Access to the Courts: An Essay for the Georgetown University Law Center Conference on the Independence of the Courts

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Access to the Courts: An Essay for the Georgetown University Law Center Conference on the Independence of the Courts

DAVID S. UDELL AND REBEKAH DILLER*

ABSTRACT

In this Essay, we argue that the gap between America's promise of equal justice and the reality of justice on the ground is substantial, and growing. Meaningful access to the courts—consisting of representation by counsel, the ability to physically enter court and understand and participate in the proceedings, and the opportunity to have claims heard—is increasingly out of reach for many Americans. First, there are not enough lawyers available to represent low-income people in civil legal matters, resulting in four-fifths of the civil legal needs of low-income individuals going unmet. Second, in the criminal justice system, where the right to counsel for the indigent is constitutionally guaranteed, attorneys are commonly underpaid, under-supervised, under-resourced and, ultimately, unable to provide effective representation. Third, for people with physical or psychiatric disabilities, court buildings and court procedures pose obstacles that may be insurmountable. Fourth, for people with limited English proficiency, the lack of translation and interpreting services in many of the nation's courts also poses barriers that are often overwhelming. Fifth, the role of the courts is increasingly circumscribed by laws and by court decisions that eliminate whole categories of claims from the courts' jurisdiction. Sixth, increased and often mandatory reliance on alternative dispute resolution has placed judicial review out of reach for an increasing number of people. These six factors, we argue, daily threaten the ability of our courts to perform their essential functions: providing predictable and fair dispute resolution, acting as a check on the legislative and executive branches, protecting the most vulnerable from the excesses of majoritarianism, and reaffirming the citizenry's faith in the legitimacy of the courts and of government in general. Finally, we conclude by offering a set of policy solutions aimed at stabilizing our courts, promoting their independence, and fulfilling the promise of equal justice.

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INTRODUCTION

Our nation’s promise of “equal justice for all” is among its proudest traditions. American courts afford a forum for individuals to settle disputes in a civil manner, under the rule of law. Courts ensure predictability so that individuals and businesses can tailor their actions accordingly; contracts, for example, are binding because courts exist to enforce them. In our tripartite system of government, courts act as a check on the ability of the legislative and executive branches to accumulate excessive power. They protect the most vulnerable among us and curb the excesses of majoritarianism. Finally, courts reaffirm the citizenry’s faith in the equal application of the laws and thus in the legitimacy of government in general.

In order for “equal justice for all” to be more than a hollow promise, people require access to the courts that is meaningful, with representation by qualified counsel; the opportunity to physically enter the court and to understand and to participate in the proceedings; and the assurance that their claims will be heard by a fair and capable decisionmaker and decided pursuant to the rule of law. Yet these features of meaningful access to the courts are increasingly absent. The gap between the promise of equal justice and the reality of justice on the ground...
is substantial, and growing, for the following reasons:

- There are not enough lawyers available to represent low-income people in civil legal matters. As one scholar has noted, "[a]ccording to most estimates, about four-fifths of the civil legal needs of low-income individuals, and two- to three-fifths of the needs of middle-income individuals remain unmet." ¹
- In the criminal law context, where counsel is guaranteed by the Supreme Court's 1963 landmark *Gideon v. Wainwright* ² decision, the promise has gone unfulfilled. Counsel for the indigent is commonly underpaid, under-supervised, under-resourced and, ultimately, unable to provide effective representation.
- For people with physical or psychiatric disabilities, court buildings and court procedures pose barriers that may be insurmountable.
- For people with limited English proficiency, the lack of translation and interpreting services in many of the nation's courts also can be insurmountable.
- The role of the courts is increasingly circumscribed by laws and by court decisions that eliminate whole categories of claims from the courts' jurisdiction.
- Increased and often mandatory reliance on alternative dispute resolution has placed judicial review out of reach for an increasing number of people.

To be sure, more lawyers and more litigation are not necessarily desirable ends. Anyone who has ever been involved in litigation is aware of its limitations—the expense, the complexity, the delay, and the ways in which human concerns can be filtered out of the process. Rising caseloads counsel against the creation of yet more grounds for lawsuits. We need our public institutions and our courts to require less, rather than more, reliance on lawyers. Long-term goals for reform must include simplifying access and promoting fair alternative dispute resolution systems, not just providing a lawyer to everyone or making more cases litigable.

But the opportunity to resolve disputes within a court pursuant to the rule of law remains essential in a broad range of matters involving the concerns of low-income individuals. Just as a person of substantial means would never dream of buying a home or seeking a divorce without consulting a lawyer, persons of modest means likewise enter into life-altering transactions for which consultation with counsel is essential. For people of limited financial means, access to an attorney can be the difference between losing a home or keeping it,

suffering from domestic violence or finding refuge, succumbing to illness or obtaining a cure, remaining hungry or securing food, or languishing in prison or reuniting with family and community.

The judiciary is often the only institution situated to resolve civil disputes. Indeed, it is the unique guardian of individuals' civil legal rights against excessive assertions of power by the executive and legislative branches. As decisions related to the War on Terror have demonstrated yet again, the courts can and do function as an essential bulwark of liberty—affording those accused of the worst crimes their only opportunity to establish their innocence and acting as a check on overreaching by the executive branch.

As we demonstrate below, for far too many people, access to the courts is illusory. Meaningful access to the courts consists of several elements. Chief among them in our adversarial system of justice is access to an attorney who can vigorously represent her client. Because courts rely upon a presentation of the issues and facts by each side's lawyers to reach a decision, lopsided justice results when one side is unrepresented. Moreover, even when they are paid for by the government, lawyers for low-income individuals must have the full range of legal tools available to any other lawyer, lest the functioning of the court system be warped. Public defenders must be adequately funded to mount aggressive defenses, lest representation be reduced to the mere appearance thereof.

Of course, even access to a lawyer is of limited value when an individual is unable to enter the courthouse or understand the proceedings. For our system to deliver justice, courts must be accessible to persons with disabilities. Also, individuals with limited English proficiency must be able to obtain translation services. Finally, the courts themselves must actually possess the power to hear the claims presented to them. When courts are stripped of jurisdiction over certain types of claims, individual rights cannot be vindicated. Moreover, when the jurisdiction-stripping is the product of legislative or executive overreach, the delicate balance of power among the three branches of government is disturbed. As a result, individuals, society, the courts, and the promise of equal justice suffer.

I. MOST LOW-INCOME INDIVIDUALS CANNOT OBTAIN COUNSEL IN CIVIL MATTERS

Nearly three decades ago, President Jimmy Carter observed: "Ninety percent of our lawyers serve ten percent of our people. We are overlawyered and underrepresented." Concern for equal justice is shared across the political spectrum. In 1995, Senator Peter Domenici (R-NM) declared on the Senate floor, "I do not know what is wrong with the United States of America saying to the needy people of this country that the judicial system is not only for the rich.

3. Rhode, supra note 1, at 371 (quoting President James E. Carter, Remarks at the 100th Anniversary Luncheon of the Los Angeles County Bar Association (May 4, 1978), in 64 A.B.A. J. 840, 842 (1978)).
What is wrong with that?... That is what America is all about."4 A decade later, the National Association of Evangelicals, the nation’s largest association of evangelical Christians, echoed these concerns in a letter to several congres­sional leaders: "Without a helping hand from legal aid programs and the shared blessings of others, low-income families too often have no place else to turn for help.... God measures societies by how they treat the people at the bottom, and He teaches us to care for the poor and oppressed among us."5

Yet notwithstanding widespread acknowledgment of the problem, the crisis of representation for low-income people in civil cases persists, and grows worse, because of chronic funding shortages, state and federal restrictions, shortfalls in pro bono help, and a rollback of financial incentives for attorneys in private practice to bring critical cases.

The major source of funding in the United States for legal aid in civil matters is the federal Legal Services Corporation (LSC), established by federal law in 1974.6 The value in real dollars of the funding appropriated by Congress to LSC has declined dramatically over the last twenty-five years. In fiscal year 1981, Congress allocated $321.3 million to LSC, which at the time was seen as the level sufficient to provide a minimum level of access to legal aid in every county, although not enough to actually meet all the serious legal needs of low-income people.7 Adjusted for inflation, this “minimum access” level of funding would need to be about $687.1 million in 2005 dollars; yet Congress’s LSC allocation for fiscal 2006 was a mere $326.5 million.8 On average, every legal aid attorney, funded by LSC and other sources, serves 6861 people. In contrast, there is one private attorney for every 525 people in the general population.9

The dramatic nature of the funding shortfall becomes even more apparent when U.S. legal aid funding is compared to that of other industrial democracies, many of which spend at least twice as much per capita on legal aid, if not more. For example, during fiscal year 1998, combined federal, state, and local government funding for civil legal services for the poor in the United States was $600 million, or $2.25 per capita.10 In contrast, England spends eleven times as much per capita on civil legal services, at $26.00 per person; the Netherlands spends four times as much, at $9.70 per person; and Germany and France spend at least twice as much, at $4.86 and $4.50 per capita.

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9. LEGAL SERVS. CORP., supra note 7, at 18.
person, respectively. 11

As a result of money shortfalls, in 2004 LSC-funded programs turned away at least one person seeking help for each person served. 12 This means that approximately one million cases per year are turned away due to lack of funding. 13 As striking as these figures are, they understare the real number of low-income people who go unserved because they do not include those who do not seek out help, those who were turned away from non-LSC-funded legal aid providers, or those who received limited advice but required full representation.

In addition to these consequences of funding shortages, the ability of legal aid programs to serve the poor is further impeded by harsh and wasteful federal restrictions imposed by Congress in 1996. These restrictions cut deeply into low-income people’s capacity to secure meaningful access to the courts. First, Congress restricted the legal tools that LSC-funded lawyers could use to represent their clients, prohibiting them from: representing clients in bringing class actions; seeking court-ordered attorneys’ fee awards; educating potential clients about their rights and then offering to represent them; and communicating with policymakers or legislators on a client’s behalf, except under very narrow circumstances. 14

Second, Congress limited the categories of clients whom LSC-funded programs could represent, prohibiting representation of certain categories of legal immigrants as well as all undocumented immigrants, people in prison, and those charged with illegal drug possession in public housing eviction proceedings. 15

Finally, Congress imposed an extraordinarily harsh and largely unprecedented limitation on LSC-funded programs: it extended these prohibitions to the non-LSC-funded activities of legal aid programs. As a result, nearly $390 million in state, local, and private funding for legal aid is restricted under the same terms as the LSC funds. 16 Faced with a court ruling that such a sweeping restriction on private funds violates the First Amendment, LSC issued a regulation that theoretically provides an opportunity for non-profits receiving LSC funds to spend their private money free of these substantive restrictions. 17 Under LSC’s “program integrity” regulation, the only way a legal aid non-profit and its private donors may free themselves of the federal restrictions is to divert private funds from direct client service in order to establish a separate program—

11. Id.
12. LEGAL SERVS. CORP., supra note 7, at 5.
13. Id.
15. See id. at 1321-55 to -56.
with physically separate staff, offices, and equipment. However, this physical separation requirement is so burdensome and wasteful that virtually no program in the country has been able to comply.

Apart from the restrictions and funding shortages, the reach of LSC-funded programs is inherently limited by their mandate to serve those in the most dire need. To be eligible for assistance from LSC recipient programs, clients must earn less than 125% of the Federal Poverty Guidelines. In real terms, a family of four living in the forty-eight contiguous states with a household income that exceeds $25,000 is ineligible for assistance from LSC-funded programs. Asset ceilings also apply.

Thus, many working poor and middle-income families find themselves in a bind when they have a legal problem. A study commissioned by the American Bar Association (ABA) and issued in 1994 found that about one-half of moderate-income households at any given time face a problem that could be addressed by the courts. However, with the exception of family law matters such as divorce, the usual course of action for such households was to try to handle the situation on their own, without a lawyer. Middle-income families also lack one of the advantages businesses have in being able to afford lawyers: while legal fees are tax deductible when incurred as a business expense, they are not when incurred for personal reasons.

Pro bono—free or reduced-fee legal assistance by private law firms—provides some relief. Yet notwithstanding the considerable resources of major law firms and the sheer number of attorneys in the United States, pro bono practice falls far short of meeting the legal needs of America’s low- and middle-income families. Pro bono participation is quite low. The average attorney donates less than a half-hour per week to pro bono service, and financial contributions average less than fifty cents per day. Less than one-third of the nation’s major law firms meet the ABA’s pro bono challenge of donating three to five percent of total revenues. Moreover, a substantial proportion of pro bono service is done for family or friends, not for low-income

22. Id. at 21.
23. See I.R.C. § 162(a) (Supp. 2006) (allowing deduction of all “ordinary and necessary expenses” incurred in the course of business); Comm'r v. Tellier, 383 U.S. 687, 690–91 (1966) (holding that litigation expenses for an underwriter's defense of a criminal prosecution for securities fraud were deductible under section 162(a)); Gilliam v. Comm'r, 51 T.C.M. (CCH) 515 (1986) (holding that litigation expenses growing out of an artist's defense of a civil tort claim were personal and not deductible under section 162(a) even though the underlying events took place on a business trip).
25. Id. The ABA Model Rules on Professional Conduct establish an aspiration that lawyers will “render at least (50) hours of pro bono publico legal services per year,” a “substantial majority” of
communities. Fewer than one in ten attorneys accept referrals from legal services programs or other organizations that serve the legal needs of low-income communities.

A recent rollback in the availability of attorneys’ fees further threatens the ability of those who have suffered civil rights violations to bring claims. In an effort to ensure that attorneys are available to bring cases under laws designed to vindicate civil rights and deter government wrongdoing, Congress has authorized successful civil rights claimants suing under certain statutes to have their attorneys’ fees paid for by their opponents. However, the courts recently have narrowed the circumstances under which parties will be deemed to have won such cases and thus be eligible to collect an attorneys’ fee award.

In the past, plaintiffs could collect a fee award when their lawsuits served as a “catalyst” for legislative or policy change that resolved the dispute, even if the plaintiffs never formally “won” in court. However, a 2001 Supreme Court decision, Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Services, restricted the definition of “prevailing party” under two federal civil rights statutes to only those claimants who achieved some sort of official judicial recognition of their “victory” to recover fees. Since Buckhannon, most of the intermediate federal appeals courts have interpreted the holding broadly to apply to all civil rights statutes that contain the same “prevailing party” language at issue in Buckhannon. Similarly, a number of appeals courts have applied Buckhannon's reasoning to other statutes where, under the common law, attorneys’ fees would be awarded between private parties and to a "prevailing party" in any action brought by or against the United States "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(b), (d)(1)(A) (2000).

26. See Rhode, supra note 24, at 17.
27. Id.
30. Id. at 603.
of state courts have relied on *Buckhannon* to restrict the definition of “prevailing party” under state fee-shifting provisions. As a result, attorneys have fewer incentives to bring cases that not only vindicate the rights of individuals but also further the societal goals of deterring discrimination and government abuse of power.

The shortage of legal assistance that results from all these factors can have devastating consequences for low-income people. Perhaps nowhere can the impact of legal assistance be seen more dramatically than in the context of domestic violence cases. Take, for example, the case of Mariella Batista, a Cuban immigrant who had suffered for years from domestic violence by an abusive partner. Ten years ago, Batista sought help from a local legal services program. Even though she feared for her life, the program had to turn her away due to the 1996 LSC restriction that prohibited representation of most immigrants. The next week, Batista was killed by her abuser outside the family court building.

Although Congress has since amended the LSC restrictions to allow for representation of domestic violence victims regardless of immigration status, the lesson persists: denial of access to a lawyer can have tragic consequences. In contrast, when legal services are made available, survivors of domestic violence have assistance obtaining protective orders, custody of their children, child support, and sometimes public assistance. Legal services programs help women achieve physical safety and financial security and thus empower them to leave their abusers. In fact, one recent study found that access to legal services was one of the primary factors contributing to a twenty-one percent decrease nationally in the reported incidence of domestic violence between 1993 and 1998.

The consequences of inadequate access to the courts affect not just the individuals directly involved, but also society at large. When families are evicted from their homes because they cannot obtain counsel in a housing
proceeding, for example, their resultant homelessness costs taxpayers in the form of public services. In New York City, the average cost of sheltering a single homeless adult is $23,000 annually—far more than providing counsel to prevent an eviction. Medical and other costs rise, too, when individuals, particularly senior citizens, lose their homes because they lack access to a lawyer. When victims of domestic violence are unable to obtain help, the health care, criminal justice, and social welfare systems bear the strain. Employers, too, suffer from decreased productivity and increased absenteeism. Many of these societal costs could be ameliorated if low-income individuals had access to counsel to assist them in resolving their legal problems.

II. THE PROMISE OF GIDEON V. WAINWRIGHT—LEGAL REPRESENTATION FOR LOW-INCOME PERSONS IN CRIMINAL MATTERS—IS LARGELY UNFULFILLED

In the 1963 landmark case of Gideon v. Wainwright, the Supreme Court established that indigent criminal defendants have the right to an attorney, under the Sixth and Fourteenth Amendments to the Constitution, regardless of their abilities to pay. Yet notwithstanding the promise of Gideon, more than forty years later the criminal justice system in many states is largely broken due to inadequate funding of indigent defense services, crushing caseloads, and a lack of oversight, supervision, and training of court-appointed defense counsel.

In 2003, in recognition of the fortieth anniversary of the Gideon decision, the ABA conducted four hearings across the country to examine the quality and consequences of indigent defense services in the nation. The ABA received testimony from a broad range of experts, documenting a stunning array of obstacles to enforcement of the Gideon right. The ABA's investigation culminated in publication of a report in 2004 titled Gideon's Broken Promise: America's Continuing Quest for Equal Justice. Among the obstacles identified by the experts were the following:

36. See Nancy Smith et al., Vera Inst. of Justice, Understanding Family Homelessness in New York City: An In-Depth Study of Families' Experiences Before and After Shelter, § 3, at 13–14, 28 (2005) (finding that almost half of all families in the New York City homeless shelter system had experienced an eviction in the five years preceding their admission to a shelter, and that being evicted made it seven times more likely that a household would enter a shelter that same month).
41. Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, Gideon's Broken Promise: America's Continuing Quest for Equal Justice (2004) [hereinafter Gideon's Broken Promise].
The lack of adequate funding for indigent defense services, leading to inadequate attorney compensation; lack of essential resources (including expert, investigative, and support services); lack of training; reliance on various cost cutting measures; and resource disparity between prosecution and indigent defense.

"Inadequate legal representation," including "meet 'em and plead 'em" lawyers; incompetent and inexperienced lawyers; excessive caseloads; lack of contact between defense counsel and clients (and lack of continuity in representation of clients); lack of investigation, research, and zealous advocacy by defense counsel; lack of conflict-free representation; and other ethical violations by defense counsel.

"Structural defects in indigent defense systems," including insufficient independence of counsel from courts and prosecutors and an absence of oversight sufficient to ensure the provision of uniform, quality legal services.

Complete failure to provide counsel to those entitled to counsel: people detained in jail without a lawyer; people encouraged to waive their right to counsel and enter pleas of guilty; and counsel provided too late or not at all.

A diverse range of additional problems, including inordinate delays in the criminal justice process; a lack of full-time public defenders and of participation by the private bar; and a lack of data regarding indigent defense systems.

Problems virtually identical to those identified in the ABA report have been the subject of numerous reports in many jurisdictions across the country, extending back decades in time. Most recently, the Chief Judge of the State of New York, Judith S. Kaye, appointed a blue ribbon commission that, after receiving testimony in a series of hearings, called for substantial reform of the defense services provided in New York State. As described in The New York Times, the commission identified "such problems as overburdened defenders who, in one county, average 1,000 misdemeanors and 175 felony cases in a year, and 'grossly inadequate' financing." The Commission further described

42. Id. at 7–14.
43. Id. at 14–20.
44. Id. at 20–22.
45. Id. at 22–26.
46. Id. at 26–28.
47. See id. at 7 n.39 (citing eight reports and articles from 1982 to 2004 on problems in indigent defense systems).
48. See Danny Hakim, Judge Urges State Control of Legal Aid for the Poor, N.Y. TIMES, June 29, 2006, at B1. According to William E. Hellerstein, a professor at Brooklyn Law School and a co-chairman of the commission, "Virtually every member of the commission has had long experience in the criminal justice system." Hellerstein added: "I think it's fair to say that despite our experience, we were somewhat taken aback by the depth and the extent of the crisis." Id.
49. Id.
“wide disparities in counties’ spending and in the resources available to prosecutors and defenders,” and noted that “[t]he state lacks standards to define what it means to provide adequate indigent defense and has no system for enforcing such standards.”

The ABA report explains that inadequate defense lawyering is a cause of wrongful convictions: “Although there undoubtedly are a variety of causes of wrongful convictions—including police and prosecutorial misconduct, coerced false confessions, eyewitness identification errors, lying informants—inadequate representation often is cited as a significant contributing factor.”

The report further quotes former Attorney General Janet Reno stating that,

[a] competent lawyer will skillfully cross-examine a witness and identify and disclose a lie or a mistake. A competent lawyer will pursue weaknesses in the prosecutor’s case, both to test the basis for the prosecution and to challenge the prosecutor’s ability to meet the standard of proof beyond a reasonable doubt.

A competent lawyer will force a prosecutor to take a hard, hard look at the gaps in the evidence....

A competent lawyer will know how to conduct the necessary investigation so that an innocent defendant is not convicted....

In the end, a good lawyer is the best defense against wrongful conviction....

The problem of wrongful convictions cannot be ignored. As of December 2006, the Innocence Project, a legal clinic at the Benjamin N. Cardozo School of Law, had identified 188 persons as having been wrongfully convicted of crimes, and of having served more than 1000 years in prison as a result. The discovery of additional wrongful convictions has become an almost daily occurrence.

One example is Eddie Joe Lloyd, a mentally ill Michigan man who was convicted of the 1984 rape and murder of a teenage girl. While residing in a psychiatric hospital, Lloyd, who suffered from paranoid schizophrenia and mild retardation, contacted police and made suggestions on how to solve this case and others. The police interrogated Lloyd and told him that, if he confessed to the murder, he would help them “smoke out” the real murderer. Lloyd then

50. Id.


confessed to the crime in horrific detail by recounting facts fed to him by the police. Lloyd's court-appointed attorney failed to challenge the coerced confession in court. As a result, Lloyd spent seventeen years in prison before being exonerated by DNA evidence. Tragically, he died two years after his release from prison.\(^{54}\)

When access to counsel in the criminal justice system is inadequate, society suffers as well. Convicting Eddie Joe Lloyd and others of crimes they did not commit enables the real perpetrators to remain at large. Moreover, taxpayers must foot the bill for lengthy appeals processes and the high costs associated with unnecessary and excessive incarceration.

Against a backdrop of rampant noncompliance with *Gideon* and the attendant costs and consequences, it is encouraging to note that there are some signs of real change. Across the country, reform initiatives are beginning to hold states accountable under *Gideon*. The ABA report cites examples of successful initiatives in Georgia, Texas, and Virginia that have led to the creation of new statewide defender systems with increased state funding and state oversight.\(^{55}\)

Additional reform efforts succeeded in Montana in 2005 and are underway in Louisiana, Michigan, New York, and Pennsylvania.

### III. COURTS OFTEN ARE UNABLE TO PROVIDE ACCESS TO PEOPLE WITH PHYSICAL AND PSYCHIATRIC DISABILITIES

If the courts are to fulfill their essential role of protecting the most vulnerable people in our society, then the most vulnerable people must be able to get into court. People with physical and psychological impairments face unique challenges when attempting to vindicate their rights in court. Although the federal Americans with Disabilities Act (ADA) aims to eradicate disability-based discrimination in a variety of settings, one threshold question is whether the courts themselves are sufficiently accessible to enable individuals with disabilities to enter courthouses and to participate in court proceedings.

Noncompliance with the ADA in state judicial systems has been widely documented.\(^{56}\) Surveys have found inaccessible courtrooms in California, Washington, Texas, New York, Tennessee, Missouri, and Florida. And, in some jurisdictions, inaccessible courtrooms are the norm.\(^{57}\)

The problems leading to this inaccessibility include:

- Architectural barriers: many people have difficulty navigating courthouse facilities, including parking lots and bathrooms, as well as

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\(^{55}\) See *Gideon's Broken Promise*, supra note 41, at 29–35.


\(^{57}\) See id. at 1857–58.
gaining access to assistive devices such as listening aids, print enlargers, etc.  
- Court practices: courts often impose inflexible scheduling requirements, including refusing to offer mid-morning or afternoon hearings for persons who need extra time to get to court.  
- Court officials: court personnel, including judges and clerks, may lack sufficient knowledge to prevent misunderstandings and to avoid reliance on mistaken stereotypes.  
- Signage: Court signage may be inadequate, making it difficult to obtain essential information, or to obtain assistance in completing required forms.  

For individuals with psychiatric impairments, analogous problems arise. Individuals may be unable to handle the stress of courtroom proceedings, the challenges of communicating with courthouse officials and judges, and the daily effects of medications.

In 2004, the Supreme Court held in Tennessee v. Lane that individuals are entitled to sue state court systems for their failure to comply with the ADA. George Lane had sued Tennessee for failing to make the county courthouse accessible to persons who rely on wheelchairs. Lane had been jailed after he refused to crawl up the courthouse steps to attend a scheduled court appearance. The Court rejected Tennessee’s argument that it was immune from suit and held that Congress was within its power in enacting the ADA as a means of protecting the constitutional right of access to the courts.

State court systems are cognizant of the need to address these problems. In a memorandum responding to the Lane decision, the National Center on State Courts identified forty-three court locations across the country where ADA compliance activities were ongoing. Additionally, the Architectural and Transportation Barriers Compliance Board (Access Board), an independent federal agency devoted to accessibility for people with disabilities, has created a Courthouse Access Advisory Committee to advise it on issues related to the accessibility of courthouses covered under the ADA. These issues include best practices, design solutions, promotion of accessible features, educational opportunities, and the gathering of information on existing barriers, practices, recom-

58. See Maryann Jones, And Access for All: Accommodating Individuals with Disabilities in the California Courts, 32 U.S.F. L. Rev. 75, 91–95 (1997).
60. 541 U.S. 509 (2004).
61. See id. at 533–34.
62. See id. at 514.
63. See id. at 518, 531.
mendations, and guidelines. Nevertheless, substantial work remains to make courthouses more accessible to persons with disabilities.

IV. COURTS OFTEN DO NOT PROVIDE TRANSLATION AND INTERPRETING SERVICES TO PEOPLE WHO HAVE A LIMITED ABILITY TO SPEAK AND UNDERSTAND ENGLISH

There is another particularly vulnerable segment of society—those people with limited proficiency in English (often known as LEP individuals)—that is frequently confronted with virtually insurmountable obstacles to accessing the courts. LEP individuals often are unable to communicate with court personnel, to conduct legal research, to read their opponents’ legal papers, and to understand and participate in court proceedings.

A recent California study found that “courtroom language services [i.e. interpreters] are virtually unavailable to many Californians.” Most court documents, such as standard pleadings, legal opinions, and self-help materials, are written in English only, making them incomprehensible to LEP individuals.

In California alone, there are seven million people who cannot access the courts without language assistance. The practical consequences for the court system are enormous. In Los Angeles County, approximately 10,000 proceedings each year are postponed because there is no interpreter available. These problems are particularly acute in rural areas, where often there is no certified interpreter available to speak the necessary language. When no interpreter can be found at all, judges must attempt to reach a fair and accurate decision knowing that they cannot communicate with one or more of the litigants. For this reason, the Judicial Council of California recently called the participation of interpreters in domestic violence proceedings “a fundamental factor contributing to the quality of justice.”

These problems generally stem from the courts’ inadequate resources. Responding to the conclusion of the California Access to Justice Commission that California’s courts generally failed to provide access to LEP individuals, the Chief Justice of the California Supreme Court, Ronald George, said that he did not perceive “any immediate prospect” of obtaining funds to alleviate the

67. See id. at 18.
68. Id. at 1 n.2.
69. Id. at 23.
problem.\textsuperscript{72} The complicated logistics of providing language access contributes to the problem. In New York State alone, litigants speak 168 different languages and many more dialects.\textsuperscript{73} Courts must ensure that the interpreters appearing in their courts are competent. Court interpreters must be proficient not only in the two languages they are translating between, but also in the legal terminology of each language. Unfortunately, in many instances, even when court interpreters are available they lack the requisite proficiency and provide incorrect translations.\textsuperscript{74}

V. COURTS HAVE HAD THEIR JURISDICTION STRIPPED AND ARE LESS AVAILABLE THAN EVER TO HEAR CERTAIN CATEGORIES OF CASES

The last two decades have witnessed a substantial narrowing of the scope of the courts' authority to enforce laws when individual litigants raise claims of unlawful conduct by the government. The effects of this eroded jurisdiction are widespread and long lasting. Principles and expectations are established that can affect the development of the law in related areas for years to come.

Some of the retrenchment is a product of the Supreme Court's own decisions. Under the banner of the so-called "new federalism," the Court has declared that the federal government lacks sufficient constitutional power to authorize some suits against the states for civil rights violations. These decisions have limited the ability of the disabled and senior citizens to seek redress against state employers for discrimination\textsuperscript{75} and have provided a rationale that more broadly threatens the continued enforcement of federal civil rights against the states. Other Supreme Court decisions have ruled that individuals may not bring claims to enforce civil rights either because the statute did not explicitly authorize such a claim\textsuperscript{76} or because such claims were not sufficiently related to Congress's constitutional power to regulate interstate commerce.\textsuperscript{77}

Other limitations result from actions of the executive or legislative branches. We highlight below several particular contexts in which the executive or legislative branches have stripped courts of the power to hear claims: the War


\textsuperscript{73} N.Y. STATE UNIFIED COURT SYS., \textit{supra} note 70, at 1.

\textsuperscript{74} See CAL. COMM’N ON ACCESS TO JUSTICE, \textit{supra} note 66, at 17–18, 22–23.

\textsuperscript{75} See, e.g., Garrett v. Bd. of Trs. of the Univ. of Ala., 531 U.S. 356 (2001) (sharply circumscribing the ability of the disabled to bring claims against state employers under the ADA); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (similarly limiting the ability of senior citizens to sue state employers for damages under the Age Discrimination in Employment Act).

\textsuperscript{76} See Alexander v. Sandoval, 532 U.S. 275, 293 (2001) (holding that private individuals could not bring claims under Title VI of the Civil Rights Act of 1964, which prohibits race- and national origin-based discrimination, under a "disparate impact" theory, and could bring claims only under the much harder to prove intentional discrimination theory).

\textsuperscript{77} See United States v. Morrison, 529 U.S. 598, 617–19 (2000) (holding that Congress was not authorized under the Commerce Clause to create a private remedy for victims of gender-motivated violence to sue in civil court).
on Terror, immigrants’ access to the courts, and the ability of prisoners to challenge the conditions of their confinement.

These limitations on the courts’ power are, of course, of particular concern to immigrants, prisoners, and those charged as terrorists. But the ultimate effects of these limitations will reach much further. The judicial branch is charged with protecting the most vulnerable in our society, who often cannot assert their rights through the political process. Consequently, the weakening of the Judiciary through the War on Terror, the assault on immigrants’ rights, and the Prison Litigation Reform Act threatens not only the direct targets of each action, but also everyone who turns to the Judiciary to protect their rights when the political process fails to do so.

A. THE EXECUTIVE BRANCH HAS Sought TO REDUCE THE FUNCTION OF THE COURTS IN REVIEWING THE GOVERNMENT’S CONDUCT IN THE WAR ON TERROR

Since the terrorist attacks of September 11, 2001, the U.S. military, the Central Intelligence Agency (CIA), and allied nations have engaged in counter-terrorism operations and detained hundreds, perhaps thousands, of individuals without the threshold of a lawful process to determine the factual or legal bases for detention. Although detainees have been tagged "the worst of the worst" by senior executive branch officials, a substantial number appear to have been incorrectly detained. During “Operation Enduring Freedom” in Afghanistan, for example, the military did not conduct hearings to determine whether the Afghans swept up during the conflict (and handed in for $5000 bounties) were properly characterized as enemies.78

Often illiterate, without English language skills or experience with any legal system, these detainees have had no meaningful opportunity to demonstrate innocence, and few advocates to protest their improper detention. Detainees have been held in the Naval Brig at Charleston, South Carolina,79 Guantánamo Bay Cuba,80 and secret CIA-run “black sites” scattered around the world.81 Coercive interrogations, rising to levels widely recognized as torture, have been confirmed at many of these overseas detention sites.82 The Bush Administration

82. See generally _Mark Danner, Torture and Truth: America, Abu Ghraib, and the War on Terror_ (2004).
holds detainees as presidentially designated "enemy combatants"—a category now applied without precedent in modern military operations or international law. 83

Protecting physical liberty against executive detention historically has been at the heart of the Judiciary's role. 84 As Supreme Court Justice David Souter recently explained, "[f]or reasons of inescapable human nature, the branch of Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory." 85 But the administration has fiercely resisted any and all judicial oversight of detention operations, arguing that even U.S. citizens detained in the United States as "enemy combatants" are entitled to only minimal due process, and certainly not to an opportunity to examine and challenge the legal and factual bases for their detention. 86

Justice Souter's insight is confirmed by journalistic reports of the principles of counterterrorism decisionmaking that have been recently adopted. According to one journalist, the Administration has acted on the principle that "a one percent chance of a catastrophe must be treated 'as certainty,'" with preventative action taken accordingly. 87 Unsurprisingly, this approach has yielded an overwhelming proportion of false positives among detainees, rendering the need for judicial oversight more pressing. Moreover, international condemnation of American detention and interrogation practices is damaging counterterrorism efforts. 88 Given these trends, judicial review for both domestic and at least some offshore facilities appears to be increasingly likely.

A tangle of thorny legal questions, however, obscures the proper venue and scope of judicial review in these detention cases. Essentially, there are three pivotal legal questions raised by detainee policy. First, what is the legal regime that governs interdiction and detention operations under counterterrorism auspices: Is it some part of the law of war, 89 or is it the civilian criminal law? 90

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84. See INS v. St. Cyr, 533 U.S. 289, 301 (2001); see also U.S. Const. art. I, § 9, cl. 2 (preventing suspension of habeas corpus except "in cases of rebellion or invasion").


86. See generally Brief for the Respondents in Opposition, Hamdi, 542 U.S. 507 (No. 03-6696).


And, if the law of war applies, which laws—specifically, which parts of the 1949 Geneva Conventions—govern? 91 Second, if a detainee falls outside the ambit of the criminal law and is detained either here or overseas, can federal courts hear challenges to detention, and, if so, how can they do so effectively? Finally, when a person is properly detained under the laws of war, especially outside areas that traditionally would have been designated as battlefields, what process ought properly be used to determine whether that person is guilty of a criminal offense? A trilogy of Supreme Court cases in 2004 92 and a fourth case decided in June 2006 93 have cast light on some of these issues, but much remains unclear.

On the first question, in *Hamdi v. Rumsfeld* the Supreme Court concluded that individuals detained on a foreign battlefield bearing arms against the United States are properly subject to the laws of war. 94 Application of the laws of war means that an “enemy combatant” detained on the battlefield may be detained for the length of the relevant territorial conflict. 95 *Hamdi* left open the very important question of whether the “enemy combatant” designation could be extended beyond the battlefield context. Further, in the 2006 *Hamdan* case, the Court held that all detainees are entitled to the protections of Common Article 3 of the Geneva Conventions, which guarantees, among other things, that sentences and executions can be carried out only upon “previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” 96 The laws of war, including some parts of the Geneva Conventions, thus apply to foreign battlefield captures. 97

Second, courts to date have rejected executive branch arguments that the judicial branch must refrain from exercising jurisdiction. Thus, the Supreme Court rejected government arguments that the Guantánamo Bay Naval Base is beyond judicial ken. 98 One district court has also concluded that jurisdiction obtains when the United States collaborates with another sovereign. 99 Once

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94. See *Hamdi*, 542 U.S. at 518–19 (O’Connor, J., plurality opinion).
95. In *Hamdi*, the relevant territorial conflict was the ground war in Afghanistan. See id. at 518, 521.
jurisdiction is established, however, how challenges to the factual and legal bases of detention can and should be brought remains unclear. Citizen detainees are at least entitled to a judicial hearing to ascertain whether they are in fact "enemy combatants."\textsuperscript{100} 

Hamdi gave some clues to the form procedures might take. Nevertheless, it is unclear whether Hamdi-compliant hearings have yet been convened, and the precise form of such hearings has yet to be definitively defined by the Judiciary.\textsuperscript{101} Much rests on the precise quanta of fact-finding permitted in challenges to government accusations of terrorist activity.

Finally, the Hamdan Court held that military commissions established to determine guilt or innocence of war crimes charges were invalid and that such commissions must comport with procedural standards established by the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions.\textsuperscript{102}

These cases leave much undecided. Procedures to determine "enemy combatant" status, as well as the scope of that term, remain unclear. The aforementioned cases also focused on the fact of detention, not the conditions of detention. After the Court in Hamdi affirmed detainees' right to counsel, issues concerning conditions of detention have largely been addressed in the context of requests by lawyers for access to their clients. Although Congress could step in and usefully clarify these questions, one intervention in December 2005 was a manifest moral and practical failure.\textsuperscript{103} That law purported to curtail federal court jurisdiction over actions arising out of Guantanamo and reflected a factually inaccurate premise that habeas litigation out of Guantánamo was similar to frivolous prison conditions challenges.\textsuperscript{104} The legislation was construed narrowly in Hamdan.\textsuperscript{105}

Even if Congress does not act, the federal courts have ample resources to determine the propriety of initial detentions, and the military justice system has the ability to hold war crimes trials safely and fairly.\textsuperscript{106} The optimal solution to the detention thicket thus is one that has been staring the nation in the face all along: employing the federal courts' and their military counterparts' long-respected capacity to mete out equitable and procedurally fair justice that will be respected around the world.

Yet, not long before this Essay went to print, Congress approved and the

\textsuperscript{100} Hamdi, 542 U.S. at 536–37 (plurality opinion).
\textsuperscript{104} See id. § 1005(c), 119 Stat. at 2742.
\textsuperscript{105} See Hamdan, 126 S. Ct. at 2765–69.
\textsuperscript{106} See generally SERRIN TURNER & STEPHEN J. SCHULHOFER, BRENNAN CTR. FOR JUSTICE AT NYU SCH. OF LAW, THE SECRECY PROBLEM IN TERRORISM TRIALS (2005).
President signed a far-reaching omnibus measure addressing the scope of detention authority, the kinds of tactics that could be used in interrogations, and the scope of post-hoc judicial review. Entitled the Military Commissions Act of 2006 (MCA),\textsuperscript{107} this Act purported to respond to \textit{Hamdan} but in fact swept much further. With respect to access to the federal courts, the MCA professes to eliminate jurisdiction over habeas corpus petitions filed by or on behalf of noncitizens designated as "enemy combatants" by the Executive.\textsuperscript{108} The Administration has argued that a noncitizen assigned the vague designation of "awaiting determination" as an "enemy combatant" is also covered by this habeas-stripping provision\textsuperscript{109}—suggesting that the Administration's intent is to detain individuals \textit{without} designating them "enemy combatants." If the government prevails, neither detainees at Guantánamo nor noncitizens swept up and detained as "enemy combatants" in the American heartland will have any meaningful opportunity to challenge the factual or legal basis of their detention by habeas corpus. The MCA further purports to eliminate all other actions that an alien "enemy combatant" might bring in federal court,\textsuperscript{110} leaving open the possibility that victims of torture, or other abusive interrogation measures, would have no civil remedy in a U.S. court.

B. THE GOVERNMENT HAS SOUGHT TO REDUCE THE ROLE OF THE COURTS IN REVIEWING DECISIONS APPLYING IMMIGRATION LAW

Judicial review has long played an important role in immigration law and remains an important safeguard of individual rights against the misuse of government power. During the past decade, however, the government has repeatedly attempted to restrict immigrants' access to the courts. Moreover, various jurisdiction-stripping provisions have been coupled with measures rendering even long-term residents deportable for minor infractions, emphasizing security at any cost. Although the Supreme Court has helped preserve judicial review, access to the courts has decreased and remains vulnerable to future limitations.

In 1996, Congress enacted two statutes that sought to significantly restrict immigrants' access to the federal courts: the Antiterrorism and Effective Death Penalty Act (AEDPA)\textsuperscript{111} and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).\textsuperscript{112} AEDPA, passed in response to the Oklahoma City bombing of 1995, contained many anti-immigrant provisions (though the


\textsuperscript{110} \textit{See Military Commissions Act of 2006 § 950(b), 120 Stat. at 2623–24.}


attack was the work of homegrown terrorists), including limits on judicial review.\textsuperscript{113} IIRIRA, enacted several months after AEDPA, contained additional anti-immigrant measures. It not only eliminated court review over administrative deportation decisions for noncitizens convicted of most criminal offenses, but also curtailed the availability of important forms of relief from deportation that took into account individual circumstances.\textsuperscript{114} These provisions, moreover, were applied retroactively, thus penalizing noncitizens for minor infractions committed decades before without any independent review or individualized assessment of their claims.\textsuperscript{115} In addition, the IIRIRA provided for the creation of a new “expedited removal” process which summarily turns away asylum seekers arriving at America’s shores.\textsuperscript{116} As human rights groups have documented, the “expedited removal” process has allowed the government to deny entry to people fleeing persecution without making an independent assessment of their claims.\textsuperscript{117}

The Supreme Court’s 2001 decision in \textit{INS v. St. Cyr}\textsuperscript{118} reaffirmed the importance of judicial review in immigration cases. The Court held that AEDPA and IIRIRA did not eliminate federal habeas corpus review over deportation orders\textsuperscript{119} and that restrictions on relief from deportation did not apply retroactively to cases pending before the statutes’ enactments.\textsuperscript{120} Further demonstrating the importance of judicial review, the Court ruled in another case that term that the INS could not indefinitely detain noncitizens in the United States.\textsuperscript{121} \textit{St. Cyr}’s importance has reverberated beyond immigration law, providing an important precedent for federal court review of the executive detention of individuals at Guantánamo Bay after September 11th.\textsuperscript{122}

However, court decisions have neither resolved all limits on judicial review nor ended the push for further restrictions. The terrorist attacks of September 11th prompted the dissolution of the Immigration and Naturalization Service and its replacement with the Department of Homeland Security,\textsuperscript{123} which has placed even greater emphasis on security at the expense of court access for

\begin{itemize}
\item \textsuperscript{113} See AEDPA §§ 401–43.
\item \textsuperscript{114} See IIRIRA tit. III, §§ 301–88 (Inspection, Apprehension, Detention, Adjudication, and Removal of Inadmissible and Deportable Aliens).
\item \textsuperscript{115} See RONALD WEICH, ACLU, \textit{UPSETTIN G CHE C KS AND BALANCES: CONGRESSIONAL HOSTILITY TO­WARD THE COURTS IN TIMES OF CRISIS} 30 (2001) (citing the example of a mother of two who was deported for a previous conviction of shoplifting fifteen dollars of merchandise when she tried to return baby clothes without a receipt, notwithstanding her pending application for citizenship and steady work history).
\item \textsuperscript{116} See IIRIRA § 302(a).
\item \textsuperscript{117} See, e.g., \textit{LAWYERS COMM. FOR HUMAN RIGHTS, IS THIS AMERICA? THE DENIAL OF DUE PROCESS TO ASYLUM SEEKERS IN THE UNITED STATES} (2000).
\item \textsuperscript{118} 533 U.S. 289 (2001).
\item \textsuperscript{119} See id. at 308–14.
\item \textsuperscript{120} See id. at 315, 326.
\item \textsuperscript{121} See \textit{Zadvydas v. Davis}, 533 U.S. 678, 699–700 (2001).
\item \textsuperscript{122} See \textit{Rasul v. Bush}, 542 U.S. 466, 474 (2004) (relying on \textit{St. Cyr}).
\end{itemize}
asylum seekers and other immigrants. In addition, streamlining regulations adopted in August 2002 weakened the system of internal administrative review of immigration judge decisions by the Board of Immigration Appeals (BIA), decreasing the BIA's size by over half, making disposition of appeals by a single BIA member (rather than a panel of three) the norm, and encouraging the issuance of opinions without analysis of the claims. The regulations have increased pressure on federal appeals courts and helped prompt calls for further limits on judicial review even though, as Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit suggested last year, such review is necessary to correct the BIA's "staggering" error rate.

In 2005, Congress enacted the REAL ID Act, which eliminated one of the ways in which immigrants adjudged deportable could seek court review of the BIA's decisions. Recently proposed legislation threatens to further undermine immigrants' access to the courts by imposing procedural obstacles to meaningful consideration of removal decisions and by restricting review of denials of citizenship petitions.

In sum, while Congress and the Executive have broad powers to set U.S. immigration policy, federal courts play an important role in ensuring that this power is exercised in accordance with the nation's laws and the Constitution. Preserving immigrants' access to the courts thus safeguards both individual liberty and the separation of powers against unlawful government action.

C. THE FUNCTION OF THE COURTS IN REVIEWING CLAIMS OF PRISONERS CHALLENGING THE CONDITIONS OF IMPRISONMENT HAS BEEN SUBSTANTIALLY CIRCUMSCRIBED

In 1996, Congress passed the Prison Litigation Reform Act (PLRA) in an attempt to reduce the volume of prison conditions cases reaching the federal courts. Underlying the law were the beliefs that the courts were being clogged by prison conditions cases, that most of the cases were frivolous, and that the reason so many cases were being brought was that prisoners have too much time on their hands.

125. See 8 C.F.R. § 3 (2005).
The PLRA contained a number of separate measures aimed at reducing the volume of prison litigation, three of which we will mention here: 133

- a reduction in the amount of attorneys’ fees available to attorneys representing prisoners in conditions cases;
- a requirement that prisoners exhaust all available internal grievance procedures (regardless of how strict or cumbersome those procedures are) prior to filing a federal lawsuit; and
- a requirement that prisoners who have had three cases dismissed as lacking in merit, frivolous, or malicious pay the full filing fee in all future cases, regardless of their ability to pay.

The PLRA has achieved its goal of reducing the quantity of prison litigation in the federal courts, but at high cost. 134 The high number of prison conditions cases had stemmed from a number of factors. First, all aspects of a prisoner’s life are under the control of prison authorities, and prisoners have very few ways of influencing the conditions of their confinement other than litigation (they generally cannot, for example, vote). 135 Second, it is not uncommon for prisoners to suffer serious violations of their constitutional rights, including rape and other violence by prisoners and prison personnel. 136 The sharp rise in the prison population in the past few decades was also a major factor underlying the rise in prisoner litigation. 137 Finally, prisoners were perceived as having unlimited time to pursue lawsuits (even though many also refrained from pursuing legitimate claims out of fear of retaliation by prison authorities).

The available data indicates that the PLRA has made it more difficult—and in some cases impossible—for prisoners to bring meritorious lawsuits. For ex-

133. In addition to the provisions discussed here, there are several other provisions of the PLRA. Two that have been particularly criticized as interfering with the power of the courts are a provision barring prisoners from seeking damages for mental and emotional injuries in the absence of physical injuries, and another provision sharply limiting the conditions under which federal courts can enter consent decrees in prison conditions cases. See generally John Boston, The Prison Litigation Reform Act: The New Face of Court Stripping, 67 BROOK. L. REV. 429 (2001).

134. According to a recent study, in the four years following the PLRA’s enactment, federal civil lawsuits by prisoners dropped by forty percent. Brian J. Ostrom et al., Congress, Courts and Corrections: An Empirical Perspective on the Prison Litigation Reform Act, 78 NOTRE DAME L. REV. 1525, 1525-26 (2003).


136. See 42 U.S.C. § 15601(2), (13) (Supp. III 2003) (finding that “experts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison,” and that the rapes involve “actual and potential violations of the United States Constitution”); Madrid v. Gomez, 889 F. Supp. 1146, 1160-61 (N.D. Cal. 1995) (discussing the “tremendous potential for abuse” of prisoners in prison, and finding that, in one particular California prison, there has been “a conspicuous pattern of excessive force”); Joyce Kosak, Comment, Mental Health Treatment and Mistreatment in Prison, 32 WM. MITCHELL L. REV. 389, 399-404 (2005) (describing the pervasive failure of prisons to provide constitutionally adequate mental health treatment).

137. See Schlanger, supra note 135, at 1586-87.
ample, the exhaustion requirement has operated to bar prisoners from challeng­ing injuries received in prison merely because those injuries sent them to the hospital during the entire short period during which they could have filed a grievance.\textsuperscript{138} The attorneys' fee award provision, together with a ban on pris­oner representation by all lawyers receiving any federal LSC funding, has made it impossible for most prisoners to find legal representation, thereby sharply reducing their chances of prevailing in meritorious cases.\textsuperscript{139} It thus appears that the PLRA took an overly blunt approach to the task of curbing frivolous litigation, with the result that a highly vulnerable and disempowered prison population is now less able to obtain court protection than ever.

VI. THE INCREASED RELIANCE ON ALTERNATIVE DISPUTE RESOLUTION METHODS RAISES NEW CONCERNS

The courts need not be understood as the exclusive forum for the enforce­ment of laws or resolution of disputes. Litigation can be prohibitively expensive, complex, and time-consuming. Presumably, there could and should be less expensive, faster, and no less fair systems for resolving disputes pursuant to the rule of law. At the very least, there is a need to simplify litigation. Alternative dispute resolution systems, such as mediation and arbitration, appear to offer one such opportunity.\textsuperscript{140}

In fact, courts offer litigants the opportunity to participate in mediation proceedings as an option prior to proceeding with full litigation, and some also offer binding arbitration as an alternative to litigation. But the private nature of these proceedings, compared to litigation, which is public in nature and creates a public record, has generated concern. Decisions are made without the sanitiz­ing effects of public scrutiny. Moreover, the law itself, which in the normal course would evolve to reflect the decisions made in litigation, does not have the opportunity to change and develop in response to outcomes and insights developed off the record.\textsuperscript{141}

Distinct from these court-affiliated alternatives to litigation is the increased inclusion of binding arbitration clauses—promises made by individuals that they will not sue in court but rather submit any dispute for resolution by a private arbitration organization—in a broad range of contracts. In many con­texts, including consumer contracts and employment agreements,\textsuperscript{142} binding

\textsuperscript{138}. Id. at 1653–54 & n.332.

\textsuperscript{139}. See id. at 1654–57.


\textsuperscript{141}. See id. at 187.

\textsuperscript{142}. It has been estimated that as of 2002, about ten to twenty percent of the workforce was covered by a mandatory arbitration agreement. See Christine M. Reilly, Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment, 90 CAL. L. REV. 1203, 1209 (2002) (citing Charlie Cray, See you in... Arbitration?, MULTINAT’L MONITOR,
arbitration clauses prohibit recourse to the courts. 143

Such arbitration requirements have been shown to be problematic for a variety of reasons. First, low-income people typically have little negotiating leverage when entering into agreements with employers, credit card companies, and many other entities. They cannot realistically expect to alter the terms of such clauses or decline to agree to them. 144 Second, the substantial administrative costs of arbitration processes may and generally do exceed those of the civil court system. 145 Third, arbitration agreements increasingly include mandatory collective action waivers. These provisions prohibit individuals from joining forces to advance their claims together through class action litigation, even though such collective action sometimes offers the best and most efficient option for recovery (particularly if the sum due is not so substantial as to induce any individual to proceed alone). 146 Fourth, in many contexts, arbitrators have been shown to develop a bias in favor of so-called repeat players. 147 Finally, as noted above, arbitration clauses are designed to preclude appeal to the courts.

When binding arbitration agreements lead to unjust results, there is little opportunity to set them aside. Under the Supreme Court’s interpretation of the Federal Arbitration Act, the scope of a court’s review of such agreements is generally restricted to the narrow question of whether the arbitration provision


143. A recent study of 161 businesses across 37 industries from which consumers make expensive or ongoing purchases found that 35.4% of those businesses included mandatory arbitration clauses in their consumer contracts. Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55, 62 (2004). The study found use of arbitration agreements in each of the following categories: Home Repair/Remodeling, Homeowners’ Insurance, Apartment Rental, Renters’ Insurance, Real Estate, Internet Service, Online Retail, Auto Purchase/Lease, Gas Card, Auto Insurance, Health Insurance, Health Club, Tour Operator, Credit Card (general, airline, store), Banking, Investments, Accountant/Tax Consultant, Attorney, and Cellular Telephone. Id. at 63 tbl. 2.


146. See Myriam Gilles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 MICH. L. REV. 373, 378 (2005) (citing David Rosenberg, Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss, 88 VA. L. REV. 1871, 1906 n.62 (2002), and arguing that class actions serve the important role of aggregating small claims). These collective action waivers also serve as a bar to collective action in the arbitration context, precluding individuals from aggregating their claims in that forum as well. See Demaine & Hensler, supra note 143, at 66 (stating that just over thirty percent of surveyed arbitration clauses precluded collective action in arbitration proceedings). Courts have generally upheld these collective action waivers. See Gilles, supra, at 400 nn.137 & 139 (surveying state and federal court decisions regarding the unconscionability of arbitration provisions that waive class action rights).

147. Lisa B. Bingham, Employment Arbitration: The Repeat Player Effect, 1 EMP. RTS. & EMP. POL’Y J. 189, 205–10 (1997) (finding that employers who are repeat players at arbitration do better in arbitration than employers who arbitrate only once).
itself, as contrasted with the broader substantive contract terms, was obtained by fraud, duress, or unconscionability.\footnote{148}{See, e.g., Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204, 1209 (2006).} This is an extremely high threshold for a party seeking court review to meet.

CONCLUSION

To stabilize our courts, assure their independence, and secure meaningful access so that all the members of our society can resolve their critical legal needs, a commitment is required by all of us. Inadequate access to the courts harms the court system itself and the citizenry’s respect for the rule of law. When segments of the public believe that the courts are unfair to the poor, or that the courts treat communities of color with hostility, the courts lose legitimacy. Not only do courts suffer as institutions, but the nation’s promise of “equal justice for all” is broken. As the Supreme Court has stated, “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”\footnote{149}{Griffin v. Illinois, 351 U.S. 12, 19 (1956).} The following specific reform initiatives aim to address and correct this fundamental problem:

**Provide essential funding for the federal Legal Services Corporation.** The ABA has recommended that LSC requires $495 million for fiscal year 2007.\footnote{150}{LSC Funding Request for 2007, DIALOGUE, Winter 2006, at 1, 23, available at http://www.abanet.org/legalservices/dia1ogue/downloads/dialogue2006win.pdf.} That is the minimum that should be provided.

**Remove federal restrictions that apply to the Legal Services Corporation and its grantees, including the restrictions that encumber non-federal funds.** These funding restrictions undercut effective representation of low-income clients by lawyers in programs that receive LSC funding.

**Ensure access to counsel in civil cases in which basic human needs are at stake.** In a formal resolution adopted unanimously in August 2006, the ABA urges governmental authorities at all levels to provide counsel to low-income individuals in important civil cases, including those in which shelter, sustenance, safety, health, or child custody are at issue.\footnote{151}{AM. BAR ASS’N, REPORT TO THE HOUSE OF DELEGATES No. 112A (2006), available at http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf.} Other nations have recognized that it is vital either to provide counsel or to simplify procedures and substantive law to the point where counsel is not necessary. The United States needs to do more in both areas.

**Authorize appropriate awards of attorneys’ fees so that civil rights suits will not be discouraged.** Our federal and state governments need to adopt policies that authorize appropriate awards of attorneys’ fees sufficient to enable low-income people to obtain qualified counsel to represent them in claims to enforce their civil legal rights and promote the rule of law.

\begin{thebibliography}{99}
\bibitem{148}See, e.g., Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204, 1209 (2006).
\bibitem{149}Griffin v. Illinois, 351 U.S. 12, 19 (1956).
\end{thebibliography}
Provide essential funding and supervision for state indigent defense services. The promise of *Gideon v. Wainwright* has been deferred for too long. Our states need to ensure that low-income persons charged with crimes receive defense counsel who are adequately financed, properly trained and supervised, and accountable to appropriate practice standards.

**Guarantee access to the courts for people with disabilities.** The ADA promises access to public buildings, including the courts. We need a national commitment by federal and state governments to finance meaningful access for people with physical and psychiatric disabilities to all of our nation’s courtrooms.

**Guarantee access to the courts for people with limited English proficiency.** People who are learning English are also entitled to equal justice, and the society and the courts are better off when laws are enforced evenly and disputes resolved pursuant to the rule of law. We need our federal government and state governments to commit sufficient resources to ensure that translation and interpretation services make it possible for all members of our society to participate equally in court proceedings.

**Correct the excesses of court-stripping.** Too many people are denied access to the courts by judicial decisions and laws that limit the jurisdiction of the courts. We need our courts, and our elected leaders, to appreciate the destabilizing consequences of rules that place the courts out of reach of the most vulnerable members of our society.

**Control the excesses of alternative dispute resolution requirements.** Although alternatives to litigation are desirable, new problems can be created by policies that favor private mediation or promote the complete waiver of litigation rights. We need to examine the societal consequences for the rule of law of taking disputes out of our public courts and promoting their resolution by non-judges in private settings. Where binding arbitration is authorized, we need to be sure that the terms are fair, that the decisionmakers are unbiased, and that judicial resolution remains available when necessary to preserve justice.