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Foreword: Root Causes of the Pro Se Prisoner Litigation Crisis

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FOREWORD: ROOT CAUSES OF THE PRO SE PRISONER LITIGATION CRISIS

*Michael W. Martin**

INTRODUCTION

In the 1968 film *Bananas*, Woody Allen portrays the pro se protagonist Fielding Mellish, who is on trial for treason, as a zany, bumbling, self-represented litigant who somehow manages to cross-examine himself and later devastate the government's key witness against him while bound and gagged pursuant to a court order.¹ Pro se litigation rarely evokes such humor and unmitigated success.

Shon Hopwood, author of the following Essay, is no Fielding Mellish. Despite having no legal formal training until this fall,² Shon has become adroit at doing what every big firm appellate practice only hopes to do: sculpting certiorari-worthy appeals to the Supreme Court involving pro se prisoners. Shon gained his expertise the hard way—through ten years in prison for a string of bank robberies and a life he has long since left behind. This hard-earned experience, as well as his subsequent success in shepherding cert-worthy petitions to the Supreme Court, gives Shon a unique and credible voice to speak on legal issues that affect inmates. His Essay argues for three changes to prisoner civil rights law and practice: (1) removing the one-year statute of limitations for non-capital federal cases found in the Antiterrorism and Effective Death Penalty Act of 1996³ (AEDPA); (2) permitting pro se prisoners with inadequate medical care claims to conduct depositions without cost via the *in forma pauperis*

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1. BANANAS (United Artists 1971).

2. Shon is now a 1L at the University of Washington School of Law.

3. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.). Before the passage of AEDPA, there was no statutorily prescribed statute of limitations in filing habeas corpus petitions in federal courts. See Eric D. Kelderman, Note, *Fairness in Habeas Petition Filings for Pro Se Prisoners: The Propriety of the Eighth Circuit's Holding in Nichols v. Bowersox*, 33 CREIGHTON L. REV. 359, 359 (2000). This one-year statute of limitations impedes many prisoner cases from even reaching the courts, regardless of their merits, because prisoners with low literacy levels or inadequate access to legal information may not take notice of AEDPA's time limit; even when they know of the time limit, they may have difficulty in timely filing their petitions. See Jessica Feierman, "The Power of the Pen": *Jailhouse Lawyers, Literacy, and Civic Engagement*, 41 HARV. C.R.-C.L. L. REV. 369, 379 (2006).

statute;⁴ and (3) providing online education, creating forms and sample briefs, and permitting “unbundled” legal services⁵—including the bar’s permission for ghost-writing briefs—for pro se appellants.⁶

This Foreword is not a critique of Shon’s proposals. Instead, it lends support to an underlying premise of Shon’s Essay: the stakes are high in pro se prisoner litigation, and the system struggles to handle the actions as fairly as it should. This Foreword will spotlight the root causes behind the pro se prisoner litigation dilemma, focusing on the following: (1) the vibrant rights regime of the United States that enables inmates to challenge their conditions of confinement, as well as their underlying convictions; (2) the need for inmates to challenge these conditions of confinement and underlying convictions; (3) the prison population boom; (4) the literacy, language, mental health, and resource deficits of the inmate population; (5) the failure of the bar to meet the inmates’ legal needs; and (6) ethical and financial constraints on the courts’ ability to otherwise level the playing field.

I. THE UNITED STATES’ ROBUST RIGHTS REGIME

Let us start with the positive: relative to most nations, the United States has a robust rights regime under which inmates may seek to grieve their conditions of confinement or length of sentence. We have numerous constitutional provisions and statutes that protect civil liberties and rights, and a strong, independent judiciary that compels respect for these laws. The Supreme Court has repeatedly held that inmates do not shed all civil rights upon passing through the prison gates; rather, they retain an array of rights—including a constitutional right of access to the courts⁷—which prison officials have an affirmative duty to safeguard.⁸ The opening paragraph of Justice Scalia’s dissent in *Brown v. Plata*⁹ captures this rights regime’s strength: “Today the Court affirms what is perhaps the most radical injunction issued by a court in our Nation’s history: an order requiring California to release the staggering number of 46,000 convicted

4. 28 U.S.C. § 1915(a)(1) (2006).

5. “[U]nbundled legal services [are t]he provision of legal services by an attorney who does not represent the client or take over the entire case, but performs specific services such as appearing at one hearing, preparing a legal brief, or negotiating a settlement after the client has prepared the case as a self-represented party. Most common in divorce cases.” *Unbundled Legal Services*, NOLO’S PLAIN ENG. L. DICTIONARY, <http://www.nolo.com/dictionary/unbundled-legal-services-term.html> (last visited Nov. 16, 2011).

6. See Shon Hopwood, *Slicing Through the Great Legal Gordian Knot: Ways to Assist Pro Se Litigants in Their Quest for Justice*, 80 FORDHAM L. REV. 1229 (2011).

7. See *Johnson v. Avery*, 393 U.S. 483, 487 (1969) (“Tennessee could not constitutionally adopt and enforce a rule forbidding illiterate or poorly educated prisoners to file habeas corpus petitions.”); see also Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners’ Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271, 283 (2010).

8. See *Bounds v. Smith*, 430 U.S. 817, 825–26 (1977) (“If a lawyer must perform such preliminary research, it is no less vital for a pro se prisoner.”); see also Benjamin R. Dryden, *Technological Leaps and Bounds: Pro Se Prisoner Litigation in the Internet Age*, 10 U. PA. J. CONST. L. 819, 819–20 (2008); Robbins, *supra* note 7, at 283.

9. 131 S. Ct. 1910 (2011).

criminals.”¹⁰ Justice Kennedy’s majority decision in *Plata* allowed for this radical result because the Court found that prison overcrowding in California had led to the “medical and mental health care provided by California’s prisons fall[ing] below the standard of decency that inheres in the Eighth Amendment.”¹¹ Underlying the *Plata* majority’s decision was the understanding that inmates retain certain basic rights:

As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.¹²

Not surprisingly, inmates regularly make use of this rights regime. From 2005 to 2010, inmates filed almost 330,000 petitions in federal courts claiming guards’ use of excessive force, deliberate indifference to their medical needs, and retaliation for their assertion of rights, among other claims.¹³ State prisoners challenging their conviction or sentence file approximately 17,000 of the nearly 55,000 cases filed each year, even though at least one state appellate court has reviewed and upheld that conviction or sentence.¹⁴

Of course, inmates have long had fewer, less robust civil rights than the average citizen,¹⁵ and these rights have only become more restricted over the past two decades with the passage of AEDPA¹⁶ and the Prison

10. *Id.* at 1950 (Scalia, J., dissenting).

11. *Id.* at 1947 (majority opinion).

12. *Id.* at 1928.

13. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 88 (2005) [hereinafter 2005 JUDICIAL BUSINESS], available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2005/tables/s24.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 97 (2006), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2006/tables/s24.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 79 (2007), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2007/tables/S23Sep07.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 78 (2008), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2008/tables/S23Sep08.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 75 (2009), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/tables/S23Sep09.pdf>; ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 78 (2010), [hereinafter 2010 JUDICIAL BUSINESS] available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/tables/S23Sep10.pdf>; see also Maureen Markey Middleton, *Typical Section 1983 Claims*, FINDLAW, <http://library.findlaw.com/1999/Jan/1/126485.html> (last visited Nov. 16, 2011) (discussing typical prisoner rights claims).

14. Joseph L. Hoffman & Nancy J. King, Op-Ed., *Justice, Too Much and Too Expensive*, N.Y. TIMES, Apr. 17, 2011, at WK8.

15. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974) (holding that prisoners have only limited due process rights in prison disciplinary proceedings); *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (asserting that prisoners retain only those First Amendment rights that are not inconsistent with their status as prisoners or with the legitimate goals of the corrections system).

16. Indeed, prisoner petitions are down from 61,238 in 2005 to 51,901 in 2010. Compare 2005 JUDICIAL BUSINESS, *supra* note 13, at 88, with 2010 JUDICIAL BUSINESS, *supra* note 13, at 78. AEDPA and the PLRA have much to do with that reduction. In addition to the one-year statute of limitations that Shon addresses, AEDPA also prohibits prisoners from

Litigation Reform Act of 1995¹⁷ (PLRA). Further, though inmates regularly make use of their right to petition for habeas corpus relief, less than two-fifths of one percent of those petitions receive any type of relief, and that relief often is a new trial or sentence that results in the inmate's return to prison.¹⁸

Nonetheless, the rights available to inmates clearly contribute to the crush of pro se litigation on the court system. In 2010, pro se prisoners filed 48,581 cases (66.6 percent) of the 72,900 pro se cases filed in federal district courts.¹⁹ Pro se litigants filed 27,209 petitions of the 55,992 petitions filed in the circuits, with pro se inmates filing 14,067 (51.7 percent) of them.²⁰ These numbers are drastically higher than in 1960, when prisoners filed only 2,000 actions in federal district courts.²¹ The factors outlined below attempt to explain the 2,400 percent increase in filings between 1960 and 2010.

II. THE NEED FOR COURTS TO REVIEW CONDITIONS OF CONFINEMENT AND INMATES' UNDERLYING CONVICTIONS

If the U.S. rights regime is the good news, the bad news is that inmates often have to make use of this rights regime. In the United States, conditions of confinement have long been an issue,²² and are even more so

filing successive petitions on the same issues drastically cuts prisoners' ability to submit successive petitions on new issues (undermining prisoners' ability to rectify deficiencies of their initial petitions), and requires deference to state court decisions, barring federal courts from hearing prisoners' petitions even when they have a valid federal claim. *See* Feierman, *supra* note 3, at 379.

17. Pub. L. No. 104-134, §§ 801–810, 110 Stat. 1321, 1321-66 to 1321-77 (1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; 42 U.S.C. §§ 1997–1997h (2006)). The PLRA's obstacles on prisoner court access include requiring prisoners to exhaust administrative remedies before filing suit in federal court—a challenge for low-literacy prisoners—and to pay fees in full, posing a strong disincentive to poor prisoners. Feierman, *supra* note 3, at 380.

18. *See* Hoffman & King, *supra* note 14. The authors argue that Congress should limit federal review of state criminal cases to capital cases or cases in which inmates produce persuasive new evidence of innocence. *See id.*

19. *Federal Caseload Trend: More Civil Cases Being Filed Without Lawyer's Help*, ADMIN. OFFICE OF THE U.S. COURTS (June 15, 2011), http://www.uscourts.gov/News/NewsView/11-06-15/Federal_Caseload_Trend_More_Civil_Cases_Being_Filed_Without_Lawyer_s_Help.aspx.

20. 2010 JUDICIAL BUSINESS, *supra* note 13, at 47. Unfortunately, there does not appear to be comprehensive statistics on pro se litigants in state courts. *See* Nina Ingwer VanWormer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 989 (2007). This is partly because many states do not track such statistics; and of the states that keep such statistics, many do not keep precise or detailed statistics on pro se litigants. *Id.* at 989–90.

21. *Pro Se Law Clerks: A Valuable Resource*, ADMIN. OFFICE OF THE U.S. COURTS, (Apr. 2011), http://www.uscourts.gov/News/TheThirdBranch/11-04-01/Pro_Se_Law_Clerks_A_Valuable_Resource.aspx [hereinafter *Pro Se Law Clerks*].

22. *See, e.g.,* Jennifer Medina, *Report Details Wide Abuse in Los Angeles Jail System*, N.Y. TIMES, Sept. 28, 2011, at A12 (reporting a long history of accusations of abuse and poor conditions in Los Angeles jails).

now due to budget cuts.²³ Indeed, human rights organizations have called the United States to task over the PLRA and AEDPA restrictions, as well as the treatment of inmates generally.²⁴ In addition, the state justice system is so overwhelmed with the crush of cases from America's war on crime that some convictions need a second look, particularly now as fiscal resources require everyone—courts, prosecutors, and defense lawyers—to do more with less.²⁵ As the research develops on how bias affects jurors and judges²⁶ and how eyewitness testimony is far less reliable than originally believed,²⁷ along with the rise of using DNA evidence to challenge jury verdicts,²⁸ the need to review convictions grows. Our justice system survives because of the nation's faith in it, and it is subject to collapse if innocents are serving time for crimes they never committed. For this reason, the courts take potential faulty conviction cases very seriously.

III. THE PRISON POPULATION BOOM

The single most important factor in the pro se prisoner litigation crush is that the United States has both the highest number of persons incarcerated²⁹

23. Cutbacks in prison budgets lead to overcrowding and understaffing, leaving inmates and correctional staff at risk. *See, e.g.*, Celeste Katz, *State Corrections Union Says Prison Budget Cuts Could Be "Catastrophic,"* N.Y. DAILY NEWS (Feb. 9, 2011, 3:59 PM), <http://www.nydailynews.com/blogs/dailypolitics/2011/02/state-corrections-union-says-prison-budget-cuts-could-be-catastrophic>. *See generally* Brown v. Plata, 131 S. Ct. 1910 (2011) (holding that prison overcrowding in California leads to prison conditions that fall below standard of decency inherent in the Eighth Amendment).

24. AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2010: THE STATE OF THE WORLD'S HUMAN RIGHTS 345–46 (2010).

25. *See* Richard A. Oppel, Jr., *Sentencing Shift Gives New Clout to Prosecutors*, N.Y. TIMES, Sept. 26, 2011, at A1 (reporting prosecutor resistance to passing new crime laws as budgets are being cut).

26. *See generally* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

27. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 9 (2011) (finding that of the first 250 cases of exoneration via DNA evidence, 190 cases (76 percent) involved eyewitness misidentification); *see also* MD. CODE ANN., CRIM. LAW § 2-202(a)(3) (LexisNexis 2011) (prohibiting prosecutors from seeking the death penalty unless they have DNA evidence, a videotape of the crime, or a videotaped voluntary confession from the suspect); Perry v. New Hampshire, 131 S. Ct. 2932, 2932 (2011) (granting certiorari on the first Supreme Court case in thirty-four years involving eyewitness identification with a claim that eyewitness identification while defendant was standing with police officer was too suggestive); State v. Henderson, 27 A.3d 872, 877–78 (N.J. 2011) (requiring tighter restrictions for admission of eyewitness testimony).

28. GARRETT, *supra* note 27, at 100.

29. *Entire World—Prison Population Totals*, INT'L CTR. FOR PRISON STUDIES, http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poptotal (last visited Nov. 16, 2011); *see also* One in 100: Behind Bars in America 2008, PEW CTR. ON THE STATES 3 (2008), <http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf> [hereinafter *One in 100*] (noting the rapidly increasing incarceration rates).

and the highest incarceration rate in the world.³⁰ At the end of 2009, the United States had 2,292,133 adult prisoners, accounting for 743 per 100,000 residents, or about 1 percent of adults in the U.S. resident population.³¹ China, four times more populous than the United States, has the second most incarcerated individuals at 1.6 million.³² This has not always been the case. Indeed, the U.S. incarcerated population more than quadrupled between 1910 and 1980, from 112,362 to 474,368; accounting for the nation's population growth, the incarceration rate increased by about 70 percent, from 121.8 inmates per 100,000 residents to 209.39.³³ Since 1980, the prison and jail population has boomed, spiking from 1,146,401 in 1990, to 1,929,867 in 2000, and to more than two million in 2009.³⁴

The Anti-Drug Abuse Act of 1986³⁵ is one of the biggest contributors to the incarcerated population boom. The Act caused a dramatic increase in incarceration for nonviolent offenses and included mandatory minimum sentences for the distribution of cocaine, including far more severe punishment for distribution of crack than powder cocaine.³⁶ In 1981,

30. *Entire World—Prison Population Rates Per 100,000 of the National Population*, INT'L CTR. FOR PRISON STUDIES, http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poprate (last visited Nov. 16, 2011).

31. *United States of America*, INT'L CTR. FOR PRISON STUDIES, http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=190 (last visited Nov. 16, 2011); see also LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2009 (Dec. 2010), available at <http://bjs.gov/content/pub/pdf/cpus09.pdf>; *One in 100*, supra note 29, at 3; *Total Correctional Population*, U.S. DEP'T OF JUSTICE, <http://bjs.gov/index.cfm?ty=tp&tid=11> (last visited Nov. 16, 2011). Press releases and publications by the Department of Justice list the incarceration rate in the United States in 2009 sometimes as 502 and sometimes 743 per 100,000 people. *Compare Key Facts at a Glance*, U.S. DEP'T OF JUSTICE, <http://bjs.gov/content/gance/tables/incrttab.cfm> (last visited Nov. 16, 2011) (listing it as 502), with GLAZE, supra, at 7 app. tbl.2 (listing it as 743). The incarceration rate of 502 reflects the number of prisoners sentenced to *more than one year* under state or federal jurisdiction (1,548,721 of 1,613,740 that include those sentenced to one year or less), which do not include the number of inmates in local jails per 100,000 U.S. residents. See U.S. DEP'T OF JUSTICE, PRISONERS IN 2009, at 2 tbl.1 n.b (Dec. 2010), available at <http://bjs.gov/content/pub/pdf/p09.pdf>. On the other hand, the incarceration rate of 743—the most commonly used number—reflects the number of inmates held in *custody* in state or federal prisons or in local jails (2,292,133 in total) per 100,000 U.S. residents. GLAZE, supra, at 7 app. tbl.2 & n.e.

32. Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations': Tough Laws and Long Terms Create Gap*, N.Y. TIMES, Apr. 23, 2008, at A1.

33. *The Punishing Decade: Prison and Jail Estimates at the Millennium*, JUSTICE POLICY INST. 1, 4 (May 2000), http://www.justicepolicy.org/images/upload/00-05_rep_punishingdecade_ac.pdf [hereinafter *The Punishing Decade*].

34. *Key Facts at a Glance*, U.S. DEP'T OF JUSTICE, <http://bjs.gov/content/gance/tables/corr2tab.cfm> (last updated Oct. 13, 2011) (including both jail and prison inmates in the calculation).

35. Pub. L. No. 99-570, 100 Stat. 3207.

36. The Anti-Drug Abuse Act created a 100-to-1 cocaine-to-crack ratio that allowed mandatory minimum sentences of five and ten years to apply to offenses involving as little as five grams (less than 0.2 ounces) to fifty grams (less than 2 ounces) of crack, respectively. See 21 U.S.C. § 841(b) (2006) (an offense involving five grams of crack, as opposed to 500 grams of cocaine, is assigned a five-year minimum sentence; an offense involving fifty grams of crack, as opposed to 5,000 grams of cocaine, is assigned a ten-year minimum sentence). The Fair Sentencing Act of 2010 alleviated some of this disparity by reducing the

40,000 people were in prison for drug offenses; today, that number is approximately half a million—a 1,100 percent increase—accounting for two-thirds of the federal inmate population.³⁷

Other law enforcement innovations—such as the “quality of life” arrests championed by the Giuliani Administration in New York City³⁸ and adopted thereafter by most major cities,³⁹ as well as longer sentences,⁴⁰ which are dramatically longer than those in most industrialized countries⁴¹—continue to fuel the prison population growth.⁴² States’ adoption of a host of correctional policies and practices have ensured the boom’s continuance.⁴³ As politically popular as these federal, state, and city “wars against crime” have been, they have resulted in a present-day prison population that is almost five times larger than it was in 1980.

IV. THE PLIGHT OF THE INMATE

The plight of the inmates themselves further complicates the pro se prisoner picture. Many enter prison with literacy and language deficits that disable their ability to properly marshal evidence and advocate on their own behalf.⁴⁴ The inability to depose and cross-examine witnesses is particularly problematic because so many cases turn on credibility.

ratio to 18-to-1, but it is not explicitly retroactive. *See* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

37. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 59 (2010).

38. *See, e.g.*, Norimitsu Onishi, *A Quality-of-Life Offense? It Could End Up in an Arrest.*, N.Y. TIMES, June 30, 1994, at B3; Joyce Purnick, *Quality of Life Works 2 Ways in Arrests.*, N.Y. TIMES, June 20, 1996, at B1.

39. *See Jailing Communities: The Impact of Jail Expansion and Effective Public Safety Strategies*, JUSTICE POLICY INST. 8 (Apr. 2008), http://www.justicepolicy.org/images/upload/08-04_REP_JailingCommunities_AC.pdf.

40. *See* Opel, *supra* note 25 (reporting prosecutor resistance to passing new crime laws as budgets are being cut). Longer sentences are fueled in part by statutory mandatory minimum sentences, such as for illegal narcotics distribution, *e.g.*, Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; three-strikes laws, *e.g.*, CAL. PENAL CODE § 667 (West 2011); and career offender sentencing guideline provisions, *e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2010).

41. *See* Liptak, *supra* note 32.

42. *The Punishing Decade*, *supra* note 33, at 8 (asserting that quality of life arrests lead to larger prison populations).

43. *See One in 100*, *supra* note 29, at 9. For example, between 1993 and 2007, the prison inmate population in Florida increased from 53,000 to over 97,000. During this period, in 1995, the Florida legislature “abolished ‘good time’ credits and discretionary release by the parole board, . . . requir[ing] that all prisoners—regardless of their crime, prior record, or risk to recidivate—serve 85 percent of their sentence.” *Id.* It was followed by a “zero tolerance” policy and other measures mandating that probation officers report every offender who violated any condition of supervision and increasing prison time for these “technical violations.” *Id.* This resulted in an increase in the number of violators in Florida prisons by an estimated 12,000. Although crime in Florida has dropped substantially during this period, some other states have also seen a decrease in crime without prison population growth. *See id.* at 9–10.

44. In one case, the Eleventh Circuit held that an adequate library satisfied the right of access to the courts, even if the prisoner was illiterate. *See* *Hooks v. Wainwright*, 775 F.2d 1433, 1438 (11th Cir. 1985).

The steady rise in mental health issues in the prison population adds to this plight. At mid-year 2005, more than half of all prison and jail inmates had a mental health problem, including 705,600 inmates in state prisons (56 percent of state prisoners), and 78,800 in federal prisons (45 percent of federal prisoners), and 479,900 in local jails (64 percent of local jail inmates).⁴⁵ The National Institute of Health reported that there was an increasing number of persons with mental illness coming into contact with the criminal justice system, estimated at as many as two million, including those who have co-occurring substance abuse disorders.⁴⁶ Also, a 2009 study on serious mental illness among prison inmates reported that the rate of current serious mental illness for male inmates was 14.5 percent and for female inmates was 31 percent.⁴⁷

Finally, incarceration itself imposes upon pro se prisoners another layer of steep disadvantages that non-prisoner pro se litigants do not face.⁴⁸ They have restricted access to libraries, legal materials, the internet, and telephones.⁴⁹ The limited resources available within prisons are often inadequate to allow prisoners to navigate the complex legal system⁵⁰ and consistently contribute to their losing cases on procedural grounds before ever reaching a decision on the merits.⁵¹

V. NO BAR TO HELP

A lack of legal representation prejudices all pro se litigants, prisoners or otherwise, in obvious and subtle ways. The ability to build a case, strategize in accordance with a case theory, avoid pleading and discovery pitfalls, survive motion practice, and tell a persuasive story to the jury are all skills that are particular to lawyers.

The absence of legal representation is particularly harmful to prisoners. First, save for a few prisoner rights stalwarts (and they all know each other),

45. DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (Sept. 2006), available at <http://bjs.gov/content/pub/pdf/mhppji.pdf>; see also *Survey: Most Inmates Show Mental Symptoms*, MSNBC.COM (Sept. 6, 2008, 8:41 PM), http://www.msnbc.msn.com/id/14707120/ns/health-mental_health/t/survey-most-inmates-show-mental-symptoms.

46. Morris L. Thigpen, *Welcome to Corrections & Mental Health*, NAT'L INST. CORR. (Mar. 3, 2011, 10:30 AM), <http://community.nicic.gov/blogs/mentalhealth/archive/2011/03/03/welcome-to-corrections-amp-mental-health.aspx>.

47. Henry J. Steadman et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCHIATRIC SERVICES 761, 761–65 (2009).

48. Robbins, *supra* note 7, at 273.

49. *Id.*; see also Dryden, *supra* note 8, at 865 (“The Internet Revolution has only left one segment of our society behind: prisoners, who ironically are those who have the most to gain from the knowledge freely available thereon.”); Feierman, *supra* note 3, at 370 (“Prisoners are dependent on the prison system for access to law books, legal resources, and often also for their education about the law.”).

50. Robbins, *supra* note 7, at 279.

51. *Id.* at 273. Moreover, the Court in *Lewis v. Casey*, 518 U.S. 343 (1996), limited the right of access to: the right to file the initial papers, direct appeals of criminal convictions, habeas corpus petitions, and civil rights actions challenging conditions of confinement—not to “litigate effectively once in court.” *Id.* at 354; see also Robbins, *supra* note 7, at 284.

there is no dedicated prisoner civil rights bar.⁵² This stands in stark contrast to employment discrimination—another large source of pro se filings in federal court⁵³—which has a vibrant plaintiff and defense bar.

Second, most prisoners cannot afford to hire an attorney,⁵⁴ and even if they could, many attorneys are “unwilling or unable to take on full representation of prisoner litigants.”⁵⁵ Add to the inmates’ dilemma that they must deal with (1) the PLRA and AEDPA obstacles;⁵⁶ (2) case law such as *Ashcroft v. Iqbal*,⁵⁷ the seminal Supreme Court case that heightened pleading standards in 42 U.S.C. § 1983 actions;⁵⁸ (3) the highly restrictive and poorly resourced prisons; and (4) the literacy, language, and mental health deficits,⁵⁹ and the conclusion is clear: pro se status is particularly lethal to prisoner civil rights actions.

VI. A SYSTEM OVERWHELMED

Without attorneys, the burden falls directly upon the courts to ensure basic fairness exists in pro se prisoner litigation; however, they are limited in what they can do for pro se prisoner litigants. First, as neutral arbiters, the Judicial Code of Ethics and the Code of Conduct for Judicial Employees limit the assistance that courts may provide the pro se litigant.⁶⁰ Second, and perhaps more importantly, judicial resources constrain the courts from assisting. Pro se cases are resource-intensive because (1) there are so many; (2) the briefing is subpar to nonexistent; (3) a lawyer-driven civil discovery system does not function well with pro se inmates; and (4) many of the prison cases, such as excessive force cases, are summary-judgment-proof, thus requiring trials with pro se litigants (who struggle with trial practice). In addition, there are other pro se cases with which courts must deal,⁶¹ not to mention a full docket of attorney-represented cases, especially criminal

52. Among all prisoner petitions filed in federal courts in 2010, 93.6 percent were filed pro se. 2010 JUDICIAL BUSINESS, *supra* note 13, at 88–90.

53. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 434 tbl.1 (2004) (reporting that 16.99 percent of plaintiffs in employment discrimination cases proceeded pro se).

54. Robbins, *supra* note 7, at 277; see also Feierman, *supra* note 3, at 369 (“Most prisoners are indigent and must represent themselves pro se in both civil suits and habeas petitions.”).

55. Robbins, *supra* note 7, at 273.

56. See *supra* notes 15–17 and accompanying text. The PLRA limits attorney’s fees to 150 percent of any monetary award received after trial. 42 U.S.C. § 1997e (2006).

57. 129 S. Ct. 1937 (2009).

58. See *id.* at 1943.

59. See *supra* notes 45–47 and accompanying text.

60. See CODE OF CONDUCT FOR U.S. JUDGES CANON 3 (2011); CODE OF CONDUCT FOR JUDICIAL EMPS. CANON 2 (2011).

61. Interestingly, though the total number of petitions by prisoners has decreased from 61,238 in 2005 to 51,901 in 2010, see *supra* note 16, the total number of petitions by non-prisoners has increased from 192,035 to 230,994 during the same period. Compare 2005 JUDICIAL BUSINESS, *supra* note 13, at 88, with 2010 JUDICIAL BUSINESS, *supra* note 13, at 78.

cases with speedy trial obligations. Thus, though the courts may attempt to limit prejudice, they can only go so far.⁶²

CONCLUSION

For the pro se litigant, fundamental rights have allegedly been impinged, and the litigant is forced to navigate systems with which even attorneys—professionals with expertise and long academic training—struggle. For the judiciary, pro se cases overwhelm courts' dockets and require extra effort and attention, given that the pro se litigants lack legal training and the judicial system typically relies on lawyers to self-police the civil dockets. For lawyers, pro se litigants represent the failure of a profession given a monopoly on legal services and its inability to absorb the impoverished who have claims against another. To the extent pro se litigation scars the judiciary and the legal profession, society as a whole suffers.

The pro se inmate dilemma is the pro se problem's perfect storm. The clear precipitants outlined above result in a large class of legally disempowered persons—most of whom have educational, mental health, and resource deficits to boot—with compromised rights so fundamental (e.g., wrongful convictions, inmate beatings, and rape) that society grimaces at the possibility of impingement. Further, pro se prisoner litigation comprises the largest portion by far⁶³ of the federal pro se docket, and threatens to overwhelm the courts. Finally, unlike employment discrimination, pro se prisoner actions lack the financial incentives to ensure that a large dedicated group of attorneys will seek to prosecute the rights of inmates. Given this scenario, the suggestions of Shon Hopwood that follow here deserve attention and thought.

62. Over the past three decades, many courts have leveraged their limited resources to create pro se offices that can more efficiently deal with issues peculiar to pro se litigants. *See generally Pro Se Law Clerks*, *supra* note 21. The pro se offices often play the dual functions of assisting the courts in ensuring that pro se pleadings merit the courts' involvement, as well as assisting the litigants, largely through procedural advice and assistance in finding pro bono counsel. *See id.*

63. Pro se prisoners filed approximately twice as many actions in federal court as all non-prisoner pro se litigants in 2010. *See* 2010 JUDICIAL BUSINESS, *supra* note 13, at 78.