1996); see also *Higgs v. Carver*, 286 F.3d 437 (7th Cir. 2002) (describing pretrial detainee's claim that he was placed in "lockdown segregation" for bringing a federal civil rights lawsuit); Cassandra Shaylor, "It's Like Living in a Black Hole": *Women of Color and Solitary Confinement in the Prison Industrial Complex*, 24 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 385, 398-99 (1998) ("A 1989 Prison Discipline Study found that the most common disciplining strategy used against jailhouse lawyers was solitary confinement."); William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 *HARV. L. REV.* 610, 647 (1979) ("There are many well-documented instances of retaliation against prisoners who dare to sue their keepers, and the possibility of subtle reprisals is ever present.").

²⁹ See, e.g., THOMAS, *supra* note 1, at 227, 229-32 ("Jailhouse lawyers may make life difficult for their keepers, but the reverse occurs more often because of the asymmetrical power relationship in which staff have the advantage. Even when a given prison may meet mandated standards defining appropriate resources, access to them may be subverted by prison policies or staff discretion."); see also *Cooper v. Schriro*, 189 F.3d 781 (8th Cir. 1999) (holding that a prisoner stated a valid First Amendment claim when he alleged that a prison official shut off water for five days because he used prison grievance system); *Harmon v. Berry*, 728 F.2d 1407 (11th Cir. 1984) (holding that a prisoner stated a claim against prison officials who spread rumors that he was a snitch and exposed him to prisoner retaliation); *Lamar v. Steele*, 693 F.2d 559 (5th Cir. 1982) (finding admissible evidence that a prison staff member had threatened to kill a jailhouse lawyer, had asked another prisoner to kill him, and had given a knife to a third prisoner asking him to kill a different jailhouse lawyer who filed suits against the prison); *Young v. Calhoun*, 656 F. Supp. 970 (S.D.N.Y. 1987) (holding that a jailhouse lawyer stated a valid claim when he alleged that, in retaliation for his provision of legal services, prison officials told other inmates that he was a homosexual and encouraged violence against him).

II. THE LEGAL LANDSCAPE

Between the 1940s and the 1970s, the Supreme Court established a jurisprudence of court access that both emphasized the importance of allowing prisoners' voices to reach the courts and recognized the practical difficulties to court access faced by unrepresented prisoners with low literacy levels.³⁰

While the Court did not address the specific question of legal training and education for prisoners, it did establish that states and prison administrations must take affirmative steps to ensure that prisoners' access to the courts is "meaningful," and that legal information and assistance may be vital to such access.

In many of its early cases on prisoner court access, the Supreme Court emphasized the importance of prisoner voice and prisoner perspectives. In 1941, in *Ex parte Hull*, the Court held that a prisoner had a right to advocate for him or herself by petitioning for a writ of habeas corpus without interference from the state.³¹ Specifically, the Court struck down a regulation that required prisoners to have their habeas petitions reviewed by prison administrators before they could submit them to the courts.³²

Soon thereafter, the Court considered the interplay between prisoners' abilities and court access more directly. In *Price v. Johnston*, the Court held that a federal circuit court has the discretionary power to command a prisoner to appear in court to argue his or her own appeal.³³ The majority recognized that a prisoner's lack of legal knowledge could limit the effectiveness of his or her arguments; nonetheless, it concluded that for a prisoner without counsel, this concern was outweighed by the interest in having both sides of the argument presented to the court. The Supreme Court thus established an inherent value in a prisoner's court appearance, regardless of the quality of the representation. According to the Court, "[t]hat the argument orally advanced by the prisoner may in fact be less than enlightening to the court does not detract from the fairness or the justice of giving him the opportunity to appear and argue."³⁴

³⁰ While the cases I review here are central to the Court's jurisprudence on prisoners' direct access to the courts as jailhouse lawyers, a wide variety of cases address the question of prisoner court access more broadly. For example, in 1964, the Supreme Court formally recognized the constitutional rights of prisoners in *Cooper v. Pate*, 378 U.S. 546 (1964), allowing a prisoner to petition pro se on a civil rights complaint. *Gideon v. Wainwright*, 372 U.S. 335 (1963), established indigent prisoners' right to the provision of counsel in criminal cases. *Haines v. Kerner*, 404 U.S. 519 (1972), required the courts to interpret pro se complaints liberally. *Wolff v. McDonnell*, 418 U.S. 539 (1974), established some, albeit limited, due process protections for prisoners faced with disciplinary charges. *Faretta v. California*, 422 U.S. 806 (1975), interpreted the Sixth Amendment to grant an accused the right to make his or her own defense.

³¹ 312 U.S. 546, 549 (1941).

³² *Id.*

³³ 334 U.S. 266, 278 (1948).

³⁴ *Id.* at 280.

Later cases required the Court to explore more thoroughly the interaction between literacy and court access. In *Johnson v. Avery*,³⁵ for example, the Court considered a prison regulation preventing prisoners from assisting each other with legal matters. Although the petitioner was a literate jailhouse lawyer, the *Johnson* Court based its decision largely on the rights of prisoners with limited literacy skills. It concluded that unless the state provided alternative forms of assistance for such prisoners seeking post-conviction relief, it could not bar inmates from assisting each other in the preparation of habeas petitions.³⁶

The Court made explicit reference to the limited literacy skills of many prisoners, noting that “[j]ails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited.”³⁷ Having acknowledged the literacy problem, the Court focused on the practical consequences—that prisoners, largely without counsel for habeas petitions, would be effectively unable to obtain court review without some form of assistance. According to the Court, “[t]here can be no doubt that Tennessee could not constitutionally adopt and enforce a rule forbidding illiterate or poorly educated prisoners to file habeas corpus petitions. Here Tennessee has adopted a rule which, in the absence of any other source of assistance for such prisoners, effectively does just that.”³⁸

The Court’s equation of limited literacy and limited intelligence is problematic; it paints prisoners as unable to acquire needed skills rather than simply lacking the necessary education. Generally, however, *Johnson* paved the way to increased court access for prisoners. By addressing the relevant literacy issues, the Court established a broad right to court access that took into account the practical realities faced by prisoners trying to exercise that right.

The Supreme Court’s jurisprudence on prisoner court access in this era also addressed both the level of legal work prisoners could be expected to perform and the affirmative obligations of the states in supporting such work. In the 1977 case *Bounds v. Smith*, the Court considered whether the state’s failure to provide adequate legal research facilities denied prisoners access to the courts in violation of the Fourteenth Amendment.³⁹ As in *Johnson*, the Court emphasized that the right of court access should not be impeded by practical obstacles. It asserted that “meaningful access” is the touchstone, and that prisoners must have “a reasonably adequate op-

³⁵ 393 U.S. 483 (1969).

³⁶ *Id.* at 490.

³⁷ *Id.* at 487 (citation omitted).

³⁸ *Id.*

³⁹ 430 U.S. 817 (1977). This was not the first time the Court addressed this issue. In 1971, it had issued a *per curiam* decision without explanation affirming a district court’s conclusion that a state was required to provide prisoners with an adequate law library. *Younger v. Gilmore*, 404 U.S. 15 (1971) (*per curiam*).

portunity to present claimed violations of fundamental constitutional rights to the courts.”⁴⁰

The *Bounds* Court squarely addressed the question of states’ affirmative obligations to ensure the right of access to the courts. Drawing support from earlier cases requiring the waiver of filing fees and the provision of transcripts, stamps and other necessary items for indigent prisoners, it concluded that such support was constitutionally required: “[t]his is not to say that economic factors may not be considered, for example, in choosing the methods used to provide meaningful access. But the cost of protecting a constitutional right cannot justify its total denial.”⁴¹

The Court’s decision provides an interesting glimpse into its understanding of the role of jailhouse lawyers and pro se petitioners. In *Johnson*, the Court had recognized that lay persons must be allowed to perform legal work if the alternative would be to abrogate a federally protected right. The *Johnson* Court had, however, de-emphasized the complexity of the legal work involved, observing that the preparation of petitions for habeas relief is often performed by laymen, and that the relevant habeas statute contemplates such participation by non-lawyers.⁴² The *Bounds* Court, in contrast, decisively asserted that prisoners would need to perform the same type of legal analysis as lawyers:

It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available. Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action. If a lawyer must perform such preliminary research, it is no less vital for a pro se prisoner.⁴³

In light of the adversarial system, the Court concluded that anything less would leave the prisoner at a disadvantage.

The *Bounds* Court rejected the claim that “inmates are ‘ill-equipped to use’ ‘the tools of the trade of the legal profession,’” and that libraries would therefore be “useless in assuring meaningful access.”⁴⁴ The Court relied, in part, on its own experience with pro se petitions to support its assertion that prisoners could file serious and legitimate claims.⁴⁵ Thus,

⁴⁰ *Bounds*, 430 U.S. at 825.

⁴¹ *Id.*

⁴² *Johnson*, 393 U.S. at 490 n.11.

⁴³ *Bounds*, 430 U.S. at 825–26.

⁴⁴ *Id.* at 826.

⁴⁵ The Court also relied on the state’s own characterization of the issue in funding applications, and on the state’s freedom to create alternative methods to ensure access to the courts. *Id.* at 826–27. Justice Stewart, in his dissent, questioned prisoners’ abilities to use a

while *Bounds* provided an important right of access to legal information, the Court did not squarely address the situation of illiterate prisoners for whom a library alone would not ensure effective representation.⁴⁶ Nonetheless, as a general matter, *Bounds* played a large role in supporting prisoner access to the courts. For years, lower courts relied on the assertion in *Bounds* that “meaningful access” to the courts was the touchstone inquiry.⁴⁷

III. OBSTACLES TO PRISONER LITIGATION

Although the Supreme Court’s jurisprudence between the 1940s and 1970s established a clear right of court access for prisoners,⁴⁸ the reality has been more complicated. The right has been undermined both by systems of judicial administration that relegate many prisoner cases to arguably second-rate treatment, and by legislation and case law that chip away at the scope of the right itself.

Increased court caseloads have led to new systems of judicial administration in which some litigants, particularly prisoners and other pro se petitioners, do not receive full hearings from Article III judges.⁴⁹ In some jurisdictions, magistrate judges hear the vast majority of prisoner cases.⁵⁰ Although some scholars have suggested that magistrates have more

law library effectively. He was convinced that granting access to a library, in most cases, would “simply result in the filing of pleadings heavily larded with irrelevant legalisms—possessing the veneer but lacking the substance of professional competence.” *Id.* at 836 (Stewart, J., dissenting). He did not, however, suggest an alternative for ensuring court access. *Id.*

⁴⁶ *Bounds* has therefore been criticized for “creat[ing] the appearance of legal access which does not exist in actual practice.” Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 443 (1993).

⁴⁷ See, e.g., *Bourdon v. Loughren*, 386 F.3d 88, 93 (2d Cir. 2004); *Pilgrim v. Littlefield*, 92 F.3d 413, 416 (6th Cir. 1996).

⁴⁸ This right of access was further bolstered by the passage of the Civil Rights of Institutionalized Persons Act in 1980. 42 U.S.C. §§ 1997–1997j (2006). See Kim Mueller, Comment, *Inmates’ Civil Rights Cases and the Federal Courts: Insights Derived from a Field Research Project in the Eastern District of California*, 28 CREIGHTON L. REV. 1255, 1264–65 (1995).

⁴⁹ See, e.g., Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1444–45 (2004).

⁵⁰ In May of 2001, for example, “the United States District Court for the Eastern District of New York appointed a new magistrate judge and assigned her to hear and to oversee significant categories of pro se matters” including prisoner cases. Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 475, 476–77 (2002). The authors also note that:

[t]he Federal Judicial Center points to three major case management approaches to the allocation of such work: blanket reference of all Social Security appeals and prisoner petitions to magistrate judges; allocation of Social Security appeals and prisoner petitions between magistrate and Article III judges; and selective assignment of Social Security appeals and prisoner petitions by individual Article III judges to magistrate judges.

time to allocate to their pro se cases and therefore produce higher quality decisions, critics contend that the relegation of the cases of prisoners and other indigent petitioners to magistrate judges may threaten the quality of justice these litigants receive.⁵¹

While empirical evidence is inconclusive about the differential treatment for pro se prisoners at the trial level, it is more widely agreed that such cases often receive inferior treatment at the appellate level. The rapid increase in the federal appellate caseload, without a commensurate increase in the number of judges, has produced a system in which the bulk of appeals are heard without oral argument and result in unpublished opinions.⁵² Critics contend that this system of “private judging” at the appellate level results in a lack of transparency and accountability on the part of the federal courts.⁵³ Scholars have also suggested that a lack of oral argument may reduce the petitioners’ chances of obtaining reversals.⁵⁴

Pro se prisoner petitions frequently fall into the category of cases decided without oral argument on the advice of a court staff attorney.⁵⁵ Such cases are also less likely to be published and available for citation than the cases of wealthier litigants with representation.⁵⁶ Prisoners’ lack of legal information and education likely exacerbates the problem: they file cases that seem at first glance to be legally uninteresting and unworthy of more serious consideration.⁵⁷ In contrast, skilled appellate lawyers advo-

Id. at 492.

⁵¹ *See id.* at 503–06.

⁵² *See, e.g.*, William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 575–84 (1981) [hereinafter Reynolds & Richman, *Price of Reform*]; William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 279–81 (1996) [hereinafter Richman & Reynolds, *Learned Hand Tradition*] (citing JUDITH A. MCKENNA, FED. JUDICIAL CTR., *STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS* 43 (1993) and Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. REV. 3, 48 (1990)); William M. Richman & William L. Reynolds, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167, 1168–72 (1978) [hereinafter Richman & Reynolds, *Non-Precedential Precedent*]; *see also* David Greenwald & Frederick A. O. Schwarz, Jr., *The Censorial Judiciary*, 35 U.C. DAVIS L. REV. 1133, 1135–37 (2002); Pether, *supra* note 49, at 1442–83.

⁵³ Greenwald & Schwarz, *supra* note 52, at 1155–58.

⁵⁴ *See, e.g.*, Reynolds & Richman, *Price of Reform*, *supra* note 52, at 624; Richman & Reynolds, *Learned Hand Tradition*, *supra* note 52, at 280–81; *see also* Pether, *supra* note 49, at 1464, 1492.

⁵⁵ *See* Pether, *supra* note 49, at 1506.

⁵⁶ Greenwald & Schwarz, *supra* note 52, at 1169 n.150. Many of these critics have also suggested that the system of non-publication further entrenches the divide between rich and poor in accessing the courts, as it sets forth a body of law available only to those with the resources to gain access to unpublished decisions. *See* Pether, *supra* note 49, at 1511.

⁵⁷ *See* Pether, *supra* note 49, at 1506. Indeed, the relegation of prisoner cases to this treatment may have begun, in large part, as a reaction to the rising number of prisoner cases in the federal courts beginning in the 1960s.

cate for oral argument by characterizing the legal issues as novel and deserving of more intense judicial scrutiny.⁵⁸

Beginning in the mid-1990s, both Congress and the Supreme Court began overtly chipping away at prisoners' access to the courts for habeas petitions and civil suits. The obstacles that hindered Chris O'Bryant's access to the courts, including procedural barriers and inadequate legal information, are representative of this broader trend.⁵⁹ As O'Bryant describes, in a prisoner population with low levels of literacy, high rates of mental illness, and frequent fears of retaliation, the burden of complying with complicated procedures without sufficient access to legal information and assistance often prevents prisoners' cases from being heard.⁶⁰

The AEDPA, for example, impedes many prisoner cases from even reaching the courts and has an especially adverse impact on prisoners with low literacy levels. In particular, the Act's one-year statute of limitations on prisoners seeking habeas relief bars numerous petitions, regardless of their merits.⁶¹ As O'Bryant describes, prisoners with low literacy levels or inadequate access to legal information may be uninformed about the AEDPA's time limit. Moreover, even when they do know of the time limit, they may have difficulty concluding their research and filing their petitions before it expires.

Other provisions of the AEDPA also limit prisoner access to the courts and disproportionately affect those with low literacy levels. For example, the Act prohibits prisoners from filing successive petitions on the same issue and drastically limits their ability to submit successive petitions on new issues. Prisoners whose initial petitions are unclear or incomplete due to their limited literacy skills or legal knowledge therefore have few opportunities to rectify the problem.⁶² The AEDPA's requirement of deference to state court decisions means that federal courts can be precluded from hearing a prisoner's petition even when the prisoner has a valid federal constitutional claim.⁶³

⁵⁸ Mitu Gulati & David Vladeck, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. (forthcoming 2006).

⁵⁹ For a thoughtful exploration of the attack on prisoners' rights more broadly by both the Supreme Court and Congress, see Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229 (1998).

⁶⁰ O'Bryant, *supra* note 2, at 309–15, 322–33.

⁶¹ See also 28 U.S.C. § 2244(d)(1) (2000) (“A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.”).

⁶² The AEDPA bars successive petitions for all claims that have already been presented in prior petitions. 28 U.S.C. § 2244(b)(1) (2000). It also bars successive petitions for new claims unless the petitioner can either show a new rule of constitutional law or a factual predicate that could not have been previously discovered through the exercise of due diligence and would be sufficient to establish by clear and convincing evidence that, “but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” 28 U.S.C. § 2244(b)(2) (2000).

⁶³ See 28 U.S.C. § 2254(d) (2000) (prohibiting federal courts from granting a writ of

The PLRA creates similar obstacles to prisoner court access that apply regardless of the merits of the case and that particularly affect prisoners with low literacy levels. Among other provisions, the PLRA requires prisoners to exhaust administrative remedies before filing suit in federal court and replaces a fee waiver provision with one requiring impoverished prisoners to pay fees in full.⁶⁴ For prisoners with low literacy levels, the administrative exhaustion requirements of the PLRA are often impossible to comply with; prison grievance systems can be complex and difficult to follow, and a failure to comply with timelines or other regulations can cause a prisoner's grievance to be rejected.⁶⁵ A fear of severe retaliation makes many prisoners reluctant to engage in the internal prison grievance system as required by the Act.⁶⁶ At the same time, the filing fees provisions pose a strong disincentive to poor prisoners.⁶⁷

In addition to the barriers created by the PLRA and the AEDPA, the Supreme Court's 1996 decision in *Lewis v. Casey* inhibits prisoners' effectiveness in court and increases the possibility that their suits will be dismissed.⁶⁸ *Casey* establishes that prisoners have no absolute right to a law library or even to represent themselves effectively in court, and sets forth strict standing requirements for prisoner lawsuits alleging a lack of access to legal information.⁶⁹ In the wake of *Casey*, many prisoners have been left without any law library access.⁷⁰ As a result, they are less likely to understand the requirements set forth by the AEDPA and the PLRA, have less information to help frame their complaints or petitions in relation to the relevant law, and will inevitably file inadequate legal papers, resulting in dismissals of their suits.⁷¹

habeas corpus for an issue adjudicated in state court unless the state court's decision was unreasonable).

⁶⁴ See 42 U.S.C. § 1997e(a) (2000); 28 U.S.C. § 1915(b) (2000). Under the PLRA, impoverished prisoners can still generally pay their fees in monthly installments. However, when a prisoner has filed three suits that are either frivolous, malicious, or fail to state a proper claim, this payment plan option is no longer permitted. 28 U.S.C. § 1915(g) (2000).

⁶⁵ For a more thorough discussion of this problem, see Jessica Feerman, *Creative Prison Lawyering: From Silence to Democracy*, 11 GEO. J. ON POVERTY L. & POL'Y 249, 262–63 (2004).

⁶⁶ *Id.* at 261–62.

⁶⁷ For a more comprehensive discussion of this issue, see Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You're Out of Court—It May Be Effective, But Is It Constitutional?*, 70 TEMP. L. REV. 471, 497–98 (1997).

⁶⁸ 518 U.S. 343 (1996).

⁶⁹ *Id.*

⁷⁰ CHRISTIAN PARENTI, *LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS* 180 (Verso Books 2000) (1999).

⁷¹ Moreover, under the PLRA, a suit dismissed because it fails to state a claim—an occurrence more likely in the absence of legal information—counts as a strike against a prisoner under the *in forma pauperis* provisions of the Act. 28 U.S.C. § 1915(g) (2000). If a prisoner receives three strikes, he or she will be prohibited from filing further lawsuits *in forma pauperis*. *Id.*

At the heart of most of the recent restrictions to prisoner court access is the goal of limiting abuse of the legal system by prisoners. The legislative history of the PLRA, for example, focused specifically on the problem of frivolous lawsuits. Proponents of the legislation highlighted statistics regarding the rate of prisoner filings and dismissals and presented stories of individual frivolous cases. According to advocates of the Act, prisoners had “tied up the courts with their jailhouse lawyer antics for too long[,] . . . making a mockery of our criminal justice system,”⁷² and a reform bill would “help put an end to the inmate litigation fun-and-games.”⁷³ Similarly, the central purpose behind the AEDPA was to prevent abuse by prisoners of the habeas process.⁷⁴ Specifically, advocates of habeas reform had long asserted that prisoners and defense lawyers were raising claims at the eleventh hour and filing successive meritless claims simply to delay final judgment in their cases.⁷⁵ In *Casey*, the Supreme Court invoked a similar picture of prisoner litigants abusing the legal system and wasting valuable judicial resources. Without any reference to the actual types of cases most frequently brought by prisoners, the Court asserted that prisoners do not have a right to access the resources necessary to “transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims.”⁷⁶

To be certain, the problem of frivolous litigation is a serious one. A Department of Justice study found that prior to 1996, nineteen percent of all prisoner lawsuits were frivolous.⁷⁷ Although the majority of prisoner cases were *not* frivolous, the burden the frivolous cases placed on the courts was still significant. The federal courts’ dockets have mushroomed in recent years, and prisoner lawsuits make up a significant portion of the docket. In 1995, for example, inmates filed almost 40,000 new federal civil lawsuits, or nineteen percent of the federal civil docket.⁷⁸ Even if the

⁷² 141 CONG. REC. S14,611, 14,628 (daily ed. Sept. 29, 1995) (statement of Sen. Thurmond).

⁷³ *Id.* at 14,626 (statement of Sen. Dole); *see also id.* (statement of Sen. Hatch) (“Jailhouse lawyers with little better to do are tying our courts in knots with the endless flow of frivolous litigation.”).

⁷⁴ *See* H.R. REP. NO. 104-518, at 111 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 944, 944 (stating that one purpose of the AEDPA is “to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases.”); *see also* *Williams v. Taylor*, 529 U.S. 362, 386 (2000) (Stevens, J., plurality opinion) (“Congress wished to curb delays, to prevent ‘retrials’ on federal habeas, and to give effect to state convictions to the extent possible under law.”).

⁷⁵ *See* Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 702, 712–15 (2002) (describing the history of this narrative about habeas abuse, and observing that in the wake of the Oklahoma City bombings, these complaints about delays in justice—particularly in death penalty cases—garnered sufficient public support to pass the AEDPA).

⁷⁶ *Lewis v. Casey*, 518 U.S. 343, 355 (1996).

⁷⁷ R. A. HANSON & H. W. K. DALEY, U.S. DEP’T OF JUSTICE, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON 1983 LITIGATION 20 (1995).

⁷⁸ Schlanger, *supra* note 9, at 1558.

proportion of frivolous cases is relatively small, the amount of judicial time allocated to such cases is substantial.

The characterization of this problem as one of widespread abuse of the judicial system by prisoners, however, misses the mark in a number of ways. First, the vast majority of jailhouse lawyering cases challenge inadequate conditions of confinement or wrongful incarceration.⁷⁹ Many of the conditions of confinement cases raise important matters such as prisoner-on-prisoner violence, excessive use of force by officers, inadequate medical care, and dangerous environmental conditions.⁸⁰ Indeed, some scholars have suggested that the repeated characterization of prisoner lawsuits as frivolous is often driven by corrections officials who simply do not want their authority questioned.⁸¹ Moreover, while critics of prisoner litigation are correct that the number of prisoner complaints has been rising over time, the prison population itself has also been burgeoning.⁸² Researchers have suggested that the number of prisoner complaints per capita actually went down in the years preceding the passage of the PLRA and the AEDPA and the Supreme Court decision in *Casey*.⁸³

More to the point, prisoners' lack of literacy and lack of access to counsel can play a significant role in the problem of frivolous cases. Prisoners' lack of rudimentary literacy skills and legal training⁸⁴ "contributes to the filing of suits that are not well written, that ignore court filing procedures, or [that] fail to state legal issues."⁸⁵ While prisoner cases are dismissed at a somewhat higher rate than other cases, many of those cases are dismissed on procedural grounds only, with no reference to the merits of the com-

⁷⁹ Nobel, *supra* note 1, at 1575.

⁸⁰ *Id.* at 1575–77.

⁸¹ See, e.g., Dragan Milovanovic & Jim Thomas, *Overcoming the Absurd: Legal Struggle as Primitive Rebellion* (1988), http://www.angelfire.com/az/sthurston/Overcoming_the_absurd.html ("Is it any wonder, then, why criminal justice personnel are so prone to perpetuate the myth of the 'frivolous case' or the 'abusive litigant?' What keepers cannot win in court, they attempt to win through their power of definition and demagogic appeals to public opinion."); see also Wilbert Rideau & Billy Sinclair, *Prisoner Litigation: How it Began in Louisiana*, 45 LA. L. REV. 1061 (1985) ("[P]rison is a ruthless world governed by rumor, misunderstanding, misinformation, and paranoia—and the knowledge of the jailhouse lawyer translates into a power to not only influence attitudes and behavior, but to assist in solving problems. Because prison officials considered that kind of power a threat to the discipline and security of the prison, they traditionally opposed the practice of jailhouse law—frequently establishing rules prohibiting it.").

⁸² Schlanger, *supra* note 9, at 1570, 1576; Stevenson, *supra* note 75, at 722.

⁸³ James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105, 142 (2000).

⁸⁴ Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 442–43 (1993); THOMAS, *supra* note 1, at 156.

⁸⁵ THOMAS, *supra* note 1, at 228. Indeed, some prisoner petitions are never even seriously considered because of procedural inadequacies, or even because of flaws in grammar or handwriting. *Id.* at 146 ("[T]he first thing that makes a good case is good spelling, good typing, good grammar. You don't see a lot of that in prisoner cases, but that's the first thing that makes a good case. . . . Now, that's number one. Can I read it? If I can read it, I take the time to read it. If it's illegible, I don't take the time to translate it. I just can't. I don't have the time.").

plaint.⁸⁶ In many cases, then, the dismissals may be a result of literacy problems rather than frivolous claims. Similarly, while prisoners filing habeas petitions are accused of raising new claims late in the process for the purpose of delaying their sentences, they may actually be omitting potentially successful claims from their initial petitions because of poor lawyering.⁸⁷

Casey itself recognized the challenges prisoners' lack of literacy posed to pro se representation. According to the Court, many prisoners could not represent themselves effectively because of their functional illiteracy.⁸⁸ However, rather than acknowledge the importance of prisoners assisting each other, as the *Johnson* Court had, *Casey* flatly rejected the notion that prisoners should be able to “litigate effectively once in court.”⁸⁹ Instead, the Court concluded that “[t]o demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires.”⁹⁰ Imposing new limitations on prisoner access to legal information, the decision exacerbated the very barriers to effective representation it described.⁹¹

While the PLRA, the AEDPA and *Casey* have succeeded in reducing the number of cases that reach the courts, they are overly blunt instruments. Courts still bear the burden of frivolous lawsuits and, importantly, an increasing number of meritorious cases no longer receive judicial review.⁹² Indeed, a prisoner's level of basic and legal literacy and his or her access to counsel will frequently play a larger role in determining the prisoner's court access than the merits of the case itself.

⁸⁶ Jennifer Winslow, Comment, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To?*, 49 UCLA L. REV. 1655, 1666 (2002).

⁸⁷ See, e.g., Stevenson, *supra* note 75, at 745; see also *Habeas Corpus Proceedings and Issues of Actual Innocence: Hearing on S. 1088 Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Barry Scheck, Co-Director, Innocence Project), available at http://judiciary.senate.gov/testimony.cfm?id=1569&wit_id=4455.

⁸⁸ Lewis v. Casey, 518 U.S. 343, 360 (1996).

⁸⁹ *Id.*

⁹⁰ *Id.* at 354; see Joseph A. Schouten, *Not So Meaningful Anymore: Why a Law Library is Required to Make a Prisoner's Access to the Courts Meaningful*, 45 WM. & MARY L. REV. 1195, 1210 (2004) (suggesting that the common practice of relying on jailhouse lawyers belies the court's contention that adequate access to courts would require the full provision of counsel).

⁹¹ The Court further justified this approach through a narrow definition of actual injury in which plaintiffs needed to demonstrate a thwarted legal claim in order to merit relief. *Casey*, 518 U.S. at 356–57. It also asserted that prisoners were only entitled to legal assistance to attack their sentences or challenge their conditions of confinement. *Id.* at 355.

⁹² See, e.g., Schlanger, *supra* note 9, at 1644 (“Its incentive scheme has most likely dissuaded potential litigants in relatively blunderbuss fashion, with only a weak relation to the merits of their cases.”).

IV. INCREASING ACCESS TO THE COURTS—ALTERNATIVE STRATEGIES

To the extent that courts are overburdened with prisoner lawsuits, alternative solutions exist that may protect the right of access to courts while still improving judicial economy by reducing the numbers of frivolous cases. In fact, in the 1941 case of *Price v. Johnston*,⁹³ the Court had already recognized the problem of numerous and successive habeas petitions and suggested an approach that would both allow for court access and increase judicial efficiency. According to the Court, ensuring meaningful hearings that are understandable to the litigant, rather than denying court access, could ameliorate the problem:

We are not unaware of the many problems caused by the numerous and successive habeas corpus petitions filed by prisoners. But the answer is not to be found in repeated denials of petitions without leave to amend or without the prisoners having an opportunity to defend against their alleged abuses of the writ. That only encourages the filing of more futile petitions. The very least that can and should be done is to make habeas corpus proceedings in district courts more meaningful and decisive, making clear just what issues are determined and for what reasons.⁹⁴

A similar theory could hold true for civil suits as well: by encouraging hearings to be clear and substantive rather than dismissing complaints on procedural grounds, courts could increase their efficiency without being forced to deny meritorious claims.

In light of the literacy problems facing prisoner litigants who appear pro se, restructuring court proceedings alone will not suffice to ensure meaningful hearings. Instead, if prisoners are given increased access to legal education and information, they will be better able to communicate with the courts. Legal training could, for example, teach prisoners to conduct legal research and writing, and to identify when a legal issue is meritorious and when it is unworthy of filing. Such training would need to be accompanied by appropriate access to information, including sufficient time at a law library or computer database to research claims.⁹⁵ Litigation on behalf of prisoners is extremely difficult, and success rates are low even for

⁹³ 334 U.S. 266 (1948).

⁹⁴ *Id.* at 293. In contrast, the dissent argued that prisoners would abuse the courts by filing petitions for the sole purpose of seeking a reprieve from daily prison life, and observed that “[i]t is difficult for me to believe that prisoners, whom the Court so often forgives for violating all rules of pleading and procedure on the ground of lay ignorance, can be a necessary source of light and leading to an appellate court.” *Id.* at 299 (Jackson, J., dissenting).

⁹⁵ This may actually be more cost efficient than many of the alternatives. In the wake of *Casey*, prison systems that removed their prison law libraries and replaced them with access to paralegals found that their costs increased. PARENTI, *supra* note 70, at 180.

experienced litigators.⁹⁶ Nonetheless, legal training for prisoners could reduce the number of procedural errors they make and increase the quality of pleadings. Although functionally illiterate prisoners would not be able to take advantage of legal education programs directly, such programs would increase the number of prisoners qualified to provide them with legal help. At the same time, the provision of basic literacy education could help such prisoners to be less alienated from the legal system and to better understand the work of their jailhouse lawyers.

Ideally, legislation would secure federal and state funding for prisoner rehabilitation and education, including legal educational programs for prisoners. Attorneys and educators could teach lawyering classes directly, or they could supervise programs in which prisoners educate each other. Support for such programs may be politically viable in the upcoming years. In the mid-1990s, during the height of the congressional attack on prisoners' rights, Congress passed legislation significantly reducing available correctional education by repealing Pell grant funding for prisoners seeking post-secondary education.⁹⁷ Recently, however, the tide has begun to turn; researchers suggest that public opinion and legislative trends may now be shifting toward rehabilitation, including the provision of educational programs for prisoners.⁹⁸ If so, both federal and state legislation may be passed that could support basic and legal education for prisoners.

In the absence of such legislation, however, alternative arrangements can provide prisoner education at little or no cost to correctional facilities. For example, at least six law schools provide street law classes in correctional institutions in their areas,⁹⁹ at least two law schools provide classes on jailhouse lawyering skills including legal research and writing,¹⁰⁰ and one law school has a program in which law students assist inmate law clerks with research and writing and help them develop materials for use by the prisoner population.¹⁰¹ Additionally, some correctional institutions have entered into partnerships with colleges, universities, and non-profit organizations to provide tuition and mentoring for prisoners enrolled in

⁹⁶ See, e.g., Richard D. Vogel, *Silencing the Cells: Mass Incarceration and Legal Repression in U.S. Prisons*, Monthly Rev., May 2004, available at <http://www.monthlyreview.org/0504vogel.htm>.

⁹⁷ See, e.g., Dominique T. Chlup, *The Pendulum Swings: 65 Years of Corrections Education*, Nat'l Ctr. for the Study of Adult Learning & Literacy, <http://www.ncsall.net/?id=826> (last visited Apr. 16, 2006).

⁹⁸ See *id.*

⁹⁹ Street Law, *Teaching Law to the Public Catalogue of Law School Projects*, <http://www.streetlaw.org/lawschool/content.asp?ContentId=7> (last visited Apr. 16, 2006).

¹⁰⁰ Kristen Booth Glen, *Pro Bono and Public Interest Opportunities in Legal Education*, 70 N.Y. St. B.J. 20, 24 (1998); State Univ. of N.Y., Buffalo, Jailhouse Lawyering Syllabus, http://www.law.buffalo.edu/Academics/courses/704/prisonlaw/jail_classes.htm (last visited Apr. 16, 2006).

¹⁰¹ Jean Whitney, *Leap: A Successful Partnership Between the Law School and the Nevada Department of Corrections*, NEV. LAW., June 2004, at 18.

college programs.¹⁰² Both law school-initiated programs and collaborations with universities and nonprofits could be replicated throughout the nation's correctional facilities.

A variety of policy reasons support the creation of such educational programs. Preliminary evidence indicates that increased legal education could help to address the problem of frivolous lawsuits. Sociologist Jim Thomas has suggested that prisoners with better legal education and information actually file fewer frivolous claims than those without.¹⁰³ Thomas based his research on a series of interviews conducted with ninety-three prisoner litigators.¹⁰⁴ Of these, nineteen met his definition of "jailhouse lawyer" in that they were experienced, had filed five or more federal lawsuits, and were sought out by others for their competence.¹⁰⁵ He found that these experienced individuals "not only discourage, but actively restrict filings" that are not meritorious.¹⁰⁶ One experienced jailhouse lawyer in Thomas's study, for example, has described his own screening process this way: "[s]ometimes people come to you, [saying] 'I want this, I want that.' And it's not valid. So you have to filter the work that comes through the [law] clinic. It's an initial screening, and you have to determine what does or does not go back to the clinic."¹⁰⁷ Improving access to legal education for prisoners could increase the number of individuals able to determine which cases have merit and recognize those unworthy of legal action.

Encouraging legal education has additional social benefits. It promotes individual growth while allowing prisoners' voices to be heard more clearly on matters of social justice. In light of the vastly disproportionate incarceration of poor people and people of color and the widely recognized biases within the criminal justice system,¹⁰⁸ it is especially vital that prisoners' voices be heard.¹⁰⁹

The act of jailhouse lawyering can assist the prisoner in redefining his or her position within the community even as he or she advocates for improved conditions: "Psychologically, the writ-writer, in seeking relief from the courts, is pursuing a course of action which relieves the tensions and anxieties created by the sentence system."¹¹⁰ This is not to suggest that

¹⁰² See Chlup, *supra* note 97; see also Jon Marc Taylor, *Alternative Funding Options for Post-Secondary Correctional Education (Part One)*, 56 J. CORRECTIONAL EDUC. 1, 6 (2005).

¹⁰³ THOMAS, *supra* note 1, at 143, 222-28.

¹⁰⁴ *Id.* While the scope of Thomas's study is relatively small, his research is thorough. Despite the difficulty of obtaining access to prisoners for in-depth conversations, Thomas conducted extensive interviews, conversations, and correspondence with Illinois prisoners in eight different correctional facilities over the course of approximately seven years.

¹⁰⁵ *Id.* at 226.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 225.

¹⁰⁸ See DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 4 (1999).

¹⁰⁹ For a more thorough discussion of this issue, see Feerman, *supra* note 65, at 262-63.

¹¹⁰ Charles Larsen, *A Prisoner Looks at Writ-Writing*, 56 CAL. L. REV. 343, 344 (1968) (quoted in Nobel, *supra* note 1, at 1573 n.28); see also Justin Brooks, *Addressing Recidi-*

prisoners could file meaningless petitions simply to pass the time or make themselves feel better. Rather, by confronting injustice and focusing on problem-solving, prisoners can create a positive reality, even within the confines of the prison.¹¹¹ As one jailhouse lawyer explained, “The feeling of being able to help . . . made me feel I was in control of my life and could help others gain control of theirs.”¹¹² Such actions can also assist in forging a sense of community around the law, learning, and social action.¹¹³ Indeed, jailhouse lawyers commonly agree that their activities have “changed their attitudes toward law and society.”¹¹⁴

The presence of jailhouse lawyers can also reduce violence in prisons while still giving voice to prisoner concerns.¹¹⁵ Being able to air a grievance to a jailhouse lawyer can help a prisoner to confront and diminish his or her frustration.¹¹⁶ Jailhouse lawyers can also help to redirect violent emotions by turning the focus to legal strategies.¹¹⁷ All of the jailhouse lawyers interviewed in Thomas’s study could identify at least one instance in which they intervened to defuse potential violence, either between prisoners,

vism: Legal Education in Correctional Settings, 44 RUTGERS L. REV. 699, 736 (1992) (“Inmates need to be given the legal skills and knowledge to deal with their individual day-to-day institutional problems. There is a common sense of helplessness among prisoners in terms of dealing with these issues, and this feeling must be combated.”).

¹¹¹ Milovanovic & Thomas, *supra* note 81 (“We suggest that prisoner litigation may reveal a deeper motive, one embedded in resistance to the absurd. This does not imply a conscious recognition by the prisoner of the motive. On the contrary, in many ways, prisoner litigants resemble the protagonists in existential literature—both the winners and losers—in that they are surrounded by mysterious forces that threaten to overwhelm them, yet do not readily acquiesce. Prisoner litigation, then, is a form of overcoming, of actively dealing with irrationality, of attempting to make sense of the senseless, and a yearning to be human in an inhumane environment.”).

¹¹² Robin Topping, *Waiting for His Day in Court: He’s Passed the Bar but a Murder Rap Has Kept Him from Practicing Law—Until Now, He Hopes*, NEWSDAY, Aug. 1, 2005, at A1.

¹¹³ Paul Schiff Berman, *An Observation and a Strange but True “Tale”: What Might the Historical Trials of Animals Tell Us About the Transformative Potential of Law in American Culture*, 52 HASTINGS L.J. 123, 167 (2000) (“Regardless of outcome, the fact that the inmate’s grievance is aired and considered, however briefly, may give a marginal member of society more of a sense of community affiliation.”).

¹¹⁴ THOMAS, *supra* note 1, at 204. This is consistent with the conclusions of “procedural justice” scholars who suggest that an individual’s participation or voice in the legal system can contribute to a belief in the system’s fairness and a personal sense of worth or value. See, e.g., Sumner J. Sydeaman et al., *Procedural Justice in the Context of Civil Commitment: A Critique of Tyler’s Analysis*, 3 PSYCHOL. PUB. POL’Y & L. 207, 210 (1997) (reviewing the arguments of procedural justice scholars); see also *Morrissey v. Brewer*, 408 U.S. 471 (1972). An argument can be made that such engagement merely co-opts prisoners by letting them articulate their needs within the strictures of a liberal state that will never truly represent them. Increasing access to information, however, does not necessitate that prisoners accept or participate in the system; it simply provides them with additional options. See Milovanovic & Thomas, *supra* note 81, on jailhouse lawyering as a rebellious, though not revolutionary, act of resistance to an unjust hierarchy of power.

¹¹⁵ THOMAS, *supra* note 1, at 196.

¹¹⁶ *Id.* at 226.

¹¹⁷ *Id.* at 196.

or between a prisoner and a staff member.¹¹⁸ As one jailhouse lawyer explained, “I think a lot of the guys . . . understand the power of the pen.”¹¹⁹

These findings are consistent with the wide body of scholarship suggesting that participation in prison education programs reduces recidivism rates,¹²⁰ even when researchers control for factors influencing an individual’s propensity to recidivate, and for the “selection bias” caused when study participants have volunteered to participate in the relevant educational program.¹²¹ The positive effect of educational programs on recidivism is not dependent on the offender’s employment after release.¹²² As a result, researchers have suggested that the benefits of education may, in part, arise from its offer of humane treatment and its promotion of communication and creative thinking.¹²³ As one prisoner explained, the education she received in prison made her into a “thinker” rather than a “reactor,” and thereby gave her a sense that she could make positive choices in her life.¹²⁴ Legal education programs, with their emphasis on communication and problem-solving skills, can similarly assist prisoners in their efforts to constructively define their own lives and to advocate for social justice in the broader community.¹²⁵

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 240.

¹²⁰ See, e.g., OPEN SOC’Y INST., EDUCATION AS CRIME PREVENTION: PROVIDING EDUCATION TO PRISONERS, RESEARCH BRIEF, OCCASIONAL PAPER SERIES, No. 2 (1997); María Elena Torre & Michelle Fine, *Bar None: Extending Affirmative Action to Higher Education in Prison*, 61 J. SOC. ISSUES 569 (2005) (“By 1996, an extensive social science literature confirmed the positive impact of higher education on poor and working class young adults, and on prisoners in particular.”) (citing Annette Johnson, Balancing Justice Task Force on Correctional Education, *A Selected Bibliography on Post-Secondary Education and Reduction in Recidivism* (2001) (published as Appendix B in CHANGING MINDS: THE IMPACT OF COLLEGE IN MAXIMUM-SECURITY PRISON, available at http://www.changingminds.ws/main_frame.html)); James S. Vacca, *Educated Prisoners Are Less Likely to Return to Prison*, 55 J. CORRECTIONAL EDUC. 297 (2004); see also Brooks, *supra* note 110, at 20.

¹²¹ STEPHEN J. STEURER & LINDA G. SMITH, NATIONAL INSTITUTE OF CORRECTIONS, EDUCATION REDUCES CRIME: THREE-STATE RECIDIVISM STUDY (2003), available at <http://nicic.org/Library/018623>.

¹²² MILES D. HARER, ORE REPORT, PRISON EDUCATION PROGRAM PARTICIPATION AND RECIDIVISM: A TEST OF THE NORMALIZATION HYPOTHESIS (1995), available at http://www.bop.gov/news/research_projects/published_reports/recidivism/orepredprg.pdf.

¹²³ *Id.* at 1–2. Cf. Torre & Fine, *supra* note 120, at 579 (“The absence of educational opportunities does violence to the human spirit, diminishes personal efficacy, and only festers cynicism, anger and despair.”).

¹²⁴ Torre & Fine, *supra* note 120, at 584; see, e.g., Vacca, *supra* note 120. By engaging prisoners in topics of importance to them, legal education programs can also inspire and facilitate the accomplishment of broader educational goals in prisons, and play a small role in addressing the limited educational opportunities generally available to the incarcerated population. See Justin Brooks, *Keeping the Jailhouse Lawyer Out of Jail: Reduce Recidivism by Teaching Law to Inmates*, CRIM. JUST. MAG., Summer 1994, at 20; Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61 (2002). Those who have engaged in jailhouse lawyering have commented that the work has “sharpened their skills” and “given them an education not otherwise attainable.” THOMAS, *supra* note 1, at 204.

¹²⁵ Torre & Fine, *supra* note 120, at 581 (“[E]ngagement in college in prison enables students to shift from seeing themselves as passive objects into seeing themselves as active

CONCLUSION

The Supreme Court’s initial jurisprudence on prisoner court access recognized the importance of prisoner voice and effective representation. Although the Court never fully resolved how to ensure these ideals for prisoners with low literacy levels, the balance leaned toward court access. In recent years, the balance has shifted. Using the justification of judicial efficiency and invoking the specter of prisoner abuse of the legal system, both the Court and Congress have chipped away at prisoners’ access to the courts. However, as Chris O’Bryant’s article demonstrates, these changes occur at the cost of important meritorious claims never receiving a hearing. As Congress contemplates further limiting access to the courts for prisoners with habeas petitions through the Streamlined Procedures Act, the time has come to search for alternative strategies. While further research is needed, Congress and prison administrators should consider the positive effects of legal education. Increasing prisoner access to legal information and education could keep to a minimum the number of frivolous claims before the courts, give greater force and effectiveness to meritorious claims, and support prisoner civic engagement.

subjects, developing a sense of critical, personal agency . . . and active, collective responsibility.”) (citations omitted).

