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Access Denied: Incarcerated Juveniles and Their Right of Access to Courts

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ACCESS DENIED: INCARCERATED JUVENILES AND THEIR RIGHT OF ACCESS TO COURTS

In the current flux of an increasingly punitive juvenile justice system, one of the system's great injustices receives little attention. Unconstitutional conditions of confinement for juveniles do not receive appropriate legal exposure. Challenges to these conditions are more difficult in light of the Supreme Court's recent restriction of a prisoner's right of access to the courts. This Note will analyze why a different standard of "meaningful access" is necessary to protect juveniles.

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INTRODUCTION

Over the last several years, growing public concern regarding juvenile crime levels has produced extensive legislative action and a corresponding increase in judicial activism to "get tough" on juvenile crime.[1] Juvenile justice reform is taking top priority at both the state[2] and federal levels.[3] Reforms, however, do not always

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[1] *See* Kirk Loggins, *North, East Support Lifted Adams to Win*, TENNESSEAN (Nashville), May 7, 1998, at 8B, *available in* 1998 WL 11553063 (discussing the election of Davidson County juvenile court judge Betty Adams and her "get tough" platform); Abraham McLaughlin, *America is Tried and Conflicted Over Youth Crime*, PORTLAND OREGONIAN, Aug. 16, 1998, at G3, *available in* 1998 WL 4230027 (stating that "the pendulum has swung toward tough punishment"); Kathy Sanders, *Lawmakers Focus on Preventing Teen Crime*, FORT WORTH STAR-TELEGRAM, Apr. 2, 1998, at 2, *available in* 1998 WL 3286455 ("For five years, Texas lawmakers have focused on a get-tough approach to juvenile crime."); *Taft Outlines Plan to Stop Juvenile Crime*, June 9, 1998, *available in* 1998 WL 7421374 (discussing the Ohio Republican Gubernatorial candidate's proposed "get-tough-on-juvenile-crime platform").

[2] *See* ADELIA YEE, NATIONAL CONFERENCE ON STATE LEGISLATURES, JUVENILE CRIME AND JUSTICE: STATE LAWS IN 1997, *in* 23 NATIONAL CONFERENCE ON STATE LEGISLATURES, STATE LEGISLATIVE REPORT, No. 13, at 3-5 (Apr. 1998) (discussing changes in state law); NATIONAL CRIMINAL JUSTICE ASSOCIATION, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE JUSTICE REFORM INITIATIVES IN THE STATES: 1994-1996 (Program Report) 79 (Oct. 1997) (referring to the "50 miniature laboratories in which juvenile justice policy is being tried and tested"); *see also* PATRICIA TORBET ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME (Research Report) 59-61 (July 1996). The July 1996 Office of Juvenile Justice and Delinquency Prevention report stated that:

> Since 1992, legislative activity has produced revisions to the laws concerning juvenile crime in more than 90% of the States. A review of the laws regarding jurisdiction, sentencing, correctional programming, information sharing, and the role of victims reveals that 47 States and the District of Columbia have made substantive changes in the past 4 years. In many States, change has occurred in

equate to improvements and, in fact, can threaten the welfare of juveniles in the justice system.

Shortly following the hotly debated Prison Litigation Reform Act's legislative reforms,[4] the Supreme Court followed suit and, in effect, created a substantial judicial reform that set prisoners' rights back several decades. In *Lewis v. Casey*,[5] the Court redefined a prisoner's right of access to the courts, significantly limiting the commonly accepted definition of "meaningful access" as set forth in *Bounds v. Smith*.[6] As lower courts struggle to grasp this new definition, incarcerated juveniles face a significant risk of losing meaningful access to the courts.

Casey's scope of right of access to the courts threatens to undermine *John L. v. Adams*,[7] an earlier Sixth Circuit decision largely based on *Bounds*' scope of the right. In *John L.*, the Sixth Circuit Court of Appeals held that failing to provide incarcerated juveniles with legal assistance is a violation of their right of access to the courts.[8] Juveniles would not be able to secure "meaningful access" to the courts unless they had legal counsel.[9] This Note discusses the impact of *Lewis v. Casey* and the potential persuasive authority of *John L. v. Adams* on incarcerated juveniles' right of access to the courts. Part I analyzes the Sixth Circuit's holding in *John L. v. Adams*. Part II examines the Supreme Court's decision in *Lewis v. Casey* and its redefinition of the right of access. Part III discusses the impact of *Casey* in the current context of juvenile justice as defined by the movement away from rehabilitation, the conditions of juvenile confinement, and the general trend of reducing prisoner litigation. Finally, Part IV details three arguments for the post-*Casey* persuasive authority of *John L.*: first, the *Casey* decision is not a decisive precedent for cases involving confined juveniles; second, juveniles should qualify as a separate category of inmates requiring affirmative assistance; and, third, juveniles suffer actual injury by not having legal representation.

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each of the past four legislative sessions. Moreover, more rapid and sweeping change has occurred in 1995 and continues to accelerate.

Id. at 59.

[3] Juvenile justice reform was one of the top ten priority legislative initiatives of the 105th Congress. *See* Pete Domenici, *Domenici's Juvenile Justice Provisions Introduced in Top-10 Legislative Package*, Jan. 21, 1997 (government press release), *available in* 1997 WL 4428751; *see also* James Turpin, *Juvenile Justice in the Spotlight*, CORRECTIONS TODAY, June 1, 1997, at 124, *available in* 1997 WL 10514050 (stating that President Clinton, Senate Majority Leader Trent Lott, and former House Speaker Newt Gingrich viewed juvenile justice as one of the top five priorities for the 105th Congress).

[4] Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321, 1321-66 (1996) (codified at 18 U.S.C. § 3626 (Supp. III 1997)).

[5] 518 U.S. 343 (1996).

[6] 430 U.S. 817, 830 (1977).

[7] 969 F.2d 228 (6th Cir. 1992).

[8] *See id.* at 230.

[9] *See id.*

I. ANALYSIS OF *JOHN L. V. ADAMS*

In 1992, incarcerated juveniles in secure Tennessee institutions brought a class action suit against the Tennessee Department of Youth Development.[10] In *John L. v. Adams*, juveniles alleged that corrections officials had denied them their constitutional right of access to the courts.[11] The Sixth Circuit held that juvenile detainees do have a right of access to the courts, and that this right includes meaningful access to the services of an attorney.[12]

In finding that juveniles have a right of access to the courts, the Sixth Circuit denied Tennessee's appeal from the district court's holding that juveniles have a right of access to the courts.[13] As the basis for its appeal, Tennessee argued that because state law treats adults and juveniles differently, juveniles do not have a right of access to the courts.[14] The court, however, reasoned that the differences in legal treatment between incarcerated juveniles and adults are not material, stating that the fact of incarceration is the "most significant similarity."[15] The court apparently considered the similarities of incarceration-related legal problems facing both juveniles and adults to be of greater import than any differences in treatment under Tennessee law and, consequently, affirmed the district court's ruling that Tennessee must accord juveniles "'a right of access to the courts comparable to incarcerated adults.'"[16]

In *John L.*, the court traced a line of other judicial decisions that recognized the right of access for prisoners as arising out of the Due Process Clause.[17] In *Ex parte Hull*,[18] the Supreme Court stated that a "state and its officers may not abridge or impair [a] petitioner's right to apply to a federal court for a writ of habeas corpus."[19] The Sixth Circuit also cited the Supreme Court's holding in *Johnson v. Avery*[20] that permitted inmates to assist other prisoners in preparing petitions for post-conviction relief when the state provided no reasonable alternative measures for accessing the courts.[21]

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[10] *See id.* at 228.

[11] *See id.* at 230.

[12] *See id.*

[13] *See id.*

[14] *See id.* at 231.

[15] *Id.*

[16] *Id.* (quoting John L. v. Adams, 750 F. Supp. 288, 291 (M.D. Tenn. 1990)).

[17] The Sixth Circuit also noted that the right of access to the courts derives existence from the Equal Protection Clause. *See* Murray v. Giarratano, 492 U.S. 1, 7 (1989) (holding that the right of access derives from the Equal Protection Clause).

[18] 312 U.S. 546 (1941).

[19] *Id.* at 549.

[20] 393 U.S. 483 (1969).

[21] *See* John L. v. Adams, 969 F.2d 228, 232 (6th Cir. 1992) (citing *Johnson*, 393 U.S. at 490).

In *John L.*, the Sixth Circuit then pointed to *Wolff v. McDonnell*[22] and the Supreme Court's extension of the right of access beyond habeas corpus petitions to civil rights actions.[23] The Sixth Circuit quoted Justice White's majority opinion in *Wolff* to establish that "'[t]he right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights.'"[24]

The Sixth Circuit, however, drew its most extensive analysis of the right of access to the courts from the Supreme Court's opinion in *Bounds v. Smith*.[25] In *Bounds*, the Court stated that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[26] *Bounds* compelled states to "shoulder affirmative obligations to assure all prisoners [adequate, effective, and] meaningful access to the courts."[27]

The Sixth Circuit recognized that most of the cases involving access to courts dealt with adult prisoners, but that several courts had extended this right to juveniles.[28] In *Morgan v. Sproat*,[29] a conditions of confinement challenge, the Mississippi court held that juveniles committed to a state "training" school have a right of access to the courts.[30] In *Morgan*, the district court held that, under a *Bounds* analysis, the state must "enable prisoners to place their grievances before the judicial system."[31]

In *John L.*, the court also looked to the Supreme Court's general guidelines set out in *In re Gault*,[32] which is recognized widely as the first and premiere case establishing children's rights.[33] In *Gault*, the Supreme Court extended the application of due process standards to juvenile proceedings.[34] Justice Fortas emphasized the importance of due process regardless of age, noting that "[u]nder our

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[22] 418 U.S. 539 (1974).

[23] *See John L.*, 969 F.2d at 232.

[24] *Id.* (quoting *Wolff*, 418 U.S. at 579).

[25] 430 U.S. 817 (1977).

[26] *Id.* at 828.

[27] *Id.* at 824; *see also id.* at 822.

[28] *See John L.*, 969 F.2d at 232-33.

[29] 432 F. Supp. 1130 (S.D. Miss. 1977).

[30] *See id.* at 1135-36.

[31] *Id.* at 1157.

[32] 387 U.S. 1 (1967).

[33] *Gault* was a child abuse case, but because courts did not recognize children's rights at the time, it was tried under a prevention of cruelty to animals statute. *Id.*

[34] *See id.* at 13.

Constitution, the condition of being a boy does not justify a kangaroo court."[35] The Court in *Gault*, however, also acknowledged that the differences between adults and juveniles may warrant a different form of due process.[36] The Sixth Circuit then reviewed a line of cases from the First Circuit that recognized a juvenile's right of access to the courts.[37] In *Germany v. Vance*,[38] an action brought under 42 U.S.C. § 1983, the First Circuit held that the "plaintiff's status as a juvenile offers no excuse. Defendants contend that 'the Constitutional requirements of *Bounds* have never been applied to juvenile correctional systems.' We reject any implication that the constitutional right of access to the courts does not apply to juveniles in [Department of Youth Services] custody."[39]

After determining that juveniles had a right of access to the courts, the Sixth Circuit looked to *Bounds* to clarify the scope of the right.[40] In *Bounds*, the Court held that access must be "adequate, effective and meaningful."[41] In its review, the Sixth Circuit looked carefully at the third requirement of *Bounds* and whether the incarcerated juveniles had "meaningful" access to the courts.[42] The court stated the proposition that "the touchstone of the right of access is meaningfulness."[43]

Courts in subsequent cases primarily focused on the scope of the *Bounds* "meaningfulness" requirement, until the decision in *Lewis v. Casey*,[44] involving prisoners' rights of access to the courts.[45] This amorphous standard has allowed the courts to exercise a great deal of discretion in looking at the facts of each case and in determining appropriate outcomes on a case by case basis. In *Bounds*, the Court set forth minimal guidelines to define "meaningfulness" in its holding that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[46]

The Sixth Circuit determined that the incarcerated juveniles in *John L.* did not have "meaningful" access.[47] Although the juveniles had access to a law library, the

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[35] *Id.* at 28.
[36] *See id.* at 28-29.
[37] *See* John L. v. Adams, 969 F.2d 228, 233 (6th Cir. 1992).
[38] 868 F.2d 9 (1st Cir. 1989).
[39] *Id.* at 16.
[40] *John L.*, 969 F.2d at 233-34.
[41] Bounds v. Smith, 430 U.S. 817, 822 (1977).
[42] *John L.*, 969 F.2d at 237.
[43] *Id.*
[44] 518 U.S. 343 (1996).
[45] *See* souces cited *infra* note 61.
[46] *Bounds*, 430 U.S. at 828.
[47] *See John L.*, 969 F.2d at 234.

court held that such access is not enough to secure meaningful access for juveniles.[48] The court concluded that "in order for . . . juvenile plaintiffs to have meaningful access to the courts, they must be afforded access to an attorney."[49] In reaching its decision, the court noted age, "lack of experience with the criminal system," and "relatively short confinement" as reasons for requiring assistance from an attorney for juveniles.[50]

The court also noted other situations in which courts have found that a library is insufficient and that incarcerated individuals must have access to counsel. For example, in *Ward v. Kort*,[51] the Tenth Circuit held that committed mental patients must be afforded access to counsel. Some courts have held that libraries do not provide adequately for non-English speaking or illiterate inmates' right of access to the courts.[52] In *Hadix v. Johnson*, a Michigan District Court held that failure to provide access to an attorney is a violation of illiterate and segregated prisoners' right of access to the courts.[53] Another court agreed, holding that an inmate's low level of education is a relevant factor in determining whether access to an attorney is necessary or whether a law library will protect the right of access to the courts sufficiently.[54]

The court in *John L.* further determined that the right of access extends only to civil rights claims related to incarceration, under Section 1983, and to constitutional rights.[55] The state need not provide an attorney for the purposes of pursuing general civil litigation matters or for claims made only under Tennessee law.[56] Furthermore, in Section 1983, the state must reimburse contract attorneys for their assistance actions only if those actions are related to juveniles' incarceration.[57]

Thus, the Sixth Circuit did not extend the scope of claims for which incarcerated juveniles have a right of access to the courts beyond the rights that *Bounds* afforded adult inmates. The Court in *Bounds* stated that habeas corpus and civil rights actions are of "'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights."[58] These litigation matters are what the court

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[48] *See id.*

[49] *Id.*

[50] *Id.*

[51] 762 F.2d 856, 860-61 (10th Cir. 1985).

[52] *See, e.g.*, Cruz v. Hauck, 627 F.2d 710, 721 n.21 (5th Cir. 1980); Stevenson v. Reed, 391 F. Supp. 1375, 1380-82 (N.D. Miss. 1975).

[53] *See* Hadix v. Johnson, 694 F. Supp. 259, 288 (E.D. Mich. 1988).

[54] *See* Canterino v. Wilson, 562 F. Supp. 106, 110 (W.D. Ky. 1983) ("Even if unlimited physical access could be provided to the law library, it would be unavailing to one who lacks sufficient opportunity or intellectual ability to utilize the facility.").

[55] *See John L.*, 969 F.2d at 237.

[56] *See id.*

[57] *See id.*

[58] Bounds v. Smith, 430 U.S. 817, 827 (1977) (quoting Johnson v. Avery, 393 U.S. 483,

sought to protect for juveniles in *John L.* The Sixth Circuit also recognized, as did the Supreme Court in *Bounds*, that in all other civil actions the state cannot "erect barriers that impede the right of access of incarcerated persons."[59] This holding meant that, although states do not have a duty to remove all barriers to the courts, they cannot *create* obstacles for incarcerated individuals.

II. ANALYSIS OF *LEWIS V. CASEY*[60]

The Supreme Court's decision in *Lewis v. Casey* represented the rejection of twenty years of jurisprudence. Prior to *Casey*, courts consistently had interpreted *Bounds* as imposing an affirmative obligation on the states to ensure a prisoner's right of access to the courts.[61]

Casey involved a claim by prisoners in Arizona Department of Corrections ("ADOC") facilities challenging a policy that prohibited contact visits with their attorneys.[62] The inmates claimed that this policy violated their due process right of access to the courts under Section 1983.[63]

A majority of the Court held that a prohibition on contact visits with an attorney is not a violation of an inmate's right of access unless the inmate establishes actual injury.[64] It is not enough to show that library or legal assistance is subpar.[65] Rather, the inmates must show that the inadequacies of the library or legal assistance actually *hindered* the inmates' pursuits of legal claims.[66] In support of this holding, the Court noted that "[c]ourts have no power to presume and remediate harm that has not been established."[67]

In *Casey*, the Court demonstrated concern that the judiciary must not violate the doctrine of standing and overreach its bounds.[68] The Supreme Court admonished the lower court and warned that courts should not perform legislative functions.[69] It is

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485 (1969)).

[59] *John L.*, 969 F.2d at 235.

[60] 518 U.S. 343 (1996).

[61] *See, e.g.*, Murray v. Giarratano, 492 U.S. 1, 3-4 (1989); Knop v. Johnson, 977 F.2d 996, 999 (6th Cir. 1992); Germany v. Vance, 868 F.2d 9, 11 (1st Cir. 1989); Cruz v. Hauck, 627 F.2d 710, 719 (5th Cir. 1980); Canterino v. Wilson, 644 F. Supp. 738, 739 (W.D. Ky. 1986).

[62] *See Casey*, 518 U.S. at 343.

[63] *See id.*

[64] *See id.* at 349.

[65] *See id.* at 347-51.

[66] *See id.* at 350.

[67] *Id.* at 361 n.7.

[68] *See id.* at 350.

[69] *See id.* at 363.

not the judiciary's duty, but rather the legislature's duty, "to shape the institutions of government in such fashion as to comply with the laws and the Constitution."[70]

The Supreme Court maintained that the proper judicial stance was to apply a deferential standard,[71] and quoted *Turner v. Safley* for the proposition that when "a prison regulation imping[es] on inmates' constitutional rights," the regulation "'is valid if it is reasonably related to legitimate penological interests.'"[72] Any standard of review other than this "reasonably related" standard would interfere with the ability of the legislature and prison staff to run an effective prison system.[73] Specifically, the Court stated that "'[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.'"[74]

The Court ultimately determined that the *Bounds* holding did not create an absolute right to a law library or to legal assistance.[75] The critical language in *Bounds* stated that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[76] In repudiating this language, the Court rejected a long line of opinions that interpreted *Bounds* as requiring a prison to provide its inmates with a law library, legal counsel, or both.[77]

Even if *Bounds* required the affirmative assistance of prison officials in an inmate's effort to bring a legal claim, the Court held, in *Casey*, that this requirement

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[70] *Id.* at 349.

[71] *Id.* at 361.

[72] *Id.* (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

[73] *See id.*; *see also* Rudolph Alexander, Jr., *Hands-Off, Hands-On, Hands-Semi-Off: A Discussion of the Current Legal Test Used by the United States Supreme Court to Decide Inmates' Rights*, 17 J. CRIME & JUST. 103, 104-08 (1994), *cited in* MARILYN MCSHANE & FRANK P. WILLIAMS III, THE AMERICAN COURT SYSTEM 41-46 (1997) (discussing the development of this "semi-hands-off doctrine" which argues that courts should not interfere with prison management). The Court in *Turner v. Safley* also noted that "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner*, 482 U.S. at 84-85.

[74] *Casey*, 518 U.S. at 361 (quoting *Turner*, 482 U.S. at 89). *But see* O'Lone v. Estate of Shabazz, 482 U.S. 342, 356 (1987) (Brennan, J., dissenting) ("The Constitution was not adopted as a means of enhancing the efficiency with which government officials conduct their affairs, nor as a blueprint for ensuring sufficient reliance on administrative expertise.").

[75] *See Casey*, 518 U.S. at 350.

[76] Bounds v. Smith, 430 U.S. 817, 828 (1977).

[77] *See* Murray v. Giarratano, 492 U.S. 1, 3-4 (1989); Knop v. Johnson, 977 F.2d 996, 999 (6th Cir. 1992); Germany v. Vance, 868 F.2d 9, 11 (1st Cir. 1989); Cruz v. Hauck, 627 F.2d 710, 719 (5th Cir. 1980); Canterino v. Wilson, 644 F. Supp. 738, 739 (W.D. Ky. 1986).

impermissibly extended the scope of the right of access.[78] Courts previously had not recognized such a broad scope of the right. Prior to *Bounds*, courts had not established an affirmative obligation to provide legal assistance.[79]

Moreover, the Court noted that the right of access to courts is not an extensive right.[80] In so doing, it reflected a recent public outcry regarding the influx of prison litigation: "*Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims."[81] Instead, the Court explained:

> The tools [which the right of access to the courts] requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.[82]

Justice Thomas's concurrence paints an even bleaker picture for prisoners' rights of access.[83] Thomas discussed the ambiguity of whether a positive constitutional right of access even exists.[84] He argued that the "'right of access' to the courts"[85] is a right "framed exclusively in the negative,"[86] by citing the holding in *Ex parte Hull* that "a State may not 'abridge or impair' a prisoner's ability to file a habeas petition."[87] Thomas also cited *Johnson v. Avery*,[88] arguing that a state cannot "'den[y] or obstruc[t]' a prisoner's" attempts to gain access to courts of law.[89]

Thomas then voiced his significant concern with overstepping the judiciary's power.[90] He reasoned that "'[i]t 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.'"[91]

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[78] *See Casey*, 518 U.S. at 353.

[79] *See id.* at 354.

[80] *See id.* at 355.

[81] *Id.*

[82] *Id.*

[83] *See id.* at 364-93 (Thomas, J., concurring).

[84] *See id.* at 367 (Thomas, J., concurring).

[85] *Id.* at 379 (Thomas, J., concurring) (quoting *Ex parte* Hull, 312 U.S. 546, 549 (1941).

[86] *Id.* at 380 (Thomas, J., concurring).

[87] *Id.* at 379 (Thomas, J., concurring) (quoting 312 U.S. at 549).

[88] 393 U.S. 483 (1969).

[89] *Casey*, 518 U.S. at 380 (Thomas, J., concurring) (quoting *Johnson*, 393 U.S. at 485).

[90] *See id.* at 386 (Thomas, J., concurring).

[91] *Id.* (Thomas, J., concurring) (quoting Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973)).

Another major concern for Justice Thomas was that the courts were requiring the state to pay for legal assistance to inmates.[92] According to Thomas's reasoning, the state does not have an obligation to pay for the non-incarcerated population's legal services and, therefore, has no obligation to provide these services to the incarcerated population:

> Like anyone else seeking to bring suit without the assistance of the State, prisoners can seek the advice of an attorney, whether *pro bono* or paid, and can turn to family, friends, other inmates, or public interest groups. Inmates can also take advantage of the liberal pleading rules for *pro se* litigants and the liberal rules governing appointment of counsel. Federal fee-shifting statutes and the promise of a contingency fee should also provide sufficient incentive for counsel to take meritorious cases.[93]

The *Casey* decision greatly reduced the likelihood of a successful claim for violation of an individual's right of access to the courts. The majority of challenges—if not all challenges—brought after *Casey* have failed to show the requisite injury as a result of alleged inadequate legal assistance.[94] Even if the inmates can show an inadequate system, it is difficult to prove a resultant harm. To do so, inmates would have to prove that, if it were not for the inadequacies of the system, they would have had a winning case. Not only do they essentially have to

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[92] *See id.* at 368 (Thomas, J., concurring).

[93] *Id.* at 375 n.4 (Thomas, J., concurring).

[94] *See* Dahler v. Goodman, No. 97-3177, 1998 WL 67359, at *2 (10th Cir. Feb. 19, 1998) ("As Lewis made clear, a prisoner may bring a claim alleging an infringement of his constitutional right of access to the courts based on alleged inadequacies in his prison's legal assistance program if, and only if, the prisoner can demonstrate that these inadequacies have caused him 'actual injury.'"); Ryder v. Van Ochten, No. 96-2043, 1997 WL 720482, at *2 (6th Cir. Nov. 12, 1997) ("*Lewis* also made clear that denial of an adequate law library or adequate assistance is not actionable unless the inmate can show that he suffered actual injury as a result of the inadequacy." (citing *Casey*, 518 U.S. at 351)); Beaven v. Debruyn, No. 96-3265, 1997 WL 599640, at *1 (7th Cir. Sept. 25, 1997) ("In order to state a claim for the violation of the constitutional right of access to the courts, an inmate must allege, not only a failure by prison officials to provide a constitutionally adequate legal assistance program . . . but also an 'actual injury' resulting from the inadequate program."); Klinger v. Department of Corrections, 107 F.3d 609, 617 (8th Cir. 1997) ("[W]e hold that plaintiffs' access-to-courts claim fails as a matter of law under *Lewis v. Casey* . . . . [A]ctual injury must be proven in order to prevail on an access-to-courts claim."); Weems v. Vose, No. 95-2235, 1996 WL 390465, at *1 (1st Cir. July 12, 1996) (finding that inmate failed to prove "actual injury" as required by *Casey*); Penrod v. Zavaras, 94 F.3d 1399, 1403 (10th Cir. 1996) ("[A]n inmate must satisfy the standing requirement of 'actual injury' by showing that the denial of legal resources hindered the prisoner's efforts to pursue a nonfrivolous claim.").

prove their case, but they also must show that they have suffered some resultant harm.

III. IMPACT OF *CASEY* IN THE CURRENT CONTEXT OF JUVENILE JUSTICE

Although no one has litigated the issue, it is likely that the holding in *Casey* will similarly reduce the state's affirmative obligations in protecting juveniles' right of access. Contrary to the opinion in *John L.*, the assistance of counsel probably no longer will be required. *Casey* discourages solutions such as those that the Sixth Circuit presented in *John L.* The holding in *Casey* substantially undercut any persuasive value that *John L.* might have had. States no longer have this incentive to hire attorneys or to place them in juvenile facilities.

While, at first glance, this undermining of *John L.* may not seem to be of great import, it is alarming when considered in conjunction with several current juvenile justice trends and issues. First, the juvenile justice system is becoming more punitive in nature. Second, unconstitutional conditions of confinement in juvenile facilities persist. Third, legislation has made it more difficult for incarcerated individuals to litigate.

Some might argue that juveniles do not deserve any special protections—that juvenile offenders should be treated similarly to adult offenders. Yet what juveniles are facing is not simply the withdrawal of a protective shield, but also the subjection to unconstitutional conditions of confinement without any effective defenses.

A. *Juvenile Justice: Moving Away from Rehabilitation*

Federal and state legislatures have turned to increasingly punitive measures to combat juvenile crime. Despite the fact that most juvenile offenders are status offenders or commit nonviolent crimes,[95] the nation increasingly bases its juvenile policy decisions on the perception of these youth as "'parasitic,' 'animalistic,' 'depraved,' 'super predators.'"[96] Longer periods of incarceration, increased ease of transferring a juvenile to adult court, and more punitive sanctions are part of a nationwide trend to "get tough" on juvenile crime.[97]

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[95] *See Juvenile Justice Awry*, AMERICA, Nov. 21, 1998, at 3 (stating that nonviolent offenses account for 94% of juvenile arrests).

[96] Charles J. Aron & Michele S. C. Hurley, *Juvenile Justice at the Crossroads*, 22 CHAMPION 10, 10 (June 1998).

[97] *See* CO. REV. STAT. §§ 19-2-516 to -518 (1998) (lowering the age of juveniles eligible for transfer to district court jurisdiction); CO. REV. STAT. §§ 19-2-107(1), 19-2-601(3)(a) (eliminating the right to a jury trial in most cases); KY. REV. STAT. ANN. §§ 635.060(4)-(5) (Banks-Baldwin 1995 & Supp. 1996) (increasing the potential incarceration period in a juvenile detention center from 30 to 90 days for children 16 years or older who commit public offenses); KY. REV. STAT. ANN. §§ 635.020(3) (Banks-Baldwin 1995 & Supp. 1996)

Recent federal legislative action has called the rehabilitative purpose of juvenile detention into question. For example, Senator Ashcroft, of Missouri, commented in a recent Senate Committee Hearing on the Violent and Repeat Juvenile Offender Act of 1997:[98]

> Today we are living with a juvenile justice system that was created around the time of the silent film. We are living with a juvenile justice system that reprimands the crime victim for being at the wrong place at the wrong time, and then turns around and hugs the juvenile terrorist, whispering ever so softly into his ear, "Don't worry, the State will cure you."[99]

The Violent and Repeat Juvenile Offender Act reflects the growing belief that "the rehabilitative model of sentencing for juveniles . . . is inadequate and inappropriate for dealing with violent and repeat juvenile offenders."[100]

State governments have been just as active, if not more so, in "reforming" juvenile justice.[101] For example, in the 1994-1995 state legislative session alone, states introduced over 700 juvenile justice reform bills.[102] States are punishing juvenile offenders as adults, increasing the potential length of juvenile incarceration, and allowing for the transfer of juveniles to the adult system at a younger age.[103]

This movement towards more punitive treatment of juveniles portends a future horror that this country's juvenile justice history foreshadows. The nation is

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(allowing for the transfer to adult court of a juvenile who is at least 16, who is accused of a felony, and who has a prior felony adjudication); *see also* Kim Brooks et al., *Beyond* In re Gault: *The Status of Juvenile Defense in Kentucky*, 5 KY. CHILDREN'S RTS. J. 1 (1997) (discussing modifications in Kentucky's juvenile justice system); James E. Craig, *Family Law Newsletter: Highlights of Colorado's New Juvenile Justice Provisions*, 26 COLO. LAW. 63 (1997) (discussing modifications to Colorado's juvenile justice code provisions).

[98] Violent and Repeat Juvenile Offender Act of 1997, S. 10, 105th Cong. § 2(a)(6) (1997).

[99] 143 CONG. REC. S145-01, at 145 (daily ed. Jan. 21, 1997) (statement of Sen. Ashcroft).

[100] Violent and Repeat Juvenile Offender Act of 1997, S. 10, 105th Cong. § 2(a)(6) (1997).

[101] *See* NATIONAL CRIMINAL JUSTICE ASSOCIATION, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, Juvenile Justice Reform Initiatives in the States 1994-1996 (Program Report) 79 (Oct. 1997); Robert B. Acton, Note, *Gubernatorial Initiatives and Rhetoric of Juvenile Justice Reform*, 5 J.L. & POL'Y 277, 281 n.21 (1996) (discussing the movements of numerous states—Alaska, Arkansas, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, North Carolina, North Dakota, Pennsylvania, Texas, and Virginia—toward a more punitive juvenile justice system); Fox Butterfield, *States Revamping Laws on Juveniles as Felonies Soar*, N.Y. TIMES, May 12, 1996, at 1.

[102] *See* Barry Krisberg, *The Legacy of Juvenile Corrections*, CORRECTIONS TODAY, Aug. 1, 1995, at 122, *available in* 1995 WL 15012604.

[103] *See supra* notes 2, 95-97 and accompanying text.

reversing course, paying little heed to the devastating lesson that history already taught it. The first juvenile detention centers in the United States opened in 1899, in response to atrocities that juveniles suffered in adult prisons.[104] A Justice Policy Institute ("JPI") report stated:

> Close to a century ago . . . the juvenile justice system was developed because children were subjected to unspeakable atrocities in adult jails, and were returned to society as hardened criminals. As the system developed, it became clear that housing young offenders and adult prisoners together was self-destructive and self-defeating.[105]

The creation of juvenile detention centers, however, did not resolve the problem of unconstitutional conditions of confinement. In the 1970s, juveniles in Arkansas facilities suffered such inhumane treatment as: being made to kill a dog as discipline; being forced to wear a dog's tail; being chained to a bed as punishment; being forced to eat feces and vomit; and being made to get on their hands and knees and oink like pigs.[106] When confronted with these troubling occurrences in the system, Arkansas officials responded that "the program was good and should be continued."[107] In another instance, a juvenile detention facility forced some of its youths to clean up after a suicide.[108]

Such brutal forms of punishment resulted in the stunned disbelief of many commentators. One noted that "[i]t is hard to believe that in the late twentieth century the American people would sanction such brutal treatment of children. Perhaps the human race is not far removed from those animals that attack their young."[109] Another commented that "[d]etention centers are nothing more than

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[104] *See* Joseph T. Christy, *Toward a Model Secure Detention Program: Lessons from Shuman Center, in* REFORMING JUVENILE DETENTION: NO MORE HIDDEN CLOSETS 108, 110 (Ira M. Schwartz & William H. Barton eds., 1994) [hereinafter REFORMING JUVENILE DETENTION] (citing T. Stokes & S. Smith, *Juvenile Detention: A Nationally Recognized Definition*, J. FOR JUV. JUST. & DETENTION SERV. 24-26 (1990)). State reform schools and juvenile facilities run by religious philanthropic organizations opened as early as 1825. *See* Krisberg, *supra* note 102, at 122.

[105] Alex Adwan, *Juveniles Behind Bars*, TULSA WORLD, July 20, 1997, at G1, *available in* 1997 WL 3643872 (quoting JASON ZIEDENBERG & VINCENT SCHIRALDI, JUVENILE POLICY INSTITUTE STUDY).

[106] *See* KENNETH WOODEN, WEEPING IN THE PLAYTIME OF OTHERS: AMERICA'S INCARCERATED CHILDREN 113-16 (1976).

[107] *Id.* at 115.

[108] *See* IRA M. SCHWARTZ, INJUSTICE FOR JUVENILES 13 (1989). Schwartz identifies other frightening conditions of confinement. *See id.* at 11-15.

[109] DONALD B. KING, 100 INJUSTICES TO THE CHILD 92 (1971) (quoting HOWARD JAMES, CHILDREN IN TROUBLE: A NATIONAL SCANDAL 106 (1970)).

factories of dehumanization and brutalization and from which the children are shipped out to larger institutions with longer histories of the same processes."[110]

Approximately thirty years ago in *Kent v. United States*,[111] the Supreme Court addressed such inequities in the juvenile justice system, noting that juveniles are not granted the same rights as adults and yet are not accorded beneficial treatment as a function of their age.[112] The Court stated that "[t]here is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[113]

Kent v. United States signaled the juvenile justice system's change in focus from punitive to rehabilitative goals. Shortly after the ruling in *Kent*, Congress passed the 1974 Juvenile Justice and Delinquency Prevention Act ("JJDPA").[114] The JJDPA explicitly focused on the individualized rehabilitative treatment, rather than punitive treatment, of juvenile offenders.[115] The legislation provided states with juvenile justice grants if they separated juvenile and adult offenders and promoted other "advanced juvenile justice practices."[116] Rehabilitation, despite differing opinions on whether the JJDPA successfully implemented it,[117] was widely-recognized as the primary goal of juvenile detention.[118] The National Juvenile Detention Association, as recently as 1990, defined juvenile detention as:

> the temporary and safe custody of juveniles who are accused of conduct subject to the jurisdiction of the court and require a restricted environment for their own community's safety while pending legal action . . . .

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[110] WOODEN, *supra* note 106, at 98.

[111] 383 U.S. 541 (1966).

[112] *See id.* at 555-56.

[113] *Id.* at 556.

[114] *See* Aron & Hurley, *supra* note 96, at 12.

[115] *See id.* The JJDPA modeled its provisions on Massachusetts' reforms to its juvenile justice system and the movement towards the use of smaller facilities and community-based programs. *See* Krisberg, *supra* note 102, at 122.

[116] Krisberg, *supra* note 102, at 122.

[117] *See id.* (indicating that the Reagan and Bush administrations did not support the JJDPA rehabilitative reforms and that the movement toward more punitive treatment of juveniles started in the 1980s); *"The Juvenile Crime Control and Delinquency Prevention Act of 1997" Draft Legislation Before the Subcomm. On Early Childhood, Youth and Families of the House Committee on Education and the Workforce*, 105th Cong. (1997) (statement of Michael Petit, Deputy Director, Child Welfare League of America) (discussing JJDPA's positive rehabilitative impact over the last two decades).

[118] *See* Holly Beatty, Comment, *Is the Trend to Expand Juvenile Transfer Statutes Just an Easy Answer to a Complex Problem?*, 26 U. TOL. L. REV. 979, 980-83 (1995) (discussing the traditional rehabilitative goals of the juvenile justice system).

> Further, juvenile detention provides a wide range of helpful services that support the juvenile's physical, emotional, and social development. Helpful services minimally include: education, recreation, counseling, nutrition, medical and health care services, reading, visitation, communication, and continuous supervision.[119]

If history is any indication, the movement back to a more punitive juvenile justice system will result in more severe conditions of confinement.

B. *Conditions of Confinement*

Although the trend toward a more punitive juvenile justice system likely will increase the severity and/or number of incidences of unconstitutional conditions of confinement, it is important to remember that juveniles are currently suffering unconstitutional conditions of confinement.[120] Circuit Judge Tom Peterson of Dade County, Florida stated: "This is the year for locking kids up, so it's hard to get people worked up . . . [b]ut I've been in this business for 30 years and never seen anything like it."[121] As Virginia officials recently noted, "get tough" legislation has aggravated overcrowding and conditions of confinement in juvenile facilities.[122] In a recent study, juvenile detention centers largely failed to meet all six basic health service criteria.[123] Overcrowding and failure to provide educational services are just two

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[119] Christy, *supra* note 104, at 108, 110 (citing Stokes & Smith, *supra* note 104, at 24-26).

[120] *See infra* note 123 and accompanying text.

[121] Sarah Huntley, *Teens Doing Hard Time in Prison Outrages Judge*, TAMPA TRIB., Oct. 3, 1997, at 1, *available in* 1997 WL 13835816 (discussing poor conditions of confinement and treatment of juveniles at the Pahokee Youth Development Center such as forcing juveniles to stand, stripped to their underwear, in solitary confinement); *see also Kenton's Dungeon*, COURIER-J. (Louisville, Ky.), July 31, 1996, at 6A, *available in* 1996 WL 6356476 (stating that "[a]nyone who believes that state-sanctioned abuse of juveniles went out with the 19th Century should read U. S. District Judge William O. Bertelsman's account of how young people are treated at the Kenton County jail. It sounds like it came from a Charles Dickens novel.").

[122] *See* Frank Green, *Efforts in Prisons Defended*, RICHMOND TIMES-DISPATCH, Feb. 17, 1996, at B1, *available in* 1996 WL 2290939.

[123] *See* HOWARD N. SNYDER & MELISSA SICKMUND, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 152, 173 (Aug. 1995). Less than half of the juvenile facilities met the stated criteria.

other concerns that juvenile facilities have failed to address.[124] One author even has termed the incarceration of juveniles "legalized child abuse."[125]

Overcrowding presents the most prevalent, and probably most widely-recognized, impact on confinement conditions.[126] A 1993 study found that more than seventy-five percent of the confined juvenile population resided in overcrowded facilities.[127] In 1991, thirty percent of the juveniles slept in under-sized rooms.[128] In 1996, the *Washington Post* and the American Civil Liberties Union ("ACLU") cited Maryland juvenile detention centers for operating at forty percent above the capacity they could house "safely."[129] ACLU legislative counsel Mark Kappelhoff stated that "[s]ending children to overcrowded and dilapidated detention facilities with limited education, counseling or treatment programs is not only a blueprint for catastrophe . . . but it promises to produce numerous children who are entirely ill prepared to face the many challenges confronting them when they are returned back to society."[130]

Overcrowding also can indicate other problematic conditions of confinement such as more incidents of institutional violence, suicidal behavior, and increased use of short-term isolation.[131] As one author has noted, overcrowded conditions can result in additional problems in the facilities: "Overcrowded facilities, particularly facilities in jurisdictions with dwindling fiscal resources, will inevitably lead to deteriorating conditions of confinement, unprofessional practices, media exposés, and

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[124] *See id.* at 149, 170; Kellie Patrick, *County Gives Low Grade to Youth Center; Classes Don't Meet Needs, Review Says*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Jan. 23, 1999, at 3B (discussing lack of proper education for juveniles in the Pahokee Youth Development Center); Frank Green, *Beaumont Teaching Alleged to Be Lacking*, RICHMOND TIMES-DISPATCH, July 10, 1996, at A1 (discussing probe into lack of education for some detained juveniles in Virginia).

[125] WOODEN, *supra* note 106, at 106.

[126] *See* SNYDER & SICKMUND, *supra* note 123, at 149.

[127] *See* BARBARA ALLEN-HAGEN, OFFICE OF JUVENILE JUSTICE DELINQUENCY PREVENTION, CONDITIONS OF CONFINEMENT IN JUVENILE DETENTION AND CORRECTIONAL FACILITIES (Fact Sheet No. 1) (visited Feb. 10, 1999) <http://www.ncjrs.org/txtfiles/ccdet.txt>; *c.f.* SNYDER & SICKMUND, *supra* note 123, at 149 (stating that in 1991, 74% of juveniles resided in crowded detention centers); Ira M. Schwartz & Deborah A. Willis, *National Trends in Juvenile Detention*, *in* REFORMING JUVENILE DETENTION, *supra* note 104, at 13, 16 ("In 1979, 6.4% of public detention centers in the United States were over capacity, housing 8.8% of all youth incarcerated in detention centers. By 1989, 27.5% of the facilities were over capacity, housing 50.4% of all incarcerated youth.").

[128] *See* SNYDER & SICKMUND, *supra* note 123, at 149.

[129] *See* ACLU News Wire, *MD Youth Detention System Strained Beyond Capacity* (last modified Sept. 6, 1996) <http://www.aclu.org/news/w090696b.html>.

[130] *Id.*

[131] *See* ALLEN-HAGEN, *supra* note 127.

possible exposure to litigation."[132] Overcrowding presents a security threat and diminishes quality control.[133]

Juvenile institutions' reliance on solitary confinement as a punitive measure, especially if used frequently or for long periods of time, can be unconstitutional. One author noted that "[c]onditions of solitary confinement have sometimes been considered as cruel and unusual punishment; the psychological factor of keeping a child in solitary confinement is most severe."[134] A recent study by the Office of Juvenile Justice and Delinquency Prevention ("OJJDP"), however, found that facilities housing fifteen percent of the incarcerated juveniles had no time limits on isolation.[135] A separate study found that in a one year period, more than 435,800 juveniles were held in short-term isolation, for anywhere between one and twenty-four hours.[136] The finding of this study also indicated that during the same time period, almost 84,000 juveniles were put in isolation for longer than twenty-four hours.[137]

For a number of juveniles, suicide is the only way out. Over the course of one year, 11,000 incarcerated juveniles committed 17,600 acts of suicidal behavior.[138] In 1990 alone, ten incarcerated juveniles actually committed suicide.[139] A sixteen year-old female who committed suicide while in an Illinois institution wrote the following poem expressing the isolation she suffered:

> There is a crack in the Earth
> And I'll have fallen in.
> Down in the darkness where I have never been.
> People are looking, staring at me;
> I lie here and wonder what do they see?
> Shall I be here forever
> I can not climb back

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[132] Ira M. Schwartz & Deborah A. Willis, *National Trends in Juvenile Detention*, *in* REFORMING JUVENILE DETENTION, *supra* note 104, at 13, 20.

[133] *See* Teri K. Martin, *Determinants of Juvenile Detention Rates*, *in* REFORMING JUVENILE DETENTION, *supra* note 104, at 30 ("Overcrowding of juvenile detention facilities threatens the security of residents and staff and undermines the quality of care which can be provided.").

[134] KING, *supra* note 109, at 92.

[135] *See* SNYDER & SICKMUND, *supra* note 123, at 151.

[136] *See* ALLEN-HAGEN, *supra* note 127.

[137] *See id.*

[138] *See id; see also* Michelle India Baird & Mina B. Samuels, *Justice for Youth: The Betrayal of Childhood in the United States*, 5 J.L. & POL'Y 177, 198 (1996) (stating that "each year 11,500 out of 65,000 incarcerated children commit suicidal acts" (citing NATIONAL CRIMINAL JUSTICE COMMISSION, THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 12, 131 (Steven R. Donziger ed., 1996)).

[139] *See* ALLEN-HAGEN, *supra* note 127.

Rotting and dying in this horrible crack
Am I alive or am I dead.
Oh God, who will save me from
This crack in my head?[140]

The increasing transfer of juveniles into adult facilities also is reason for concern. Studies have shown that children in adult facilities are five times more likely to be sexually assaulted, two times more likely to suffer physical abuse at the hands of prison staff, and fifty percent more likely to be attacked with a weapon than children in juvenile facilities.[141] Representative William Delahunt of Massachusetts, discussing the dangers of incarcerating juveniles with adults, stated that an adult prison is "a graduate school of crime for children."[142]

Conditions of confinement challenges, although rare for juveniles, tell the story of a system in need of reform.[143] In 1993, United States District Court Judge Richard M. Bilby issued a consent decree mandating 109 changes in Arizona's juvenile

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[140] WOODEN, *supra* note 106, at 149.

[141] *See* American Civil Liberties Union, *ACLU Factsheet on the Juvenile Justice System* (visited Feb. 10, 1999) <http://www.aclu.org/library/fctsht.html> (citing Jeffrey Fagan et al., *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 1 (1989); *see also* Adwan, *supra* note 105, at G1 (discussing the findings of a Justice Policy Institute study stating "that the youngest inmates in adult prisons are the 'prototype' of a prison rape victim").

[142] Associated Press, *Officials at Odds Over Fate of Young Offenders*, TULSA WORLD, June 10, 1997, at A7, *available in* 1997 WL 3640621.

[143] In addition to the cases discussed in this Note, the American Bar Association Juvenile Justice Center web site offers synopses of conditions of confinement for incarcerated juveniles. *See* ABA Criminal Justice Section Juvenile Justice Center, *Juvenile State Round-Up: 1/6/98* (visited Feb. 10, 1999) <http://www.abanet.org/crimjust/juvjus/1698ru.html> (discussing a federal court jury's award of $8,000 to a teenager incarcerated in Arkansas' Washington County jail who "had been beaten, raped and sodomized, had salt rubbed in wounds, orange peelings rubbed in his eyes, and was forced to lick blood off other inmates over a period of five days"); ABA Criminal Justice Section Juvenile Justice Center, *Juvenile State Round-Up: 11/10/97* (visited Feb. 10, 1999) <http://www.abanet.org/crimjust/juvjus/11-10state.html> (discussing a California grand jury decision declaring San Francisco's Juvenile Hall "unfit to house the city's children" because the institution did not have water sprinklers or a central locking system); ABA Criminal Justice Section Juvenile Justice Center, *Juvenile State Round-Up: 7/30/97* (visited Feb. 10, 1999) <http://www.abanet.org/crimjust/juvjus/7-30state.html> (noting Kentucky's "inadequate and even abusive care of committed juveniles" and discussing a U.S. District Court Judge's finding that conditions and overcrowding in South Carolina's juvenile prisons were unconstitutional). In addition, the Human Rights Watch web site occasionally includes information on conditions of confinement. *See, e.g.*, Human Rights Watch, *Conditions of Confinement for Children in Colorado Fail to Meet International Standards* (visited Feb. 10, 1999) <http://www.hrw.org/hrw/press/colorado.htm> (discussing human rights abuses in the Colorado juvenile system).

detention program.[144] Those who think that incarcerated juveniles receive "Club Med" treatment are not entirely incorrect. "Club Med" was the term for an incident in an Orlando juvenile detention center where guards locked several young boys in a room with four larger boys and they were "beaten with towels, forced to do exercises and punched."[145]

These are not isolated examples of abuse. In February 1998, the Justice Department called for Georgia to reform its juvenile prison system, accusing the state of "'egregious,' 'abusive' and 'grossly substandard' conditions"[146] including: physically abusing juveniles, stripping juveniles and leaving them locked naked in their cells for days, using chemical and mechanical restraints on mentally ill juveniles, and failing to provide them with adequate education, medical, mental health, and rehabilitative services.[147]

In South Carolina, U.S. District Court Judge Joseph Anderson ruled that overcrowded prisons violated juvenile inmates' constitutional rights.[148] The December 1990 class action lawsuit had alleged "[s]evere overcrowding, spoiled food, use of tear gas to maintain discipline and an understaffed infirmary."[149] Despite the order to improve conditions,[150] juveniles reported in 1996 affidavits that "they were hog tied for hours at a time . . . with their wrists handcuffed behind their backs and tied to their feet . . . . Others said up to 20 youths were crammed for up to a day into a cell designed for four, without access to a bathroom."[151]

Juveniles in the Louisiana juvenile corrections systems spoke of guards who beat them with broomsticks, sexually abused them, and punched them until they bled.[152]

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[144] *See A Quick Guide to the History of the Arizona Department of Juvenile Corrections* (visited Feb. 10, 1999) <http://www.juvenile.state.az.us/html>. The consent decree resulted from a 1986 civil rights lawsuit that Mathew Davey Johnson, an incarcerated juvenile held in the Catalina Mountain secure facility, brought against the Catalina Mountain superintendent James Upchurch and the state of Arizona. *See id.*

[145] Debbie Salamone, *2 Ex-Guards at Juvenile Home Avoid Prison Time*, ORLANDO SENTINEL, Mar. 14, 1997, at D1, *available in* 1997 WL 2761830.

[146] New York Times News Service, *Ga. Vows to Improve Its Juvenile Prisons*, BALTIMORE SUN, Mar. 22, 1998, at 10A, *available in* 1998 WL 4957517.

[147] *See Reform Deal to Aid Georgia's Juvenile Inmates*, S.F. EXAMINER, Mar. 22, 1998, at A7, *available in* 1998 WL 5181422; Steve Visser & Peter Mantius, *U.S., Ga. Reach Pact on Youth Jails*, ATLANTA CONST., Mar. 18, 1998, at F1, *available in* 1998 WL 3683027 (also stating that 75% of these juveniles were detained for nonviolent or status offenses).

[148] Douglas Davisson, *Charges of Mistreatment Resurface at Juvenile Prison*, THE HERALD (Rock Hill, S.C.), Dec. 5, 1996, at 6A, *available in* 1996 WL 8280053.

[149] Douglas Davisson, *DJJ Opens Center to Evaluate Juveniles*, THE HERALD (Rock Hill, S.C.), July 30, 1997, at 1A, *available in* 1997 WL 8123190.

[150] *See* Davisson, *supra* note 148, at 6A.

[151] *Id.*

[152] *See* James Varney, *Youngsters Brutalized Despite Reform Efforts*, NEW ORLEANS TIMES-PICAYUNE, Aug. 1, 1997, at A1, *available in* 1997 WL 12658262.

These abuses continued despite similar findings in a 1996 Justice Department Report on Louisiana juveniles facilities and subsequent state reform efforts.[153] The 1996 report found that "'[l]iterally dozens of juveniles are being seriously injured on a monthly basis across the four facilities .... The incidence of fractures to jaws, noses, cheeks, and eye sockets, as well as serious lacerations requiring sutures (usually to faces) is disturbing.'"[154]

C. *Trend of Cutting Back on Prisoner Litigation*

Not only are conditions of confinement bad and likely to get worse, but the government also has made it increasingly difficult for incarcerated individuals to bring lawsuits challenging these conditions. The Prison Litigation Reform Act ("PLRA") presents the most significant of these obstacles.[155]

Although the aim of the PLRA is to reduce the number of frivolous lawsuits, it simultaneously fashions more hoops through which the legitimate plaintiff must jump.[156] John Boston, the director of the Prisoners' Rights Project of the New York City Legal Aid Society, noted some of the dangerous effects of the PLRA in a recent editorial:

> [Its] provisions deny outright any legal remedy for serious violations of the law. One prohibits cases "for mental or emotional injury" to inmates "without a prior showing of physical injury." If upheld, and interpreted as government lawyers have been urging, this provision will bar any remedy for constitutional violations that do not leave marks: denial of mental health care (unless the inmate commits suicide or self-mutilates), racial discrimination, denial of religious freedom, retaliation for filing grievances and many others.[157]

The PLRA also limits the ability of courts to grant prospective relief and to issue consent decrees.[158] The PLRA allows for the termination of a consent decree unless it meets certain specific requirements.[159] When Congress was considering the PLRA, Senator Joseph Biden, of Delaware, pointed out the devastating effects that it could

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[153] *See id.*

[154] *Id.* (quoting JUSTICE DEPARTMENT REPORT (June 1996)).

[155] *See* Russ Pulliam, *An Alternative to Overcrowding*, INDIANAPOLIS STAR, Aug. 5, 1998, at A8 (stating that a sheriff's decision to double-bunk inmates likely would not be overruled because of the PLRA).

[156] *See id.*

[157] John Boston, *PLRA Is Not the Answer*, CORRECTIONS TODAY, Aug. 1, 1998, at 21.

[158] *See id.*; David C. Leven, *25 Years After Attica*, N.Y.L.J., Sept. 19, 1996, at 2.

[159] *See* Ira Bloom, *Prisons, Prisoners, and Pine Forests: Congress Breaches the Wall Separating Legislative from Judicial Power*, 40 ARIZ. L. REV. 389, 411 (1998).

have on children. He noted that staff members of a Pennsylvania juvenile detention facility (at 160 percent holding capacity) often beat the children with chains and other objects.[160] Only the entry of a court order resolved these problems.[161] Mark Soler, president of the Youth Law Center, a national public interest law firm, later testified that legislators failed to consider the impact of the PLRA on children.[162] He emphasized the importance of consent decrees in previous jail and juvenile facility cases; these decrees were now in danger of being terminated since none of them contained the required PLRA findings.[163]

Prison litigation, although often seen as largely frivolous,[164] has played an important role in asserting and guaranteeing the rights of the prison population. One commentator correctly summarized the importance of prison litigation: "Perhaps more than any other single mechanism, prisoner litigation has contributed to prison reform, and even when a suit is lost, litigation opens the windows of prisons just a bit wider to make their historically dark interiors just a bit more visible to those on the outside."[165] Conditions of confinement challenges are particularly important, and result in substantial improvements to the adult system.

As important as this litigation historically has been, and continues to be, for adult inmates, the defense of incarcerated juveniles' rights takes on added importance.[166] As one juvenile expert noted "children are often unable to defend themselves or assert their rights in any meaningful way."[167]

A lawyer plays an integral role in the litigation process for incarcerated juveniles. Unlike adult inmates who have the ability to bring "pro se" litigation, juveniles as a class lack the proper standing and requisite skill. In general, the "[a]ssistance of a legal counsel facilitates a more efficient and skillful handling of their complaints and assures inmates of fair treatment and 'protection of our most valued rights.'"[168]

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[160] *See* 141 CONG. REC. S14,628 (daily ed. Sept. 29, 1995) (statement of Sen. Biden).

[161] *See id.*

[162] *See Implementation of Prisoners Rights Legislation: Testimony of Mark I. Soler Hearings on Pub. L. No. 104-134 Before the Senate Judiciary Comm. on the Prison Litigation Reform Act*, 104th Cong. 58 (Sept. 25, 1996), *available in* 1996 WL 556530.

[163] *See id.*

[164] *See* Sandra J. Senn, *Stemming of the Tide: Reduction in Federal Pro Se Prisoner Lawsuits*, 9 S.C. LAW. 24, 25 (1997) ("What began in the 1960s with a liberal stance by the judiciary on the issue of prisoners' rights has now blossomed into an expensive playpen for convicts and detainees.").

[165] JIM THOMAS, PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER 5 (1988).

[166] *See* KING, *supra* note 109, at 90.

[167] *Id.* at 91.

[168] Song Hill, Casey v. Lewis: *The Legal Burden is Raised; The Physical Barrier is Spared*, 25 GOLDEN GATE U. L. REV. 1, 29 (1995) (quoting Bounds v. Smith, 430 U.S. 817, 827, 831 (1977) (citation omitted)).

Alone, juveniles do not have the background necessary to investigate and bring their own claims.[169]

By scaling back an inmate's ability to bring a legal claim, governmental power increases. As one of the amicus briefs for the petitioners in *Casey* stated, "without some access to the courts, then there is no possible limit on governmental power."[170] Without access to courts, inmates have no method to enforce their other legal rights.[171]

The "politics of secrecy"[172] in the institutional setting demands that juveniles have access to legal counsel in order to protect their rights.[173] "This deliberate 'politics of secrecy' . . . keeps the American public ignorant of what is happening to their 100,000 children imprisoned at this very moment."[174] Patricia Wald has described juvenile detention as the "'hidden closet for the skeletons of the rest of the system.'"[175] This secrecy can result in public ignorance regarding confinement conditions especially when prison staff utilize the "CYA" or "Cover Your Ass" policy to explain the use of physical punishment to outsiders.[176] Scholars Ira M.

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[169] *See infra* notes 196-221 and accompanying text.

[170] Transcript of Oral Argument at *38, Lewis v. Casey, 518 U.S. 343 (1996) (No. 94-1511), *available in* 1995 WL 712349.

[171] *See* Julie B. Nobel, Note, *Ensuring Meaningful Jailhouse Legal Assistance: The Need for a Jailhouse Lawyer-Inmate Privilege*, 18 CARDOZO L. REV. 1569, 1594 (1997).

[172] Senator Bayh noted:

> Almost as a rule, confinement institutions are closed systems inaccessible to public inspection, inaccessible even to judicial review.
>
> . . . The young inmates are often treated as if they were slaves, while the guards, too often, become unchallenged tyrants, who can send children to the "hole" on mere whim or fancied slight. The guard's word is law, not to be challenged or questioned.

Juvenile Confinement Institutions and Correctional Systems: Hearings on S. 32 Before the Subcomm. to Investigate Juvenile Delinquency, 92nd Cong. 3 (1971) (statement of Sen. Birch Bayh, chairman of the subcommittee).

[173] *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 354-55 (1987) (Brennan, J., dissenting). Justice Brennan stated:

> Prisoners are persons whom most of us would rather not think about. . . . [T]hey exist in a shadow world that only dimly enters our awareness.
>
> . . . When prisoners emerge from the shadows to press a constitutional claim, they invoke no alien set of principles drawn from a distant culture. Rather, they speak the language of the charter upon which all of us rely to hold official power accountable. They ask us to acknowledge that power exercised in the shadows must be restrained at least as diligently as power that acts in the sunlight.

Id.

[174] WOODEN, *supra* note 106, at 21.

[175] William H. Barton & Ira M. Schwartz, *Introduction*, *in* REFORMING JUVENILE DETENTION, *supra* note 104, at 1, 1 (quoting I. M. Schwartz et al., *Juvenile Detention: The Hidden Closet Revisited*, 4 Q. JUST. 219-35 (1987)).

[176] *See* WOODEN, *supra* note 106, at 115.

Schwartz and Deborah A. Willis maintain that "[b]ecause detention centers are hidden from view, the problems which confronted the system 20 years ago remain unaddressed and appear to be spiraling out of control."[177]

The increasing trend toward privatization of detention centers calls for even greater concern regarding the accountability of prison officials.[178] The focus quickly shifts from traditional goals to profit margins and the 3.2 billion dollar annual juvenile justice "market."[179] Opponents of privatization have argued that the goals of incarceration and detention cannot be met simultaneously with a profit motive: "the most humanistic concepts can be corrupted by those who are relied upon to actualize them when the lure of financial gain relegates the welfare of the children to secondary importance."[180]

Inhumane treatment in juvenile facilities more likely will go undetected if juveniles are not provided with an opportunity to voice their complaints to an attorney. Not providing juveniles with the assistance of legal counsel only continues a detrimental trend denying them appropriate representation. Juveniles usually do not receive legal counsel and assistance until the adjudicatory phase, if then. The lack of representation can be astonishing—in three surveyed states, less than fifty percent of juveniles charged with delinquency received legal representation.[181] Thus, they enter the juvenile detention centers without having received any legal assistance.[182]

The snapshot of juvenile lawsuits gets lost in the bigger picture of frivolous prison litigation. Although only one percent of prisoner petitions are successful,[183] juveniles rarely file frivolous lawsuits—they understand less about their constitutional rights and, as Mark Soler noted from his experience, "are reluctant to

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[177] Ira M. Schwartz & Deborah A. Willis, *National Trends in Juvenile Justice*, *in* REFORMING JUVENILE DETENTION, *supra* note 104, at 13, 21.

[178] Several recent reports on poor conditions of confinement have involved privately run juvenile institutions. *See, e.g.*, Heather Szerlag, *Searching for the Bottom Line: Teen Girl's Death Probed at YSI Iowa Center*, YOUTH TODAY, Jan./Feb. 1996, at 48.

[179] *Id.*

[180] WOODEN, *supra* note 106, at 231.

[181] *See* DOUGLAS C. DODGE, OFFICE OF JUVENILE JUSTICE DELINQUENCY AND PREVENTION, DUE PROCESS ADVOCACY (Fact Sheet No. 49) (Jan. 1997) (explaining that this lack of representation can be attributed to "parents' reluctance to retain an attorney; inadequate public defender legal services in nonurban areas; and judicial ambivalence toward advocacy in treatment-oriented juvenile courts").

[182] *See* Sharon McCully, *Detention Reform from a Judge's Viewpoint*, *in* REFORMING JUVENILE DETENTION, *supra* note 104, at 162, 165. An additional concern is the number of juveniles who waive the right to counsel in delinquency proceedings. *See* DODGE, *supra* note 181 (noting that 34% of the public defender offices surveyed reported that "juveniles 'often' waive" their right to counsel).

[183] *See* Transcript of Oral Argument at *47, Lewis v. Casey, 518 U.S. 343 (1996) (No. 94-1511), *available in* 1995 WL 712349.

take action, fearing retribution by staff or thinking that they 'deserve' the treatment they got."[184] Furthermore, providing juvenile inmates with legal assistance actually could reduce frivolous claims. According to the oral argument of Ms. Alexander, attorney for Fletcher Casey in *Lewis v. Casey*, "the studies of effective legal access program[s] show that the effect of the program[s] is to reduce the filing of frivolous lawsuits. The volume goes down, because once prisoners have some opportunity to know what [the requirements are]."[185] Juveniles need access to an attorney in order to determine both their constitutional rights and whether filing a claim would be frivolous.

Lack of attorney assistance denies juveniles meaningful access to the courts and, therefore, denies them an avenue to address valid complaints. Irreparable harm can result to the child who has no outlet to vent their complaints or frustrations. The increasing emphasis on punishment, rather than on rehabilitation, fails to recognize that the majority of these children will be returned to society. If a fifteen-year-old child is sentenced to twenty-five years of poor treatment, then society cannot expect them to behave in conformance with societal norms upon their release. One counselor, and former inmate, noted:

> Our prisons and reformatories are still places where we house the most wretched members of our society, and expect them to be magically transformed into acceptable citizens.
>
> That the frogs we wish to become kings usually remain frogs should come as no surprise to us. Legend has it that in order for a frog to become a king, the frog must be kissed by a princess. We don't kiss our frogs, we crush them and we wonder that we have created only crippled frogs instead of kings.[186]

As the National Juvenile Defender Association recognized in their mission statement, "[b]ecause juveniles are immature and still developing, the impact of environment is forceful. No environment is neutral; it either fosters development or damages it."[187] When the juveniles are released from detention, they may react negatively to law enforcement if their experiences while in detention were unfavorable. An FBI agent noted that "'[t]hese are the kids who someday will kill a cop for giving them a traffic ticket just because of attitudes developed toward

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[184] *Implementation of Prisoners Rights Legislation*, *supra* note 162.

[185] Transcript of Oral Argument at *38, Lewis v. Casey, 518 U.S. 343 (1996) (No. 94-1511), *available in* 1995 WL 712349.

[186] *Juvenile Confinement Institutions and Correctional Systems, Hearings on S. Res. 32 Before the Subcomm. to Investigate Juvenile Delinquency*, 92nd Cong. 596 (1971) (statement of Charles Scott, Counselor, Maryland Training School for Boys, Baltimore, Md., and former prison inmate).

[187] Christy, *supra* note 104, at 108, 111.

authority while in [a juvenile facility].'"[188] Attorney assistance in resolving conditions is, therefore, not only in the best interest of the incarcerated juvenile, but also in society's best interest.

IV. THE POST-*CASEY* PERSUASIVE AUTHORITY OF *JOHN L.*

Despite the apparent detrimental impact of *Casey* on the *John L.* decision, it is possible to postulate several arguments as to why *John L.* should remain good law. The Court in *Casey* left the door slightly open for juveniles: first, *Casey* was a plurality opinion lacking a strong concurrence; second, juveniles may deserve additional protection as a special class of inmates; and third, the lack of legal representation for juveniles may itself meet the *Casey* "actual injury" requirement.

A. *The* Casey *Decision Does Not Give Clear Direction*

The Court's decision in *Casey* was not as definitive as the eight-to-one vote would make it appear. Three justices, Souter, Ginsburg, and Breyer, joined in the *Casey* judgment but dissented in Part II of the opinion.[189] Justice Stevens dissented in the entirety.[190]

System-wide relief was not appropriate in *Casey* because there were only isolated incidents of constitutional violations among the few illiterate and segregated prisoners. Justice Souter stated that this type of relief did not apply in *Casey* because of "the respondents' failure to prove that denials of access to illiterate prisoners pervaded the State's prison system."[191] The majority, in Part II of the *Casey* opinion,

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[188] WOODEN, *supra* note 106, at 21 (quoting Agent Bob Nixon). In fact, some studies indicate that a large percentage of adult inmates were juvenile offenders. Charles Manson, right before being convicted of murder, provided the following chilling testimony:

> I haven't decided yet what I am or who I am. I was given a name and a number and I was put in a cell and I have lived in a cell with a name and a number . . . . I never went to school, so I never growed up in the respect to learn, to read and write too good. So I stayed in that jail and I have stayed stupid, and I have stayed a child while I have watched your world grow up. . . . I have done my best to get along in your world and now you want to kill me . . . . Ha! I'm already dead, have been dead all my life. I've lived in your tomb that you built. I did seven years for a $37.50 check. I did 12 years because I didn't have any parents . . . . When you were out riding your bicycle, I was sitting in your cell looking out the window and looking at pictures in magazines and wishing I could go to high school and go to the proms, wishing I could go to the things you could do, but oh so glad, oh so glad, brothers and sisters, that I am what I am.

Id. at 57.

[189] *See* Lewis v. Casey, 518 U.S. 343, 393 (1996).

[190] *See id.* at 404 (Stevens, J., dissenting).

[191] *Id.* at 397 (Souter, J., concurring).

stated that "the court's failure to identify anything more than isolated instances of actual injury renders its finding of a systemic *Bounds* violation invalid."[192] However, in a juvenile detention center, system-wide relief would be appropriate because the entire inmate population is a special class in need of access to counsel.[193]

The Supreme Court, in discussing the juvenile's right to counsel in initial proceedings, has indicated that it may be amenable to such arguments. On numerous occasions since the *Gault* decision, the Court has articulated the importance of an attorney's role in juvenile proceedings. In *Fare v. Michael C.*,[194] the Court stated that "the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts."[195]

B. *Juveniles as a Special Class of Inmates*

Juveniles are a distinct class of inmates requiring affirmative assistance. *Casey* recognized that some individuals must be provided legal assistance, but stated that providing illiterate and non-English speaking inmates with adequate legal assistance did not mandate a system-wide remedy.[196]

In determining whether juveniles should be classified as a group in need of special treatment, courts should look to the characteristics of the inmate population at issue. An amicus brief filed for the petitioners in *Casey* stated that, "[t]he right of access to the courts requires corrections officials to afford inmates a meaningful opportunity to present constitutional claims in a judicial forum. That principle requires officials to consider the general character and circumstances of various inmate populations."[197] The brief discussed an earlier Supreme Court decision, *Morrissey v. Brewer*,[198] in which the Court stated that "due process is flexible and calls for such procedural protections as the particular situation demands."[199]

Procedures must be based on "the capacities and circumstances of those who are to be heard."[200] One can present a strong argument that juveniles do not have the capability of bringing a challenge.[201] *Bounds*, however, guarantees

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[192] *Id.* at 349.

[193] *See infra* text accompanying notes 196-221.

[194] 442 U.S. 707 (1979).

[195] *Id.* at 719.

[196] *See Casey*, 518 U.S. at 360.

[197] Amicus Brief at *8, Lewis v. Casey, 518 U.S. 343 (1996) (No. 94-1511), *available in* 1995 WL 782808.

[198] 408 U.S. 471 (1972).

[199] *Id.* at 481.

[200] Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970).

[201] See *Younger v. Gilmore*, 319 F. Supp. 105 (N.D.Cal. 1970), in which the court stated:
A prisoner should know the rules concerning venue, jurisdiction, exhaustion of remedies, and proper parties respondent. He should know *which* facts are legally

> the conferral of a capability—the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts. When any inmate, even an illiterate or non-English speaking inmate, shows that an actionable claim of this nature which he desired to bring has been lost or rejected, or that the presentation of such a claim is currently being prevented, because this capability of filing suit has not been provided, he demonstrates that the State has failed to furnish "adequate law libraries or adequate assistance from persons trained in the law."[202]

In *Casey*, the Court did not discuss and, thus, did not overturn, this aspect of *Bounds*. In a slightly different context, one commentator has noted that the "'peculiar vulnerabilities'" of juveniles justify their claims to appointed counsel.[203] Building on Blackstone's words that the "'very disabilities [of minors] are privileges,'"[204] Catherine Ross, a visiting professor at Boston College Law School, argues that the differences between the average child and average adult, although traditionally used to minimize children's rights, mandate the appointment of counsel for juveniles in civil litigation.[205] Ross notes the several areas of law already requiring legal representation for juveniles including: the termination of parental rights; abuse, neglect, or dependency proceedings; delinquency proceedings that may result in incarceration; as well as custody proceedings and some civil litigation brought under some states' statutes.[206] Ross argues only for the extension of the right

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> significant, and merit presentation to the court, and which are irrelevant and confusing. . . .
>
> "Access to the courts," then, is a larger concept than that put forward by the State. It encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him.

Id. at 110. Without counsel, juveniles do not have access to the courts.

[202] *Casey*, 518 U.S. at 356 (emphasis omitted) (quoting Bounds v. Smith, 430 U.S. 817, 828 (1977)).

[203] *See* Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1571 (1996) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 452 (1992)).

[204] *Id.* (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 452 (1992)).

[205] *See id.* at 1571-72.

[206] *See id.* at 1574-75; *see also* Public Welfare, 45 C.F.R. § 1340.14(g) (1994) (mandating the appointment of a guardian ad litem for judicial proceedings involving abuse and neglect); MASS. ANN. LAWS ch. 119, § 39F (Law Co-op. 1994) (providing for children's right of counsel in juvenile proceedings if child is "in need of services"); N.H. REV. STAT. ANN. § 458:17-a (1983) (providing for a guardian ad litem for children during divorce proceedings); WIS. STAT. ANN. § 767.045 (West 1998) (requiring the appointment of a guardian ad litem

to counsel in civil litigation cases when a child is called before a court.[207] Many of her arguments, however, could support the assertion that incarcerated juveniles should have legal representation.[208]

Ross maintains that one of the main differences between juveniles and adults is their ability to communicate.[209] Effective communication is a learned skill—a skill garnered through years of experience. In support of her argument, Ross quotes Danish novelist Peter Høeg:

> Speaking is not easy. All your life you have listened, or looked as if you were listening. The living word came down to you, it was not something you, personally, gave voice to. You spoke only after having put up your hand, and when you had been asked a question, and you said what was certain and correct . . . .
>
> The hurdles to communication by children on their own behalf are ameliorated by the classic functions of the advocate's craft—listening, eliciting information, tracking down facts, and using all of those tools to advance a position.[210]

Ross also discusses the differences between children and adults in terms of cognition, emotion, and judgment.[211] Ross argues that: "vulnerability is a bundle of presumed, perceived, or measurable ways in which children differ from adults in dimensions such as factual understanding, inferential understanding (appreciation), reasoning (both intellectual and moral), and ability to exercise choice, including understanding the repercussions of choice."[212]

Interestingly, Ross compares children to prisoners in arguing for the appointment of counsel to children.[213] If, as Ross suggests, "[t]he view of children as prisoners functions as a metaphor for powerlessness and lack of control,"[214] then surely incarcerated children are deserving of the utmost protection.

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in actions involving the family); *In re* Gault, 387 U.S. 1, 36-37 (1967) (holding that juveniles have a right to representation in judicial proceedings that may result in incarceration); Howard A. Davidson, *The Child's Right to Be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 269-70, 270 n.58 (1991) (discussing some states' requirements for appointing a guardian ad litem in custody cases).

[207] *See* Ross, *supra* note 203, at 1575.

[208] *See infra* notes 211-14 and accompanying text.

[209] *See* Ross, *supra* note 203 at 1578.

[210] *Id.* (quoting PETER HØEG, BORDERLINERS 218 (1994)).

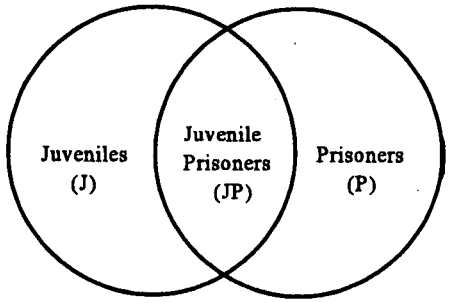
[211] *See id.* at 1588-89.

[212] *Id.* at 1590.

[213] *See id.* at 1601.

[214] *Id.* at 1607.

The classic Venn diagram schematic illustrated below demonstrates the reasoning behind this argument. Both prisoners and juveniles, represented by circles "P" and "J," respectively, are in relatively powerless positions and deserve special attention to ensure that their rights are protected. The incarcerated juveniles, represented by the overlapping area ("JP") of the intersecting circles, are in an especially vulnerable situation that *mandates* access to counsel.



One also can equate the juvenile class to a class of illiterate, or non-English speaking, inmates in their right to legal assistance. In *Casey*, the Supreme Court explicitly acknowledged the special protections that may be due to such inmates, stating that "[a]s a result of the inability to receive adequate legal assistance, prisoners who are slow readers have had their cases dismissed with prejudice."[215] Justice O'Connor noted that "there is some indication that a prisoner who cannot read or who does not speak English might not have meaningful access to a library even if it were there."[216] Justice Souter commented: "We're placing books in front of someone who cannot read them, and we're placing legal helpers in front of someone who cannot communicate with them. That seems utterly senseless."[217]

Along the lines of the court's reasoning in *John L.*, one commentator noted:

> "[A]ccess to the fullest law library anywhere is a useless and meaningless gesture in terms of the great mass of prisoners. . . . To expect untrained laymen to work with entirely unfamiliar books, whose content they cannot understand, may be worthy of Lewis Carroll, but hardly satisfies the substance of the constitutional duty."[218]

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[215] Lewis v. Casey, 518 U.S. 343, 356 (1996) (quoting Casey v. Lewis, 834 F. Supp. 1553, 1558 (Ariz. 1992)).

[216] Transcript of Oral Argument at *5, Lewis v. Casey, 518 U.S. 343 (1996) (No. 94-1511), *available in* 1995 WL 712349.

[217] *Id.* at *6.

[218] Nobel, *supra* note 171, at 1597 (quoting Falzerano v. Collier, 535 F. Supp. 800, 803 (D.N.J. 1982)).

The functional illiteracy of the incarcerated juvenile population makes a law library ineffective in securing the juveniles' right of access to the courts. This argument is vulnerable, however, because a large percentage of the adult inmate population is illiterate. For example, in *Casey*, thirty-five percent of the inmate population in question had a reading level of seventh grade or below, yet this was not enough to justify system-wide relief.[219] Illiteracy alone does not provide sufficient reason to afford juveniles a service not granted to adult inmates.

Complicated procedures present another argument for providing legal counsel to incarcerated juveniles. In order to bring a conditions of confinement challenge, for example, a juvenile first would have to exhaust all administrative remedies. Even if a juvenile cleared this hurdle, the timing and format requirements of lodging a legal complaint against the corrections system is formidable. One judge explained his criteria for reviewing inmate petitions:

> [T]he first thing that makes a good case is good spelling, good typing, good grammar. You don't see a lot of that in prisoner cases, but that's the first thing that makes a good case. . . . Now, that's number one. Can I read it? If I can read it, I take the time to read it. If it's illegible, I don't take the time to translate it. I just can't. I don't have the time.[220]

Even if the incarcerated juvenile is of an exceptionally high education level, he is unlikely to have the experience or background necessary to properly present a claim without assistance from counsel.[221]

Without legal assistance, juveniles are unlikely to have the ability to bring a successful claim, whether, as noted in *John L.*, this inability is due to their age or to inexperience with the legal system. Following the logic set forth in *John L.*, only a lawyer can provide "meaningful access" to juveniles. Valid claims will not be heard unless attorney assistance is provided.

C. *Actual Injury Requirement*

The argument that the lack of legal representation for juveniles works an actual injury is, in essence, the argument of this Note. Justice Scalia stated in *Casey* that "[i]t is the role of courts to provide relief to claimants, in individual or class actions,

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[219] *See* Amicus Brief at *5 n.3, Lewis v. Casey, 518 U.S. 343 (1996) (No. 94-1511), *available in* 1995 WL 782808 (citing Pet. App. at 25a).

[220] Nobel, *supra* note 171, at 1578 n.65 (citing JIM THOMAS, PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER 146 (1988)).

[221] *See* Ross, *supra* note 203, at 1599 ("[I]n most instances, minors lack the ability to gather facts and deal with issues, handle their cases, [or] understand legal issues . . . without guidance from an attorney.").

who have suffered, or will imminently suffer, actual harm."[222] Juveniles will "imminently suffer" harm by not having legal counsel to assist in protecting their rights. Although this argument failed for adults, juveniles are specially situated. Courts should continue to recognize that "'evolving standards of decency' against which courts evaluate the constitutionality of the conditions certainly provide greater protection for juveniles than for adults."[223]

V. CONCLUSION

The *Casey* decision represents a substantial step backwards in constitutional prison litigation. In following public opinion, the Court has erected more barriers to obtaining access to the judicial process. Judge Pregerson, the Ninth Circuit judge in *Lewis v. Casey*, warned that "barrier by barrier, our constitutional jurisprudence will be set back another 50 years."[224] *Casey* began to pull shut the "iron curtain" that *Wolff v. McDonnell* stated did not exist "between the Constitution and the prisons of this country."[225]

Juveniles are in a precarious position—they are receiving more punitive treatment and less rehabilitation, while the legislative and judiciary branches strip their meaningful access to the courts and ability to challenge unconstitutional conditions. The *Casey* decision apparently compounded this situation by undermining the holding in *John L.* that failure to provide juveniles with the assistance of legal counsel violates their constitutional right of access to the courts.

Certain characteristics of the incarcerated juvenile population, however, justify continued special treatment as set forth in *John L.* It is in the best interests of these juveniles, as well as the communities into which they will eventually be released, that legal counsel be provided to assist them in asserting their rights while incarcerated. Even if the trend toward more punitive treatment of juveniles continues, it should not permit unconstitutional treatment.

AMY E. WEBBINK

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[222] Lewis v. Casey, 518 U.S. 343, 349 (1996) (Scalia, J., concurring).

[223] Gary v. Hegstrom, 831 F.2d 1430, 1437 n.3 (9th Cir. 1987) (citing Santana v. Collazo, 714 F.2d 1172, 1179 (1st Cir. 1983) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958))).

[224] Hill, *supra* note 168, at 32 (citing Casey v. Lewis, 4 F.3d 1516, 1537 (Pregerson, J., dissenting)).

[225] Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).