ILLITERATE INMATES AND THE RIGHT OF MEANINGFUL ACCESS TO THE COURTS

I. INTRODUCTION

In the 1977 case of *Bounds v. Smith*,[1] the Supreme Court found that state prison authorities have an affirmative duty to provide inmates with "meaningful" access to the courts in order to petition for writs of habeas corpus and to raise civil rights claims.[2] The Court, however, gave little guidance as to how it expected the states to fulfill this duty. Instead, the Court merely mentioned a number of alternative methods, such as providing law libraries and various modes of legal assistance.[3]

In the recent case of *Lewis v. Casey*,[4] the Court attempted to clarify the scope and requirements of the right of access.[5] The *Lewis* Court re-emphasized that *Bounds* did not mandate any particular method of providing court access to inmates.[6] Rather, the Court noted that the right of access is qualitative; it is based on the adequacy of the inmates' opportunity to access the courts.[7] Additionally, the Court found that post-*Bounds* decisions by lower courts had construed too liberally the right of access.[8] Most importantly, *Lewis* recognized an actual-injury requirement for those inmates challenging the adequacy of their state's access programs.[9]

The *Bounds* Court specifically acknowledged the special difficulty facing illiterate inmates who need to present written claims to the courts.[10] A recent literacy study shows that illiteracy affects much of the nation's inmate population.[11] This Note explores the obstacles to providing illiterate inmates with "meaningful access."

Part II discusses the history and rationale of the *Bounds-Lewis* right of access. Part III discusses the problem of prison illiteracy. Part IV outlines the arguments offered against not only the source, but also the extent of the right of access. Finally, Part V illustrates the special problems associated with providing court access to illiterate inmates, focusing particular attention on the inadequacy of

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[1] 430 U.S. 817 (1977).

[2] *See id.* at 828.

[3] *See id.* at 830-31.

[4] 116 S. Ct. 2174 (1996).

[5] *See id.*

[6] *See id.* at 2182.

[7] *See id.* at 2180.

[8] *See id.* at 2181.

[9] *See id.* at 2179-82.

[10] *See* Bounds v. Smith, 430 U.S. 817, 823-24 (1977).

[11] *See generally* KARL O. HAIGLER ET AL., NAT'L CTR. FOR EDUC. STAT., LITERACY BEHIND PRISON WALLS (1994).

prison libraries in furnishing such access. Part V also considers the various methods of providing legal assistance to illiterates.

II. A RIGHT OF MEANINGFUL ACCESS TO THE COURTS

A. *Background*

On June 24, 1996, the Supreme Court decided *Lewis v. Casey*.[12] Twenty-two inmates of the Arizona Department of Corrections filed a class-action suit alleging a violation of their constitutional right of access to the courts.[13] The Court dismissed all but two of the claims for not having established any actual injury.[14] The two inmates satisfied the standing requirement by showing that they were either illiterate or non-English speaking.[15] The Court reasoned that a system-wide remedy was not necessary since the injury touched only these two particular inmates.[16]

The Court based the *Lewis* decision on its 1977 ruling in *Bounds v. Smith*.[17] In *Bounds,* the Court found that prison authorities have an affirmative duty to provide inmates with "meaningful" access to the courts.[18] The Court based this constitutional duty on a line of cases dating back over thirty-five years.[19]

The first of these "access" cases was *Ex Parte Hull*,[20] in which the Court struck down a Michigan State prison regulation requiring prison authority screening of inmate *pro se* habeas corpus petitions before filing with the federal court.[21] The Court found that an inmate has a right to petition the federal courts for a writ of habeas corpus without interference from prison officials.[22] While *Hull*'s importance stems from the fact that it was the Court's first recognition of an inmate's right of access, its holding neither established an affirmative duty to assist prisoners nor extended beyond the area of habeas corpus.[23]

In *Johnson v. Avery*,[24] the Court extended the right of access to invalidate a Tennessee prison regulation prohibiting the operation of so-called "jailhouse lawyers": inmates offering assistance to other inmates in preparing legal documents.[25] The prohibition greatly impaired the State's highly illiterate prison pop-

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[12] 116 S. Ct. 2174.

[13] *See id.* at 2177.

[14] *See id.* at 2183-84.

[15] *See id.* at 2184.

[16] *See id.* at 2183-84.

[17] 430 U.S. 817 (1977).

[18] *See id.* at 828.

[19] *See id.* at 821-22.

[20] 312 U.S. 546 (1941).

[21] *See id.* at 548-49.

[22] *See id.* at 549.

[23] Karen B. Swenson, *John L. v. Betty Adams: Taking Bounds in the Direction for Incarcerated Juveniles*, 24 MEMPHIS ST. U. L. REV. 429, 434-35 (1994).

[24] 393 U.S. 483 (1969).

[25] *See id.*

ulation from petitioning for habeas corpus relief.[26] Although the Court declined to acknowledge either a general right of access or an affirmative duty of state assistance,[27] it suggested that providing legal assistance to illiterate inmates was one method to facilitate a prisoner's exercise of his constitutional right of access to the courts.[28]

The Court first recognized a state's affirmative duty to facilitate inmate access to the courts in *Younger v. Gilmore*.[29] *Gilmore* affirmed a district court ruling that required the State of California to enhance the quality and quantity of legal materials available to inmates.[30] In particular, the State needed to provide inmates with such law books as would adequately allow "reasonable access" through properly drafted petitions and complaints.[31] As an alternative to libraries, the district court suggested direct legal assistance.[32]

In *Wolff v. McDonnell*,[33] the Court explicitly extended the right of access to civil rights actions.[34] The Court offered two justifications.[35] First, because the same factual situations could support both habeas corpus petitions as well as actions under 42 U.S.C. § 1983[36] (hereinafter "Section 1983"), the Court found that the distinction between the two claims could not support the protection in one instance and the denial in the other.[37] Second, both actions function to protect fundamental constitutional rights.[38]

In *Bounds v. Smith*, the Court combined the holdings in the line of "access" cases with a body of law recognizing affirmative state duties to ensure adequate, effective, and meaningful access to the courts through financial help to indigent inmates.[39] The Court noted the special difficulty facing illiterate inmates who need to present written claims to the courts.[40] Specifically, the Court focused on the capability of inmates to conduct the research necessary for initial pleading as well as for the rebuttal of State responses.[41] Unfortunately, the Court gave little guidance as to how states might fulfill this duty. It simply offered alternatives that might establish compliance. Mentioned methods included adequate law libraries as well as various modes of legal assistance.[42]

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[26] *See id.* at 487.

[27] *See* Swenson, *supra* note 23, at 437-38.

[28] *See Avery*, 393 U.S. at 489.

[29] 404 U.S. 15 (1971), *aff'g* Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970).

[30] *See id.* (citing *Avery* in the two-sentence *per curium* opinion).

[31] *See Gilmore*, 319 F. Supp. at 109-10.

[32] *See id.* at 110-11.

[33] 418 U.S. 539 (1974).

[34] *See id.*

[35] *See id.*

[36] 42 U.S.C. § 1983 (1995).

[37] *See Wolff*, 418 U.S. at 579.

[38] *See id.*

[39] *See* Bounds v. Smith, 430 U.S. 817, 822-25 (1977).

[40] *See id.* at 823-24.

[41] *See id.* at 825-26.

[42] *See id.* at 830-31. The Court carefully noted that an access program's adequacy does

In *Lewis v. Casey*, the Court clarified the *Bounds* rule by finding that subsequent lower court decisions had construed the access right too broadly.[43] The Court also reiterated the "touchstone" of the right of access, noting that *Bounds* guaranteed only the capability of meaningful access, not any specific assistance method.[44] Finally, and most importantly, the *Lewis* Court found an actual-injury requirement implicit throughout the line of "access-to-courts" cases.[45]

According to the *Lewis* Court, the right only encompasses the filing of grievances which arise from an inmate's incarceration, and of which he is aware.[46] In other words, states need not assist, in any way, either an inmate's ability to discover claims or his ability to litigate effectively beyond the pleading stage.[47] To require such assistance by the states would be "effectively to demand permanent provision of counsel," in a way beyond the Constitution's contemplation.[48]

The right of access to the courts requires a "reasonably adequate opportunity" to seek relief for constitutional violations.[49] Prison law libraries or legal assistance programs are merely means by which a state may ensure such an opportunity.[50] The right of access is not a *per se* right to legal libraries or assistance. It is left largely to prison officials to determine which method of compliance will best suit the access needs of their prisoners.[51]

Moreover, an inmate may not establish a violation of his or her right of access merely in "some theoretical sense."[52] A complaining inmate must additionally demonstrate specific instances in which the State's failure to provide certain types of assistance impeded his efforts to file a complaint or petition.[53] According to the Court in *Lewis,* the actual-injury prerequisite not only allows correctional authorities the opportunity to experiment with different means of ensuring access,[54] but also prevents courts from encroaching upon the province of the legislature and the executive.[55]

While consistently recognizing the right of access to the courts as fundamental, the Supreme Court never has explicitly stated the constitutional provision

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not depend upon any particular method of assistance. *See id.* at 832.

[43] *See* Lewis v. Casey, 116 S. Ct. 2174, 2181 (1996).

[44] *See id.* at 2182.

[45] *See id.* at 2179-82.

[46] *See id.* at 2181.

[47] There is a presumption that convictions and sentences are valid. *See id.* at 2196 (Thomas, J., concurring) (citing Hatfield v. Bailleaux, 290 F.2d 632, 640-41 (9th Cir. 1961)).

[48] *See id.* The Court wanted to avoid providing inmates with the tools to become "litigating engines." *Id.* at 2182.

[49] *See id.* at 2180 (quoting Bounds v. Smith, 430 U.S. 817, 825 (1977)).

[50] *See id.* at 2180.

[51] *See id.* at 2182, 2185-86.

[52] *Id.* at 2180.

[53] *See id.*

[54] *See id.* at 2181-82.

[55] *See id.* at 2183.

from which the right derives.[56] However, the Court has, at various times, identified the right as deriving either from Due Process[57] or Equal Protection.[58] Additionally, the Court has mentioned the right to redress grievances as laying some foundation for the right of access.[59]

B. *The Importance of Access*

Primarily, the justification for the right of access emanates from the importance of the types of claims upon which the earlier access cases were based: petitions for the writ of habeas corpus and civil rights claims under Section 1983. The writ of habeas corpus, in its simplest form, attacks the basis of one's confinement and demands release from custody.[60] More importantly, the so-called "Great Writ"[61] plays a crucial role in the "line of defense against constitutional violations."[62] Today, the writ operates to seek review in the federal courts of state court convictions.[63] For a prisoner, it is often the last resort, because he can petition for the writ only after he has exhausted all state remedies and appeals.[64]

It is axiomatic that an incarcerated individual loses or forfeits many of the rights he enjoyed as a free citizen. However, the Supreme Court has recognized a number of constitutional guarantees that penetrate prison walls.[65] Such rights as those against cruel and unusual punishment, those guaranteeing medical care provision, and those protecting due process interests have contributed greatly to the "just and humane"[66] qualities of correctional institutions.[67]

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[56] *See id.* at 2187 (Thomas, J., concurring) (acknowledging the Court's "inability, in the 20 years since [*Bounds*], to agree upon the constitutional source of the supposed right."); Bounds v. Smith, 430 U.S. 817, 833 (1977) (Burger, C.J., dissenting) ("[T]he Court leaves us unenlightened as to the source of the 'right of access to the courts' . . .").

[57] *See* Murray v. Giarratano, 492 U.S. 1, 11 n.6 (1989) (recognizing that the right of access is a "consequence" of due process); Procunier v. Martinez, 416 U.S. 396 (1974).

[58] *See* Pennsylvania v. Finley, 481 U.S. 551, 557 (1987).

[59] *See, e.g.*, Turner v. Safley, 482 U.S. 78 (1987).

[60] *See* MYRON MOSKOVITZ, CASES AND PROBLEMS IN CRIMINAL PROCEDURE: THE COURTROOM 767 (1995).

[61] *See* BLACK'S LAW DICTIONARY 710 (6th ed. 1990) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES, 129).

[62] Bounds v. Smith, 430 U.S. 817, 828 (1977). *See also* Harris v. Nelson, 394 U.S. 286, 290-91 (1969) ("The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.").

[63] *See* MOSKOVITZ, *supra* note 60, at 767.

[64] *See* Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1, 7-8 (1991).

[65] *See* Jody L. Sturtz, Comment, *A Prisoner's Privilege to File In Forma Pauperis Proceedings: May It Be Numerically Restricted?*, 1995 DET. C.L. REV. 1349, 1349-50 (1995).

[66] Brief of Prisoners in Northern California Class Actions as Amici Curiae in Support of Respondents at 3, Lewis v. Casey, 116 S. Ct. 2174 (1996) (No. 94-1511).

The many cases underlying the law of prisoners' substantive rights reveal that *pro se* inmate litigants brought most of the complaints.[68] It would be paradoxical to recognize prisoners' rights without also recognizing the right to protect them in court. Surprisingly, prison reforms of the types established through Section 1983 litigation depend more on an inmate's ability to bring the claim than on his ability to succeed in court.[69]

Additionally, prisoner suits, whether founded in habeas corpus or Section 1983, have a therapeutic value.[70] The ability to bring suit works not only as a "safety valve" for frustrated prisoners,[71] but also as a force for legitimating the terms of imprisonment.[72] Inmates may also benefit simply from the ability to communicate with others outside the prison gates, even if such interaction takes place only within the confines of the courtroom.[73]

III. ILLITERACY

While literacy, as a concept, is difficult to define completely, the word "literacy" most often refers, in its simplest form, to an individual's ability to read, write, and speak English.[74] More thorough and accurate definitions additionally comprehend such language skills as they relate to one's further ability to "function . . . in society, to achieve one's goals, and to develop one's knowledge and potential."[75] Such broader conceptions recognize that illiteracy affects much more than merely one's ability to read a letter or magazine. Illiteracy outside the confines of prison persistently prevents otherwise capable workers from finding and sustaining decent employment.[76] Within correctional confinement, illiteracy stands as a direct barrier between a prisoner and those fundamental rights which bridle the deprivation of life, liberty, and property.

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[67] *See* Sturtz, *supra* note 65, at 1349-51; Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 428-34 (1993).

[68] *See, e.g.*, Hudson v. McMillian, 503 U.S. 1 (1992); Bell v. Wolfish, 441 U.S. 520 (1979); Estelle v. Gamble, 429 U.S. 97 (1976).

[69] *See* William Bennett Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 639 n.148 (1979).

[70] *See* Eisenberg, *supra* note 67, at 440.

[71] *See id.* at 441. "[I]t is better for the prisoner to file a frivolous section 1983 complaint than to assault a correctional officer, murder another prisoner, or engage in additional antisocial behavior." *Id.*

[72] *See* Turner, *supra* note 69, at 637.

[73] *See* Eisenberg, *supra* note 67, at 441.

[74] *See, e.g.*, National Literacy Act of 1991, Pub. L. No. 102-73, 105 Stat. 333 (codified in scattered sections of 20 U.S.C.).

[75] HAIGLER ET AL., *supra* note 11, at 3 (*quoting* the National Literacy Act of 1991, Pub. L. No. 102-73, 105 Stat. 333).

[76] *See* IRWIN S. KIRSCH ET AL., NATIONAL CENTER FOR EDUCATIONAL STATISTICS, ADULT LITERACY IN AMERICA xvii (1993); Tamar Lewin, *Behind Prison Walls, Poor Reading Skills Also Pose a Barrier*, N.Y. TIMES, March 17, 1996, at A18.

Any practical definition of literacy must recognize that there are varying types and levels of proficiency. One can easily think of literacy in rough equivalence to grades of education.[77] Such categorizing, however, must reflect more than simple language proficiency. We may term one who has completed schooling through the eighth grade, while certainly able to read, "functionally illiterate": lacking the requisite skills to function in society.[78] One who is "totally illiterate" is incapable of understanding any print information.[79] A "marginally illiterate" individual, while possessing reading skills beyond the basic levels, still lacks the skills necessary to navigate within the demands of our complex society.[80]

The National Adult Literacy Survey

The National Adult Literacy Survey ("NALS"), completed in 1993 with federal funding, was the largest assessment of literacy skills among the country's adult population.[81] The National Center for Education Statistics ("NCES") periodically releases reports based on the findings of the NALS. In September 1993, the NCES released its first such report.[82]

The NCES reports recognize three areas of literacy: prose, document, and quantitative.[83] Prose literacy involves the use of information contained in materials such as news stories, editorials, and fiction.[84] Document literacy encompasses the ability to use forms, tables, and applications.[85] Quantitative literacy involves the use of numbers or operations "embedded" in text.[86]

The NALS data measures proficiencies in each type of literacy based on five levels.[87] At Level 1, which represents the lowest proficiency score, most individuals can retrieve only a single piece of information from a short text.[88] The progression up through Level 5 involves discerning increasing amounts of information from more complicated texts.[89] The materials used in the higher levels

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[77] *See* DEP'T OF EDUC, ADULT LEARNING & LITERACY CLEARINGHOUSE FACT SHEET #4: LITERACY (1996). Jeanne Chall, a reading researcher at Harvard University, defined the terms "total", "functional", and "marginal" illiteracy as corresponding, respectively, to reading skills at the fourth, eighth, and twelfth grade levels. *See id.*

[78] *See* LITERACY VOLUNTEERS OF AMERICA, FACTS ON ILLITERACY IN AMERICA (1996). Such basic skills include reading a newspaper, filing an employment application, and following written instructions. *See id.*

[79] *See supra* note 77 and accompanying text.

[80] *See id.*

[81] *See* HAIGLER ET AL., *supra* note 11, at 2.

[82] *See* KIRSCH ET AL., *supra* note 76 (measuring literacy skills of the American adult population).

[83] *See* HAIGLER ET AL., *supra* note 11, at 3-4.

[84] *See id.* at 3.

[85] *See id.*

[86] *See id.* at 4.

[87] *See id.* at 9.

[88] *See id.* at 11 fig.2.

[89] *See id.*

contain distracting information, require increasingly complex inferences, and test the reader's ability to compare and contrast.[90] Individuals in the lowest two levels experience significant difficulty integrating and synthesizing information.[91]

The results of the first NCES study represent literacy skills among members of the general adult population.[92] The study reported that, of the 191 million American adults, nearly forty-four million operate at Level 1 in all three types of literacy.[93] Only roughly between thirty-four and forty million adults operate in the highest two levels.[94]

In October 1994, an NCES report asserted that the nation's prison population exhibited a much higher prevalence of illiteracy than the general adult population.[95] Almost half of the members of the prison population were without a high school or equivalent diploma.[96] Fourteen percent had educations below the eighth grade level.[97] Additionally, the typical twenty-five-year-old inmate functioned at two to three grade levels below the level actually completed in school.[98]

Sadly, approximately seventy percent of prisoners perform in Levels 1 and 2 in prose, document, and quantitative literacy.[99] The average proficiency level among inmates is Level 2,[100] with less than one percent occupying Level 5.[101] The proficiencies in all three types of literacy are substantially lower for the inmate population than for the general population.[102]

Legislators have recognized this nation's illiteracy problem in the general population as well as in the prisons. The federal government has established the goal of eliminating the adult illiteracy problem in this country by the year 2000.[103] The National Literacy Act of 1991[104] is an attempt to effectuate that goal through federal funding for research and development. The Act extends funding to the states to establish state literacy resource centers that assist local, public and private nonprofit literacy organizations.[105]

The Act specifically offers grants to state and local prison literacy pro-

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[90] *See id.*

[91] *See* KIRSCH ET AL., *supra* note 76, at xv.

[92] *See id.* at xiii-xiv.

[93] *See id.* at xiv.

[94] *See id.* at xv.

[95] *See* HAIGLER ET AL., *supra* note 11, at 20.

[96] *See id.* at 17.

[97] *See* KIRSCH ET AL., *supra* note 76, at 49 tbl. 1.10.

[98] *See* DONNA BELLORADO, U.S. DEP'T OF JUSTICE, MAKING LITERACY PROGRAMS WORK: A PRACTICAL GUIDE FOR CORRECTIONAL EDUCATORS 1 (1986).

[99] *See* HAIGLER ET AL., *supra* note 11, at xviii.

[100] *See id.* at 19 tbl. 2.3.

[101] *See id.* at 19-20.

[102] *See id.* at 20.

[103] *See* National Literacy Act of 1991, Pub. L. No. 102-73, 105 Stat. 333, 334.

[104] *Id.* at 333.

[105] *See id.* § 103, 105 Stat. at 338-39 (codified at 20 U.S.C. §1208 (aa) (Supp. 1996)).

grams.[106] The goal is to achieve an eighth-grade literacy equivalence throughout the inmate population.[107] Additionally, a number of states have enacted legislation providing for literacy training in their correctional systems.[108]

IV. ARGUMENTS AGAINST THE RIGHT OF ACCESS

Attacks against the recognized right of access come in a number of forms. Justice Thomas' concurring opinion in *Lewis* is an attack waged at the underlying basis and propriety of the right itself.[109] More commonly, courts have argued that the *Bounds* right of access is narrow in scope.[110]

A. *Attacks to the Right's Source*

Justice Thomas argues that, while the Constitution guarantees inmates a right of access to the courts, it does not contemplate an affirmative duty of the government to finance the means of access.[111] Thus, he criticizes the basis upon which *Bounds* and other courts have recognized affirmative state facilitation of access. Justice Thomas recognizes that the constitutional basis for the *Bounds-Lewis* line has been left uncertain.[112]

Thomas perceives the *Bounds* holding as based on two lines of "access to the courts" cases.[113] One line of cases recognized an equal protection basis for the access right.[114] The other line comprehended a due process foundation.[115] However, Thomas argues that *Bounds*, while purportedly relying on the two lines of precedent, actually departed sharply from both.[116]

According to Thomas, the equal protection cases did not create a "free standing" right of access to the courts.[117] Rather, they established a right of *equal* access.[118] Instead of finding an affirmative state duty to provide inmates with law libraries or legal assistance, the equal protection line of cases recognized the

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[106] *See id.* § 601, 105 Stat. at 356-57 (codified at 20 U.S.C. § 1211-2 (Supp. 1996)).

[107] *See* 20 U.S.C § 1211-2(f)(2) (Supp. 1996).

[108] *See, e.g.*, ARIZ. REV. STAT. § 31-229 (1996) (requiring inmates to attain an eighth-grade equivalency); CAL. PENAL CODE § 2053.1 (West 1997) (ninth-grade equivalency); FLA. STAT. ANN. § 944.801 (West 1996) (eighth-grade equivalency); IOWA CODE ANN. § 904.516 (West 1996) (sixth-grade equivalency); MASS. GEN. LAWS. ANN. ch. 127 App., § 1-2 (West 1996) (eighth-grade equivalency); OR. REV. STAT. § 421.084 (1995) (eighth-grade equivalency).

[109] *See* Lewis v. Casey, 116 S. Ct. 2174, 2186 (1996) (Thomas, J., concurring).

[110] *See* Knop v. Johnson, 977 F.2d 996 (6th Cir. 1992); Bee v. Utah State Prison, 823 F.2d 397 (10th Cir. 1987); Hooks v. Wainwright, 775 F.2d 1433 (11th Cir. 1985).

[111] *See Lewis*, 116 S. Ct. at 2186-87 (Thomas, J., concurring).

[112] *See id.* at 2187-88 (Thomas, J., concurring).

[113] *See id.* at 2188 (Thomas, J., concurring).

[114] *See id.*

[115] *See id.*

[116] *See id.*

[117] *See id.*

[118] *See id.*

state's much more limited duty to refrain from discriminating against inmates on the basis of poverty.[119] These cases involved the elimination of fees attached to state criminal procedures, such as the filing of claims and the copying of transcripts.[120]

A major case in the equal-access line was *Griffin v. Illinois*.[121] In *Griffin*, the Court sustained a criminal defendant's challenge to the fee charged for trial transcripts necessary in order to obtain appellate review of his conviction.[122] The Court reaffirmed that there is no constitutional right to appellate review.[123] However, once a state decides to provide such review it may not exclude a person from participating in the appellate process solely because he or she is indigent.[124] Justice Thomas finds no right of meaningful access to the courts implicit in the *Griffin* decision.[125]

In another equal-access case, *Douglas v. California*,[126] the Court again refused to recognize a *per se* right of access to the courts.[127] The Court merely held that a state, once it establishes a first appeal as of right, must provide counsel for indigent defendants.[128] The provision of counsel in such situations, as Justice Thomas points out, is premised not on a right of meaningful and effective access, but on a duty of the State not to impede access through economic barriers.[129]

Justice Thomas believes that the *Bounds* Court strained the right recognized by the equal protection cases "beyond recognition" to establish a right to state financing of access programs.[130] He explains that even if the *Bounds* Court properly based the right of meaningful access on the *Griffin-Douglas* line of precedent, the right is invalid, because that line of cases relied on a theory of equal protection theory which has since been abandoned.[131] The disparate impact theory of equal protection formed the foundation of the equal access cases.[132] The Court had largely abandoned this theory prior to the *Bounds* decision.[133] Thomas therefore finds the right to state-provided, meaningful access unfounded.[134] However, this portion of his argument applies only insofar as the *Bounds* decision indeed relied on Equal Protection.

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[119] *See id.*
[120] *See id.*
[121] 351 U.S. 12 (1956).
[122] *See id.* at 13-14.
[123] *See id.* at 18.
[124] *See id.*
[125] *See* Lewis v. Casey, 116 S. Ct. 2174, 2189 (1996) (Thomas, J., concurring).
[126] 372 U.S. 353 (1963).
[127] *See id.*
[128] *See id.*
[129] *See Lewis*, 116 S. Ct. at 2190 (Thomas, J., concurring).
[130] *See id.*
[131] *See id.* at 2190-91.
[132] *See id.* at 2191.
[133] *See id.*
[134] *See id.*

Likewise, in a line of due process cases, beginning with *Ex Parte Hull*,[135] courts imposed no affirmative duty on the states to finance access facilities.[136] These cases merely prevented arbitrary interference with physical access to the courts.[137] Justice Thomas argues that the *Bounds* Court incorrectly read a qualitative element, meaningfulness, into *Hull* and its progeny.[138] Still, it is unclear to what extent the right of meaningful access to the courts is based on Due Process grounds.

B. *Attacks on the Right's Scope*

The *Lewis* Court recognized the restricted scope of the *Bounds* rule.[139] However, even before the *Lewis* decision, a number of courts had recognized the limited reach of *Bounds*.[140] For instance, the Court of Appeals for the Eleventh Circuit noted that "*Bounds* refers to law libraries *or* other forms of legal assistance, in the disjunctive, no fewer than five times."[141]

The Court of Appeals for the Eleventh Circuit recognized that the right of counsel for the imprisoned only reaches the extent to which such legal assistance is available, as a right, to non-prisoners in civil cases.[142] The court found that the right of appointed counsel for indigent defendants applied neither to civil rights actions nor to discretionary appellate review.[143] Moreover, it found no automatic right to representation in prisoner civil rights and federal habeas corpus proceedings.[144] The court reasoned that since no right to provision of counsel exists after the filing of a complaint, no such entitlement should attach to the complaint's preparation.[145] It recognized, however, that legal assistance, whether or not a constitutional mandate, is the preferred method for providing access.[146]

The Court of Appeals for the Sixth Circuit defined access as "getting the courthouse door opened in such a way that it will not automatically be slammed shut . . . ."[147] The court found that legal assistance, if required for meaningful access, is not synonymous with legal representation.[148] Rather, it determined that

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[135] 312 U.S. 546 (1941).

[136] *See Lewis*, 116 S. Ct. at 2188 (Thomas, J., concurring).

[137] *See id.* at 2188, 2193-94.

[138] *See id.*

[139] *See id.* at 2181.

[140] *See* Knop v. Johnson, 977 F.2d 996 (6th Cir. 1992); Bee v. Utah State Prison, 823 F.2d 397 (10th Cir. 1987); Hooks v. Wainwright, 775 F.2d 1433 (11th Cir. 1985).

[141] *Hooks*, 775 F.2d at 1435.

[142] *See id.* at 1436. The Tenth Circuit similarly found that illiterate prisoners are in no better position than illiterate non-prisoners. *See Bee*, 823 F.2d at 399.

[143] *See Hooks*, 775 F.2d at 1437-38.

[144] *See id.*

[145] *See id.* at 1438.

[146] *See id.*

[147] Knop v. Johnson, 977 F.2d 996, 1006-07 (6th Cir. 1992).

[148] *See id.* at 1007.

paralegals could provide adequate assistance when necessary.[149] The court further stated that once inmates gain access, courts may then decide whether appointment of an attorney is appropriate.[150]

V. MEANINGFUL ACCESS FOR ILLITERATES

A. *The Need for Assistance*

1. Complexity of Claims

Illiterate prisoners have a more profound need for legal assistance than literate inmates who may be able to effectively use a prison law library.[151] Even inmates who are only moderately illiterate share this heightened need.[152] That an illiterate cannot use books is certainly the most obvious ground for the assertion that even the most adequate libraries cannot serve the needs of all inmates.[153] An additional ground inheres in the complexity of the claims inmates most often need to raise. Detailed pleading requirements, complex procedural rules, and strict deadlines create barriers to untrained *pro se* petitioners and complainants.[154]

The complexity of habeas corpus and civil rights claims is evident in the time and attention the Supreme Court and lower courts have dedicated toward their resolution.[155] Simply to reach the pleading stage of litigation requires a great deal of research into and understanding of legal concepts.[156] Most inmates, even literates, have difficulty navigating the procedural and substantive demands of filing and litigating.[157]

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[149] *See id.* at 1006. The Court defines paralegals as "not necessarily individuals who have completed two-year training courses designed for document managers . . . but intelligent laypeople who can write coherent English and who have had some modicum of exposure to legal research and to the rudiments of prisoner-rights law." *Id.*

[150] *See id.* at 1007.

[151] *See, e.g.*, Bounds v. Smith, 430 U.S. 817, 823-24 (1977).

[152] Moderately literate inmates may still lack the training or capacity to fully comprehend legal texts. The Court of Appeals for the Fifth Circuit noted the testimony of a prison librarian that "inmates on not-unusual occasions came down to use the law library but soon asked to return to their cells, because they did not know what books to look for or how to find out how to use them." Cruz v. Hauck, 627 F.2d 710, 720 n.20 (5th Cir. 1980).

[153] "Giving an illiterate the run of the stacks is like giving an anorexic a free meal at a three-star restaurant." DeMallory v. Cullen, 855 F.2d 442, 451 (7th Cir. 1988). *See also Cruz*, 627 F.2d at 721 ("Library books, even if 'adequate' in number, cannot provide access to the courts for those persons . . . who are illiterate.").

[154] *See* Brief of Amicus Curiae Prison Legal Services of Michigan in Support of Respondents, Lewis v. Casey, 116 S. Ct. 2174 (1996) (No. 94-1511).

[155] *See* Brief of Prisoners in Northern California Class Actions as Amici Curiae in Support of Respondents, Lewis v. Casey, 116 S. Ct. 2174 (1996) (No. 94-1511).

[156] *See* Raymond Y. Lin, Note, *A Prisoner's Constitutional Right to Attorney Assistance*, 83 COLUM. L. REV. 1279, 1306 (1983).

[157] *See* Brief of Amicus Curiae Legal Aid Bureau, Inc., in Support of Respondents, Lewis v. Casey, 116 S. Ct. 2174 (1996) (No. 94-1511).

Prison *pro se* litigants constantly face opposition from highly trained and resourced state attorneys.[158] The inmate must be capable of responding to the "seemingly authoritative citations" of the State's response and argument.[159] Even for a trained lawyer the "complex maze of jurisprudence"[160] determining violation of constitutional rights is daunting.[161]

In particular, the requirements facing habeas corpus petitioners are extremely difficult to overcome.[162] Concededly, courts have attempted to ease the requirements for *pro se* petitioners.[163] However, for illiterate prisoners these relaxed standards lack any realistic effectiveness. First, even the most simplified forms are "useless to a person who cannot sound out the words on the page . . . ."[164] Second, there are limits to a court's ability to construe *pro se* pleadings liberally, especially one that rambles and fails to assert any legally cognizable claim.[165] One cannot know "whether to file, what to file, where to file, when to file, how to file, [or] what to do before filing" if he is unable to research and/or comprehend the relevant law.[166]

2. Distinguishing Literate and Illiterate Prisoners

Law libraries and legal materials provide access to the courts only for those inmates who can read and comprehend English.[167] Without adequate legal assistance for illiterate inmates, those inmates who are sufficiently literate have a distinct advantage in the preparation and filing of legal documents. Often illiterates find assistance in fellow inmates who are literate and who are more capable of understanding legal complexities.[168] However, given the substantial number of illiterate prisoners, there may not be an adequate number of literates available for

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[158] *See id.* at 4.

[159] *See* Bounds v. Smith, 430 U.S. 817, 826 (1977).

[160] Brown v. Vasquez, 952 F.2d 1164, 1167 (9th Cir. 1991).

[161] *See* Murray v. Giarratano, 492 U.S. 1, 28 (1989) (Stevens, J., dissenting).

[162] For instance, a prisoner is barred from asserting a constitutional claim in a subsequent federal habeas corpus proceeding if he did not raise it in his initial application. *See* McCleskey v. Zant, 499 U.S. 467 (1991).

[163] For example, in *Haines v. Kerner*, 404 U.S. 519 (1972), the Supreme Court directed the federal courts to apply "less stringent standards" in considering *pro se* pleadings. *Id.* at 520.

[164] Brief of Amicus Curiae Prison Legal Services of Michigan in Support of Respondents at 12-13, Lewis v. Casey, 116 S. Ct. 2174 (1996) (No. 94-1511).

[165] *See* Lin, *supra* note 156, at 1307. Even when construing pleadings liberally, "courts are under no obligation to assist [pro se] plaintiffs in working their way through the Federal Rules of Civil Procedure." Eisenberg, *supra* note 67, at 444. Eisenberg notes that "[m]any pro se litigants are thus able to file their complaints only to have the action promptly dismissed on summary judgment." *Id.*

[166] *See* Brief of Amicus Curiae Legal Aid Bureau, Inc., in Support of Respondents at 8, Lewis v. Casey, 116 S. Ct. 2174 (1996) (No. 94-1511).

[167] *See, e.g.*, Lewis v. Casey, 116 S. Ct. 2174, 2186 (1996) (Thomas, J., concurring).

[168] *See* Brief for the United States as Amicus Curiae at 19, Lewis v. Casey, 116 S. Ct. 2174 (1996) (No. 94-1511).

effective assistance.[169]

3. Distinguishing Prisoners and Free Citizens

Numerous legal aid organizations provide free legal advice and representation for indigent citizens.[170] Clerks' offices in both federal and state courts offer procedural advice and distribute forms and sample pleadings to non-incarcerated *pro se* litigants.[171] Also, many local, state, and law school law libraries are available for use by members of the community.[172]

Often, no such assistance is available to *pro se* litigants behind prison bars. Incarceration effectively prevents an inmate from accessing legal aid services that would be available to him if he was not in prison.[173] Very few public and public-interest agencies actively pursue prisoner civil rights cases.[174] Private lawyers are also without incentive to represent inmates, even in the hope of obtaining a contingency fee.[175]

Moreover, federal courts lack effective authority to appoint representation in these cases.[176] The courts are left with the option either to exercise their uncertain power to appoint counsel, or to seek volunteers to represent the inmate claimant.[177] However, due to the number of *pro se* inmate claims, there is a severe shortage of volunteer counsel.[178] Moreover, prisoners differ from members of the free population in an easily overlooked respect: free citizens have no need to challenge the deprivation of their freedom.

B. *Requirements of the Access Right*

The *Bounds-Lewis* line of cases offers little guidance in how prison authorities are to satisfy their duty to provide prisoners with meaningful access to the courts.[179] Surely, "meaningful" implies more than physical access to materials.

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[169] *See* Knop v. Johnson, 977 F.2d 996, 1006 (6th Cir. 1992) (*citing* Knop v. Johnson, 667 F. Supp. 467, 488 (W.D. Mich. 1987)).

[170] *See* NATIONAL LEGAL AID & DEFENDER ASS'N, 1993/94 DIRECTORY OF LEGAL AID AND DEFENDER OFFICES IN THE UNITED STATES AND TERRITORIES (1993) (listing 108 pages of civil legal aid and 25 pages of special needs organizations).

[171] *See* Brief of Amicus Curiae Legal Aid Bureau, Inc., in Support of Respondents at 22, Lewis v. Casey, 116 S. Ct. 2174 (1996) (No. 94-1511).

[172] *See id.* at 23.

[173] *See id.* at 24.

[174] *See* Eisenberg, *supra* note 67, at 466. A small number of non-profit organizations and law schools offer assistance in prisoner rights cases, but for the majority of prisoners, such institutional programs are unavailable. *See id.* at 463.

[175] *See id.* at 466.

[176] *See, e.g.*, Mallard v. United States Dist. Ct., 490 U.S. 296 (1989).

[177] *See* Eisenberg, *supra* note 67, at 466. During 1990-91, the federal courts of appeals appointed counsel in only 100 of the almost 8,000 prisoner civil rights cases. *See id.* at 465.

[178] *See id.* at 466.

[179] *See* Lewis v. Casey, 116 S. Ct. 2174, 2181-82 (1996).

For illiterate inmates, law libraries will not suffice to guarantee the right of access. The *Lewis* emphasis on "adequate opportunity" most likely requires more than libraries for illiterates.[180]

Though the Court in *Bounds* declined to outline the specific requirements of meaningful access, it did suggest that, in some cases, more than a law library would be necessary.[181] The Court offered a number of legal assistance alternatives as substitutes or supplements for a library.[182]

For example, the *Bounds* Court mentioned the use of inmates as paralegals.[183] Indeed, some of the earliest access-to-court cases recognized, and even endorsed, the practice of allowing inmates to assist one another in filing court documents.[184] Such inmates are often referred to as "writ-writers" or "jailhouse lawyers."[185] The term "jailhouse lawyer" encompasses at least two distinct groups of inmates. One group includes disbarred lawyers who are now incarcerated.[186] Inmates who have developed legal research and writing skills while incarcerated, either through prison education programs or self-teaching comprise the other group.[187] The latter group is far more prevalent and will be the focus of this discussion.

Jailhouse lawyers can be highly effective in helping illiterate inmates use legal materials.[188] If a marginally literate inmate needs assistance, the jailhouse lawyer can help him make sense of legal texts and documents. If the inmate litigant is totally illiterate, the jailhouse lawyer is available to perform research and filing *for* him.

For a number of reasons, jailhouse lawyers are an ineffective means of providing legal assistance to illiterates and other inmates. First, there are often too few of them to effectively serve all those requiring assistance.[189] Second, due to safety concerns, prison administrators often, legitimately restrict their activities.[190] Such restrictions have their greatest effect on inmates held in high-security "lockdown" areas.[191] Third, most jailhouse lawyers possess, at most, only rudimentary legal skills.[192] This deficiency is especially common with self-taught inmate paralegals. An underskilled jailhouse lawyer may actually hinder the access right of an inmate he is purporting to assist.[193] Fourth, prison adminis-

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[180] *See id.* at 2182.

[181] *See* Bounds v. Smith, 430 U.S. 817, 831 (1977).

[182] *See id.* (listing examples of the numerous alternatives).

[183] *See id.*

[184] *See, e.g.*, Johnson v. Avery, 393 U.S. 483 (1969).

[185] *See id.* at 488.

[186] *See* Eisenberg, *supra* note 67, at 445.

[187] Nevertheless, Howard B. Eisenberg suggests that most "jailhouse lawyers" are no better educated than the average inmate. *See id.*

[188] *See, e.g.*, Shango v. Jurich, 965 F.2d 289, 293 (7th Cir. 1992).

[189] *See* Knop v. Johnson, 977 F.2d 996, 1006 (6th Cir. 1992).

[190] *See id.*

[191] *See* Lewis v. Casey, 116 S. Ct. 2174, 2185 (1996).

[192] *See* Hadix v. Johnson, 694 F. Supp. 259, 284 (E.D. Mich. 1988).

[193] *See* Johnson v. Avery, 393 U.S. 483, 488 (1969).

trators often lack procedures to properly monitor the quality of the work.[194] Fifth, officials likewise are ineffective in supervising the conduct of the jailhouse lawyers. While prison policy usually restricts inmate-assistants from charging fees for their services, it is customary for substantial amounts of money to change hands.[195] More commonly, jailhouse lawyers receive payment in the form of cigarettes or drugs.[196] Sixth, uncertainty concerning the confidentiality of communications between the inmate litigant and the jailhouse lawyer may chill the disclosure necessary for proper assistance.[197]

A state that relies on jailhouse lawyers to provide illiterate inmates with meaningful access must ensure that it trains these aides adequately. A number of states have programs for training inmates as law clerks.[198] These programs may establish avenues for meaningful access to the courts.[199] Unfortunately, merely training inmates as paralegals does not necessarily address the other factors, mentioned above, that undermine the effectiveness of jailhouse lawyers.

The *Bounds* Court also suggested the use of paralegals or law students.[200] A paralegal could provide assistance of similar quality to that of a well-trained inmate law clerk. Moreover, use of non-inmate paralegals avoids the security and compensation concerns surrounding jailhouse lawyers. A weakness of any paralegal assistance program, however, is that a paralegal is not a lawyer and can offer only limited legal advice.[201] The same concern affects the use of law students. A United States District Court found that a Texas program of providing access by combining a bookmobile with assistance from law students was adequate only after the students became certified to give legal advice.[202]

One way to solve the problems presented by paralegal assistance, both inmate and non-inmate, is to use licensed attorneys. The Court in *Bounds* mentioned a number of methods for providing inmates with access to practicing lawyers.[203] Some attorneys, the Court recognized, may volunteer their services to local prisons.[204] Otherwise, prisons could hire staff attorneys to work full or part-time.[205] Additionally, public defenders' offices and other legal services agencies might provide lawyers on an as-needed basis.[206]

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[194] *See Hadix*, 694 F. Supp. at 284.

[195] *See id.*

[196] *See* Eisenberg, *supra* note 67, at 445 ("[I]n most situations the 'lawyer' is paid in cigarettes, candy bars, or some form of illicit consideration, including sexual favors or drugs.").

[197] *See* A JAILHOUSE LAWYER'S MANUAL 34 (Andrew Cameron ed., 3d ed. 1992).

[198] *See id.*

[199] Often the rationale for training inmate law clerks is "that their services will be more meaningful if they have received some instruction." *Id.*

[200] *See* Bounds v. Smith, 430 U.S. 817, 831 (1977).

[201] *See* A Jailhouse Lawyer's Manual, *supra* note 197, at 34.

[202] *See* Morrow v. Hardwell, 640 F. Supp. 225, 227 (W.D. Tex. 1986).

[203] *See Bounds*, 430 U.S. at 831.

[204] *See id.*

[205] *See id.*

[206] *See id.*

Some states, unwilling or unable to hire prison attorneys, have contracted with private law firms to aid inmates.[207] Other states have combined the assistance of legal aid organizations with that of private firms.[208] Another viable assistance scheme relies on law school clinical programs, in which teaching professionals supervise the work of students.[209] Whatever the structure of the assistance program, one that includes actual attorneys can offer a wider range of services and a greater level of competence than one that does not.

The United States Bureau of Prisons ("BOP"), which operates eighty-one incarceration facilities, uses an access program which combines a number of the alternative methods mentioned in *Bounds*.[210] Through a combination of services, the BOP attempts to provide optimal access while addressing many of the security and administrative concerns that such programs present.[211]

A system of libraries comprises the core of the BOP plan. This system includes approximately 250 libraries, which vary in size and stock.[212] Each institution must provide a "main" library that contains a thorough collection of federal materials.[213] "Satellite" and "basic" libraries provide inmates without access to the main library with only the most commonly used materials.[214]

The BOP requires each of its institutions, unless it operates a legal aid program, to allow inmates to assist each other in research and in document preparation.[215] In the Sixth Circuit, a pilot program trains inmate law clerks to assist illiterate inmates.[216] Thus, the institution can monitor the assistance given to illiterate inmates.

In eight of its facilities, the BOP has established legal aid programs.[217] Inmates in these institutions enjoy a broad range of legal services including, but not limited to, assistance in pursuing habeas corpus and civil rights claims.[218] The facilities without formal programs provide referrals to outside legal aid organizations and promote attorney visitation.[219]

The *Lewis* Court's recognition of an actual-injury prerequisite need not pre-

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[207] *See, e.g.*, Bee v. Utah State Prison, 823 F.2d 397, 398 (10th Cir. 1987).

[208] *See, e.g.*, Nordgren v. Milliken, 762 F.2d 851, 852 n.2 (10th Cir. 1985).

[209] *See, e.g.*, Blake v. Berman, 877 F.2d 145, 146 (1st Cir. 1989).

[210] *See* Brief for the United States as Amicus Curiae at 25, Lewis v. Casey, 116 S. Ct. 2174 (1996) (No. 94-1511).

[211] *See id.* at 24; *see also* 28 C.F.R. § 453.10 (1996).

[212] *See* Brief for the United States as Amicus Curiae at 25, Lewis v. Casey, 116 S. Ct. 2174 (1996) (No. 94-1511).

[213] *See id.*

[214] *See id.*

[215] *See* 28 C.F.R. § 543.11(f)(1) (1996).

[216] *See* Brief for the United States as Amicus Curiae at 27 n.18, Lewis v. Casey, 116 S. Ct. 2174 (1996) (No. 94-1511).

[217] *See id.* at n.17.

[218] *See* 28 C.F.R. § 543.15(a) (1996).

[219] *See* Brief for the United States as Amicus Curiae at 26-27, Lewis v. Casey, 116 S. Ct. 2174 (1996) (No. 94-1511).

clude the requirement of legal assistance in the prisons.[220] The illiterate population of this country's prisons is too substantial to be overlooked.[221] Illiteracy and a general lack of basic English skills permeate our entire correctional system.[222] In *Lewis*, the Court specifically noted that both the illiterate and non-English speaking respondents had established the requisite showing of actual injury.[223] The Court further suggested that it would sustain a system-wide remedy if respondents had established a system-wide injury.[224] A prison system which provides only a legal library without adequate legal assistance ignores the access needs of its illiterate population. Certainly, where one can show that a substantial portion of the system's population is under-served by its access program, a court can recognize such an injury as sufficient to warrant a system-wide remedy.[225]

One may argue that the methods for providing meaningful access are within the exclusive province of prison authorities. The *Bounds* allowance of "local experimentation" seems to conceive of prisons as correctional laboratories where prison officials establish proper access programs through trial and error.[226] Concededly, prison authorities possess a level of expertise well suited to the complexities of running a correctional system.[227] In addition, prison officials have an acute concern for the security, administrative, and fiscal issues involved in the provision of resources to inmates.[228]

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[220] Justice Stevens believes that an inmate satisfies the actual-injury requirement merely by claiming that his access is impeded. *See Lewis*, 116 S. Ct. at 2208 (Stevens, J., dissenting). "[P]risoners are uniquely subject to the control of the State, and . . . unconstitutional restrictions on the right of access to the courts . . . frustrate the ability of prisoners to identify, articulate, and present to courts injuries flowing from that control . . . ." *Id.*

[221] *See* discussion *supra* Section II.

[222] *See id.*

[223] *See Lewis*, 116 S. Ct. at 2183-84.

[224] *See id.* at 2184 ("The constitutional violation has not been shown to be systemwide, and granting a remedy beyond what was *necessary to provide relief* to [the two injured respondents] was therefore improper." (emphasis added)). Surely, system-wide relief is necessary in instance of system-wide injury. *See id.*

[225] *See id.* at 2179 ("[T]he success of respondents' systemic challenge was dependent on their ability to show widespread actual injury."). The Court further noted that where a systemic deprivation of access exists, "finding a prisoner with a claim affected by this extremity will probably be easier than proving the extremity." *Id.* at 2181 n.4. Justice Souter suggests that in situations of "complete and systemic denial of all means of court access," the majority's actual-injury requirement may not apply. *Id.* at 2204 (Souter, J., concurring in part and dissenting in part).

[226] *See id.* at 2180; Bounds v. Smith, 430 U.S. 817, 832 (1977).

[227] "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources . . . " Turner v. Safley, 482 U.S. 78, 84-85 (1987).

[228] *See Lewis*, 116 S. Ct. at 2179, 2182, 2185-86. "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." Preiser v.

The *Lewis* Court recognized the actual-injury requirement as crucial in sustaining the proper balance of power between government branches.[229] It acknowledged the role of the judiciary in providing relief to suffering claimants.[230] It further asserted that prisons are government institutions whose administration is strictly within the power of the political branches.[231]

Despite strong grounds for asserting the propriety of deference to prison authorities' choice of access programs, the courts are better equipped to remedy such widespread denial of access to illiterate prisoners. The authority of the courts to remedy failures of States to satisfy their affirmative duties is well settled.[232] Furthermore, special deference to prison administrators is improper where the courts possess the expertise. The courts are the ultimate arbiters of constitutional violations; they are the experts in determining the scope and extent of states' constitutional duties.[233] It is primarily a judicial responsibility to ensure adequate access to all members of the prison population.

When prison officials fail in their affirmative duty to provide access, they disturb the separation of powers by interfering with the judiciary's role in protecting fundamental rights.[234] Access to the courts is, necessarily, the right upon which the protection of all other rights depends. Certainly it is within the exclusive province of the courts to determine how to guarantee access to their own doors.

VI. CONCLUSION

The *Bounds-Lewis* line of cases clearly establishes an affirmative duty of states, through their prison officials, to provide inmates with meaningful access to the courts. If prison populations were completely literate, or even substantially literate, a state could fulfill its obligation by the mere provision of law libraries. Indeed, for many inmates, libraries of basic legal sources provide a type of access within the *Bounds* Court's contemplation. However, even the best-equipped law library cannot provide meaningful court access to an illiterate inmate.

The *Lewis* Court's recognition of an actual-injury requirement conditions the availability of remedy on an illiterate's ability to show that an access program's inadequacy has prevented him from bringing a specific claim. The extent of the

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Rodriguez, 411 U.S. 475, 491-92 (1973).

[229] *See Lewis*, 116 S. Ct. at 2179.

[230] *See id.* at 2183.

[231] *See id.* "[T]he Framers never imagined that federal judges would displace state executive officials and state legislatures in charting state policy." *Id.* at 2197 (Thomas, J., concurring).

[232] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[233] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[234] *See* Brief of Amicus Curiae Prison Legal Services of Michigan in Support of Respondents at 60, Lewis v. Casey, 116 S. Ct. 2174 (1996) (No. 94-1511). Justice Stevens, dissenting in *Lewis*, noted that a state's freedom to experiment with methods of inmate legal assistance depends on the experiment's adequacy in providing meaningful access. *Lewis*, 116 S. Ct. at 2207 (Stevens, J., dissenting).

relief is in direct relation to the extent of the injury demonstrated. Thus, the *Lewis* Court was justified in denying system-wide relief, as only two inmates of the plaintiff class exhibited deficient English skills. Unfortunately, however, the Court did not consider the prevalence of illiteracy among the nation's inmates.

The *Lewis* actual-injury requirement should not be read to forestall system-wide challenges based on the *Bounds* right. Illiterate inmates challenging the adequacy of a State's program need simply show that they constitute a substantial portion of the incarcerated population. While courts may be unwilling to accept Justice Stevens' assertion that *any* impediment to an inmate's access satisfies actual injury, they should acknowledge such injury where a prison system does not account for the special access barriers facing illiterates.

Once illiterate inmates have established the need for a system-wide remedy, the task becomes one of selecting the proper type of relief. As long as the chosen method provides meaningful access, prison officials should enjoy discretion in selecting an access program tailored to the needs of their particular system. The *Bounds* Court recognized that states can provide legal assistance through various approaches. The *Bounds-Lewis* line requires meaningfulness and adequacy of opportunity, rather than any particular access scheme.

The BOP plan, incorporating a combination of legal assistance methods, may provide a model by which states can develop their own programs. The BOP's approach takes advantage of the strengths of various assistance methods, while also recognizing that each presents certain administrative and security concerns. The element of the BOP's plan that warrants the most attention from State prison officials is the requirement that, in the absence of a legal aid program, an institution must allow inmates to assist one another. While outside legal aid programs provide the highest quality of assistance, fiscal and security restraints may make the use of prison law clerks the most attractive assistance method for many systems. Although "jailhouse lawyers" are not lawyers in the proper sense, training programs may not only enhance their ability to serve as legal aids, but also their ability to work specifically with illiterates.

John Matosky