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# BOUNDS AND BEYOND: A NEED TO REEVALUATE THE RIGHT OF PRISONER ACCESS TO THE COURTS

Steven D. Hinckley\*

## I. INTRODUCTION

There is little doubt that a prisoner's most important right is access to the courts. Without access, prisoners have neither a forum in which to question the conditions and constitutionality of their confinement, nor an arena in which to seek vindication of other alleged rights violations. Therefore, the right of access is the foundation upon which other prisoners' rights are built.<sup>1</sup>

Nevertheless, the concept of a prisoner's right to legal assistance is just passing its infancy in the historical sense. Until the early 1940's, the judiciary had steadfastly followed a policy of great deference to prison administrators regarding the internal management of prisons. This autonomy led to abuse.<sup>2</sup>

Against this backdrop, the United States Supreme Court initiated a line of prisoner access opinions beginning in 1941 with *Ex parte Hull*<sup>3</sup> and culminating in 1977 with *Bounds v. Smith*,<sup>4</sup> which radically changed a prisoner's right to gain access to the courts. However, in the ten years since *Bounds*, serious doubts have arisen concerning the continuing constitutional efficacy of that decision, and it is clear that the right of access is currently in flux.

This article will look briefly at the history of prisoner access to the courts from *Hull* through *Bounds*, followed by an examination of the lower federal court opinions in which these early cases, in particular *Bounds*, have been analyzed and applied. As will be seen, the *Bounds* decision appears to conflict directly with other fundamental prisoner rights cases. This dilemma calls for a reeval-

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1. See *Bounds v. Smith*, 430 U.S. 817 (1977).

2. See Flores, *Bounds and Reality: Lawbooks Alone Do Not a Lawyer Make*, 77 LAW LIBR. J. 275, 276 (1984-85) (presents a brief historical background of this attitude of deference known as the "hands-off doctrine").

3. 312 U.S. 546 (1941).

4. 430 U.S. 817.

uation of the constitutional standards on which the right of access is based. In fact, it is suggested that a small, but theoretically attractive group of opinions may have already articulated an acceptable constitutional standard to take the issue of prisoners' access to the courts beyond *Bounds* and into the coming decade.

## II. HISTORICAL DEVELOPMENT: ORIGIN OF PRISONERS' RIGHT OF ACCESS TO THE COURTS

### A. Federal Court Development of the Right

One troubling aspect of the Supreme Court's opinion in *Bounds* is that the majority did not clearly identify the constitutional basis for what it described as a fundamental right of prisoner access to the courts.<sup>5</sup> However, this right was not created in a vacuum; quite to the contrary, the *Bounds* decision was the culmination of thirty-six years of landmark federal court decisions that markedly enhanced a prisoner's ability to seek redress of complaints before courts of law. Prior to the 1940's, the judiciary had been loath to interfere with the management of prisoners, preferring to defer to the judgment of local prison authorities. The unfortunate result of this pervasive "hands-off"<sup>6</sup> policy was that prisoners had little, if any, access to the courts. Consequently, many potentially meritorious claims were probably never litigated.

The first major judicial reevaluation of the "hands-off doctrine" occurred in 1941 when, in *Ex parte Hull*,<sup>7</sup> the Supreme Court struck down a Michigan prison regulation that required prisoners to submit habeas corpus petitions for writs and other legal documents to prison officials for "review" before allowing them to be filed with the courts. In what at the time was a startling judicial foray into an area that had historically been the exclusive province of prison officials, the Court struck down the regulation, holding that a state and its officers "may not abridge or impair petitioner's

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5. In separate dissenting opinions following the *Bounds* decision, Chief Justice Burger and Justice Rehnquist questioned the majority's basis for characterizing the right of access as a "fundamental constitutional right." See *Bounds v. Smith*, 430 U.S. 817, 833-34 (1977) (Burger C.J., dissenting); see *id.* at 837-39 (Rehnquist, J., dissenting).

6. See J. GOBERT & N. COHEN, RIGHTS OF PRISONERS § 1.02 (1981 & Cum. Supp. 1986); Westling & Rasmussen, *Prisoners' Access to the Courts: Legal Requirements and Practical Realities*, 16 LOY. U. CHI. L.J. 273, 274-75 (1985); Comment, *An Overview of Prisoners' Rights: Part I, Access to the Courts Under Section 1983*, 14 ST. MARY'S L.J. 957, 959-60 (1983).

7. 312 U.S. 546 (1941).

right to apply to a federal court for a writ of habeas corpus."<sup>8</sup> Further, the Court stated that the quality and content of petitions for habeas corpus addressed to a federal court were questions that only the court could judge.<sup>9</sup> Although the opinion imposed no affirmative obligation upon states to ensure that prisoners in their institutions had access to the courts, the Court did, for the first time, express the essentially unarguable position that states must not actively interfere with incarcerated persons' right to petition a court to review the legality of their incarceration.<sup>10</sup>

Although the Court issued a series of opinions following *Hull*<sup>11</sup> that sought to guarantee that indigent prisoners would receive access to the courts,<sup>12</sup> the next major pre-*Bounds* decision pertaining to prisoner access to the courts was *Johnson v. Avery*.<sup>13</sup> At issue in

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8. *Id.* at 549.

9. *Id.*

10. *Id.* At least one commentator has stated that the *Hull* Court seemed less interested in making inroads into the long-standing "hands-off policy" than in asserting a court's "traditional jurisdictional prerogative to pass on the form and merits of a claim addressed to it." See Potuto, *The Right of Prisoner Access: Does Bounds Have Bounds?* 53 IND. L.J. 207, 208 (1977-78). Regardless, the *Bounds* Court cites the *Hull* decision as the first Supreme Court case in which it was recognized that prisoners retain a constitutional right of access to the courts. See *Bounds*, 430 U.S. at 821-22.

11. See Potuto, *supra* note 10, at 208.

12. See *Mayer v. Chicago*, 404 U.S. 189 (1971) (state must provide transcript of nonfelony trial); *Williams v. Oklahoma City*, 395 U.S. 458 (1969) (state must provide indigent inmate with transcript of petty offense trial); *Gardner v. California*, 393 U.S. 367 (1969) (equal protection required that indigent prisoners receive transcript of habeas corpus proceeding); *Roberts v. LaValle*, 389 U.S. 40 (1967) (state must provide indigent inmates with transcript of preliminary hearings); *Long v. District Court*, 385 U.S. 192 (1966) (state must provide indigent inmates with transcripts of post-conviction proceedings); *Rinaldi v. Yeager*, 384 U.S. 305 (1966) (requirement that only unsuccessful and subsequently imprisoned defendants reimburse the cost of trial transcripts violates the equal protection clause); *Draper v. Washington*, 372 U.S. 487 (1963) (release of trial transcript cannot be conditional upon a judge's approval or the prisoner's ability to pay); *Lane v. Brown*, 372 U.S. 477 (1963) (policy requiring that the public defender review all requests for coram nobis transcripts violates equal protection); *Douglas v. California*, 372 U.S. 353 (1963) (state must provide indigent inmates with counsel for direct appeals of their convictions); *Smith v. Bennett*, 365 U.S. 708 (1961) (equal protection clause is violated when a state refuses to allow an indigent prisoner to file a habeas corpus petition without paying filing fees); *Burns v. Ohio*, 360 U.S. 252 (1959) (state violates equal protection by requiring indigent prisoners to pay filing fees before allowing appeal to be filed); *Eskridge v. Washington State Bd. of Prison Terms and Paroles*, 357 U.S. 214 (1958) (per curiam); *Griffin v. Illinois*, 351 U.S. 12 (1956) (state's failure to provide a trial transcript or reasonable substitute to inmates unable to buy them is tantamount to a denial of adequate and effective appellate review). *But see United States v. MacCollom*, 426 U.S. 317 (1976) (transcripts need not be provided when the request was plainly frivolous and prisoner had waived a prior opportunity to obtain such transcripts); *Britt v. North Carolina*, 404 U.S. 226, 230 (1971) (state need not provide transcripts to indigent prisoners when an adequate alternative was available, but not used).

13. 393 U.S. 483 (1969).

*Avery* was a Tennessee prison regulation that forbade prison inmates from seeking assistance from other inmates in preparing legal documents, including applications for writs of habeas corpus.<sup>14</sup> The state claimed that this regulation preserved prison discipline and kept "jailhouse lawyers" from practicing law.<sup>15</sup> While cognizant of the state's primary role in matters of prison administration and prisoner discipline,<sup>16</sup> the Court nevertheless ruled that the regulation violated the prisoners' constitutional right of access to the courts since it effectively denied illiterate or poorly educated prisoners the opportunity to file habeas corpus petitions.<sup>17</sup> The Court qualified its holding in several important respects; specifically, prison officials retained the right to set reasonable limitations on the time and location of the activities of jailhouse lawyers,<sup>18</sup> and to impose punishment on inmates giving or receiving consideration for such "legal services."<sup>19</sup> *Avery's* most important qualification was the Court's offer of an alternative to jailhouse lawyers for states uncomfortable with their existence. The Court held that a state would be required to allow jailhouse lawyers *unless* it devised and funded a "reasonable alternative" program designed to assist inmates in preparing legal documents.<sup>20</sup> Although *Avery* did not significantly change the basic *Hull* admonition that states must stand neutral when prisoners seek access to the federal courts by writ of habeas corpus, and did not go so far as to require states to establish reasonable legal assistance programs for inmates, it did expand upon *Hull* in several respects. First, the *Avery* Court ruled that the effect of a regulation restricting the activity of jailhouse lawyers could be as violative of a prisoner's right of access to the courts as a *Hull*-type regulation aimed at restricting the prisoners

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14. *Id.* at 484.

15. *Id.* at 485.

16. *Id.* at 486.

17. *Id.* at 487; *cf.* *Wainwright v. Coonts*, 409 F.2d 1337 (5th Cir. 1969); *United States ex rel Stevenson v. Mancusi*, 325 F. Supp. 1028 (W.D.N.Y. 1971) (extending the Supreme Court's rationale in *Avery* to include all inmates). *See generally* J. GOBERT & N. COHEN, *supra* note 6, § 2.03, at 26-28.

18. *Avery*, 393 U.S. at 490.

19. *Id.* *See generally* Westling & Rasmussen, *supra* note 6, at 280-83.

20. *Avery*, 393 U.S. at 490. The Court went so far as to cite, with approval, the legal assistance plans in existence in some states at the time that *Avery* was decided. Specifically, the Court mentioned a program in which attorneys provided by the public defender's office were made available to prisoners to assist with habeas corpus applications, another that employed advanced law students to advise inmates, and still another in which members of a local bar association volunteered their services to area prisoners. Law libraries were not mentioned as an acceptable alternative. *See id.* at 489. *See generally* J. GOBERT & N. COHEN, *supra* note 6, § 2.03, at 29-30; Westling & Rasmussen, *supra* note 6, at 283-84.

themselves from petitioning a court. A second and more subtle distinction between *Hull* and *Avery* was that, for the first time, the *Avery* Court began to speak of alternative legal assistance programs.<sup>21</sup> By the time *Bounds* was decided, the idea of alternative approaches to prisoner access to the courts would become extremely significant.

Perhaps the single most important prisoner access opinion prior to *Bounds* was *Gilmore v. Lynch*.<sup>22</sup> In *Gilmore*, a California district court struck down a state prison regulation excluding state and federal reporters and annotated codes from prison libraries, holding that the regulation caused an unconstitutional denial of the prisoners' right of access to the courts. Citing reforms that had made it easier for affluent inmates to purchase legal materials, the court held that serious equal protection problems would arise if indigent prisoners could not obtain adequate legal materials in the prison library.<sup>23</sup> The district court spoke of "[r]easonable access to the courts" as a "constitutional imperative"<sup>24</sup> that had prevailed over a variety of state interests, and held that the state must insure this access by expending public funds to provide either adequate law libraries or legal services programs to prisoners.<sup>25</sup> As a consequence, the district court moved the scope of prisoner access to the courts well beyond that expressed in *Hull* and *Avery*, stating for the first time that state officials were required to shoulder the affirmative burden of insuring that satisfactory means of legal assistance were available to all inmates.<sup>26</sup> *Avery*, and its predecessor *Hull*, merely required that states avoid actively impeding prisoners' attempts to gain access, with the *Avery* court further suggesting that a state could go beyond this neutral stance and establish a legal assistance program if it chose to do so. Having broken

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21. See Potuto, *supra* note 10, at 209-10.

22. 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam).

23. See *Gilmore*, 319 F. Supp. at 111.

24. *Id.* at 109. The court did not specify the constitutional derivation of this "constitutional imperative"; however, the holding did state that the equal protection clause of the fourteenth amendment requires that states provide indigent prisoners with "the tools necessary to receive adequate hearing in the courts . . ." *Id.*

25. See *id.* at 112. The district court's opinion in *Gilmore* represented the first judicial consideration of adequate law libraries as a constitutionally satisfactory means of providing prisoner access. However, the court did recognize that, in order to provide meaningful access, prison libraries must contain similar materials to those normally used by criminal attorneys in preparing their cases. *Id.* at 110-11.

26. *Id.* at 110. See generally Potuto, *supra* note 10, at 210-11.

new ground, the district court refused to provide state officials with any concrete guidelines to use when devising the state's approach to prisoner access. Preferring instead to speak only in general terms of the kinds of legal assistance options available to the state, the court followed the approach of prior cases and deferred to the judgment of the Department of Corrections in establishing either an adequate law library or a "new method of satisfying the legal needs of its charges."<sup>27</sup> The district court's decision was later affirmed by the Supreme Court in a brief opinion<sup>28</sup> that cited, without elaboration, *Avery* as the basic authority for its conclusion.<sup>29</sup>

Although *Hull*, *Avery*, and *Gilmore* had blazed a significant trail in the area of prisoner access to the courts, each of these cases was limited, factually, to situations in which prison officials had attempted to interfere with inmates' ability to apply for writs of habeas corpus. Therefore, some states continued to restrict openly prisoners' access when they sought to present other kinds of legal claims, including allegations of civil rights violations. The Court responded to this situation in *Wolff v. McDonnell*,<sup>30</sup> by ruling that the basic right of access is equally as applicable to prisoners bringing section 1983<sup>31</sup> actions as to those bringing habeas corpus actions.<sup>32</sup> Recognizing that no inmates, including those totally or functionally illiterate, may be denied the right to bring civil rights actions to protect certain constitutional rights, the Court ruled that prisons must allow jailhouse lawyers to function or develop a reasonable alternative to assure that these claims can be articulated.<sup>33</sup> Providing, for the first time, an explicit statement concerning the derivation of that right, the Court stated that "the right of access to the courts, upon which *Avery* was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning

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27. *Gilmore*, 319 F. Supp. at 112, *aff'g* *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970).

28. *See Younger v. Gilmore*, 404 U.S. 15 (1971) (per curiam).

29. *See id.* at 15. *See generally* Potuto, *supra* note 10, at 210-14; Comment, *supra* note 6, at 964-65.

30. 418 U.S. 539 (1974).

31. 42 U.S.C. § 1983 (1982).

32. *See Wolff*, 418 U.S. 579. The Court held that the constitutional rights protected by § 1983 and habeas corpus actions are often the same and that there is "no reasonable distinction between the two forms of actions." *Id.* at 579-80.

33. *Id.*

violations of fundamental constitutional rights."<sup>34</sup> However, by citing the due process right of access as having its foundation in *Avery*, it appeared that the Court had retreated from the position articulated in *Gilmore* that required states to shoulder affirmative burdens to develop plans to insure prisoner access, and instead had returned to a position requiring only that states remain neutral and avoid actively impeding a prisoner from advancing a claim.<sup>35</sup> In fact, after *Wolff*, a dual standard in regard to states' obligations vis a vis prisoner access to the courts existed. At a bare minimum, the Court clearly had ruled that states could not actively interfere with prisoners' rights to bring habeas corpus and civil rights actions. However, in the case of habeas corpus claims, the Court imposed an affirmative burden on the state to establish either a law library or other legal services program designed to assist prisoners in filing for habeas corpus relief.<sup>36</sup> Having made this careful distinction between habeas corpus petitions and civil rights actions, it appeared that the Court had established a right of prisoner access to the courts which was constitutionally sound and predictable in scope. However, many issues concerning prisoner access were unresolved by *Wolff* and its predecessors. Fortunately, the Court waited less than three years before it addressed these issues again.

## B. *Bounds v. Smith*

In *Bounds v. Smith*,<sup>37</sup> the Supreme Court considered whether North Carolina's failure to supply prison inmates with an adequate law library, in the absence of some reasonable state-supported alternative legal assistance program, violated prisoners' constitutional right of access to the courts. Based on a review of its pris-

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34. *Id.* at 579. Due process clearly requires that states must not impede the right of any individual, whether incarcerated or not, to seek access to the courts, particularly to present allegations that constitutional rights are being violated. Consequently, due process is a thoroughly reasonable constitutional basis for the pre-*Bounds* cases. See Potuto, *supra* note 10, at 215-16.

35. Unfortunately, the Court does not articulate the reasons for its decision not to apply a *Gilmore*-like affirmative burden on states to insure that prisoners bringing § 1983 actions have access to an adequate law library or alternative legal assistance program. In fact, *Younger v. Gilmore* is cited only briefly by the majority in *Wolff*. See *Wolff*, 418 U.S. at 578-79.

36. The Court seemingly drew the distinction between habeas corpus and civil rights actions based on its appreciation for the constitutional scope of the "Great Writ" as well as the fact that habeas corpus actions examine the legality of the confinement more closely than any other constitutional claim. Potuto, *supra* note 10, at 216.

37. 430 U.S. 817 (1977).



oner access decisions since *Ex parte Hull*,<sup>38</sup> the Court held that the fundamental constitutional right of access had been "established beyond doubt,"<sup>39</sup> and that such access must be "adequate, effective, and meaningful,"<sup>40</sup> to pass constitutional muster. Returning to, and expanding upon, many of the principles first outlined in *Gilmore v. Lynch*,<sup>41</sup> and affirmed in *Younger v. Gilmore*,<sup>42</sup> the Court ruled that prisoners' need for legal assistance was equally compelling in both habeas corpus and civil rights actions.<sup>43</sup> In either case, states must assume the affirmative duty of ensuring meaningful access to the courts through the provision of "adequate law libraries or adequate assistance from persons trained in the law."<sup>44</sup> In so holding, the Court specifically rejected the oft-repeated argument that prisoners are incapable of using "the tools of the trade of the legal profession"<sup>45</sup> due to the inherent complexity of the legal system and legal materials,<sup>46</sup> and the high rate of illit-

38. 312 U.S. 546 (1941).

39. *Bounds*, 430 U.S. at 821. See generally, J. GOBERT & N. COHEN, *supra* note 6, § 2.07, at 38-41; Comment, *A Prisoner's Constitutional Right to Attorney Assistance*, 83 COLUM. L. REV. 1279, 1283-84 (1983).

40. *Bounds*, 430 U.S. at 822.

41. 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd sub nom.* *Younger v. Gilmore*, 404 U.S. 15 (1971) (per curiam).

42. 404 U.S. 15 (1971) (per curiam).

43. See *Bounds*, 430 U.S. at 825. The Court expressly rejected the state's contention that legal assistance or law libraries are not essential in filing habeas corpus petitions or civil rights complaints since these procedures require only a statement of the facts without supporting authority. The Court stated that a knowledge of the applicable law must be applied to the facts to determine whether a colorable claim exists and that an attorney would "verge on incompetence" if he or she failed to research the case before proceeding. The Court held that the need for this preliminary research was no less compelling for pro se prisoners. *Id.* at 825-26.

44. *Id.* at 828 (emphasis added). See generally J. GOBERT & N. COHEN, *supra* note 6, § 2.07, at 39-41; Potuto, *supra* note 10, at 216-20; Comment, *supra* note 39, at 1283-84.

45. *Bounds*, 430 U.S. at 826.

46. See *id.* at 836 (Stewart, J., dissenting). For one judge's harsh assessment of the value of prison libraries, see *Falzerano v. Collier*, 535 F. Supp. 800 (D.N.J. 1982):

In this court's view, access to the fullest law library anywhere is a useless and meaningless gesture in terms of the great mass of prisoners. The bulk and complexity have grown to such an extent that even experienced lawyers cannot function efficiently today without the support of special tools, such as the computer research systems of . . . LEXIS and WESTLAW. 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.

Access to full law libraries makes about as much sense as furnishing medical services through books like: "Brain Surgery Self-Taught," or "How to Remove Your Own Appendix," along with scalpels, drills, hemostats, sponges and sutures.

*Id.* at 803.

eracy among inmates.<sup>47</sup> Rather, the Court found that its experience indicated that pro se petitioners were capable of using law books to research and ultimately file serious and legitimate claims,<sup>48</sup> making adequate law libraries a constitutionally acceptable means of providing prisoners with access to the courts. While stopping short of stating the specific volumes that a library should contain to insure "adequacy," the Court's approval of North Carolina's proposed library plan,<sup>49</sup> calling for the inclusion of North Carolina's statutes and selected federal statutes, North Carolina and federal case reporters since 1960, and a small list of secondary services,<sup>50</sup> indirectly did establish a set of minimum collection standards to be used in the provision of constitutionally sufficient prison law libraries.

Having expended considerable energy in refuting many of the arguments used to attack law libraries as vehicles of meaningful access to the courts, the *Bounds* Court then completed its reaffirmation of *Gilmore* by stating that law libraries are but one constitutionally acceptable method of assuring such access. States, the Court reasoned, were free to develop alternative means to achieve the goal.<sup>51</sup> Indeed, the opinion noted that nearly half the states and the District of Columbia had developed some professional or quasi-professional legal assistance programs for prisoners.<sup>52</sup> As it had done in *Gilmore*, the Court listed a number of these pro-

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47. Many post-*Bounds* opinions have examined the startlingly low literacy rate among prison inmates and its effect on the ability of law libraries to serve as means of providing meaningful access to the courts. See, e.g., *Hooks v. Wainwright*, 775 F.2d 1433, 1435 (11th Cir. 1985), cert. denied, 107 S. Ct. 313 (1986) (citing a lower court finding that 50% of all Florida prisoners are functionally illiterate); *Cruz v. Hauck*, 627 F.2d 710, 721 (5th Cir. 1980) (library books alone cannot provide meaningful access to the courts for inmates who are illiterate or speak no English); *Battle v. Anderson*, 457 F. Supp. 719, 737 (E.D. Okla. 1978) (70% of the inmate population have neither the intelligence nor the education to conduct their own research); *Wade v. Kane*, 448 F. Supp. 678, 681 (E.D. Pa. 1978) (approximately 80% of all inmates seeking the services of an in-prison law clinic are unable to read and comprehend legal reference materials, while approximately 30%-50% of the same group are functionally illiterate), *aff'd without opinion*, 591 F.2d 1338 (3d Cir. 1979).

48. *Bounds*, 430 U.S. at 826-27.

49. *Id.* at 833.

50. See *id.* at 819 n.4. The Court stated that, with the exception of the "questionable omission" of Shepard's Citations and the local rules of court, the proposed collection adhered to a list approved by the American Bar Association, the American Association of Law Libraries, and the American Correctional Association, as the minimum collection for adequate prison law libraries. *Id.*

51. *Id.* at 830. Although the states were allowed the option of establishing either law libraries or legal assistance programs, the Court stated that "[s]uch programs . . . may have a number of advantages over libraries alone." *Id.* at 831.

52. *Id.* at 831.

grams,<sup>53</sup> including training of inmates as paralegal assistants to work under the supervision of an attorney, the use of paraprofessionals or law students as volunteers or in clinical programs, the use of volunteer attorneys, hiring of part-time consulting attorneys, the formation of prison legal services programs complete with full-time staff attorneys, and use of public defender and other legal services programs.<sup>54</sup> However, the Court refused to earmark any program as more satisfactory than the others. In fact, the Court left the development of such programs entirely to the states' discretion, holding that states would not be compelled to follow any of the specific approaches listed in the opinion in their own legal access programs.<sup>55</sup> Instead, the Court encouraged states to engage in "local experimentation,"<sup>56</sup> warning only that any resultant plans would be evaluated judicially as a whole to "ascertain [their] . . . compliance with constitutional standards."<sup>57</sup> Realizing that the evaluative focus of any alternative legal services program centers around its impact on an inmate's ability to prepare a petition or complaint,<sup>58</sup> it seems clear that the Court intended a very flexible standard of adequacy that would differ from institution to institution, based on such local factors as "actual demand for legal services, the average time required to handle each case, and the availability of alternative sources of legal information."<sup>59</sup> The Court also anticipated that economic factors could be a legitimate consideration when choosing the program used to provide meaningful access, as long as states realize that "the cost of protecting a constitutional right cannot justify its total denial."<sup>60</sup>

However, by placing the responsibility for establishing "adequate" law libraries or "reasonable" alternative legal assistance programs totally in the hands of the states without providing a strict framework for deciding what is adequate or reasonable, the *Bounds* Court invited a wealth of prisoners' rights litigation and effectively left each court on its own to define these terms on a

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53. *Id.*

54. *Id.* See generally J. GOBERT & N. COHEN, *supra* note 6, § 2.03, at 29-30; § 2.06, at 37-38; Westling & Rasmussen, *supra* note 6, at 283-84.

55. *Bounds*, 430 U.S. at 832.

56. *Id.*

57. *Id.*

58. *Id.* at 828 n.17.

59. Westling & Rasmussen, *supra* note 6, at 284.

60. *Bounds*, 430 U.S. at 825; see also Ducey, *Survey of Prisoner Access to the Courts: Local Experimentation a'Bounds*, 9 NEW ENG. J. CRIM. & CIV. CONFINEMENT 47, 60-62 (1983).

case-by-case basis.<sup>61</sup> Unfortunately, as the post-*Bounds* decisions suggest, the Supreme Court may have missed its best opportunity to put teeth in the fundamental constitutional right of prisoner access to the courts, by providing unequivocal minimum standards to be followed by all states when constructing their approaches to prisoner access. Rather than seizing the moment to abolish the overly deferential "hands-off" doctrine, at least in an area where constitutional rights are at stake, by demanding that states provide truly meaningful access to prisoners, the Court dealt only in generalities and trusted the "good judgment" of the states to establish adequate, effective, and meaningful programs.

A review of the federal court cases testing the adequacy of these plans demonstrates the variety of law library and legal services plans that have been designed to meet *Bounds* obligations. Clearly, the courts have struggled to provide a predictable analytical framework to aid in their application of the *Bounds* principles that, as one recent decision stated, "suffer for lack of internal definition and prove far easier to state than to apply."<sup>62</sup>

### III. FEDERAL COURT INTERPRETATIONS OF *Bounds*

#### A. *General Principles*

Because of the express flexibility that *Bounds v. Smith*<sup>63</sup> left to the states to fashion constitutionally acceptable programs to provide prisoners with meaningful access to the courts, similarities between state plans are somewhat rare. However, out of this confusion, several general, guiding principles have arisen that would appear to be applicable to all right of access cases, without regard for the specific access plan chosen by the state. The first, and perhaps most important, principle to arise from the federal cases interpreting *Bounds*, has been the resounding judicial approval of the cryptic constitutional analysis provided by the Court to support its right of access to the courts.

Although the *Bounds* majority described the existence of a constitutional right of prisoner access to the courts as "beyond doubt,"<sup>64</sup> and characterized that right as "fundamental,"<sup>65</sup> critics

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61. See Comment, *supra* note 39, at 1284.

62. *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985).

63. 430 U.S. 817 (1977).

64. *Id.* at 821.

65. *Id.* at 828.

on and off the Court openly questioned the constitutional underpinnings of that result. Justice Rehnquist, in his dissenting opinion, made no secret of his distaste for the theoretical bases of the majority holding, stating that "the 'fundamental constitutional right of access to the courts' . . . is created virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived."<sup>66</sup> While the *Bounds* Court indisputably failed to provide an unequivocal discussion of the specific constitutional bases for its decision, it appears that the federal courts are satisfied that the majority's reliance upon the prisoners' access cases analyzed in the opinion established a legal foundation sufficient to support the existence of a prisoner's right of access to the courts. While most courts have stopped short of the Fifth Circuit's description of the right of access as "perhaps *the* fundamental constitutional right,"<sup>67</sup> opinions strongly supporting the constitutionality of that right can be found in each federal circuit.<sup>68</sup> Thus, while the Court's characterization of the right of access may have appeared overly sweeping at the time of the *Bounds* decision, subsequent judicial history has now removed any doubt that prisoners have a constitutional right of access to the courts sufficiently fundamental to require that states expend funds to facilitate prisoners' exercise of that right.

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66. *Id.* at 840 (Rehnquist, J., dissenting). Potuto, *supra* note 10, at 227. See generally Note, *Constitutional Law—Corrections—Prisoners' Constitutional Right of Access to Courts Imposes Duty on State to Provide Prison Law Libraries*, 23 VILL. L. REV. 613, 620-22 (1977-78). Regardless of this objection, the Court itself had identified varying constitutional sources for prisoners' right of access to the courts before its decision in *Bounds*. Compare *Wolff v. McDonnell*, 418 U.S. 539, 577-80 (1974) (right of access to the courts founded in the due process clause) and *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) (prisoners' right of access is a corollary of due process) with *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (*per curiam*) (prisoners retain first amendment right to redress grievances) and *Griffin v. Illinois*, 351 U.S. 12, 19-20 (1956) (due process and equal protection require states to provide indigent prisoners with trial transcripts to facilitate access to the courts). It appears that most commentators support the proposition that due process underlies the right of access. See, e.g., Comment, *supra* note 39, at 1284-1300; Note, *Prisoners' Rights—Failure to Provide Adequate Law Libraries Denies Inmates' Right of Access to the Courts*, 26 U. KAN. L. REV. 636, 644 (1978).

67. *Cruz v. Hauck*, 475 F.2d 475, 476 (5th Cir. 1973).

68. See, e.g., *Toussaint v. McCarthy*, 801 F.2d 1080, 1108-10 (9th Cir. 1986); *Campbell v. Miller*, 787 F.2d 217, 225 (7th Cir.), *cert. denied*, 107 S. Ct. 673 (1986); *Hooten v. Jenne*, 786 F.2d 692, 695 (5th Cir. 1986); *Ward v. Kort*, 762 F.2d 856, 858 (10th Cir. 1985); *Williams v. Wyrick*, 747 F.2d 1231, 1232 (8th Cir. 1984); *Holt v. Pitts*, 702 F.2d 639, 640 (6th Cir. 1983); *Bonner v. City of Prichard*, 661 F.2d 1206, 1212 (11th Cir. 1981); *Rich v. Zitnay*, 644 F.2d 41, 43 (1st Cir. 1981); *Williams v. Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978), *cert. denied*, 442 U.S. 911 (1979); *Sostre v. McGinnis*, 442 F.2d 178, 189 (2d Cir. 1971) ("[t]he Constitution protects with special solicitude a prisoner's access to the courts"), *cert. denied sub nom.* *Oswald v. Sostre*, 405 U.S. 978, *cert. denied*, 404 U.S. 1049 (1972); *Wade v. Kane*, 448 F. Supp. 678, 683, *aff'd*, 591 F.2d 1338 (3rd Cir. 1979).

Faced with no hope of a judicial reprieve from establishing legal access programs as mandated in *Bounds*, most states dutifully set about the task of developing such programs, engaging in sometimes lengthy periods of "local experimentation,"<sup>69</sup> as was encouraged by the Court. Unfortunately, instances have been uncovered in which states have, either inadvertently or intentionally, seized upon the Court's reluctance to establish an arbitrary time limit for compliance, and have failed to institute a legal access program capable of passing constitutional muster.<sup>70</sup> The most egregious example of state recalcitrance was North Carolina's inability or unwillingness to develop an acceptable access program during the eleven years that had passed since the original federal district court mandate to do so.<sup>71</sup> Although the district court directed the state to implement a plan calling for either adequate law libraries or adequate assistance from persons trained in the law within 120 days of its 1974 order, the state chose to appeal, unsuccessfully, to the Fourth Circuit Court of Appeals,<sup>72</sup> and the Supreme Court.<sup>73</sup> Having failed to overturn the order to establish an access program, North Carolina developed a prison law library system which was subsequently challenged by state inmates as constitutionally inadequate.<sup>74</sup> A five year period of protracted litigation ensued, during which the state did little to cooperate with the federal courts. Finally, the district court took affirmative action to insure that North Carolina prisoners would receive adequate access to the courts by ordering the state to develop a plan including, in some form, the assistance of counsel.<sup>75</sup> In so doing, the North Carolina federal court, following the example set earlier by federal district courts in Oklahoma<sup>76</sup> and Kentucky,<sup>77</sup> merely extended the Supreme Court's rule allowing states to choose between the establishment of prison law libraries and legal assistance by persons trained in the law<sup>78</sup> to cover situations in which the states fail to develop or properly im-

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69. *Bounds*, 430 U.S. at 832.

70. *Id.*

71. The original order, submitted by Judge Larkins in 1974, is in an unreported district court opinion.

72. *See Smith v. Bounds*, 538 F.2d 541 (4th Cir. 1975), *aff'd*, 430 U.S. 817 (1977).

73. *See Bounds*, 430 U.S. 817.

74. *See Smith v. Bounds*, 610 F. Supp. 597, 599 (E.D.N.C. 1985).

75. *Id.* at 606.

76. *See Battle v. Anderson*, 457 F. Supp. 719 (E.D. Okla. 1978).

77. *See Canterino v. Wilson*, 562 F. Supp. 106 (W.D. Ky. 1983).

78. *See Bounds*, 430 U.S. at 828.

plement a constitutionally sufficient prisoner access plan within a reasonable period of time. In such cases, courts have assumed the responsibility of fashioning a plan containing the elements that will provide meaningful access to the courts,<sup>79</sup> thus eliminating the states' *Bounds*-approved option of choosing the type of legal assistance they make available to their prisoners. Therefore, while the Supreme Court has ruled that states should be free initially to choose among legal access programs featuring law libraries, legal assistance plans, or some combination of the two, the federal trial courts ultimately are responsible for insuring that states in fact develop constitutionally adequate access programs.<sup>80</sup>

States may consider economic factors when choosing the methods they will use to provide access to the courts.<sup>81</sup> However, they are not free to totally deny prisoners their fundamental right of access because of a lack of financing.<sup>82</sup> States also cannot defend constitutionally deficient access programs with claims of "good faith efforts" and "good will."<sup>83</sup> Regardless of the states' concern for conservation of fiscal resources, the financial burden placed on the states pales in comparison to the risk that prisoners may not be afforded their right of access.<sup>84</sup>

Courts interpreting *Bounds* have broadened the scope of the Su-

79. See, e.g., *Smith*, 610 F. Supp. at 606 (affirmative action taken because the state had "proven itself unable or unwilling to insure that its law libraries [were] constitutionally adequate to meet its inmates' needs"); *Canterino*, 562 F. Supp. at 112 (state cannot reject its constitutional responsibility of assisting inmates in the preparation and filing of meaningful legal papers); *Battle*, 457 F. Supp. at 737 (court assumed the responsibility of fashioning an adequate legal access program after ruling that the state had not complied with repeated orders to change its library plan to provide meaningful access to all prisoners).

80. This would seem to be the logical extension of the Supreme Court's admonition that all state access plans would be evaluated by the courts "as a whole to ascertain [their] compliance with constitutional standards." See *Bounds*, 430 U.S. at 832. Seemingly, those states whose legal access programs are found to be lacking are subject to a possible court order mandating the type of program to be established.

81. See *Bounds*, 430 U.S. at 825.

82. See *id.*; see also, e.g., *Nadeau v. Helgemoe*, 561 F.2d 411, 417 (1st Cir. 1977) ("[T]he denial of a fundamental right . . . cannot be justified by reference to cost or convenience"); *Cody v. Hillard*, 599 F. Supp. 1025, 1062 (D.S.D. 1984) ("if the state wishes to hold inmates in institutions, it must provide funds to maintain the inmates in a constitutional manner"); *Ramos v. Lamm*, 485 F. Supp. 122, 167 (D. Colo. 1979) (lack of finances not a defense for constitutional violations), *aff'd in part*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

83. See *Ramos*, 485 F. Supp. 167; *cf.*, *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) ("Financial cost alone is not a controlling weight . . . but the Government's interest . . . in conserving scarce fiscal and administrative resources is a factor that must be weighed.")

84. See generally Comment, *supra* note 39, at 1317-18.

preme Court's holding by extending the right of access to types of prisoners not originally considered. Indeed, county<sup>85</sup> and municipal<sup>86</sup> jails must provide their prisoners with adequate law libraries, absent alternative legal assistance programs, just as states must do, regardless of the number of inmates incarcerated in a particular jail.<sup>87</sup> However, courts have held that jail authorities may not be required to furnish *Bounds* access when, "because of the shortness of incarceration the courts would not reasonably expect an inmate to have sufficient time to petition the courts."<sup>88</sup> Further, several courts have posited that female prisoners must be granted the same meaningful access to the courts that their male counterparts within the states receive.<sup>89</sup> Finally, at least one federal circuit has ruled that a person held under a mental commitment is entitled to have meaningful access to the courts in the same fashion as other prisoners.<sup>90</sup>

### B. *The Prison Law Library Alternative*

During the ten years since the *Bounds v. Smith*<sup>91</sup> decision, the federal courts have been inundated with cases testing the constitutionality of the various state-established prisoner access programs. An overwhelming majority of these courts agreed, at least initially, with the Supreme Court's mandate that the states must provide either adequate law libraries or adequate assistance from persons trained in the law<sup>92</sup> in order to provide prisoners with meaningful

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85. See, e.g., *Hooten*, 786 F.2d at 697; *Morrow v. Harwell*, 768 F.2d 619, 624 (5th Cir. 1985); *Leeds v. Watson*, 630 F.2d 674, 676-77 (9th Cir. 1980); *Noren v. Straw*, 578 F. Supp. 1, 5 (D. Mont. 1982); *Parnell v. Waldrep*, 511 F. Supp. 764, 769-70 (W.D.N.C. 1981).

86. See, e.g., *Harris v. Young*, 718 F.2d 620, 623-24 (4th Cir. 1983); *Leeke*, 584 F.2d at 1340.

87. See *Morrow*, 768 F.2d at 624 (the number of inmates incarcerated does not alter the jail's responsibility to insure the right of access to legal materials since the right is individual rather than group in nature). See generally Comment, *The Impact of Bounds v. Smith on City and County Jail Facilities*, 67 Ky. L.J. 1064 (1978-79).

88. *Hooten*, 786 F.2d at 697; see also *Cruz v. Hauck*, 515 F.2d 322, 333 (5th Cir. 1975) ("inmates whose confinement is of a very temporary nature or for purposes of transfer to other institutions" need not be afforded full *Bounds* access to the courts), cert. denied, 424 U.S. 917 (1976).

89. See *Canterino*, 562 F. Supp. at 111; *Glover v. Johnson*, 478 F. Supp. 1075, 1079 (E.D. Mich. 1979).

90. See *Ward*, 762 F.2d at 858-59.

91. 430 U.S. 817 (1977).

92. See *Bounds*, 430 U.S. at 828.



access to the courts.<sup>93</sup> However, before *Younger v. Gilmore*,<sup>94</sup> the courts historically had denied prisoners the right to engage in legal research<sup>95</sup> based on the assumption that inmates could not use sophisticated legal materials to raise serious and legitimate claims. While the *Bounds* Court made at least a cursory defense of some inmates' ability to use legal materials in a meaningful way,<sup>96</sup> there is little question that legal assistance programs were considered the better alternative to law libraries.<sup>97</sup> Thus, while a state may satisfy its burden of establishing adequate prisoner access programs by providing inmates with adequate law libraries, judicial reluctance to allow prisoners to use legal materials still appears in lower court opinions,<sup>98</sup> causing many states to establish law libraries only when alternative approaches are unavailable or inadequate.<sup>99</sup>

Regardless, many states have attempted to satisfy their duty to provide prisoners with access to the courts through the establishment of a prison law library program. These programs frequently have been subjected to judicial review to determine their adequacy. Most of the resultant opinions evaluate the adequacy of inmate

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93. See, e.g., *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 855 (9th Cir. 1985) ("[A] prison must provide inmates with access to an adequate law library or, in the alternative, with adequate assistance from persons trained in the law."); *Corgain v. Miller*, 708 F.2d 1241, 1250 (7th Cir. 1983) (the state, not the prisoner, is free to choose between law library and alternative legal services); *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981) ("It is the state's option to choose among the avenues of access or combinations thereof to satisfy its constitutional obligation."); *Williams v. Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978) ("Under *Bounds*, the state is duty bound to assure prisoners some form of meaningful access to the courts. But states remain free to satisfy that duty in a variety of ways."), *cert. denied*, 442 U.S. 911 (1979). *McMurry v. Phelps*, 533 F. Supp. 742, 766 (W.D. La. 1982) (avenue chosen by the state to provide prisoner access to the courts is not important as long as it complies with constitutional standards); *Carter v. Kamka*, 515 F. Supp. 825, 831 (D. Md. 1980) (citing *Bounds*' flexible approach to the form that a legal access program might take); *Hall v. Maryland*, 433 F. Supp. 756, 776 (D. Md. 1977), *aff'd in part sub nom. Carter v. Mandel*, 573 F.2d 172 (4th Cir. 1978).

94. 404 U.S. 15 (1971) (per curiam).

95. See, e.g., *Hatfield v. Bailleaux*, 290 F.2d 632, 640 (9th Cir. 1961) (state is under no constitutional duty to provide inmates with libraries), *cert. denied*, 368 U.S. 862 (1961).

96. See *Bounds*, 430 U.S. at 826-27. *But see id.* at 836 (Stewart, J., dissenting) (access to a law library will result in pleadings possessing veneer without the substance of professional competence).

97. The Court spoke highly of the "many imaginative" forms of legal assistance programs devised by states and stated that these programs "may have a number of advantages over libraries alone." *Id.* at 831.

98. See, e.g., *McMurry*, 533 F. Supp. at 767 (libraries are expensive to purchase and maintain); *Boulies v. Ricketts*, 518 F. Supp. 687, 688 (D. Colo. 1981) (libraries are more expensive and time-consuming for a state to maintain than legal assistance programs and may provide lower quality legal assistance than programs using persons trained in the law).

99. See generally *Westling & Rasmussen*, *supra* note 6, at 285.

access to the law library with two criteria: first, the physical adequacy of the library and legal materials contained therein; and, second, the sufficiency of inmate access to the library.<sup>100</sup>

Most judicial inquiries concerning a prison law library's physical adequacy begin and end with an analysis of the library collection. Although the *Bounds* Court approved North Carolina's proposed law library collection,<sup>101</sup> the decision did not expressly articulate minimum collection standards as guidance to other states and courts.<sup>102</sup> However, a prison library must at least contain state and federal constitutions, annotated federal code volumes containing titles 18 and 28, all federal procedural rules, an active set of statutes for the state in which the prison lies, federal and state case reporters from 1960 to the present, Shepards Citations for federal and state cases, local court rules, selected treatises, indexes, and a law dictionary.<sup>103</sup> Some courts have stretched these minimum collection standards by requiring materials such as the complete na-

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100. *Id.*

101. *See Bounds*, 430 U.S. at 819 n.4. The proposed law library collection for North Carolina prisons contained the following materials:

- North Carolina General Statutes
- North Carolina Reports (1960-present)
- North Carolina Court of Appeals Reports
- Strong's North Carolina Index
- North Carolina Rules of Court
- United States Code Annotated:
  - Title 18
  - Title 28 §§ 2241-2254
  - Title 28 Rules of Appellate Procedure
  - Title 28 Rules of Civil Procedure
  - Title 42 §§ 1891-2010
- Supreme Court Reporter (1960-present)
- Federal 2d Reporter (1960-present)
- Federal Supplement (1960-present)
- Black's Law Dictionary
- Sokol: Federal Habeas Corpus
- LaFave and Scott: Criminal Law Hornbook (2 copies)
- Cohen: Legal Research
- Criminal Law Reporter
- Palmer: Constitutional Rights of Prisoners

102. In approving this list, the Court expressly noted that it conformed with the minimum prison collection endorsed by the American Bar Association, American Correctional Association, and the American Association of Law Libraries, with the exception of the "questionable omission" of Shepard's Citations and local court rules. *Id.*

103. This minimum collection was approved in a number of post-*Bounds* cases. *See, e.g., Cepulonis v. Fair*, 563 F. Supp. 659, 660 (D. Mass. 1983), *aff'd in part and vacated in part*, 732 F.2d 1 (1st Cir. 1984); *Fluhr v. Roberts*, 460 F. Supp. 536, 538 (W.D. Ky. 1978); *Hardwick v. Ault*, 447 F. Supp. 116, 133-34 (M.D. Ga. 1978). *See generally Westling & Rasmussen, supra* note 6, at 285-86.

tional reporter system for the region in which the prison lies, as well as federal and state digests covering cases from at least 1960 to the present.<sup>104</sup> In addition, it appears that the *Bounds*-approved library collection would be considered deficient in the area of treatises and other secondary materials by today's standards.<sup>105</sup> Regardless of what a library's holdings catalog indicates *should* be contained within the collection, most courts judge the adequacy of a library based on the materials actually available to prisoners, thereby placing the burden upon prison officials to review their collections regularly to insure that all necessary materials are available, intact, and updated.<sup>106</sup>

Once courts are satisfied that a prison's law library collection is at least adequate, prisoners have little success arguing that the law library contains insufficient materials to combat legal opponents who have access to larger, more comprehensive collections.<sup>107</sup> Further, the courts have not found that the inherent complexity of legal research materials requires that a prison law library be staffed by a professional librarian.<sup>108</sup>

State and federal prisons accepting custody of out-of-state prisoners transferred because of overcrowding in the transferring state, or because of an interstate or inter-institutional agreement, cannot be compelled to provide such prisoners with the legal materials of

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104. See *Kendrick v. Bland*, 541 F. Supp. 21, 34 (W.D. Ky. 1981); *Craig v. Hocker*, 405 F. Supp. 656, 669 (D. Nev. 1975).

105. See AMERICAN ASSOCIATION OF LAW LIBRARIES, RECOMMENDED COLLECTIONS FOR PRISON AND OTHER INSTITUTION LAW LIBRARIES 1-10 (rev. ed. 1985). The American Association of Law Libraries list of minimum prison law library materials, which the *Bounds* Court cited approvingly, has changed drastically since its original publication in 1972. The current list is much more comprehensive in recognition of the fact that, to be considered truly adequate, an adequate law library must contain not only statutes and court reports, but also many basic law hornbooks, formbooks, and finding aids.

106. See *Ramos v. Lamm*, 639 F.2d 559, 582 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Kendrick v. Bland*, 586 F. Supp. 1536, 1551 (W.D. Ky. 1984); *cf.* *Rhodes v. Robinson*, 612 F.2d 766, 771 (3d Cir. 1979) (discarding of outdated advance sheets did not adversely affect prison library's adequacy since *Bounds* evaluation focused on the volumes retained in a collection rather than those discarded). *But see* *Robbins v. South*, 595 F. Supp. 785, 788 (D. Mont. 1984) (stating that prison libraries may be held to a less stringent standard of currentness and completeness than law libraries in law schools and large law firms).

107. See, e.g., *Lindquist*, 776 F.2d at 856 (prison library need only meet minimum constitutional standards and need not provide a library that affords prisoners with the best possible access to the courts); *Dugar v. Coughlin*, 613 F. Supp. 849, 853 (S.D.N.Y. 1985) (courts will not second guess a prison's library procedures if they meet constitutional minimal standards); *Robbins*, 595 F. Supp. at 788 (libraries provided by prisons need not be comparable to those found in law schools and large law firms).

108. See *Kendrick*, 586 F. Supp. at 1550; *Fluhr*, 460 F. Supp. at 537.

the transferring state. Although these prisoners retain their constitutional right of access to the courts, the responsibility remains on the transferring state to ensure that affected prisoners have continued access to the courts of the state in which they were originally imprisoned, either by providing the transferring state's legal materials to the law library in the prisoner's new penal institution, or by providing the prisoner with the legal assistance of a person trained in the law of the transferring state.<sup>109</sup>

Although the foregoing collection considerations are vital when the adequacy of a prison library is being considered, the courts view the question of prisoners' physical access to the library to be of equal or greater import.<sup>110</sup> Even the most fully stocked library is meaningless if prisoners are not offered sufficient opportunity to use the facility.<sup>111</sup> However, courts have been mindful of the legitimate administrative and security concerns unique to prisons, and have allowed reasonable library usage restrictions in certain cases.<sup>112</sup>

Prison regulations limiting library access or the time, manner, and place allotted to prisoners to conduct legal research are frequently the subject of judicial scrutiny. While restricted physical access to the library is not unconstitutional *per se*,<sup>113</sup> courts have

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109. See *Rich v. Zitnay*, 644 F.2d 41, 43 (1st Cir. 1981) (state may not wash its hands of its obligation to insure access to its courts simply by transferring the prisoner out of state); *Hudson v. Israel*, 594 F. Supp. 664, 669 (E.D. Wis. 1984) (transferring state must provide either an adequate law library or adequate aid from persons trained in the law of the transferring state) (citing *Brown v. Smith*, 580 F. Supp. 1576, 1577-78 (M.D. Pa. 1985)).

110. See, e.g., *J. GOBERT & N. COHEN*, *supra* note 6, § 2.07, at 40.

111. See generally *Westling & Rasmussen*, *supra* note 6, at 287-89.

112. *Kendrick*, 586 F. Supp. at 1550 ("A prison library is but one factor in the totality of all factors bearing on inmate access to the court."); see also *Twyman v. Crisp*, 584 F.2d 352, 357 (10th Cir. 1978) ("restricted access to the [prison] law library is not *per se* denial of access to the courts").

113. See *Ramos*, 639 F.2d at 582-84 (regulation restricting library access to three hours every thirteen weeks is clearly violative of inmates' constitutional rights); *Nadeau v. Helgemoe*, 561 F.2d 411, 413, 418 (1st Cir. 1977) (state must provide inmates with more than one hour of library access per week); *Canterino v. Wilson*, 562 F. Supp. 106, 110 (W.D. Ky. 1983) (fifteen hours of library access per week, when combined with inexperienced inmate assistance, is unconstitutional); *Jones v. Wittenburg*, 509 F. Supp. 653, 683-84 (N.D. Ohio 1980) (eighty minutes of library access per week, when combined with law student assistance, did not satisfy rules adopted by state court). *But see Hudson v. Robinson*, 678 F.2d 462, 466 (3d Cir. 1982) (ten-day delay before notarization of document is not a denial of right of access); *Harrell v. Keohane*, 621 F.2d 1059, 1060-61 (10th Cir. 1980) (*per curiam*) (regulation limiting library access to five inmates at a time not a denial of prisoner's constitutional rights); *Wetmore v. Fields*, 458 F. Supp. 1131, 1143 (W.D. Wis. 1978) (four hours of library access per day is sufficient where additional time is available to inmates facing imminent deadlines).

not hesitated to strike down regulations adjudged to be unreasonable in light of prisoners' constitutional right of access to the courts.<sup>114</sup> To pass constitutional muster, a state must convince the courts that restrictive regulations are necessary for legitimate penal policies and objectives, and that prisoners retain some form of meaningful access to the courts despite the restrictions.<sup>115</sup> The maintenance of prison security, internal order, and discipline are essential institutional goals which may require the limitation or temporary retraction of prisoners' rights.<sup>116</sup>

States without compelling reasons to restrict library access or alternative legal assistance programs are compelled by the *Bounds* holding to provide prisoners with direct access to an adequate law library.<sup>117</sup> Since legal research initially involves the use of many indexes and cross-references, any prison practice requiring inmates to submit specific book or case requests to runners who retrieve the requested material from the library is an unacceptable substitute for personal access by the requesting prisoner.<sup>118</sup>

States choosing the *Bounds* law library alternative clearly may

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114. See generally Westling & Rasmussen, *supra* note 6, at 288-89.

115. *Id.* at 288.

116. *Cookish v. Cunningham*, 787 F.2d 1, 5-6 (1st Cir. 1986); see also *Campbell v. Miller*, 787 F.2d 217, 228 (7th Cir. 1986) ("The security status of a prisoner may justify reasonable steps restricting his direct access to legal materials."), *cert. denied*, 107 S. Ct. 673 (1986); *Lindquist*, 776 F.2d at 858 (Constitution does not require unlimited prisoner access to a law library); *Walker v. Mintzes*, 771 F.2d 920, 932 (6th Cir. 1985) (post-riot restrictions on prisoner use of library is reasonable where alternative assistance programs and jailhouse lawyers exist); *Williams v. Wyrick*, 747 F.2d 1231, 1232 (8th Cir. 1984) (regulations supported by prison's legitimate security interest override any inconvenience they may cause prisoners); *Kendrick*, 586 F. Supp. at 1550 (the existence of size constraints, which permit only a limited number of prisoners to use the law library at the same time, does not establish the inadequacy of the library); *Boston v. Stanton*, 450 F. Supp. 1049, 1057 (W.D. Mo. 1978) (inmates without imminent filing deadlines may have to wait two to three weeks for access to the library).

117. *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985); accord *Green v. Ferrell*, 801 F.2d 765, 772 (5th Cir. 1986).

118. See, e.g., *Green*, 801 F.2d at 772 (requirement that inmates request specific volumes from a law library without personal access or legal assistance is constitutionally inadequate); *Corgan v. Miller*, 708 F.2d 1241, 1245 (7th Cir. 1983) (requirement that a prisoner know in advance exactly what materials he needs to consult without the ability to browse the collection creates a "Catch-22"); *Jones v. Diamond*, 594 F.2d 997, 1024 (5th Cir. 1979) (book paging systems are of no use to prisoners who have no idea what to request); *Martino v. Carey*, 563 F. Supp. 984, 1003-04 (D. Or. 1983) ("It is completely unrealistic to expect prisoners to know the names of law books [and cases] they will need for research . . . so that these can be requested from a guard."). *But cf.* *Caldwell v. Miller*, 790 F.2d 589, 606 (7th Cir. 1986) (paging system requiring inmates to request library materials by specific citations does not violate prisoners' access right so long as adequate reference materials are available to the requesting party).

impose some reasonable limitations and restrictions on library collections and prisoner access thereto; however, the ultimate burden of showing that these restrictions do not unduly impair a prisoner's right of access to the courts rests with corrections officials.<sup>119</sup> The *Bounds* Court's unfortunate failure to clearly articulate minimum standards for library adequacy forces courts to evaluate each case on an ad hoc basis, making the true constitutional parameters of prisoner library access unpredictable.<sup>120</sup>

### C. *Alternative Legal Assistance Programs*

Although the establishment of adequate prison law libraries is one constitutionally acceptable method of assuring prisoners' meaningful access to the courts, the *Bounds v. Smith*<sup>121</sup> Court did not foreclose "alternative means to achieve that goal."<sup>122</sup> Specifically, in the absence of adequate prison law libraries, states must implement legal assistance programs featuring some degree of professional or quasi-professional legal assistance to prisoners.<sup>123</sup> Stating that these programs "take many imaginative forms,"<sup>124</sup> the Court described a number of alternative programs that could be instituted within a prison to satisfy constitutional requirements: 1) the use of full-time staff attorneys; 2) the organization of a network of volunteer attorneys established through bar associations or other groups; 3) the hiring of lawyers as part-time consultants; 4) the training of inmates as paralegals to work under the direction of attorneys; and 5) the use of paraprofessionals and law students.<sup>125</sup> However, as in the case of the law library alternative, the Court refused to mandate any specific minimum constitutional standards for alternative legal assistance programs, choosing to leave the details of such programs to the individual states and penal institutions.<sup>126</sup> The sole essential feature of any program established is to enable prisoners to file petitions and complaints with

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119. See generally J. GOBERT & N. COHEN, *supra* note 6, § 2.07, at 43-44.

120. See generally Comment, *supra* note 39, at 1284-85.

121. 430 U.S. 817 (1977).

122. *Id.* at 830.

123. *Id.* at 831; see also Toussaint v. McCarthy, 801 F.2d 1080, 1110 (9th Cir. 1986); *Walters v. Thompson*, 615 F. Supp. 330, 340 (N.D. Ill. 1985); *Kendrick v. Bland*, 586 F. Supp. 1536, 1552 (W.D. Ky. 1984).

124. *Bounds*, 430 U.S. at 831.

125. *Id.* The Court stated that by 1977, nearly half of the states and the District of Columbia had developed some alternative legal assistance program. *Id.* at 830-31.

126. *Id.* at 832.

the courts which would provide prisoners, ipso facto, with "meaningful access" to the judicial system.<sup>127</sup> Again, as in judicial evaluations of the adequacy of prison libraries, each alternative legal assistance program established must be examined on a case-by-case basis to determine its constitutional sufficiency.<sup>128</sup>

As expressly anticipated and encouraged by the *Bounds* Court, states implementing legal assistance programs in their prisons have actively engaged in "local experimentation"<sup>129</sup> to find the best type of program for each institution. While many differences exist, particularly in regard to the persons actually chosen to provide prisoners with legal assistance, a number of common principles have emerged from the lower federal courts. The courts overwhelmingly have subscribed to the constitutional efficacy of the *Bounds* "alternative approach," ruling that states making legal assistance programs available to prisoners need not also establish prison law libraries.<sup>130</sup> The choice between law libraries and legal assistance programs lies with the state.<sup>131</sup> Prisoners who decide not to use the state-chosen alternative have no basis, constitutional or otherwise, to claim violation of their access rights.<sup>132</sup> Many courts have ruled that the mere appointment of counsel satisfies a state's constitutional duty to protect the prisoners' right of access, even in cases

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127. *Id.* at 828 n.17; accord *Carter v. Fair*, 786 F.2d 433, 435 (1st Cir. 1986). See generally *Westling & Rasmussen*, *supra* note 6, at 283-84.

128. See, e.g., *Mann v. Smith*, 796 F.2d 79, 85 (5th Cir. 1986) (court will merely examine the record of the instant case to determine if a prison's legal assistance program has afforded prisoner "meaningful access" to the courts).

129. *Bounds*, 430 U.S. at 832.

130. See, e.g., *Corgain v. Miller*, 708 F.2d 1241, 1250 (7th Cir. 1983) (states under no duty to provide prison law libraries when adequate alternative services are available); *Spates v. Manson*, 644 F.2d 80, 85 (2d Cir. 1981) (no right to state-financed library resources where state-financed legal assistance is available); *Almond v. Davis*, 639 F.2d 1086, 1090 (4th Cir. 1981) (adequate legal assistance program is a viable alternative to the requirement of a law library); *Falzerano v. Collier*, 535 F. Supp. 800, 803 (D.N.J. 1982) (state discharged its constitutional duty to provide access to courts by providing prisoners with lawyers).

131. The attorney who represented the prisoner before the Supreme Court in *Bounds*, Barry Nakell, feels that there are a number of advantages to legal assistance programs over prison law libraries including "competence, prompt action, the ability of lawyers to use outside resources, the reduction of frivolous petitions, and the ability of lawyers to resolve problems by methods other than litigation." *Flores*, *supra* note 2, at 287. The *Bounds* Court itself notes that a majority of prison administrators supported creation and expansion of legal assistance programs. See *Bounds*, 430 U.S. at 829 n.18.

132. *Holt v. Pitts*, 702 F.2d 639, 640-41 (6th Cir. 1983); accord *United States v. Wilson*, 690 F.2d 1267, 1271 (9th Cir. 1982), *cert. denied*, 464 U.S. 867 (1983); *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981); *United States v. Chatman*, 584 F.2d 1358, 1360 (4th Cir. 1978); *Carter v. Kamka*, 515 F. Supp. 825, 833 (D. Md. 1980).

where prisoners wish to proceed pro se at trial and have no intention of actively using their "standby counsel."<sup>133</sup>

As to the quality and quantity of services provided by prison legal assistance plans, courts have not approved of the use of "dependent, untrained, and inadequately supervised individuals as the sole means of giving inmates access to the courts."<sup>134</sup> In addition, periodic assistance by a legal services program has been held unsuitable to satisfy the state's constitutional obligations.<sup>135</sup> In such cases, particularly where prisoners have no access to a law library, the state must provide inmates with "assistance by trained, skilled, and independent legal personnel."<sup>136</sup> Although these individuals are generally attorneys,<sup>137</sup> courts have ruled that constitutionally adequate assistance can be rendered to prisoners by law students and paralegals<sup>138</sup> in certain closely supervised situations.<sup>139</sup>

#### IV. ACCESS TO PRISON LAW LIBRARIES OR LEGAL ASSISTANCE AS ALTERNATIVES: ARE BOTH REQUIRED TO ASSURE MEANINGFUL ACCESS TO THE COURTS?

As a corollary to its holding that prisoners have a fundamental constitutional right of access to the courts, the Court in *Bounds v. Smith*<sup>140</sup> also emphasized that states have a duty to insure "meaningful" access.<sup>141</sup> By allowing states to choose either adequate law libraries or alternative legal assistance programs to facilitate prisoner access in their penal institutions, the Court demonstrated little concern that the method chosen could adversely affect a prisoner's ability to prepare and file meaningful legal papers.<sup>142</sup> In practice, however, any state establishing prison law libraries, or le-

133. See, e.g., *Spates v. Manson*, 644 F.2d 80, 85 (2d Cir. 1981); *Boston v. Stanton*, 450 F. Supp. 1049, 1057 (W.D. Mo. 1978); see *infra* notes 179-81 and accompanying text.

134. *Walters*, 615 F. Supp. at 340; see also *Harrington v. Holshouser*, 741 F.2d 66, 69-70 (4th Cir. 1984); *Ramos v. Lamm*, 639 F.2d 559, 584-85 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Cruz v. Hauck*, 627 F.2d 710, 720-21 (5th Cir. 1980); *Kendrick*, 586 F. Supp. at 1552; *Canterino v. Wilson*, 562 F. Supp. 106, 110-12 (W.D. Ky. 1983).

135. See *Leeds v. Watson*, 630 F.2d 674, 676-77 (9th Cir. 1980). However, the court indicated that periodic assistance combined with prisoners' access to a law library would have satisfied constitutional requirements.

136. *Walters*, 615 F. Supp. at 340; see also *Lovell v. Brennan*, 566 F. Supp. 672, 696-97 (D. Me. 1983), *aff'd*, 728 F.2d 560 (1st Cir. 1984); *Canterino*, 562 F. Supp. at 110-12.

137. See generally Comment, *supra* note 6, at 982-83.

138. See generally J. GOBERT & N. COHEN, *supra* note 6, § 2.06, at 37-38.

139. See *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985).

140. 430 U.S. 817 (1977).

141. See *id.* at 823.

142. See *id.* at 828 n.17.



gal assistance plans, may have doomed some prisoners in the state to anything but meaningful access since the right of meaningful access to the courts is of an individual rather than a group nature.<sup>143</sup> Therefore, an access plan that may provide some, or even a majority, of a state's prisoners with meaningful access to the courts, may not be helpful to many prisoners who have an equally compelling right to reject that plan and seek access in a way not subscribed to by the state.

The constitutional flaw in the *Bounds* approach to meaningful prisoner access can best be illustrated by an examination of two types of prisoners affected most adversely when states are allowed to choose either prison law libraries or legal assistance programs, specifically, illiterate or poorly educated prisoners incarcerated in a state that provides access exclusively through law libraries, or prisoners desirous of exercising their right to proceed with their criminal cases pro se who are incarcerated in a state that provides access exclusively through a legal assistance plan.

#### A. *Law Library Access: Illiterate and Undereducated Prisoners*

The *Bounds v. Smith*<sup>144</sup> majority defended its position that an adequate prison law library could provide inmates with meaningful access to the courts<sup>145</sup> by stating that the "Court's experience indicates that pro se petitioners are capable of using lawbooks to file cases raising claims that are serious and legitimate even if ultimately unsuccessful."<sup>146</sup> However, contrary evidence appears so overwhelming that Justice Stewart, in his dissent, may have been more accurate when he wrote that "'meaningful access' to the federal courts can seldom be realistically advanced by the device of making law libraries available to prison inmates untutored in their use."<sup>147</sup>

State prisoners, as a class, are far less educated than the general population.<sup>148</sup> As illustrated by federal statistics<sup>149</sup> compiled in

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143. See *Morrow v. Harwell*, 768 F.2d 619, 624 (5th Cir. 1985); accord *Hooten v. Jenne*, 786 F.2d 692, 697 (5th Cir. 1986).

144. 430 U.S. 817 (1977).

145. See *supra* notes 44-48 and accompanying text.

146. *Bounds*, 430 U.S. at 826-27.

147. *Id.* at 836 (Stewart, J., dissenting).

148. See Comment, *supra* note 39, at 1281.

149. See *id.* at nn.21 & 22 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 468 (1981); and the NATIONAL CRIMINAL JUS-

1981, over thirty percent of all prisoners have less than an eighth grade education, as opposed to only nine percent with less than an eighth grade education among the general population.<sup>150</sup> Obviously, large numbers of those poorly educated inmates are illiterate or functionally illiterate, making the value of law libraries to them dubious at best.<sup>151</sup>

The problems arising from a lack of comprehension of the content of legal materials are exacerbated by the inherent complexity of many areas of the law, such as habeas corpus and civil rights actions, that are of special interest to prisoners.<sup>152</sup> While the courts have attempted to mitigate the difficulties that prisoners face in researching and filing habeas corpus petitions and civil rights actions by requiring only that prisoners "set forth facts giving rise to the cause of action,"<sup>153</sup> and have traditionally been very liberal when evaluating prisoner complaints,<sup>154</sup> there is only so much that most prisoners can accomplish due to a basic misunderstanding of the substantive and procedural complexities of their cases.<sup>155</sup>

Although *Bounds* states that an adequate prison law library, without assistance by persons trained in the law, can serve as a vehicle to satisfy prisoners' fundamental constitutional right to access the courts, subsequent opinions have openly questioned whether library books, even if adequate in number, can truly provide inmates, particularly those who are illiterate or who do not speak English, with "meaningful" access to the courts.<sup>156</sup> This criticism is based on the theory that the "adequacy of a prisoner's right of access to the courts must be measured by the actual opportunity he or she has to raise a valid and meaningful claim before the courts."<sup>157</sup> This is in line with the Supreme Court's pre-

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TICE INFORMATION AND STATISTICS SERVICE, U.S. DEP'T OF JUSTICE, PROFILE OF STATE PRISON INMATES: SOCIODEMOGRAPHIC FINDINGS FROM THE 1974 SURVEY OF INMATES OF STATE CORRECTIONAL FACILITIES 9-12 (1979)).

150. *Id.* at n.22.

151. *See id.* at 1281.

152. *See id.* at 1306.

153. *Bounds*, 430 U.S. at 825.

154. *See Comment, supra* note 39, at 1307.

155. *Id.* at 1307-08.

156. *See, e.g., Cruz v. Hauck*, 627 F.2d 710, 721 (5th Cir. 1980); *Walters v. Thompson*, 615 F. Supp. 330, 339 (N.D. Ill. 1985); *Smith v. Bounds*, 610 F. Supp. 597, 603-04 (E.D.N.C. 1985); *Canterino v. Wilson*, 562 F. Supp. 106, 111-12 (W.D. Ky. 1983); *Glover v. Johnson*, 478 F. Supp. 1075, 1096 (E.D. Mich. 1979); *Wetmore v. Fields*, 458 F. Supp. 1131, 1142-43 (W.D. Wis. 1978); *Wade v. Kane*, 448 F. Supp. 678, 684-85 (E.D. Pa. 1978), *aff'd without opinion*, 591 F.2d 1338 (3d Cir. 1979).

157. *Glover*, 478 F. Supp. at 1096; *accord Stevenson v. Reed*, 391 F. Supp. 1375, 1380-81

*Bounds* position, taken in *Wolff v. McDonnell*,<sup>158</sup> that the due process clause assures that no one will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. This Court specifically stated that, "[t]he recognition by the Court that prisoners have certain constitutional rights which can be protected by civil rights actions would be diluted if inmates, often 'totally or functionally illiterate,' were unable to articulate their complaints to the courts."<sup>159</sup> In fact, the *Bounds* opinion expressly allows states to create a situation in which educationally disadvantaged prisoners can be effectively denied that access by simply allowing states to feel that they can satisfy their duty to provide all prisoners with meaningful access to the courts by establishing prison law libraries.

To remedy this constitutional dilemma, a number of federal courts have logically extended the *Bounds* holding by declaring that, while states may continue to provide prisoners with access to the courts through the establishment of adequate prison law libraries,<sup>160</sup> their obligation does not end there. For those inmates without sufficient intellectual abilities or educational attainment to allow reasonable comprehension of their legal claims, the state also must provide some form of direct legal assistance to help these prisoners translate their complaints into a meaningful presentation.<sup>161</sup> This assistance may be supplied by an attorney,<sup>162</sup> but also can be from a "free world person with paralegal training,"<sup>163</sup> a competent inmate writ-writer,<sup>164</sup> or an inmate-operated law clinic.<sup>165</sup>

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(N.D. Miss. 1975), *aff'd*, 530 F.2d 1207 (5th Cir.), *cert. denied*, 429 U.S. 944 (1976).

158. 418 U.S. 539 (1974).

159. *Id.* at 579.

160. *See Cruz*, 627 F.2d at 721.

161. *See, e.g., id.*; *Walters*, 615 F. Supp. at 339; *Cody v. Hillard*, 599 F. Supp. 1025, 1060-61 (D.S.D. 1984), *aff'd*, 799 F.2d 447 (8th Cir. 1986); *Canterino*, 562 F. Supp. at 110-11; *Glover*, 478 F. Supp. at 1096; *Wade*, 448 F. Supp. at 684.

162. *See, e.g., Smith*, 610 F. Supp. at 604 (state must devise a plan providing for assistance of counsel when library is ruled inadequate); *Canterino*, 562 F. Supp. at 112 (attorney assistance necessary despite existence of an adequate law library).

163. *Canterino*, 562 F. Supp. at 111.

164. *See, e.g., Cruz*, 627 F.2d at 721; *Canterino*, 562 F. Supp. at 111-12; *Glover*, 478 F. Supp. at 1097; *Wetmore*, 458 F. Supp. at 1142. *But cf. Smith*, 610 F. Supp. at 602-05 (state may not supplement law library access with untrained inmate paralegals).

165. *See Wade*, 448 F. Supp. at 684-85.

## B. *The Impact of Bounds on Pro Se Defendants*

As previously discussed, a state that satisfies its constitutional duty to provide prisoners with meaningful access to the courts through the establishment of legal assistance programs, using persons trained in the law to assist inmates in the preparation and filing of legal papers,<sup>166</sup> cannot be compelled also to establish prison law libraries.<sup>167</sup> While legal assistance programs arguably are more meaningful for the average prisoner, lacking in reading and comprehension skills, than a law library plan, they are decidedly less meaningful for a prisoner who, as a defendant in a criminal action, wishes to exercise his constitutional right of self-representation.

The Supreme Court, in *Faretta v. California*,<sup>168</sup> ruled that a defendant has a constitutional right to conduct a pro se defense.<sup>169</sup> The Court stated that this right, which is "necessarily implied by the structure of the [Sixth] Amendment,"<sup>170</sup> grants the accused the right to make his defense personally.<sup>171</sup> Although the Court warned that a pro se defendant probably would be better served by trained counsel,<sup>172</sup> once the choice to proceed pro se is made, the state may not prevent the jailed pro se defendant from preparing his defense.<sup>173</sup> Preparation has been defined as "having adequate time in which to work and having materials available to do the legal research necessary to prepare [a] defense."<sup>174</sup> Speaking of the personal nature of sixth amendment rights, the Ninth Circuit has stated that, "[t]he rights to notice, confrontation, and compulsory process' mean, at a minimum, that time to prepare and some access to materials and witnesses are fundamental to a meaningful

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166. See *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

167. See *supra* notes 130-32 and accompanying text.

168. 422 U.S. 806 (1975).

169. *Id.* at 836.

170. *Id.* at 819.

171. *Id.*

172. *Id.* at 834.

173. See *Milton v. Morris*, 767 F.2d 1443, 1445 (9th Cir. 1985) (defendant who exercises *Faretta* right to conduct his own defense should not be subjected to the possibility that, through circumstances beyond his control, he will not be allowed to prepare his defense); see also Note, *The Jailed Pro Se Defendant and the Right to Prepare a Defense*, 86 YALE L.J. 292, 296 (1976) (adequate opportunity to prepare is a fundamental component of due process and the state cannot prevent a pro se defendant from preparing his defense because he has chosen to exercise his constitutional right of self-representation).

174. Potuto, *supra* note 10, at 231.

right of representation."<sup>175</sup> This denotes access to law books, witnesses, and other tools, as necessary if the defendant hopes to exercise his pro se right in a meaningful way.<sup>176</sup>

How can the sixth amendment guarantee that a pro se litigant will be allowed to prepare and conduct his own defense be reconciled with the *Bounds* alternative access scheme that expressly allows states, with adequate prisoner legal assistance plans in place, to refuse to supply library materials to inmates? The courts have had difficulty in solving this conundrum. Some courts, while fully recognizing the constitutional right to a pro se defense, have followed steadfastly the *Bounds v. Smith*<sup>177</sup> alternative access principle, holding that when legal assistance is available through a government-sponsored program, the state has met its constitutional obligation and need not provide additional prison law libraries simply because an inmate refuses legal representation and proceeds pro se.<sup>178</sup> Several courts have indicated that where a defendant desires to proceed pro se, the appointment of counsel to act as an "informal legal advisor"<sup>179</sup> or "standby" attorney,<sup>180</sup> whether his services are used or not, discharges a state's constitutional duty to provide prisoners' access to the courts.<sup>181</sup> In fact, the Supreme Court has held that a pro se defendant's sixth amendment right to conduct his own defense is not violated by the unsolicited participation of standby counsel<sup>182</sup> as long as the defendant has a "fair chance to present his case in his own way."<sup>183</sup> A prisoner whose access to legal materials is severed from the outset clearly will not have any chance to present his case in any way.

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175. *Milton*, 767 F.2d at 1446 (quoting *Faretta*, 422 U.S. at 818).

176. *See id.*

177. 430 U.S. 817.

178. *See, e.g.*, *Corgain v. Miller*, 708 F.2d 1241, 1250 (7th Cir. 1983); *United States v. Wilson*, 690 F.2d 1267, 1271 (9th Cir. 1982), *cert. denied*, 464 U.S. 867 (1983); *Spates v. Manson*, 644 F.2d 80, 84-85 (2d Cir. 1981); *United States v. Chatman*, 584 F.2d 1358, 1360 (4th Cir. 1978); *Falzerano v. Collier*, 535 F. Supp. 800, 803 (D.N.J. 1982); *Carter v. Kamka*, 515 F. Supp. 825, 833 (D. Md. 1980); *Boston v. Stanton*, 450 F. Supp. 1049, 1057 (W.D. Mo. 1978).

179. *Boston*, 450 F. Supp. at 1057.

180. *Spates*, 644 F.2d at 85.

181. *See supra* note 133 and accompanying text; *accord* *United States v. West*, 557 F.2d 151, 152-53 (8th Cir. 1977) (per curiam). *Contra* *Owens-El v. Robinson*, 442 F. Supp. 1368, 1387 (W.D. Pa. 1978). *See generally* Potuto, *supra* note 10, at 231-32 (it is an error to assume that representation by an attorney adequate to satisfy *Bounds* can satisfy a state's obligation to provide incarcerated defendants with legal materials since this would obviate the pro se right).

182. *McKaskle v. Wiggins*, 465 U.S. 168 (1983).

183. *Id.* at 177.

Other courts have been willing to adopt a dual standard, allowing the state to make its *Bounds* choice while providing prisoners desiring to proceed pro se with adequate library materials.<sup>184</sup> Although there are added costs and security problems involved in supplying incarcerated pro se defendants with library materials, these security problems seemingly have not proven insurmountable for those states choosing the *Bounds* library option.<sup>185</sup>

### C. Beyond Bounds: Law Libraries and Legal Assistance

Lost in the rush to establish state access plans is the fact that the Court's avowed touchstone in *Bounds v. Smith*<sup>186</sup> was "meaningful access" for each prisoner incarcerated within a state.<sup>187</sup> Rights and liberties are personal and not subject to an all-encompassing law of averages. In this vein, a number of courts, having examined the diverse individual needs of prisoners within their states' penal institutions, have arrived at the conclusion that the *Bounds* alternative access rule is flawed and incapable of providing the sort of "meaningful access" that the Court sought. The basic thesis of these courts was stated eloquently by Wisconsin District Court Judge James E. Doyle in *Wetmore v. Fields*<sup>188</sup> when he wrote that "the inferior courts should not be averse to discern in the disjunctive 'or' as it appears in . . . *Bounds* too extreme a frugality in the Supreme Court's vindication of prisoners' 'adequate, effective, and meaningful' access to the courts."<sup>189</sup> In calling for a broader, fairer interpretation of *Bounds*, Judge Fields summarized the extreme dependency of prisoners on the judiciary and recommended a simple, direct rule to guide states and courts in their attempts to bring truly meaningful access to prisoners:

So radically and massively does government assault individual freedom when it engages in imprisonment that, in my view, the due process clause should be held to require that through the weeks, months, and years, prisoners be afforded abundant and effective

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184. See, e.g., *Owens-El*, 442 F. Supp. at 1387; cf. *Milton*, 767 F.2d at 1446 (conclusion based strictly on *Faretta* principles).

185. See generally Potuto, *supra* note 10, at 232-33 (general discussion of potential security problems associated with delivery of law books to incarcerated pro se defendants).

186. 430 U.S. 817 (1977).

187. *Id.* at 823.

188. 458 F. Supp. 1131 (W.D. Wis. 1978).

189. *Id.* at 1142 (quoting *Bounds*, 430 U.S. at 822); accord *Canterino v. Wilson*, 562 F. Supp. 106, 111 (W.D. Ky. 1983); *Glover v. Johnson*, 478 F. Supp. 1075, 1096 (E.D. Mich. 1979).

means to mount challenges to particular conditions of confinement for resolution by the judicial branch. Without regard to the degree of formal education, intellectual powers, or gifts of expression of a particular prisoner, he or she should be constitutionally entitled to a choice among: adequate assistance from persons trained in the law, direct access to truly adequate law libraries, and the opportunity for assistance from fellow prisoners with legal research and writing.<sup>190</sup>

Perhaps the first case to apply Judge Fields' broader view of *Bounds* was *Glover v. Johnson*.<sup>191</sup> In that case, the court expressly ruled that to read *Bounds* as obligating a state to provide either an adequate law library or an adequate legal assistance program was to interpret the decision too narrowly.<sup>192</sup> The court further stated that an adequate law library is of no meaningful use to prisoners incapable of conducting basic legal research.<sup>193</sup> In such cases, courts have recognized that inmates must be provided access to individuals with legal research skills.<sup>194</sup>

It was not until 1983, however, that the expanded prisoner access principles founded in *Wetmore* and *Glover* were carried to their natural conclusion. In *Canterino v. Wilson*,<sup>195</sup> a Kentucky federal district court ruled that, dependent upon the circumstances in a particular prison, all constitutionally adequate legal access plans must affirmatively include three elements:

First, some source of legal information of a professional nature must be available to all inmates for the full legal development of their claims. This may consist of an adequate law library available to all inmates or qualified attorneys in sufficient number, or some combination of both. Secondly, for those inmates who possess insufficient intellectual or educational abilities to permit reasonable comprehension of their legal claims, provision must be made to allow them to communicate with someone who, after consultation with the legal learning source, is capable of translating their complaints into an understandable presentation . . .<sup>196</sup> [Third,] [w]here these sources

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190. *Wetmore*, 458 F. Supp. at 1142. Interestingly, Judge Fields did not decide the instant case in line with his expansive views of prisoner access, considering himself unhappily obliged to follow the much narrower, traditional view expressed in *Bounds*.

191. 478 F. Supp. 1075.

192. *Id.* at 1096.

193. *Id.*

194. *Id.*

195. 562 F. Supp. 106.

196. "This goal may be accomplished for the unlearned inmate through an institutional attorney, . . . paralegal, . . . or an inmate . . . writ-writer." *Id.* at 111; accord *Kendrick v.*

of assistance are present, and no physical or coercive restraints to prisoners complaints exist, due process mandating access to the courts is met.<sup>197</sup>

Thus, while preserving the state's choice between establishment of law libraries and legal assistance plans as authorized by *Bounds*, *Canterino* adds the additional element of alternative assistance for prisoners who cannot make meaningful use of the option chosen.

With the addition of a fourth element recognizing the fundamental right of a prisoner to refuse state-offered assistance and proceed with his case pro se, the *Canterino* approach represents a step toward truly meaningful access for all prisoners as originally anticipated, but never accomplished, under *Bounds*.

## V. CONCLUSION

Ten years after the *Bounds v. Smith* decision, it is clear that the Supreme Court's alternative access approach is fatally flawed. States establishing prison law libraries, to the exclusion of legal assistance programs, effectively bar access to the courts by the many illiterate and poorly educated prisoners in the nation's penal institutions. On the other hand, states establishing legal assistance programs, to the exclusion of prison law libraries, violate a prisoner's right to proceed pro se.

What is needed is a far-sighted approach, such as that expressed in *Canterino v. Wilson*, to insure that all inmates, regardless of circumstance and personal constitutional preference, will receive the access to the courts most meaningful to them.

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Bland, 586 F. Supp. 1536, 1549 (W.D. Ky. 1984).

197. *Canterino*, 562 F. Supp. at 111.