

2013

Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries

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ARTICLES

Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries

JONATHAN ABEL*

The prison law library has long been a potent symbol of the inmate's right to access the courts. But it has never been a practical tool for providing that access. This contradiction lies at the core of the law library doctrine. It takes little imagination to see the problem with requiring untrained inmates, many of them illiterate or non-English speakers, to navigate the world of postconviction relief and civil rights litigation with nothing more than the help of a few library books. Yet law libraries are ubiquitous in American prisons. Now, in light of a technological revolution in legal research methods, prison libraries face an existential crisis that requires prison officials, courts, scholars, and inmates to reconsider the very purpose of the prison law library. This Article takes up that challenge by providing a novel historical account of the prison law library's development.

This Article uses original historical research to show how prison law libraries arose, not as a means of accessing the courts, but rather as a means of controlling inmates' behavior. By placing the origin of the prison law library in the first decades of the twentieth century—half a century earlier than typical accounts—this Article shows how the law library evolved to take on a new purpose in the 1960s and 1970s, when the Supreme Court and other courts first began to fashion a law library doctrine. The central argument of this Article is simple: The courts' attempts to graft an access-to-courts rationale onto a law library system that had developed for other purposes led to a law library doctrine riddled with contradictions and doomed to failure. This historical account helps explain a prison law library system that never really made sense in terms of providing access to the courts. As prisons look to update their law libraries in light of sweeping technological changes, it is all the more important to understand the history of the law library system so that authorities can plan for its future.

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* Law Clerk to the Honorable Chief Judge Alex Kozinski, United States Court of Appeals for the Ninth Circuit. © 2013, Jonathan Abel. I'm grateful for the expert assistance of the editors of *The Georgetown Law Journal*. I would also like to thank Professor Robert Weisberg for his guidance, and my wife, Shira Levine, for all her help.

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INTRODUCTION

In 1996, the Supreme Court heard *Lewis v. Casey*, a case in which a class of Arizona inmates sued the state for failing to provide adequate prison law

libraries.¹ The Supreme Court sided with Arizona in that case, holding that prisoners do not have a free-standing constitutional right to a law library and thus can bring law library claims only if they show a concrete injury as a result of the libraries' deficiencies.² In the wake of this decision, prisons in Iowa took the books from their law libraries and dumped them outside to rot.³ The Idaho prison system sold its law library collection on eBay.⁴ And Arizona prisons shut down all but one of their law libraries.⁵ To many commentators, this signaled the end of the prison law library.⁶ But almost two decades later, these libraries are far from extinct. In fact, prison law libraries remain up and running in practically every state, thanks in large part to their embrace of technology.

Computerization has fundamentally changed legal research both inside and outside of prison. As a result, jail and prison officials around the country are struggling with how to update their law libraries to reflect the many technological changes. The book-lined walls of the classic prison law library are now being replaced by computer terminals that run Westlaw and LexisNexis searches. At last count, forty states provided access to some form of electronic legal research in their prisons.⁷ In Maryland, for example, each death row inmate has access to computers to do legal research.⁸ Hawaii gives its inmates access to LexisNexis collections loaded onto computer kiosks with "shatterproof" touch screens.⁹ Oregon's collections are available almost entirely on CD-ROM,¹⁰ while Alaska allows inmates to connect to LexisNexis via the Internet (as opposed to using a CD).¹¹ The entire federal prison system has switched over to electronic law libraries, as have many of the nation's 3,000 local jails.¹² Some of these jails have even gone as far as handing out laptops to inmates so the inmates can research from the security of their own cells.¹³ As Sheela Kesaree

1. *Lewis v. Casey*, 518 U.S. 343, 346-47 (1996).

2. *Id.* at 351.

3. Evan R. Seamone, *Fahrenheit 451 on Cell Block D: A Bar Examination To Safeguard America's Jailhouse Lawyers from the Post-Lewis Blaze Consuming Their Law Libraries*, 24 *YALE L. & POL'Y REV.* 91, 91 (2006).

4. *Id.* at 92.

5. *Id.* at 91-92.

6. See, e.g., Joseph L. Gerken, *Does Lewis v. Casey Spell the End to Court-Ordered Improvement of Prison Law Libraries?*, 95 *LAW LIBR. J.* 491, 491-92 (2003).

7. Telephone Interview with Jane Newman, Nat'l Sales Manager for Corr. Div., LexisNexis (Jan. 11, 2012) (on file with author).

8. *Maryland's Death-Row Geeks*, *WIRED* (Mar. 30, 2001), <http://www.wired.com/culture/lifestyle/news/2001/03/42739>.

9. Press Release, LexisNexis, *Legal Research Kiosks for Inmates Help States Save Money, Comply with Law* (Mar. 4, 2004).

10. Telephone Interview with Randy Geer, Chief of Inmate Servs., Or. Dep't of Corr. (Nov. 23, 2011) (on file with author).

11. *Alaska Prisons Replace Law Libraries with Online Research*, *CORRECTIONAL NEWS* (Jan. 19, 2006), <http://www.correctionalnews.com/print/1792>.

12. Telephone Interview with Jane Newman, *supra* note 7.

13. Jason Tsai, *Laptops Behind Bars; Bergen Jail First To Provide Online Legal Aid in Cells*, *THE REC.*, Aug. 21, 2007, at A1.

Zemlin, director of marketing and planning at LexisNexis, said: "Print law libraries are quickly becoming a thing of the past."¹⁴

The benefits of electronic law libraries are obvious. They are cheaper than their print cousins.¹⁵ They take less effort to maintain. And, for a skilled user, the electronic law library is far easier to use. But computerization comes with a cost, especially for inmates without computer skills. Recently, a self-described "computer-illiterate" inmate in Ohio sued the state on the grounds that the prison system's switch from print to electronic collections left him unable to conduct legal research.¹⁶ Other inmates have followed suit with similar allegations.¹⁷ At the same time, inmates have also complained that technological changes have not gone far enough. They want more than just access to Westlaw and LexisNexis databases; they want the ability to search the Internet's countless legal resources.

The electronic library revolution, then, raises many questions about how best to update the classic law library doctrine. How much access is too little? How much access is too much? What should prisons do with inmates who cannot read or speak English? Do computers just change the medium of legal research, or do they fundamentally reshape the purpose of prison law libraries?

The prison law library doctrine is not the first doctrine to undergo redefinition in light of the computer revolution. One need look no further than Fourth Amendment doctrine for an example. Over the course of the twentieth century, the courts hammered out the rules of searches and seizures. But as computers proliferated—and as law enforcement began to search them—many aspects of this classic doctrine became unclear.¹⁸ How, for instance, does the plain view doctrine apply when searching files on a computer desktop rather than inside a desk? Can an officer with a search warrant for child pornography open every document on the hard drive just to make sure it has not been purposefully mislabeled? Can a computer technician run a search for any file containing the word *cocaine*? The courts addressed these questions by looking to the guiding principles of Fourth Amendment doctrine to make the best analogies between the chest of drawers of yesteryear and the hard drive of today.¹⁹

But this method of analogizing from guiding principles is completely useless in the context of the prison law library doctrine. Try though one might, it is impossible to find a guiding principle behind this doctrine. In fact, the search for a guiding principle—for a *raison d'être* for the prison law library—provides far

14. *Alaska Prisons Replace Law Libraries with Online Research*, *supra* note 11.

15. Brenda Vogel, *Meeting Court Mandates: The CD-ROM Solution*, CORRECTIONS TODAY, Dec. 1995, at 1 ("Computerization can be the key to controlling or decreasing these costs.").

16. Linda Martz, *Inmate Sues Over Access to Law Books*, MANSFIELD NEWS J., Sept. 6, 2011.

17. See *infra* notes 293–98 and accompanying text.

18. See, e.g., Recent Case, *Fourth Amendment—Plain View Doctrine—En Banc Ninth Circuit Holds that the Government Should Waive Reliance on Plain View Doctrine in Digital Contexts*, 123 HARV. L. REV. 1003, 1003 (2010).

19. See Orin S. Kerr, *Fourth Amendment Seizures of Computer Data*, 119 YALE L.J. 700 (2010) (discussing the definition of Fourth Amendment seizures in light of new technology).

more questions than answers. Does it make sense to provide indigent, illiterate, often non-English-speaking inmates with shelves of library books? Can even the most well-educated prisoners realistically make use of case law and treatises in navigating the court system? Did the prison law library *ever* make sense?

The question of how to update the prison library doctrine in light of technological changes—a question I will return to at the end of this Article—is in some ways a ridiculous question because it assumes that the print version of the law library actually made sense. But the inquiry into updating the law library is helpful in one respect: It forces us to reexamine the prison library doctrine and its origins. What emerges is a story of a classic institution that lurched along because of its symbolic value, even though it was never capable of providing meaningful access to the courts.

It is not just in retrospect that one can see the flaws in prison law libraries. A chorus of voices has been criticizing these law libraries from the moment the Supreme Court first endorsed them in 1971. “Law books are not the answer,” NAACP attorney William Bennett Turner declared at a prison law library conference in 1972. “What’s required is legal services, not law books.”²⁰ The American Bar Association agreed.²¹ So did Marjorie Le Donne, co-chair of the American Correctional Association’s committee on prison law libraries: “[Y]ou need more than books; you need to know how to proceed through the books.”²² O. James Werner, author of the first manual on prison law libraries, echoed the sentiment. “[L]egal collections and reference service[s] in prisons [cannot] ultimately provide what is really needed,” he said. “What is needed are legal services.”²³

Lowly inmates and distinguished jurists alike have criticized the prison law library system. Joshua K. Boyer, a federal prisoner in Pekin, Illinois, and an avid user of the law library there, nonetheless called it “ridiculous” to expect an inmate to be able to navigate the legal system with library materials alone. “Law libraries aren’t an adequate means of accomplishing what the Constitution requires,” he said.²⁴ Justice Potter Stewart wrote that prison law libraries would “simply result in the filing of pleadings heavily larded with irrelevant legalisms possessing the veneer but lacking the substance of professional competence.”²⁵ A California prison official asserted that “only a few inmates would have either

20. William Bennett Turner, NAACP Attorney, Relevant Court Decisions—A Legal View, Address Before the “Prison Legal Libraries: Idea into Reality” Conference (Apr. 22, 1972), in PRISON LEGAL LIBRARIES: IDEA INTO REALITY, CONFERENCE PROCEEDINGS 12–13 (1972) [hereinafter PRISON LIBRARY CONFERENCE PROCEEDINGS].

21. O. JAMES WERNER, MANUAL FOR PRISON LAW LIBRARIES 84 (1976).

22. Marjorie Le Donne, Co-Chairman, Am. Corr. Ass’n Comm. on Provision of Legal Materials for Prisoners, The Problem Explained, Address Before the “Prison Legal Libraries: Idea into Reality” Conference (Apr. 22, 1972), in PRISON LIBRARY CONFERENCE PROCEEDINGS, *supra* note 20, at 21.

23. O. James Werner, *Law Libraries for Correctional Facilities*, 26 LIBR. TRENDS 71, 92 (1977).

24. E-mail from Joshua Boyer, Federal Prisoner, to author (Feb. 8, 2012) (on file with author).

25. *Bounds v. Smith*, 430 U.S. 817, 836 (1977) (Stewart, J., dissenting).

the intelligence, the skill or the ability to profit from” law libraries.²⁶

Metaphors and analogies abound in the criticism of these libraries. One district court compared the institution of law libraries to “furnishing medical services through books like: ‘Brain Surgery Self-Taught,’ or ‘How to Remove Your Own Appendix,’” calling access to even “the fullest law library . . . a useless and meaningless gesture . . . worthy of Lewis Carroll.”²⁷ A Georgia bar official compared giving library books to inmates to saying: “[W]e’re going to give you a can of soup to eat, but we’re not going to give you a can opener to eat it with.”²⁸ An academic commentator likened a death-row inmate with nothing more than library access to “the man who is expected to fight a duel with his hands tied behind his back.”²⁹ And in North Carolina, the budget subcommittee wasted no time on figurative language. It simply exclaimed that it had “never heard of [anything] as foolish”³⁰ as a prison law library. The list of criticisms goes on and on.

When the Supreme Court last took up the law library issue in 1996, the Justices made their criticism clear in the opinion and in oral argument. “We’re placing books in front of someone who cannot read them, and we’re placing legal helpers in front of someone who cannot communicate with them. That seems utterly senseless,” one Justice said. “Why isn’t it senseless?”³¹ Later, a Justice asked whether any of the people “in the scholarly community” have considered “whether or not the library requirement makes sense at all? It seems to me that maybe libraries might be a waste, and that there might be much better, more efficient ways in which to provide prisoners some assistance.”³² Other questions included whether the state of Arizona, which was challenging an order to improve its law libraries, believed that “the library requirement is just fanciful.”³³ It was striking the extent to which the very premise of this classic doctrine—the assumption that law libraries could provide inmates with

26. Charles Hull, Assistant to the Dir. on Admin. Procedure, *The Correction Officers’ View*, Address Before the “Prison Legal Libraries: Idea into Reality” Conference (Apr. 22, 1972), in *PRISON LIBRARY CONFERENCE PROCEEDINGS*, *supra* note 20, at 30, 34–35.

27. *Falzerano v. Collier*, 535 F. Supp. 800, 803 (D.N.J. 1982).

28. H. Eli Lightner, II, Student Commentary, *Replacing Prisoners’ Rights with DVDs: How a New System in Georgia Diminishes Prisoners’ Access to the Courts*, 30 J. LEGAL PROF. 145, 151 (2006) (citing Steve Seidenberg, *Replacing Lawyers with DVDs: Georgia Prisons Give Inmate Paralegal Aid, Computer Access for Their Cases*, 3 A.B.A. J. E-REPORT 3, at 2 (2004)).

29. RUDOLF ENGELBARTS, *BOOKS IN STIR* 43 (1971).

30. Transcript of Oral Argument, *Bounds v. Smith*, 430 U.S. 817 (1977) (No. 75-915), available at http://www.oyez.org/cases/1970-1979/1976/1976_75_915. Across the border in Canada, Solicitor General Francis Fox expressed a similar sentiment when a parliamentary subcommittee recommended beefing up the law libraries: “It should be pointed out at the outset that legal aid would seem to provide a more appropriate solution to the problems referred to in the Sub-committee’s recommendation” FRANCIS FOX, *RESPONSE OF THE SOLICITOR GENERAL TO THE PARLIAMENTARY SUB-COMMITTEE REPORT ON THE PENITENTIARY SYSTEM IN CANADA* 18 (1977).

31. Transcript of Oral Argument at *4, *Lewis v. Casey*, 518 U.S. 343 (1996) (No. 94-1511), 1995 U.S. Trans. LEXIS 130.

32. *Id.* at *8.

33. *Id.* at *9.

access to the courts—was under attack.

Not surprisingly, the decision in *Lewis v. Casey* dramatically cut back on the law library right, so much so that it was seen as the death knell for prison law libraries.³⁴ But nearly two decades later, law libraries continue to be an integral part of prison systems across the country, even though they lack a clear purpose and even though the Supreme Court has given states license to abandon them. The staying power of these libraries, in light of the many attacks on them, is one of the many unexplained phenomena that this Article will explore.

This Article looks at how prison law libraries came to be and where they are going. It examines the contradictions of the law library doctrine and attempts to answer the basic question that has gone unasked in the scholarly literature: How did prison law libraries come to be when they never made sense as tools for accessing the courts? The answer to this question reveals much about the libraries themselves and prisoners' rights generally. The central argument of this Article is simple: The courts attempted to graft an access-to-justice rationale onto a law library system that developed for very different reasons, which led to a doctrine riddled with contradictions and doomed to failure.

These questions are not just a matter of academic interest. The state of the prison law library system has significant ramifications for the court system as a whole. In 2010, prisoner litigation accounted for 41,358 cases in the federal district courts³⁵ and another 11,079 cases in the federal appellate courts.³⁶ And these figures do not even account for the crush of suits filed by prisoners in the state court system. In the vast majority of these cases, the inmates do not have the assistance of counsel³⁷—the law library is their only source of assistance in the litigation process. Thus, changes in the prison law library system can have a dramatic impact on the quantity and the quality of the tens of thousands of inmate suits that the courts hear each year.

This Article proceeds in three Parts. Part I challenges the standard history of prison law libraries by presenting new evidence that these libraries flourished as far back as the beginning of the twentieth century. Many commentators and judges—including some on the Supreme Court—have overlooked the early history of prison law libraries, as if the idea of giving law books to inmates came about for the first time in the 1960s and 1970s.³⁸ But vibrant law libraries

34. See, e.g., Gerken, *supra* note 6 at 491.

35. *Judicial Facts and Figures 2010*, U.S. COURTS, tbl.4.6, <http://www.uscourts.gov/Statistics/JudicialFactsAndFigures/JudicialFactsAndFigures2010.aspx> (last visited Aug. 14, 2012).

36. *Id.* at tbl.2.3.

37. *Id.* at tbl.2.4.

38. See, e.g., *Lewis v. Casey*, 518 U.S. 343, 382 (1996) (Thomas, J., concurring) (referring to “[t]he rise of the prison law library” as “a recent phenomenon”); see also BRENDA VOGEL, *DOWN FOR THE COUNT: A PRISON LIBRARY HANDBOOK* 87 (1995); Larry E. Sullivan & Brenda Vogel, *Reachin' Behind Bars: Library Outreach to Prisoners, 1798–2000*, in *LIBRARIES TO THE PEOPLE: HISTORIES OF OUTREACH* 113, 120–21 (Robert S. Freeman & David M. Hovde eds., 2003) (noting that the “prisoner’s civil rights litigation of the 1960s . . . resulted in a federal court mandate to establish law libraries in prisons”); Benjamin R. Dryden, Comment, *Technological Leaps and Bounds: Pro Se Prisoner Litigation in the*

existed in prisons as early as 1900, and these libraries had nothing to do with giving inmates access to the courts. In fact, prison law libraries grew out of an earlier tradition of general-interest prison libraries. Those general-interest libraries were intended to provide therapy, entertainment, and even education. Early law libraries added their own rationales: keeping inmates busy, convincing inmates that their sentences were just, legitimizing the criminal justice system, and limiting frivolous litigation. Even as late as 1966, prison chief Louie Wainwright explained why his Florida prisons provided library books, never mentioning access to the courts in his explanation. The history of the prison law library, then, calls for a fundamental rethinking of the library's purpose. In short, its original purpose had nothing to do with access to the courts.

Part II examines the development of the law library *doctrine*. Decades after the first law libraries came about, the federal courts began to recognize a constitutional right of access to the courts. But these access-to-the-courts cases did not mention law libraries, preferring instead to provide access to the courts through attorneys, paralegals, and even jailhouse lawyers. In 1971 and again in 1977, the Supreme Court endorsed law libraries, but it did so with considerable reservations. The Court feared that books would do little for uneducated, illiterate, and non-English-speaking inmates. Nonetheless, law libraries spread throughout the country because of a confluence of interests between inmate advocates and prison officials. Advocates saw the law library as a steppingstone to a postconviction right to counsel. Prison officials, forced to provide some type of legal assistance, chose law libraries as the cheapest, most feckless option. Neither advocates nor officials believed law libraries were effective for providing access to the courts, but both sides promoted the libraries for ulterior motives.

In Part III, the Article unpacks the contradictions that emerged from a law library doctrine hollow at its core. Basic aspects of the doctrine have never been nailed down. There is no clear textual hook in the Constitution for the library right. Instead, courts have pointed to six different hooks. Nor is there a sense for what claims an inmate must be assisted in bringing. In *Lewis v. Casey*, the Supreme Court held that inmates have no right to use the library to "discover grievances" or to "litigate effectively,"³⁹ leading some to wonder whether *any* law library right still exists. Even the question of how the doctrine interacts with other criminal procedure doctrines is unclear. For example, the circuits are split about whether pretrial, pro se inmates have a law library right, with the majority of circuits saying no.

In a concluding note, the Article returns to the implications of technological change for the law library doctrine. The computerization that was supposed to

Internet Age, 10 U. PA. J. CONST. L. 819, 826 (2008) ("In the 1960s, however, a broad rehabilitation-minded movement by 'activist librarians' began to expand prison library services to include law books, novels, and academic curricula." (footnote omitted)).

39. 518 U.S. at 354 (emphasis omitted).

solve so many problems in accessing the courts may have actually made things worse. Even more significantly, prison officials do not seem to care.

The story that follows of the prison law library system serves as a cautionary tale about the dangers of implementing a symbolic doctrine when a more practical one is required.

I. THE HISTORY OF PRISON LAW LIBRARIES

Many commentators and courts ignore the early history of prison law libraries, treating prison law libraries as if they were purely creatures of the reforms of the 1960s and 1970s.⁴⁰ “The rise of the prison law library and other legal assistance programs is a recent phenomenon, and one generated largely by the federal courts,” wrote Justice Clarence Thomas.⁴¹ Librarian Brenda Vogel wrote, in her treatise on prison libraries, that the Supreme Court’s endorsement of law libraries in the 1970s was “as if a bolt of lightning had struck the prison library, transforming it from a dark and lazy depository.”⁴²

But the history goes back much further. As early as 1900, prisons offered books and other legal materials to inmates.⁴³ The oft-forgotten history is essential to understanding the doctrine because it shows how libraries did not develop as means of providing access to the courts. In fact, prison law libraries emerged from a larger tradition of general-interest prison libraries whose goals were to provide religious and secular education, to rehabilitate prisoners psychologically and socially, and to distract prisoners from the monotony of institutional life. Prison *law* libraries added other rationales onto this core: keeping inmates busy and thus out of trouble, convincing inmates their sentences were just, instilling in prisoners a greater respect for the law, helping to legitimize the criminal justice system, undermining the jailhouse lawyer’s monopoly on legal information, and limiting supposedly frivolous litigation by convincing inmates that they had no legal grounds for complaint. Notably, these rationales did *not* include access to the courts.

A. PRISON LAW LIBRARIES: 1900 TO 1960

1. General-Interest Libraries in Prisons

The earliest prison libraries emerged at the end of the eighteenth century. As early as 1790, the Philadelphia Prison Society delivered books to inmates at the Walnut Street Jail,⁴⁴ and by 1802, the Kentucky State Penitentiary boasted its

40. See *supra* note 38 and accompanying text (discussing the rise of prison law libraries in the 1960s and 1970s).

41. *Lewis*, 518 U.S. at 382 (Thomas, J., concurring); see also Sullivan & Vogel, *supra* note 38, at 120–21.

42. VOGEL, *supra* note 38, at 87.

43. See *infra* section I.A.2.

44. ENGELBARTS, *supra* note 29, at 26.

own in-house library.⁴⁵ These were not law libraries; they did not provide access to legal materials. Nor could they properly be called general-interest libraries. Rather, these early prison libraries were entirely made up of “Bibles, prayerbooks, sermons,” and other religious materials.⁴⁶ In 1829, Tennessee created a prison library consisting of “moral and religious books,”⁴⁷ and in 1825, a New York juvenile institution established a moralizing library collection to “strengthen the character of the wayward urchins.”⁴⁸ As the nineteenth century progressed, the religious monopoly loosened. In 1840, New York’s Sing Sing library was “[p]robably the first prison library supplying more than Bibles and religious tracts.”⁴⁹ By 1873, all prisons in the northern states provided libraries,⁵⁰ with collections that went beyond religious materials—but not far beyond. Even into the twentieth century, prison libraries maintained their religious character, as shown by the example of one Illinois prison where, in the 1930s, all books still “had to be okayed by the priest or protestant minister.”⁵¹

The nineteenth and twentieth centuries saw an expansion in the purpose of these general-interest prison libraries. Prisons became interested in libraries as a way both to instill a “state of order and obedience”⁵² and to provide academic enrichment to an unschooled population. Reformers saw a tight connection between reading and good behavior. Inmates who became regular readers “had changed entirely in body and mind,” according to the report of one reformer in the 1880s.⁵³ In 1931, the assistant director of the U.S. Bureau of Prisons wrote that the key function of libraries was to stimulate the interests of the inmates.⁵⁴ In 1934, another commentator wrote that “books may help to overcome the bitter anti-social spirit common in all prisons, or perhaps turn some man’s mind toward an honest profession or trade.”⁵⁵ In the 1940s, the American Prison Association expanded these objectives by stating what it saw as the purposes of books in prison: “social and vocational training,” “salutary release from emotional strain,” and support for rehabilitation programs.⁵⁶ The federal prison system boldly stated that libraries invigorate prisoners’ minds and “tend to counteract the development of prison stupor.”⁵⁷ Under Governor Earl Warren, California passed the Prison Reorganization Act, which said that “the reading of good literature and the study of technical books [had] a constructive influence

45. James F. Hazel, *A Survey of the Literature on Prison Libraries 2* (1955) (unpublished master’s dissertation, Drexel Institute of Technology) (on file with author).

46. *Id.*

47. RICHARD F. WATSON, *PRISON LIBRARIES* 36 (1951).

48. Sullivan & Vogel, *supra* note 38, at 115.

49. Hazel, *supra* note 45, at 1 (quoting BLAKE MCKELVEY, *AMERICAN PRISONS* 12 (1936)).

50. Sullivan & Vogel, *supra* note 38, at 117.

51. Hazel, *supra* note 45, at 1.

52. Sullivan & Vogel, *supra* note 38, at 115.

53. *Id.* at 117.

54. ENGELBARTS, *supra* note 29, at 36.

55. Hazel, *supra* note 45, at 7.

56. Sullivan & Vogel, *supra* note 38, at 119.

57. *Id.*

on the prisoner.”⁵⁸

The rationales for general-interest prison libraries were religious, academic, disciplinary, and entertainment oriented. Many of these rationales would carry through into the prison law library context. But access to the courts was not part of the motivation for these general-interest libraries. In fact, many prisons affirmatively banned law books and legal materials until the 1950s.⁵⁹

There were some important exceptions, however, and the discussion that follows examines the vibrant law library culture that built up within prisons as early as 1900. Why did these libraries come about so far ahead of their time? What did prisoners and prison officials see as the purpose of these law libraries? As the history shows, no one ever believed that libraries could deliver effective access to the courts, but law libraries developed because they served many other purposes.

2. Law Libraries in Prisons: The Early History

The earliest recorded law library took root in California’s San Quentin prison by 1900. In that prison, access to law books was a “privilege” that inmates received after serving a year.⁶⁰ While poring through law books one day in 1900, convicted murderer J. Wess Moore “discovered the existence of a special clause” in a state statute that required prisons to report to the Governor a list of all inmates entitled to clemency.⁶¹ Those reports were not being made, and the inmate used his legal discovery to cause a stir that made headlines in the California papers. A decade and a state away, the *New York Times* reported in 1912 on a progressive state prison in Florence, Arizona, which allowed inmates to study law through correspondence courses. An inmate nicknamed the “Attorney General” had accumulated “a small library of law books.”⁶²

Those early collections of books had been eclipsed by the 1930s, as more developed law libraries began to appear. In 1931, for example, the law library in New York’s Sing Sing prison made news when the warden was accused of providing inmates with a bigger library than the New York attorney general’s.⁶³ The warden defended himself against these charges by offering his condolences

58. ENGELBARTS, *supra* note 29, at 53.

59. WILLIAM J. COYLE, *LIBRARIES IN PRISONS: A BLENDING OF INSTITUTIONS* 54–55 (1987).

60. *Convict Reformer: Intelligent Prisoner in San Quentin Proposes Scheme To Avoid Necessity of Penitentiary in Southern California—Wess Moore’s Parole Plan*, L.A. TIMES, Jan. 15, 1905, at III.

61. *Id.*

62. *Gov. Hunt’s Plan for Making Men Out of Convicts*, N.Y. TIMES, Aug. 11, 1912, at SM11.

63. *Denies Legal Fees in Jail: Lewis Says Lawyers in Sing Sing Prepare Writs Free for Inmates*, N.Y. TIMES, Aug. 13, 1931, at 12. There were more low-key examples, too. A 1932 manual on prison libraries recommended stocking the *Cyclopedic Law Dictionary* as well as materials on immigration. “Recent changes in naturalization laws make pamphlet material the most up-to-date help in preparing for citizenship,” the book instructed. It recommended pamphlets such as the *Manual of the U.S. for the Information of Immigrants*, and *How To Become a Citizen*, as well as *Constitution of the U.S. with Suggestions for Those Preparing for Citizenship*. AM. LIBRARY ASS’N, *THE PRISON LIBRARY HANDBOOK* 116 (Edith Kathleen Jones ed., 1932).

to the attorney general for possessing such a small library.⁶⁴ Notably, despite the large size of the library, the warden did not see these books as sufficient for guaranteeing access to the courts. Instead, he assigned two attorneys-turned-prisoners to help with legal research and writing. "If a man with ample funds can get a lawyer outside the prison to prepare . . . a writ," the warden said, "I see no reason why a man inside with no funds should be deprived of his right to appeal."⁶⁵ Even at Sing Sing, law books were no substitute for legal counsel. This would be a recurrent theme in the debate about prison law libraries.

The infamous prison at Alcatraz also supported a bustling law library. In 1939, inmates surged into the library, inspired by the recent success of a fellow inmate's habeas petition.⁶⁶ The *Chicago Daily Tribune* described a lively scene as the nation's "toughest convicts" concentrated like "[c]ollege [m]en" on the "[b]ooks in the library and legal publications which the prisoners are permitted to receive."⁶⁷ Inmates at Alcatraz filed as many as a dozen petitions per week in 1939.⁶⁸ This vigorous legal culture continued into the 1940s, when Cecil "The Brain of Alcatraz" Wright used the law library to secure his own release from "The Rock"—*twice*.⁶⁹ Wright wrote thirteen habeas petitions on his own behalf during his time in Alcatraz, two of which succeeded. His first asserted that he could not be kept in federal custody because he was on parole from a state conviction and thus still in state custody. A federal judge ordered him released. Federal officials quickly prevailed on their state counterparts to release Wright from parole, at which point he was returned to Alcatraz. Wright again set to work writing habeas petitions. After five years, he convinced the same federal judge that his conviction should be thrown out because, among other things, his attorney had a conflict of interest.⁷⁰

The law libraries at Sing Sing and Alcatraz looked primitive, however, compared to the law library that served Illinois's Stateville and Joliet prisons. By 1955, that law library had spawned such a culture of legal research that the prisons together came to be known as "the world's largest law school."⁷¹ In the period from 1943 to 1954, inmates at the 4,400-man Stateville facility shot off 27,890 filings to the courts, not including those filed by their attorneys.⁷² "Almost every inmate who can read is a self-taught student of law, and many of

64. *Denies Legal Fees in Jail*, *supra* note 63.

65. *Id.*

66. *Convicts Study Law in Alcatraz To Free Selves: File Own Petitions in Federal Courts*, CHI. DAILY TRIB., Mar. 26, 1939, at 14.

67. *Id.* State inmates imprisoned in Indiana had access to law books by 1936. *Jones v. Dowd*, 128 F.2d 331, 333 (7th Cir. 1942).

68. *Convicts Study Law in Alcatraz To Free Selves*, *supra* note 66.

69. Jim Spencer, *Brain of Alcatraz Still Wheeling, Dealing in Law*, CHI. TRIB., Aug. 28, 1984, at D1; *see also* *Wright v. Johnston*, 77 F. Supp. 687, 694–95 (N.D. Cal. 1948).

70. Spencer, *supra* note 69.

71. George Wright & Chesly Manly, *Prison Fare Ample, Both in Books, Food: Best Read Work Is Encyclopedia of Law as Inmates Study To Fight for Release*, CHI. DAILY TRIB., July 5, 1955, at 1.

72. *Id.*

them attain great proficiency in the subject," the *Chicago Daily Tribune* reported.⁷³ In addition to a 15,000-volume library,⁷⁴ the most popular book of which was a legal encyclopedia,⁷⁵ prisoners were allowed to buy their own law books. A quarter of all inmates at Stateville purchased at least one law book,⁷⁶ and in the Joliet prison, some bought so many that books overflowed the small cells.⁷⁷ The prison further accommodated the legal research bug by renting out 400 typewriters.⁷⁸ It was a striking example of how vibrant law libraries could be even in an era before they were required and before the courts were receptive to inmate litigation.

All of this legal research did not sit well with some in the legislative and judicial branches. In 1955, Illinois Congressman James Murray told a House judiciary subcommittee about the library activity in hope that the basic facts of this enormous library would convince Congress to limit state prisoners' habeas rights. (For all the hubbub about legal research, only one of the thousands of petitions had resulted in an inmate's release, according to Murray.)⁷⁹ Murray was not alone in complaining about the legal work. In 1956, Illinois Supreme Court Justice Walter V. Schaefer faulted the state's prison law libraries for the fact that twenty percent of the nation's habeas filings came from Illinois. Writing in the *Harvard Law Review*, he accused the state's wardens of "overcompensat[ing]" for earlier practices of depriving inmates of access to the courts.⁸⁰ With legislators and judges criticizing the law library, what could have motivated Stateville and Joliet Warden Joseph Ragen to let it grow so big? Not constitutional requirements. Not a sense for the future development of the law. No, it appears the warden had more practical reasons, at least according to the newspaper. Ragen said he was "not too unhappy" with the situation because "the job of preparing petitions keeps the prisoners[] occupied."⁸¹

At times, though, the intense culture of legal research at Stateville and Joliet was taken to an extreme. In 1950, convicted murderer Maurice Meyer sued the warden of the prison for \$300,000 for violating what Meyer described as the right to operate a law practice in prison. The *Chicago Daily Tribune* labeled this "the first time in penal history that convicts have attempted such action."⁸² Meyer was far from the average inmate. Sentenced in 1933 for binding a girl inside a sack and throwing her off a bridge, Meyer turned his attention in prison to studying the law. Over the course of two decades, Meyer filed 200 motions in

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. Philip Dodd, *Law Books Find New Place in Convicts' Life: Fill Cells at Joliet, House Group Told*, CHI. DAILY TRIB., June 25, 1955, at 10.

78. *See id.*

79. *Id.*

80. Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 22 (1956).

81. Dodd, *supra* note 77.

82. *3 Convicts Sue Warden Ragen for \$300,000*, CHI. DAILY TRIB., Jan. 11, 1949, at 18.

the courts, including a successful writ to the U.S. Supreme Court resulting in the release of "four men serving life terms for murder" and another petition in a lower court freeing a man "imprisoned for life on a rape conviction."⁸³ Meyer also authored a legal treatise, *Exhaustion of State Court Remedies*, which formed the basis of a lecture series that a habeas lawyer delivered at Yale Law School in the 1950s.⁸⁴ The Seventh Circuit noted that Meyer claimed to be "an expert as to the law of 'habeas corpus.'"⁸⁵

But Meyer's willingness to aid his fellow inmates was far from altruistic. In 1949, Meyer and two other inmates arranged with a lawyer on the outside to start a law practice.⁸⁶ The jailhouse lawyers would draft the paperwork for inmates' appeals, and the outside lawyer would represent them in court.⁸⁷ In exchange, Meyer proposed that they should all be paid from the inmate amusement fund. When they pushed this proposal upon the warden, however, the warden balked.⁸⁸ The warden's refusal to go along led the three inmates to file the suit, which was ultimately dismissed.⁸⁹ When the Seventh Circuit dismissed the case, the warden "disbarred" Meyer from practicing on behalf of other inmates.⁹⁰ Stateville and Joliet thus provide an example of a law library culture grown so strong as to challenge the warden's authority.

3. Propagating the Prison Law Library Myth

The story of Maurice Meyer and the law library that created him was far from typical, but it is nonetheless significant because it shows how advanced some law libraries had become decades before the Supreme Court ever mentioned them as a form of access to the courts. The stories of Maurice Meyer and Cecil "The Brain of Alcatraz" Wright are also useful in understanding how the law library myth developed. Despite the fact that most inmates could not use these libraries to any great effect, there were a few exceptions who made access to the courts seem possible. It was not just Meyer and Wright. In 1948, a Sing Sing inmate managed to reduce his sentence after he turned up a procedural error.⁹¹ Six years of legal research on his part revealed the fact that the judge had impermissibly counted a juvenile conviction in setting his sentence. In 1954,

83. Wright & Manly, *supra* note 71, at 2.

84. *Id.*

85. See Siegel v. Ragen, 180 F.2d 785, 787 (7th Cir. 1950). Meyer claimed that a federal district judge had ordered him to establish "a legal department" in the prison, an assertion that the Seventh Circuit dismissed as "simply incredible." "Obviously the right to practice law or to maintain a law department within the confines of a state penitentiary is not a right secured by the Constitution of the United States." *Id.* at 788.

86. *3 Convicts Sue Warden Ragen for \$300,000*, *supra* note 82.

87. *Id.*

88. *Id.*

89. See Siegel, 180 F.2d at 789.

90. The warden "disbarred" Meyer, and instituted a new rule that inmates were not allowed to work on each other's cases. Wright & Manly, *supra* note 71, at 2.

91. *Convict's Study of Law Books Rewarded; Fourth Offender Status Erased, Term Cut*, N.Y. TIMES, Jan. 24, 1948, at 30.

an inmate at New York's Clinton Prison used the law library to challenge his status as a four-strikes offender. After four years of research and one hundred days of handwriting a forty-six-page brief, the inmate convinced the judge to drop his life sentence.⁹² These successes made headlines and gave the impression that law libraries provided access to the courts. However, it is worth remembering that these stories made the news precisely because they were so exceptional.

Many inmates were not equipped to use the libraries to litigate their cases. And many more never had the chance to try because their prisons did not provide law libraries or even allow inmates to buy law books. In 1944, for example, a New York court denied an inmate's request for law books, holding that it was "not a matter within the ambit of this court's jurisdiction,"⁹³ even though many other prisons in New York offered law libraries. Across the country in Washington State, a federal district court responded to a request for the "lawbooks necessary to prepare [an inmate's] appeal" by holding it was "not within the province of the courts to supervise the treatment of prisoners in the penitentiary, but only to deliver from prison those who are illegally detained there."⁹⁴ Prison rules regarding law books, the court held, "could not change the legality or illegality of appellant's detention."⁹⁵ As these and other cases make clear, the courts largely took a "hands-off" approach to supervising the prisons, at least until the 1960s. Whether a prison provided a 15,000-volume library or banned all law books was entirely up to the prisons themselves. That choice was not treated as a constitutional issue. While some prisons offered such libraries for the reasons discussed above, most offered no legal access at all. This would begin to change, however, in the 1960s.

B. PRISON LAW LIBRARIES IN THE 1960S

In the 1960s, a legal doctrine finally began to form around the prison law library. Long merely an act of executive grace, the decision to create a law library started to become a constitutional issue in the eyes of the courts. This transition did not take place overnight. In the late 1950s and throughout the 1960s, courts staked out positions all over the map on whether law libraries were required. This was a significant development because, for decades, libraries had existed without court order. Those early libraries served various rationales that this section and the previous one address. But court involvement in the law library doctrine changed the nature of the law libraries themselves.

92. Edith Evans Asbury, *Ex-lifer Resumes a Normal Routine: Man Who Wrote Own Appeal Heads First for Broadway, Strawberries and Coffee*, N.Y. TIMES, Apr. 10, 1954, at 16.

93. *People ex rel. Dafoe v. Jackson*, 46 N.Y.S.2d 904, 905 (App. Div. 1944).

94. *Taylor v. United States*, 179 F.2d 640, 643 (9th Cir. 1950).

95. *Id.*

1. The Courts' Views on Prison Law Libraries

The case of *Hatfield v. Bailleaux* highlights the courts' uncertainty about the law library doctrine in the 1960s.⁹⁶ In 1959, inmates at the Oregon State Penitentiary filed a complaint in district court that they had not been allowed to "study law or prepare legal documents" in their cells, but rather were restricted to studying in a prison law library that could accommodate only eleven inmates at a time and was open for only thirty hours per week.⁹⁷ On top of that complaint, the inmates found the library's collection paltry. It contained portions of the Oregon statutes, "one or two" volumes of *Corpus Juris Secundum*, some advance sheets of Oregon Supreme Court decisions, and nothing more.⁹⁸ Moreover, the prison barred inmates from receiving "any treatises or statutes," even if those sources were not available in the law library's collection. These regulations were designed to prevent jailhouse lawyers from helping other prisoners and to prevent jail cells from becoming overcrowded with books, but inmates saw these actions as bringing about a denial of their rights.

The district court struck down the regulations, holding that an inmate representing himself should "have the same opportunities to prepare his case as one represented by an attorney."⁹⁹ The court added that, "[w]ithout such books, a prisoner, without legal training or experience, finds it virtually impossible" to navigate the court system.¹⁰⁰ But the Ninth Circuit reversed, holding that courts should not tamper with prison regulations unless the purpose and effect of those regulations was to "interfere with such reasonable access" to the courts "with regard to their respective criminal matters."¹⁰¹ The touchstone was noninterference, a theme that would arise over and over in discussions of prison law libraries. If the prison went out of its way to hamper inmates' access to the courts, that was improper. But the prison could throw up roadblocks, so long as they were justified by something other than a desire to interfere with inmates' legal access.

Underlying the Ninth Circuit's stance was its view that convictions were "presumptively valid." Thus, the Constitution did not require prisons to provide resources for the purpose of "enabl[ing] an inmate to search for legal loopholes in the judgment and sentence under which he is held," nor to "spend his prison time or utilize prison facilities in an effort to discover a ground for overturning a presumptively valid judgment."¹⁰² The Ninth Circuit recognized some right of access to the courts, but, whatever it entailed, this right did not include the ability to research and "search for" claims. *Bailleaux* exemplifies the courts' cramped vision of the access-to-courts doctrine: Prisons need not assist inmates

96. 177 F. Supp. 361 (D. Or. 1959).

97. *Id.* at 362-63.

98. *Id.* at 363.

99. *Id.*

100. *Id.* at 364.

101. *Hatfield v. Bailleaux*, 290 F.2d 632, 640 (9th Cir. 1961).

102. *Id.* at 640-41.

in making their legal claims, so long as they avoid interfering with inmates' legal cases.

In fact, many courts remained profoundly skeptical of prison law libraries. In 1967, the California Supreme Court denied a petition from an inmate who claimed his right to conduct legal research was unconstitutionally infringed upon by the prison's policies. There is "no statutory right to engage in such research; nor is there any constitutional duty laid upon the states to provide facilities for that purpose, so long as access to the courts is not thereby unreasonably impeded," the court held.¹⁰³ This was another example of the noninterference rationale.¹⁰⁴ Likewise, a Florida district court in 1968 denied an inmate's request for law books, holding that the prison system was "under no obligation to provide the material requested."¹⁰⁵ This legal uncertainty was reflected in the behavior of corrections officials throughout the 1960s. In 1969, for example, the warden of the infamous "Tombs" jail in lower Manhattan banned all law books from the facility unless an attorney specifically requested the books. His justification showed the cavalier attitude many wardens took to law libraries: As the warden explained to the *New York Times*, "If law books aren't controlled . . . the courts are flooded with an impossible number of writs, such as 'I didn't get my mail on time' or 'I didn't get my sheets.'"¹⁰⁶ That an official of a high-profile jail could reject libraries so brazenly shows how little purchase the doctrine had even in the late 1960s.

2. Prison Officials' Views on Prison Law Libraries

For those prison officials who provided legal materials to their inmates, what was the motivation, given that very few courts required such materials? Was it an access-to-court rationale or something entirely different? In 1968, Morris Cohen, a librarian and law professor at the University of Pennsylvania, reported on an informal survey he conducted of state prison officials' attitudes toward law libraries. A majority of wardens reported the following benefits of the law library system: "gives defendants a better feeling of fair and just treatment and prevents bitter feelings in many cases"; keeps inmates busy and thus prevents inmates' becoming "administrative problems"; instills a "greater respect for the law"; affirms that society cares enough about the prisoner "to accord him continuing civil rights"; and satisfies the inmate that "there are no legal grounds

103. *In re Allison*, 425 P.2d 193, 197 (Cal. 1967).

104. For prisoners who were represented by an attorney, as was the petitioner in the case, the complaint that research materials were confiscated "should be viewed in that light." *Id.* at 198. California's own prison rules stressed that legal materials were "a privilege, not a right." *Id.* at 197.

105. *Coonts v. Wainwright*, 282 F. Supp. 893, 896 (M.D. Fla. 1968).

106. David Burnham, *The Tombs: An 'Island of Forgotten Men' in City*, N.Y. TIMES, Sept. 2, 1969, at 1. Granted, the situation in a jail is different from in a prison because all the jail inmates—at least all the pretrial ones—have a right to counsel. As discussed later, a number of circuits have held that if an inmate has been offered the services of counsel, the inmate has no right to legal materials, even if he has rejected that offer. *See infra* section III.D.

for appeal.”¹⁰⁷ Significantly, this list did not include providing access to the courts. In fact, Cohen viewed libraries as poor tools for guaranteeing such access, especially compared to the “preferable” method of “professional assistance.”¹⁰⁸ He even suggested that inmate legal research “may be so unsophisticated as to mislead some prisoners.”¹⁰⁹ According to Cohen, to the extent that prison officials believed there was value in a prison law library, it was not in the library’s utility as a tool for accessing the courts.

Cohen’s observations are corroborated by the minutes from the annual meetings of the American Correctional Association. These annual meetings, which gathered prison officials from around the country, give a fascinating window into what prison officials thought of law libraries and into the reasons that some of them installed law libraries in their prisons long before they were legally required to do so. Of particular interest is a 1966 speech by Louie Wainwright, director of the Florida Department of Corrections and past president of the association.¹¹⁰

Wainwright’s speech discussed several rationales for providing legal materials, but access to courts was not among them. The speech acknowledged that “there is no present legal requirement for an institution to provide law books for inmates.”¹¹¹ Nonetheless, Florida prisons provided basic legal texts to inmates for several reasons. First was a therapeutic justification. Wainwright cited a Florida State University study, which found that the authors of ninety-eight percent of “*Gideon* writs” “lacked information or had misconceptions about their legal rights.”¹¹² Wainwright insisted there could be “therapeutic” benefits in “resolving” the inmates’ legal questions. His second rationale for law libraries was an effort—“futile at times”—to wrest power from jailhouse lawyers.¹¹³ The more inmates who knew something about the law, the less sway the jailhouse lawyers could boast. The third rationale for law books was the most counterintuitive. Wainwright believed that, by providing legal information, he could cut down on the number of frivolous suits filed against the prisons. He pointed to Minnesota prisons, which distributed legal pamphlets to inmates and thus cut down on the number of “ill-prepared and useless writs,” while at the same time reducing the “disappointment and frustration of prisoners who have their writs rejected.”¹¹⁴ Disseminating law books in prison was good for the prison and good for the prisoner. Significantly, however, access to the courts

107. Morris L. Cohen, *Reading Law in Prison*, 48 PRISON J. 21, 25 (1968).

108. *Id.* at 26.

109. *Id.*

110. Louie L. Wainwright, Dir., Fla. Div. of Corr., Legal Information and Resources for Inmates, Address Before American Correctional Association (Aug. 28–Sept. 1, 1966), in PROCEEDINGS OF THE NINETY-SIXTH ANNUAL CONGRESS OF CORRECTION OF THE AMERICAN CORRECTIONAL ASSOCIATION 235 (1966) [hereinafter Wainwright Speech].

111. *Id.* at 236.

112. *Id.*

113. *Id.*

114. *Id.* at 238.

was not one of Wainwright's rationales for providing law libraries.

When Wainwright cared about providing access to courts, he turned to legal counsel, not libraries. He claimed in his speech that Florida did everything it could to provide access to the courts without making inmates undergo the difficult task of legal research. In the wake of the 1963 *Gideon v. Wainwright*¹¹⁵ decision, for example, more than 2,500 Florida prisoners sought to overturn their convictions.¹¹⁶ The courts and prisons worked together to help the largely uneducated inmate population file these *Gideon* writs. For their part, the courts amended the rules of criminal procedure to make it "extremely easy," in Wainwright's words, to file a *Gideon* writ.¹¹⁷ That was essential, he said, to "avoid the necessity of inmates having to perform difficult research in preparing motions."¹¹⁸ As a result, "[m]any inmates won their freedom without even opening a law book."¹¹⁹ The prison system did its part by bringing lawyers into some of the prisons to help inmates with their claims. Several private foundations paid for the local public defender to provide legal advice to prisoners. Wainwright called this a "successful experiment," which "forestalled some of the frivolous writs."¹²⁰ He told the assembled audience of prison officials that there was so much enthusiasm among his employees for this experiment that he was considering extending the program to other prisons.

There is an obvious irony in Wainwright, *Gideon*'s opponent, suggesting that the assistance of postconviction counsel was necessary to provide access to the courts. But beyond that irony is the important point of Wainwright's speech: When officials wanted to provide therapy, to undermine jailhouse lawyers, or to reduce frivolous litigation, they turned to prison law libraries. But when they wanted to provide access to the courts, they championed any method other than asking inmates to conduct legal research. In this important speech in front of his peers, Wainwright effectively acknowledged that law books could not provide sufficient access to the courts.

The minutes of the American Correctional Association meetings are also informative for what officials did not say. The minutes demonstrate how little prison officials discussed law libraries prior to the first Supreme Court law library case in 1971. Although general-interest libraries were almost an annual agenda item throughout the 1960s, the American Correctional Association ignored *law* libraries almost entirely. In a 1960 speech entitled "Our Libraries—The Next Ten Years," the speaker mentioned nothing about law libraries.¹²¹

115. 372 U.S. 335 (1963).

116. Wainwright Speech, *supra* note 110, at 236.

117. *Id.* at 237.

118. *Id.*

119. *Id.*

120. *Id.*

121. See Price Chenault, Dir. of Educ., N.Y. State Dep't of Corr., Our Libraries—The Next Ten Years, Address Before the American Correctional Association (Aug. 28–Sept. 2, 1960), in PROCEEDINGS OF THE NINETIETH ANNUAL CONGRESS OF CORRECTION OF THE AMERICAN CORRECTIONAL ASSOCIATION 219 (1960).

Nor did the 1963 speech delivered by librarian Marion H. Vedder, chair of the Committee on Institution Libraries. That speech focused on what magazines should be allowed in prisons and on the prospects for bibliotherapy.¹²² In 1964, a prison library speech emphasized the need to integrate prison libraries with educational and vocational training programs—debate teams, discussion clubs, and correspondence courses—but said nothing about the important issue of law books.¹²³ And one year later, a library-science professor at Columbia University accused the assembled officials of “criminal neglect” in not providing “adequate educational and library services” to prisoners.¹²⁴ “Must we wait for a sweeping federal inquiry and government intervention,” he asked, “before we can recognize that inmates represent a segment of our population in great need of education and rehabilitation?”¹²⁵ Amazingly, in all his talk of sweeping reform, he made no mention of law libraries. And in 1970, just one year before the Supreme Court’s first law library decision, a speech entitled “The Library of the Future” made no reference to law books, even though law libraries would become the dominant issue for prison librarians over the next quarter century.¹²⁶

Other than Wainwright, only one person in the 1960s addressed the annual meetings on the topic of prison law libraries. That person was Arthur A. Charpentier, a librarian for the New York City Bar Association. He gave a speech in 1966, immediately before Wainwright’s, mentioning titles of books that could be used to create a respectable law library collection.¹²⁷ But his message did not resonate with prison officials, according to librarian Marion Vedder. Looking back from the distance of 1973, Vedder recalled that officials had heard about “more and more court decisions favoring inmates who claimed to have been denied basic rights,”¹²⁸ but Charpentier’s message about the need

122. Marion H. Vedder, Chairman, Am. Corr. Ass’n Comm. on Inst. Libraries, Report of the Committee on Institution Libraries (Aug. 25–29, 1963), in *PROCEEDINGS OF THE NINETY-THIRD ANNUAL CONGRESS OF CORRECTION OF THE AMERICAN CORRECTIONAL ASSOCIATION* 236 (1963).

123. C. J. Eckenrode, Superintendent, Educ. & Vocational Training, U.S. Bureau of Prisons, The Correctional Library Comes of Age, Address Before the American Correctional Association (Aug. 30–Sept. 4, 1964), in *PROCEEDINGS OF THE NINETY-FOURTH ANNUAL CONGRESS OF CORRECTION OF THE AMERICAN CORRECTIONAL ASSOCIATION* 205, 207 (1964).

124. Ray L. Trautman, Professor, Sch. of Library Sci., Columbia Univ., Innovate—Don’t Procrastinate, Address Before the American Correctional Association (Aug. 22–26, 1965), in *PROCEEDINGS OF THE NINETY-FIFTH ANNUAL CONGRESS OF CORRECTION OF THE AMERICAN CORRECTIONAL ASSOCIATION* 133, 133 (1965).

125. *Id.*

126. Milton Shatzel, Librarian, Auburn Prison, N.Y., The Library of the Future, Address Before the American Correctional Association (Oct. 11–15, 1970), in *PROCEEDINGS OF THE ONE HUNDREDTH ANNUAL CONGRESS OF CORRECTION OF THE AMERICAN CORRECTIONAL ASSOCIATION* 216 (1970).

127. Arthur A. Charpentier, Librarian, The Ass’n of the Bar of the City of N.Y., Law Collections in Penal Institutions, Address Before the American Correctional Association (Aug. 28–Sept. 1, 1966), in *PROCEEDINGS OF THE NINETY-SIXTH ANNUAL CONGRESS OF CORRECTION OF THE AMERICAN CORRECTIONAL ASSOCIATION* 230 (1966).

128. Marion H. Vedder, Former Chairman, Am. Corr. Ass’n Comm. on Inst. Libraries, What’s Happening in the Area of Legal Materials in Correctional Institutions, Address Before the American Correctional Association (Aug. 12–17, 1973), in *PROCEEDINGS OF THE ONE HUNDRED AND THIRD ANNUAL CONGRESS OF CORRECTION OF THE AMERICAN CORRECTIONAL ASSOCIATION* 215, 215 (1973).

to establish legal collections did not sink in. Vedder said, "Correctional administrators viewed the cost of basic law collections as prohibitive and I am sure that most administrators gave a very low priority to establishing and maintaining adequate law libraries."¹²⁹

That all changed in 1971, however, when the Supreme Court endorsed libraries in *Younger v. Gilmore*.¹³⁰ As Vedder said, "[A]dministrators who could barely tolerate the inmate's right to prepare a writ, became more aware of the increasing number of court decisions favoring inmate claims. They began looking for the most *economical* and practical ways to satisfy the reasonable needs of inmates for legal services."¹³¹ Quite simply, prison libraries were the most "economical" form of compliance.¹³² And when the Supreme Court weighed in, the law library doctrine all of a sudden became a legal force that prisons could not ignore.

For years, the prisons that provided law libraries did so for the reasons that Wainwright and others mentioned—providing therapy, legitimizing the criminal justice system, and reducing frivolous litigation. But the Supreme Court's endorsement of law libraries in 1971 imposed a new rationale on the prison law library. The Court treated the law library as a tool for accessing the courts, despite the fact that the Supreme Court and other courts realized that the law library was not up to the task. The history of law libraries prior to the 1960s and 1970s is important, then, because it shows that prison law libraries did not develop as tools for accessing the courts. This access-to-the-courts rationale was foisted upon them by the doctrinal developments of the 1970s. Understanding where this access-to-courts rationale came from thus helps to explain why law libraries spread around the country in the 1970s, despite the fact that they were of such little practical value in making the courts accessible.

II. THE WOBBLY PATH TO A LAW LIBRARY DOCTRINE

In the 1970s, the Supreme Court delivered two opinions endorsing law libraries as tools for accessing the courts. Although prison officials read these decisions as full-throated endorsements of law libraries, a closer look at the decisions reveals that the Supreme Court harbored serious doubts about law libraries' effectiveness. Despite those doubts, these law libraries spread to prisons throughout the country because of an uneasy *détente* between prisoner advocates and prison officials.

129. *Id.*

130. 404 U.S. 15 (1971).

131. Vedder, *supra* note 128, at 215–16 (emphasis added).

132. See also COYLE, *supra* note 59, at 54 (characterizing prisons' choice of libraries over legal counsel as "largely a consideration of economics").

A. NONLIBRARY ACCESS-TO-COURTS CASES: *EX PARTE HULL* AND *JOHNSON V. AVERY*

The first case in any history of the law library doctrine is *Ex parte Hull*, a Supreme Court opinion that makes no mention of libraries or books.¹³³ In 1941, Michigan prisons would not allow inmates to file habeas petitions until those petitions had been reviewed and approved by the prison.¹³⁴ Inmate Cleio Hull nonetheless smuggled a petition out of prison and had it filed on his behalf.¹³⁵ His case challenging the prison's policy made it to the Supreme Court, which in 1941 held that states "may not abridge or impair" the right to file a habeas petition.¹³⁶ This holding, important though it was on its own terms, took on an even greater importance. It marked the end of the "hands-off" doctrine, in which courts had refrained from meddling in the day-to-day operations of prisons.¹³⁷ In a real sense, this was the beginning of the prisoner litigation era. As courts became increasingly willing to entertain prisoner complaints, inmate litigation became more promising, and access to legal assistance came to be seen as more and more essential.

The next case in the standard story of the doctrine also said nothing about law libraries. *Johnson v. Avery*, decided by the Supreme Court in 1969, held that the Tennessee prison system could not prohibit jailhouse lawyers from assisting other prisoners "unless and until" the state provided "some reasonable alternative to assist inmates."¹³⁸ Many inmates are "totally or functionally illiterate," their "educational attainments are slight," and their "intelligence is limited," the Court reasoned.¹³⁹ If Tennessee banned jailhouse lawyers, a large group of illiterate, uneducated inmates would be denied access to the courts.¹⁴⁰ The Court thus gave Tennessee the choice: permit jailhouse lawyers or provide a suitable alternative.

The opinion does not mention law libraries as a means of accessing the courts, and this omission speaks volumes about the Court's low opinion of prison law libraries. The Court suggested a number of alternatives to jailhouse lawyers—that is, a number of other ways that prisons could provide access to the courts—but law libraries were not on that list. The Court suggested public

133. See, e.g., *Bounds v. Smith*, 430 U.S. 817, 821–22 (1977); Steven D. Hinckley, *Bounds and Beyond: A Need To Reevaluate the Right of Prisoner Access to the Courts*, 22 U. RICH. L. REV. 19, 19 (1987); Emily Shepard Smith, *May It Please the Court: Law Students and Legal Research Instruction in Prison Law Libraries*, 29 LEGAL REFERENCE SERVICES Q. 276, 278–79 (2010); Comment, *Not So Meaningful Anymore: Why a Law Library Is Required To Make a Prisoner's Access to the Courts Meaningful*, 45 WM. & MARY L. REV. 1195, 1199 (2004).

134. *Ex parte Hull*, 312 U.S. 546, 548–49 (1941).

135. *Id.*

136. *Id.* at 549.

137. See generally Charles E. Friend, Note, *Judicial Intervention in Prison Administration*, 9 WM. & MARY L. REV. 178 (1967) (analyzing the trend towards judicial intervention in prison administration).

138. 393 U.S. 483, 490 (1969).

139. *Id.* at 487.

140. *Id.* at 488.

defenders,¹⁴¹ volunteer attorneys,¹⁴² senior law students,¹⁴³ and even “standardized habeas corpus forms” designed for use by “laymen.”¹⁴⁴ But nowhere did the Court mention law books as an alternative, even though a number of states already provided books to inmates, and even though Johnson requested that the district court provide him with law library access—a request that was ignored by all levels of the court system.¹⁴⁵ The inference to draw from this omission is that the Court did not see law libraries as an adequate means for providing access to courts. As late as 1969, the Supreme Court was not even willing to treat prison law libraries as an adequate alternative to jailhouse lawyers, the lowest level of legal assistance.

B. *YOUNGER V. GILMORE*: THE FIRST LAW LIBRARY CASE

The first time the Court endorsed prison law libraries was in 1971 with its opinion in *Younger v. Gilmore*.¹⁴⁶ Short though this two-sentence opinion was, it forced prisons to go further than ever before in providing legal assistance to inmates. For the first time, prisons were required to do more than merely avoid interfering with access to the courts; they had to provide affirmative legal assistance. This decision launched the prison law library doctrine, but amazingly it did so without using the words “prison,” “law,” or “library.”¹⁴⁷ To understand the significance of *Younger*, however, it is essential to look at the lower court decision, *Gilmore v. Lynch*.¹⁴⁸

Gilmore v. Lynch was a class action aimed at stopping the California Department of Corrections from destroying large parts of its law library collections. For years, California maintained law libraries with collections that varied greatly from prison to prison. In the late 1960s, the state decided to standardize these collections. It drafted a list of eleven basic titles and announced plans to

141. *Id.* at 489. It dismissed the alternatives that the Tennessee prison was already offering. “Sometimes” allowing inmates to look in the yellow pages for the address of a lawyer did not count as a real alternative. Nor did “on several occasions” asking a public defender to consult on a case. *Id.* at 488–89.

142. *Id.* at 489.

143. *Id.*; *id.* at 495–96 (Douglas, J., concurring).

144. *Id.* at 496 (Douglas, J., concurring).

145. It seems unlikely that this was an accidental omission. If the Court thought law libraries were an alternative, why wouldn’t it have mentioned them? This intuition is enforced by the fact that the Supreme Court opinion itself notes that the inmate asked for—and was denied—law books. So the Court was aware of the law-book option. The silence on the topic of law libraries thus takes on meaning. In the district court, Johnson asked for “various legal materials and Supreme Court reports,” only to have the court deny the request, holding that the state need not furnish “these materials and reports.” *Johnson v. Avery*, 252 F. Supp. 783, 787 (M.D. Tenn. 1966). It hastened to add that habeas petitions “should not[] contain extensive legal citations. All that is required is a short, simple and intelligible statement of the facts upon which the petitioner bases his claim for relief.” *Id.*

146. 404 U.S. 15 (1971).

147. *See id.*

148. *See id.* at 15. This affirmed the holding of a panel of three district court judges. *Gilmore v. Lynch*, 319 F. Supp. 105, 112 (N.D. Cal. 1970).

remove any books not on the list.¹⁴⁹ “[T]he State of California was about to have a book-burning,” as one NAACP lawyer put it.¹⁵⁰ Inmates in Folsom and San Quentin prisons—whose collections were the largest, and thus had the most to lose—filed suit.¹⁵¹

The prisoners argued that the reduction violated their right of access to the courts. They also alleged an equal protection violation, as inmates who could afford attorneys or law books would not be harmed as much by the reduction as those who could not.¹⁵² California argued that it had “no obligation to provide library facilities,” citing *Hatfield v. Bailleaux*.¹⁵³ The libraries were a matter of “governmental grace,” California insisted, and if the library reduction plan had to be analyzed under any tier of scrutiny, it should receive nothing more than rational-basis review.¹⁵⁴

The three-judge district court sided with the inmates on equal protection grounds, holding that unlike more affluent prisoners, indigent inmates were “relegated” to the mercy of jailhouse lawyers and “to the resources of the prison law library.”¹⁵⁵ The court also gave a novel spin to *Johnson v. Avery*, declaring that *Johnson* “makes it clear that some provision must be made to ensure that prisoners have the assistance necessary to file petitions and complaints which will in fact be fully considered by the courts.”¹⁵⁶ This new reading of *Johnson* would be adopted by the Supreme Court in *Younger v. Gilmore*. Prisons had to do more than just stay out of the way; they affirmatively had to help inmates file their claims.¹⁵⁷

Beyond this extension of *Johnson*, the decision of the three-judge district court in *Gilmore v. Lynch* was also significant in endorsing libraries as a means of accessing the courts. Even in this endorsement, however, there was reason to doubt the court’s confidence in libraries. The district court showed its discomfort with law libraries by recommending a “legion” of alternatives for access to the courts.¹⁵⁸ The court started off by recommending public defenders, law professors, and law students, much as the Supreme Court did in *Johnson*.¹⁵⁹ Then, “[f]or further suggestions,” it cited three essays in the 1968 *California*

149. *Gilmore*, 319 F. Supp. at 107 n.2. In addition, the state law library had set up its own restrictive list of law books that could circulate to prisoners, sometimes permitting just one copy of a text for circulation among 30,000 inmates. *Id.* at 107 & n.4.

150. Turner, *supra* note 20, at 8.

151. The new regulations also limited the ability of inmates to receive copies of cases, even if they purchased them on their own. Each inmate was limited to the slip opinion in his own case. John Wahl, NAACP Attorney, Address Before the “Prison Legal Libraries: Idea into Reality” Conference (Apr. 22, 1972), in PRISON LIBRARY CONFERENCE PROCEEDINGS, *supra* note 20, at 56.

152. *Gilmore*, 319 F. Supp. at 108.

153. *Id.*

154. *Id.*

155. *Id.* at 111.

156. *Id.* at 110.

157. See *Younger v. Gilmore*, 404 U.S. 15, 15 (1971).

158. *Gilmore v. Lynch*, 319 F. Supp. 105, 110 (N.D. Cal. 1970).

159. *Id.* at 111.

Law Review that made radical proposals for extending the right to counsel.¹⁶⁰ The first essay was written by an inmate who said that what was needed was “a decision like *Douglas v. California*,” which established a right to counsel on the first direct appeal.¹⁶¹ Access to the courts “can only be accomplished by providing counsel to poor prisoners,” the inmate wrote.¹⁶² The second article was written by a prison librarian who emphasized that librarians should work more directly on inmates’ cases rather than forcing inmates to “rely on their own efforts.”¹⁶³ This recommendation was hardly an endorsement of inmates’ researching prowess or of the law library system in general, especially coming from someone so familiar with the realities of prison legal research. The final essay was written by a defense attorney who called for the creation of “a state public defender, expert in handling appeals from criminal convictions.”¹⁶⁴ The current system of leaving inmates to their own devices was “hit-and-miss, trial-and-error,” and downright inadequate, he wrote.¹⁶⁵ Thus, even though *Gilmore v. Lynch* recognized a law library right, the district judges seemed to prefer almost any other alternative for providing access to the courts. And the Supreme Court’s affirmance of *Gilmore v. Lynch* implicitly put the Court’s stamp on these views.¹⁶⁶

But prison officials did not share that uneasiness. Around the country, prisons embraced these libraries. Law libraries were suddenly on the agenda for practically every prison system in the country.¹⁶⁷ The American Correctional Association created an ad hoc committee in 1971 to study the “Provision of Legal Materials for Prisoners.”¹⁶⁸ The next year, the U.S. Chamber of Commerce hosted two seminars for the creation of prison library guidelines.¹⁶⁹

In decades past, many prison administrators had seen prison law libraries as expensive, meddlesome, and frivolous, but they quickly changed their minds. Given the requirement of providing some form of affirmative legal assistance—either through libraries or legal counsel—libraries were suddenly desirable. As librarian Brenda Vogel wrote, “the majority of correctional agencies chose the

160. *Id.* at 111 n.8.

161. Charles Larsen, *A Prisoner Looks at Writ-Writing*, 56 CALIF. L. REV. 343, 363 (1968).

162. *Id.*

163. Herman C. Spector, *A Prison Librarian Looks at Writ-Writing*, 56 CALIF. L. REV. 365, 370 (1968).

164. Marshall W. Krause, *A Lawyer Looks at Writ-Writing*, 56 CALIF. L. REV. 371, 377 (1968).

165. *Id.* at 372.

166. See *Younger v. Gilmore*, 404 U.S. 15, 15 (1971).

167. In 1971, three months before the Supreme Court’s decision in *Younger v. Gilmore*, the *Los Angeles Times* reported on a vigorous culture of “writ-writing” at San Quentin prison, where 3,000 writs had been filed in the past year—an “increase” in volume that officials attributed to the encouragement of “civil rights lawyers and prison-reform advocates” and that inmates attributed to a combination of their inability to afford competent private attorneys and their “lack [of] confidence” in court-appointed attorneys. Philip Hager, *Matter of Self-Defense: Inmate ‘Writ-Writers’ Chase Elusive Goals*, L.A. TIMES, Aug. 9, 1971, at A3.

168. Vedder, *supra* note 128, at 216.

169. *Id.*

seemingly less complex remedy, adequate law libraries, rather than adequate assistance.”¹⁷⁰ As noted by Marion Vedder, chair of the American Correctional Association’s Committee on Institution Libraries, the prisons were looking for “the most economical and practical” way to provide “legal services.”¹⁷¹ And that search led directly to prison law libraries.

C. *BOUNDS V. SMITH: THE SECOND LAW LIBRARY CASE*

The second and more significant Supreme Court case to take up the law library question was *Bounds v. Smith*,¹⁷² which the Supreme Court decided in 1977. *Bounds* held for the first time that there was a “fundamental constitutional right of access to the courts” that required prisons to supply “adequate law libraries or adequate assistance from persons trained in the law.”¹⁷³ Whereas *Younger* required affirmative assistance of some kind—be it a library or any of a “legion” of alternatives—*Bounds* singled out law libraries for special treatment. Law libraries were not necessary for guaranteeing access to the courts, but they were sufficient.¹⁷⁴ *Bounds* also stood out for its statement that inmates were intellectually capable of using law libraries.¹⁷⁵ But in the end, even *Bounds* demonstrated ambivalence toward the effectiveness of libraries in providing access to the courts.

In *Bounds*, a class of North Carolina prisoners sued the state for its “failure to provide legal research facilities.”¹⁷⁶ The district court sided with the prisoners, citing *Younger v. Gilmore*, but stopped short of telling North Carolina how to remedy the violation.¹⁷⁷ Instead of recommending legal research facilities, the district court “suggest[ed] that a program to make available lawyers, law students, or public defenders might serve the purpose *at least as well as* the provision of law libraries.”¹⁷⁸ Despite the court’s recommendations, North Carolina chose law libraries over legal assistance. It proposed seven full-size law libraries across the state and two smaller ones in a segregation unit

170. BRENDA VOGEL, *A Prisoner’s Locus Sanctum: The Law Library*, in *THE PRISON LAW LIBRARY PRIMER* 60, 61 (2009).

171. Vedder, *supra* note 128, at 216.

172. 430 U.S. 817 (1977).

173. *Id.* at 828. In the meantime, the Court in *Wolff v. McDonnell* had extended the access-to-court right beyond habeas corpus petitions to include civil rights actions:

Petitioners contend that *Avery* is limited to assistance in the preparation of habeas corpus petitions and disputes the direction of the Court of Appeals to the District Court that the capacity of the inmate adviser be assessed in light of the demand for assistance in civil rights actions as well as in the preparation of habeas petitions. Petitioners take too narrow a view of that decision.

Wolff v. McDonnell, 418 U.S. 539, 579 (1974).

174. *Bounds*, 430 U.S. at 828.

175. *Id.* at 826–27.

176. *Id.* at 818.

177. *Id.* at 818–19.

178. *Id.* at 819 (emphasis added).

and a woman's prison¹⁷⁹—this from a state whose legislature professed to have “never heard of [anything] as foolish” as a prison law library.¹⁸⁰ The inmates rejected the proposal, however, calling instead for a law library at all seventy-seven prisons.¹⁸¹ The case wound its way to the Supreme Court.

Bounds went beyond *Younger* in the explicitness of its endorsement of law libraries and in its confidence in inmates' ability to do legal research. The majority opinion, by Justice Thurgood Marshall, pushed back on the claim that “inmates are ‘ill-equipped to use’ ‘the tools of the trade of the legal profession,’ making libraries useless in assuring meaningful access.”¹⁸² Marshall wrote that, in the Court's experience, pro se petitioners had proven themselves “capable of using lawbooks to file cases raising claims that are serious and legitimate even if ultimately unsuccessful.”¹⁸³ Working under the assumption that inmates could make use of legal books, the law library system made some sense.

But for all its professed confidence in the utility of libraries, there are reasons to suspect that even the *Bounds* Court had its doubts. Not only did the Court provide no support for the statement that inmates could use the libraries effectively, citing only Justice Marshall's own experience, but it also made a point of mentioning all the different alternatives to law libraries: public defenders, volunteer lawyers, law students, paralegals, and even jailhouse lawyers.¹⁸⁴ Why was *Bounds* so confident in inmates' abilities to use law books effectively? Commentator Christopher Smith argues that it was North Carolina's insistence that libraries were so useless that pushed the Court into overstating its belief in libraries' effectiveness.¹⁸⁵ The Court found itself refuting the claim that “no prisoners can utilize libraries,” rather than addressing the question of “whether *all or most* prisoners” could use them, Smith wrote.¹⁸⁶ This was arguably a more strident position than the Court intended to take.

179. *Id.*

180. Transcript of Oral Argument at 5, *Bounds v. Smith*, 430 U.S. 817 (1977) (No. 75-915), available at http://www.oyez.org/cases/1970-1979/1976/1976_75_915.

181. *Bounds*, 430 U.S. at 819. That was impossible, the state insisted, because North Carolina's seventy-seven prisons were spread across a state that is nearly 500 miles from east to west. “We will have an incredible equal protection problem in the State of North Carolina with these small units spread across the State,” Deputy Solicitor General Jacob L. Safron warned at oral argument in the case. Transcript of Oral Argument at 8, *Bounds v. Smith*, 430 U.S. 817 (1977) (No. 75-915), available at http://www.oyez.org/cases/1970-1979/1976/1976_75_915.

182. *Bounds*, 430 U.S. at 826 (quoting Brief for Petitioner at 17, *Bounds v. Smith*, 430 U.S. 817 (1977) (No. 75-915)).

183. *Id.* at 826–27 (“[I]f petitioners had any doubts about the efficacy of libraries, the District Court's initial decision left them free to choose another means of assuring access.”).

184. *Id.* at 830–31.

185. Christopher E. Smith, *Examining the Boundaries of Bounds: Prison Law Libraries and Access to the Courts*, 30 *How. L.J.* 27, 30–31 n.27 (1987). Deputy Attorney General Jacob Safron, for example, said only a “small handful” of inmates were capable of using the libraries and that he took this “almost . . . as a personal insult” because it devalued the education he went through to be a professional lawyer. Transcript of Oral Argument at 5, *Bounds v. Smith*, 430 U.S. 817 (1977) (No. 75-915), available at http://www.oyez.org/cases/1970-1979/1976/1976_75_915.

186. Smith, *supra* note 185.

And the story of *Bounds* on remand only reinforces the doubts the courts had about the effectiveness of law libraries. On remand, North Carolina dragged its feet for a decade, refusing to fix its law library system.¹⁸⁷ Finally, the district court entered an order. But this order did not mandate improvements to law libraries; instead, the district court found that libraries were inadequate to meet prisoners' needs and thus ordered North Carolina to provide legal counsel to inmates in prison.¹⁸⁸ "It would be difficult to find a clearer indication of the inadequacy of that portion of the *Bounds* decision endorsing law libraries," Smith wrote, "than the same case ten years later demonstrating numerous proven deficiencies."¹⁸⁹ This coda to *Bounds* showed the courts' continuing lack of confidence in law libraries as a means of accessing the court. It also showed how the law library question was inextricably linked to the debate over the right to counsel, a connection taken up in the next section.

D. THE LAW LIBRARY DEBATE FLIPPED ON ITS HEAD

Prior to the 1970s, inmate advocates supported the creation of law libraries as a step toward increasing access to the courts.¹⁹⁰ Meanwhile prison officials largely opposed libraries as unnecessary intrusions on prison operations. The *Younger* and *Bounds* opinions reversed the polarity of that debate. Given the choice between paying for law libraries and paying for legal assistance, prison officials suddenly embraced libraries.¹⁹¹ At the same time, advocates came to view the law library as an impediment to more meaningful forms of legal assistance, such as a postconviction right to counsel.¹⁹² The end result was that advocates found themselves pointing out all the ways that libraries were inadequate, while prison officials found themselves arguing that law libraries provided more than enough assistance.¹⁹³ This pole shift helps explain the core contradiction of the doctrine: libraries somehow spread across the country despite the fact that no one viewed them as effective. In short, both sides in the library debate were driven by motives that had nothing to do with inmates' abilities to use the libraries effectively.

1. Inmate Advocates Opposed Law Libraries Insofar as Libraries Became an Impediment to a Postconviction Right to Counsel

Both inmate advocates and prison officials saw the connection between law libraries and the right to counsel. In 1972, just one year after *Younger*, law library supporters gathered in Berkeley for a conference titled "Prison Legal

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

188. *Id.* at 606.

189. *Smith*, *supra* note 185, at 43.

190. *See, e.g.*, Transcript of Oral Argument, *Bounds v. Smith*, 430 U.S. 817 (1977) (No. 75-915), available at http://www.oyez.org/cases/1970-1979/1976/1976_75_915.

191. *See Smith*, *supra* note 133, at 279.

192. *Id.*

193. *See, e.g., Smith*, 610 F. Supp. at 599.

Libraries: Idea into Reality.”¹⁹⁴ The topic of the conference was how to turn the symbolic library into a practical tool. Conference participants stressed the need to provide attorneys, law students, and paralegals to supplement law libraries. Librarian Marjorie Le Donne, co-chair of the American Correctional Association’s commission on legal materials for inmates, called it “essential that all of this law library service be backed up with some kind of professional [counseling]: you need more than books; you need to know how to proceed through the books.”¹⁹⁵ “What’s required is legal services, not law books,” said William Bennett Turner, an NAACP attorney. “This means legal services of the kind where you sit down with a prisoner and you get his story and you advise him.”¹⁹⁶ John Wahl, the lead plaintiff’s attorney in *Younger*, echoed the need for lawyers over books: “Obviously there are not enough lawyers to give a battery of attorneys similar to those that served in the [Jimmy] Hoffa case to every inmate or to every person,” but with the victory in *Younger* “[w]e’ve taken a small step.”¹⁹⁷ The hope was that law library access could be a toehold on the climb to a postconviction right to counsel.

The connection was so tight between libraries and the right to counsel that criminology professor Barry Krisberg feared the library right could actually undermine *Gideon*. “[L]egal material in prisons could provide clear justification for us to forget the inmates,” Krisberg said. He worried that people would say: “Having given them the appropriate ammunition or tools, we don’t have to bother about inmates any longer.”¹⁹⁸ He was particularly concerned that law libraries “might give the state grounds to take lightly its responsibility as enunciated in the Supreme Court decision of *Gideon v. Wainwright*.”¹⁹⁹

Many others were concerned about the effectiveness of prison law libraries. In 1973, the Arkansas Department of Corrections expressed the view, as related by librarian Marion Vedder, that “service to inmates by attorneys is a more effective method of providing legal services, especially to those inmates incapable of reading or understanding the books.”²⁰⁰ Vedder told the American Correctional Association that “no one would take issue on [Arkansas’s] point,” except to note that “at present there are not enough attorneys available . . . to meet the demand.”²⁰¹ Here was yet another public acknowledgment by a library booster that libraries were not enough.

The preference for attorneys over library books has remained a theme for decades whenever the courts have taken up the law library question. In *Lewis v.*

194. PRISON LIBRARY CONFERENCE PROCEEDINGS, *supra* note 20.

195. Le Donne, *supra* note 22, at 21.

196. Turner, *supra* note 20, at 12–13.

197. Wahl, *supra* note 151, at 58.

198. Barry Krisberg, Asst. Prof. of Criminology, Univ. of Cal., Address, in PRISON LIBRARY CONFERENCE PROCEEDINGS, *supra* note 20, at 29.

199. *Id.*

200. Vedder, *supra* note 128, at 218.

201. *Id.* (emphasis added).

Casey, the last Supreme Court case to deal with law libraries, the attorney representing the prisoners—the one arguing for expanded law library facilities—expressed her own misgivings about libraries' usefulness.²⁰² "We have no attachment to law libraries," she said. "Personally, I think law libraries are not the best way to provide access . . ." ²⁰³ This was quite an admission coming from a prisoners' rights advocate.

On the other side of the debate, opponents of broad inmate rights also saw the connection between libraries and the right to counsel. In his *Bounds* dissent, Justice William Rehnquist wrote that if meaningful access depended on libraries, "there is no convincing reason why it should not also include lawyers appointed at the expense of the State."²⁰⁴ He added: "Just as a library may assist some inmates in filing papers . . . appointment of counsel would assure that the legal arguments advanced are made with some degree of sophistication."²⁰⁵ For Rehnquist, the fact that the law library right was supported by the same logic as the right to postconviction assistance of counsel showed that neither right was truly guaranteed by the Constitution. Similarly, in *Lewis v. Casey*, Justice Antonin Scalia warned that giving prisoners the right to "discover" claims and "litigate effectively" would lead down a slippery slope to the right to counsel: "To demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires."²⁰⁶ If the access-to-courts right was taken seriously enough to require a library, then it should also require a right to counsel.

A flurry of lower courts have also recognized the connection between the law library right and the right to counsel. As one court put it, "[a]n adequate law library, by itself, cannot provide meaningful access to the courts for those inmates unable to read and understand library materials."²⁰⁷ Many district courts and one circuit court agreed. In 1979, for example, a Michigan district court held it "obvious" that even an adequate library was insufficient to provide access to the courts to inmates who were "illiterate or otherwise unable to do effective legal research."²⁰⁸ That court ordered the continuation of a

202. *Lewis v. Casey*, 518 U.S. 343 (1996).

203. Transcript of Oral Argument at *48, *Lewis v. Casey*, 518 U.S. 343 (1996) (No. 94-1511), 1995 U.S. Trans. LEXIS 130.

204. *Bounds v. Smith*, 430 U.S. 817, 841 (1977) (Rehnquist, J., dissenting).

205. *Id.*

206. *Lewis*, 518 U.S. at 354 (emphasis omitted). An amicus brief in the case expressed the concern that states would be at the mercy of the "purely subjective" discretion of judges if states "are required to do more than place inmates on a par with unincarcerated persons by providing for access to legal materials—while not having to go so far as actually to assure effective representation for inmates by offering counsel." Brief for the National Conference of State Legislatures et al. as Amici Curiae Supporting Respondents at 7, *Lewis v. Casey*, 518 U.S. 343 (1996) (No. 94-1511).

207. *United States ex rel. Para-Professional Law Clinic v. Kane*, 656 F. Supp. 1099, 1105 (E.D. Pa. 1987).

208. *Glover v. Johnson*, 478 F. Supp. 1075, 1096 (E.D. Mich. 1979) (quoting *Wade vs Kane*, 448 F. Supp. 678, 684 (E.D. Pa. 1978)).

paralegal training program and the implementation of a legal education course so that the women's prison—which did not have any jailhouse lawyers—could establish a cadre of inmates sufficient to help other inmates with their cases.²⁰⁹ A year later, in 1980, the Fifth Circuit concluded that “[l]ibrary books, even if ‘adequate’ in number, cannot provide access to the courts for those persons who do not speak English or who are illiterate.”²¹⁰ Subsequently, a Kentucky district court held that *Bounds* required, among other things, an attorney, a paralegal, or an experienced inmate for those prisoners who could not use law books.²¹¹ In 1984, a South Dakota district court held that inmates needed “law-trained assistance.”²¹² And, in 1992, an Arizona district court concluded that “illiterate and non-English-speaking inmates” must be provided legal assistance, not just books.²¹³ While the Supreme Court has never gone as far as these lower courts, the lower court opinions nonetheless demonstrate that libraries and the right to counsel are intertwined in the minds of many judges. These lower courts saw libraries as a starting point, not an end point, for access to the courts. In their view, what was truly needed was the assistance of counsel.

The most interesting case in this respect is *Hooks v. Wainwright*.²¹⁴ The case arose in Florida in 1970 and dragged on for fifteen years. The Florida district court ruled that inmates must receive the assistance of counsel in addition to library books,²¹⁵ but the Eleventh Circuit reversed that decision. This case is worth examining not only because the district and circuit courts took such different positions, but also because advocates and prison officials at one point reached a settlement—the prisons would provide lawyers for inmates who could not use the law libraries—only to see that settlement scuttled by the legislature. That settlement shows a consciousness on both sides that law libraries were not enough to provide access to the courts.

In 1970, Raymond Hooks requested from the clerk of the court a copy of the decision in his drug case, only to be told that he would have to pay a fee.²¹⁶ Hooks responded not by paying the fee but by petitioning the federal district court for law library access.²¹⁷ In March 1971, the state responded to Hooks's claim by listing all of the legal resources available to prisoners in Florida.²¹⁸ The district court was not impressed. It said the materials were scattered across the state's many prisons, and even if they had been consolidated in one place, they still would have amounted to “no more than a useless hodgepodge of outdated statutes, incomplete case reporters and nonessential treatises covering

209. *Id.* at 1097.

210. *Cruz v. Hauck*, 627 F.2d 710, 721 (5th Cir. 1980).

211. *Canterino v. Wilson*, 562 F. Supp. 106, 111 (W.D. Ky. 1983).

212. *Cody v. Hillard*, 599 F. Supp. 1025, 1061 (D.S.D. 1984).

213. *Lewis v. Casey*, 518 U.S. 343, 348 (1996).

214. 775 F.2d 1433 (11th Cir. 1985).

215. *Hooks v. Wainwright*, 536 F. Supp. 1330, 1349 (M.D. Fla. 1982).

216. *Id.* at 1332.

217. *Id.*

218. *Id.*

topics such as agency, taxes and trusts.”²¹⁹ Nonetheless, the court dismissed the complaint in July of 1971 because, as a later decision explained, “the law at that time failed to provide support for Hooks’s position.”²²⁰

However, just four months later, the Supreme Court handed down *Younger v. Gilmore*, which established a cause of action for Hooks’s law library claim.²²¹ The Florida district court reinstated Hooks’s suit, and for the next decade, the case sputtered along. The state proposed plans for inmate access to the courts, while Hooks and other inmates countered with their own proposals. The court held evidentiary hearings, entertained petitions from prospective interveners, assigned amicus counsel to each side, and allowed the parties to adjust their filings in light of *Bounds*.²²² The court then waited for the parties to negotiate a settlement. In 1981, a decade after the litigation began, the two sides reached a tentative agreement: the prisons would supply public defenders to handle postconviction litigation and challenges to conditions of confinement, but only for those inmates who were indigent and “unable by reason of lack of the necessary education or linguistic skills or by lack of access to library facilities to represent” themselves.²²³ This satisfied advocates who wanted assistance of counsel, and it demonstrated a realization on the part of prison officials that libraries themselves were insufficient. But, the state legislature would not approve the settlement.²²⁴

In the wake of the settlement’s collapse, the district court decided the case in favor of the inmates. Though *Bounds* required a library or some other form of assistance, the Florida district court held that a law library on its own was not enough.²²⁵ The district court distinguished *Bounds* because, unlike *Bounds*, *Hooks* was based on a developed factual record. The court held that the record demonstrated that “most prisoners are totally unequipped, both in terms of their education and their mental capacity, to effectively prepare and file their own meaningful legal papers.”²²⁶ For “many, many prisoners,” even if they had unlimited access to a library, they would be “unable to effectively use” it.²²⁷ Therefore, the district court concluded, the assistance of counsel was “the only means through which” to provide “meaningful access to the courts.”²²⁸

While the district court conceded that providing counsel to convicted inmates was “somewhat of a radical concept,” it pointed out that nearly half the states at the time of *Bounds* provided “professional or quasi-professional legal assistance

219. *Id.*

220. *Id.* at 1333.

221. 404 U.S. 15 (1971).

222. *Hooks*, 536 F. Supp. at 1333–35.

223. *Id.* at 1336 n.11.

224. *Id.* at 1336–37.

225. *Id.* at 1349–50.

226. *Id.* at 1346.

227. *Id.* at 1350.

228. *Id.*

to prisoners.”²²⁹ In addition, the Florida Bar and the U.S. Department of Justice “recommended the adoption of a plan providing for the assistance of counsel.”²³⁰ The district court felt it was on solid ground, but the Eleventh Circuit disagreed, as discussed in the next section.

2. The States’ Noninterference Principle

States quickly warmed to law libraries as a way of complying with their access-to-courts responsibilities. But how could it possibly satisfy the Constitution’s access-to-court requirements to put “books in front of someone who cannot read”?²³¹ How could these libraries plausibly be sufficient? The answer was not that libraries were effective in providing court access. Nor was the answer that libraries were all that the states could afford. Rather, states defended their ineffective library systems with the noninterference principle. This principle held that prisons could comply with the Constitution simply by staying out of the way of inmates’ legal research.

The noninterference principle went through several iterations. First, the states used the noninterference principle to justify providing inmates with *no* legal resources whatsoever. In *Bounds*, for example, North Carolina argued that the state had “not interfered” with the prisoners’ access to the courts.²³² The state read *Ex parte Hull*,²³³ *Johnson v. Avery*,²³⁴ and *Younger v. Gilmore*²³⁵ as addressing situations where the state “by affirmative action, has *interfered* with prisoners’ attempts to go to court.”²³⁶ The interference in *Ex parte Hull* was the prison’s screening of habeas petitions.²³⁷ The interference in *Johnson* was the prison’s prohibition on jailhouse lawyers.²³⁸ And the interference in *Younger* was the state’s plan to destroy large parts of the library collection.²³⁹ These cases, North Carolina said, “while forbidding interference . . . do not require the states affirmatively to provide assistance.”²⁴⁰ This accorded with “common sense,” the state argued: There was no constitutional requirement to provide law-abiding but indigent citizens with legal assistance, so why should indigent *inmates* be treated any better?²⁴¹

Bounds rejected this version of the noninterference principle in announcing

229. *Id.* at 1352.

230. *Id.*

231. One Justice asked this question in oral arguments. Transcript of Oral Argument at 4, *Lewis v. Casey*, 518 U.S. 343 (1996) (No. 94-1511), 1995 U.S. Trans. LEXIS 130.

232. Brief for Petitioners at 15, *Bounds v. Smith*, 430 U.S. 817 (1977) (No. 75-915).

233. 312 U.S. 546 (1941).

234. 393 U.S. 483 (1969).

235. 404 U.S. 15 (1971).

236. Brief for Petitioners at 8–12, *Bounds v. Smith*, 430 U.S. 817 (1977) (No. 75-915) (emphasis added).

237. *Ex Parte Hull*, 312 U.S. at 548–49.

238. *Johnson*, 393 U.S. at 490.

239. *Gilmore v. Lynch*, 319 F. Supp. 105, 107 n.2 (1970).

240. Brief for Petitioners at 12, *Bounds v. Smith*, 430 U.S. 817 (1977) (No. 75-915).

241. *Id.*

an affirmative obligation to provide some type of legal assistance—either law books or other aid. But the noninterference principle did not die. It morphed into its second form. In this second iteration, states insisted that the only thing they had to do in terms of providing assistance was to give inmates the same resources as non-inmates. That parity would constitute noninterference. In other words, if states provided public law libraries outside of prison, that is all they had to do inside of prison. It did not matter whether the prisoners were unable to use these libraries; the important point was that the state provided the same access inside and outside of custody. The noninterference principle provided a useful explanation, then, of how the Constitution could possibly consider prison law libraries adequate: They were adequate because they put the inmate in the same position he would have occupied outside of prison.

The archetypal example of this version of the noninterference principle is seen in the Eleventh Circuit's decision in *Hooks v. Wainwright*.²⁴² Whereas the district court held that libraries alone were insufficient, the Eleventh Circuit took the opposite view. It said *Bounds* and its forebears had "simply removed barriers to court access that imprisonment or indigency erected. They in effect tended to place prisoners *in the same position as non-prisoners* and indigent prisoners in the same position as non-indigent prisoners."²⁴³ If an illiterate inmate could not use the prison law library, that was not the fault of the prison system, the Eleventh Circuit held, because that inmate would not have been able to use a law library on the outside either.

The Eleventh Circuit was completely unapologetic about the failings of prison law libraries. In fact, it said the obviousness of those failings proved that *Bounds* had never intended to guarantee meaningful access to the courts, much less a postconviction right to counsel:

That books would be of no use to the illiterate needs no discussion. *Bounds* surely did not hold that libraries must be provided to illiterate prisoners. . . . It presses credulity to contend that the Supreme Court in *Bounds* intended there would be a constitutional right to legal counsel, if it were found that some prisoners were illiterate and that nonlawyer prisoners could not use the libraries as well as lawyers.²⁴⁴

The Eleventh Circuit thus flipped the assistance-of-counsel argument on its head. It said that when *Bounds* spoke of providing law libraries, it was so obvious that books would be of "no use to the illiterate" inmate that, if this uselessness were a problem, *Bounds* would have made other provisions.²⁴⁵ In other words, the *Bounds* Court knew that lawyers would be needed for truly effective access to the courts, yet it nonetheless decided *not* to mandate the

242. 775 F.2d 1433 (11th Cir. 1985).

243. *Id.* at 1436 (emphasis added).

244. *Id.*

245. *Id.*

provision of counsel. In the Eleventh Circuit's view, this showed that the *Bounds* Court was not concerned with making access to the courts truly effective. All *Bounds* required was for the prison not to interfere—that is, for there to be parity between the resources given to inmates and the resources given to non-inmates. In this reading, effective access to the courts was not at all a touchstone of the doctrine.

Other cases similarly advanced the noninterference principle. Pennsylvania used the noninterference principle to challenge a court order that required the provision of not only a law library but also the assistance of counsel.²⁴⁶ Pennsylvania argued that the court order went too far in coddling prisoners, given that the assistance of counsel was “a right heretofore unavailable to their illiterate and indigent counterparts who are free citizens.”²⁴⁷ The Tenth Circuit used similar reasoning in promoting the noninterference rationale.²⁴⁸ Even though Utah already provided counsel for habeas and civil rights actions, Utah inmates complained that state-provided counsel was available only for the filing of the “initial pleading.”²⁴⁹ As a result, uneducated and illiterate inmates struggled to access the courts at later stages of litigation.²⁵⁰ This argument did not persuade the Tenth Circuit, however. That an illiterate or uneducated inmate had a reduced ability to litigate his claim “makes him no different than a non-prisoner who is illiterate,” the court held.²⁵¹ Yet again, the state was excused for not providing effective access to the courts merely because it put prisoners and nonprisoners in the same position with respect to legal services.

Arguably the crowning achievement of the noninterference principle came in *Lewis v. Casey*, where Arizona used the noninterference principle to defend the adequacy of its law library system. In oral argument, one Justice after another pelted Arizona Attorney General Grant Woods with questions about whether prison law libraries really could deliver access to the courts to the average inmate, much less the illiterate or non-English-speaking inmate.²⁵² The attorney general fell back on the noninterference rationale.²⁵³ The library system was adequate, he said, because “we put people on equal footing as to the people who have not committed crimes and who are not in prison.”²⁵⁴ Woods referred to a hypothetical illiterate or non-English-speaking resident of Phoenix.²⁵⁵ That person can go to the public law library, Woods said, and “[i]f they can't use it

246. See Petition for Writ of Certiorari for Defendant-Appellant at 14–15, *Zimmerman v. Para-Professional Law Clinic*, 485 U.S. 993 (1988) (No. 87-1347), 1986 WL 766525.

247. *Id.* at 23–24.

248. See *Bee v. Utah State Prison*, 823 F.2d 397 (10th Cir. 1987).

249. *Id.* at 398.

250. *Id.* at 398–99.

251. *Id.* at 399.

252. Transcript of Oral Argument, *Lewis v. Casey*, 518 U.S. 343 (1996) (No. 94-1511), 1995 U.S. Trans. LEXIS 130.

253. *Id.* at 12–13.

254. *Id.* at 11.

255. *Id.* at 11–12.

because of their own personal deficiencies, they can use family, friends, they can try to get a lawyer . . .”²⁵⁶ Those same options existed for inmates, Woods insisted: “We allow them to do all of those sort of things so they are not disadvantaged, and that’s the point behind *Bounds*.”²⁵⁷

Of course, the noninterference principle has its own logical limitations. It is doubtful that prison law libraries were ever on par with law libraries on the outside. And even if they were, the reality is that incarceration interferes with every aspect of a prisoner’s life, so it is naïve to suggest that a prison could ever reach this goal of noninterference.²⁵⁸ But whether or not the noninterference principle made sense is beside the point. What is important to see is how prisons used the principle as an excuse—as a principled reason to justify the provision of patently useless libraries.

III. THE INTERNAL CONTRADICTIONS OF THE LAW LIBRARY DOCTRINE

In the 1970s and 1980s, prison law libraries spread throughout the country even though no one believed they were effective at providing access to the courts. This contradiction—the popularity of law libraries in spite of their ineffectiveness—rests at the core of the law library doctrine. It should not be surprising, then, that a doctrine built on such a contradiction turned out to be rife with logical inconsistencies and paradoxes. This Part explores several of the most glaring oddities of the doctrine.

A. *LEWIS V. CASEY*: THE STANDING PARADOX AND THE ABSENCE OF A RIGHT TO “DISCOVER” CLAIMS OR TO “LITIGATE EFFECTIVELY”

In 1996, *Lewis v. Casey* dramatically reshaped the law library doctrine and in so doing created a number of new contradictions. *Lewis v. Casey* arose when inmates in Arizona sued the state for failing to provide adequate law library facilities.²⁵⁹ The district court and the Ninth Circuit sided with the inmates.²⁶⁰ But the Supreme Court, in an opinion by Justice Scalia, held that the inmates had not satisfied the “actual injury” requirement of the standing doctrine because they had not shown that the failings of the libraries had directly “hindered” a viable legal claim.²⁶¹ *Bounds* did not create an “abstract, freestanding right to a law library or legal assistance,” Justice Scalia announced, so inmates had to do more than just show that the law libraries were “subpar in

256. *Id.* at 11.

257. *Id.* at 12.

258. For example, a warden who prevents an inmate from filing a habeas petition is obviously interfering with the inmate’s legal case. But a warden who prevents an inmate from visiting a crime scene to search for clues is acting reasonably, even though preventing the inmate from traveling is nonetheless a form of interference. The point is simply that true noninterference is impossible in a prison setting.

259. 518 U.S. 343, 346–47 (1996).

260. *Id.* at 346–48.

261. *Id.* at 349, 351.

some theoretical sense.”²⁶² This heightened standing requirement, however, created a paradox: Any inmate actually harmed by a deficient library would probably not be able to show that he had a viable claim *and* that the claim was hurt by the library’s inadequacy.²⁶³ The heightening of the standing requirement essentially choked off the flow of law library claims, thus freezing the law library doctrine in time.

In addition to changing the standing requirement, *Lewis v. Casey* further altered the doctrine by limiting the types of claims to which an inmate was entitled to assistance in bringing. Initially, in the era of *Ex parte Hull*, access to the courts meant the ability to file direct appeals and habeas petitions.²⁶⁴ But the types of legal actions for which prisoners were entitled to help in filing gradually expanded to include civil rights suits and—at the law library doctrine’s apex—child-custody, divorce, and civil claims. *Lewis v. Casey* narrowed the range of claims that prisons had to accommodate. After *Lewis v. Casey*, prisons needed to provide legal resources only for habeas petitions and for suits challenging the conditions of confinement. As Justice Scalia noted with panache, “*Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims.”²⁶⁵

Lewis v. Casey further muddied the doctrine, however, by holding that there was neither a right to “discover grievances” nor to “litigate effectively once in court.”²⁶⁶ Without the right to “discover” a claim through research, a prisoner might never know about the ineffective assistance-of-counsel doctrine or other areas of law that could be grounds for an appeal. And without any right to “litigate effectively,” an inmate could find himself in the Dadaist position of having a legal right to receive help in filing a habeas petition but not in responding when the state attorney general moves to dismiss his claim. Libraries had long been effective in theory but feckless in fact. *Lewis v. Casey* made the theory even more convoluted. After all, what does the law library right mean if an inmate is not entitled to use it to “discover grievances” or to “litigate effectively”?

B. THE MYSTERIOUS ORIGINS OF THE CONSTITUTIONAL RIGHT

Despite all the talk of constitutional requirements, there has never been a consensus about where in the Constitution to anchor the law library right. Courts have tied the right to no fewer than six provisions: Due Process, Equal

262. *Id.* at 351.

263. See Gerken, *supra* note 6, at 500 (“[The] ability to litigate a denial of access claim is evidence that the plaintiff has no denial of access claim!” (quoting *Walters v. Edgar*, 163 F.3d 430, 436 (7th Cir. 1998))).

264. See 312 U.S. 546 (1941).

265. *Lewis*, 518 U.S. at 355.

266. *Id.* at 354.

Protection, the Petition Clause, the Privileges and Immunities Clause, the fundamental rights doctrine, and the Sixth Amendment right to self-representation.²⁶⁷ The haziness of these origins has provided fodder for attacks on the legitimacy of the law library right. For instance, in oral argument in *Bounds*, Justice Byron White pressed the prisoners' attorney to pinpoint the textual hook: "What provision of the Constitution [is it] that provides the right to law libraries for prisoners? . . . Tell me what provision of the Constitution."²⁶⁸ Chief Justice Warren Burger, in dissent, accused the *Bounds* majority of "leav[ing] us unenlightened as to the source of the 'right of access to the courts.'"²⁶⁹ Justice Rehnquist, in another dissent, complained that *Bounds* announced a "fundamental constitutional right" that "is found nowhere in the Constitution" and is "created virtually out of whole cloth."²⁷⁰

Two decades later, the constitutional origins of the doctrine remained unclear. In *Lewis v. Casey*, one Justice repeated the same question Justice White had asked in the *Bounds* oral argument: "Quite literally and specifically, what amendment do you tie it to?"²⁷¹ Justice Clarence Thomas, in his concurring opinion, further attacked *Bounds* for "fail[ing] to identify a single provision of the Constitution to support the right created in that case."²⁷² And both the Fifth and the Sixth Circuits faulted the murkiness of the doctrine's textual origins for the "lack of internal definition" of the law library right.²⁷³

The haziness of the doctrine's origins further exacerbates the internal contradictions discussed above. The confusion about where in the Constitution to locate the right makes it all the more difficult to know how to interpret this right, given that different areas of the Constitution receive different levels of deference from the Supreme Court. This nebulousness also makes it difficult to determine how best to adapt the doctrine to the technological changes that have transformed prison law libraries, a topic we return to at the end of this Article.

267. *Knop v. Johnson*, 977 F.2d 996, 1002-03 (6th Cir. 1992) ("The Court's opinion in *Bounds* is silent as to the source of this right, but on other occasions the Supreme Court has said variously that it is founded in the Due Process Clause of the Fourteenth Amendment, or the Equal Protection Clause, or the First Amendment right to petition for a redress of grievances. Lower courts have also implicated the Privileges and Immunities Clause of Article IV." (citations omitted)).

268. Transcript of Oral Argument, *Bounds v. Smith*, 430 U.S. 817 (1977) (No. 75-915), available at http://www.oyez.org/cases/1970-1979/1976/1976_75_915.

269. *Bounds v. Smith*, 430 U.S. 817, 833-34 (1977) (Burger, C.J., dissenting).

270. *Id.* at 839-40 (Rehnquist, J., dissenting).

271. Transcript of Oral Argument at 36, *Lewis v. Casey*, 518 U.S. 343 (1996) (No. 94-1511), 1995 U.S. Trans. LEXIS 130.

272. *Lewis v. Casey*, 518 U.S. 343, 366 (1996) (Thomas, J., concurring).

273. *Knop v. Johnson*, 977 F.2d 996, 1003 (6th Cir. 1992) ("One Court of Appeals has suggested, with respect to principles developed under the 'right of access' rubric, that 'because their textual footing in the Constitution is not clear, these principles suffer for lack of internal definition and prove far easier to state than to apply.'" (quoting *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir.1985))).

C. THE CORRECT AMOUNT OF ACCESS: WHICH CLAIMS? WHAT RESOURCES?
HOW EFFECTIVE?

The law library doctrine suffers from a lack of principled boundaries. Basic questions about how much access is enough were never answered. As one Justice asked in the *Younger v. Gilmore* oral argument, how could the courts acknowledge the right to a law library but then stop short of requiring the library to be on par with the Supreme Court's law library?²⁷⁴ The reason the Court never spelled out how many or what types of books were required for an adequate law library was likely because the Court wanted to empower the states to experiment. But the ironic result of this restraint is that it led to a mountain of litigation. The decision of the Supreme Court not to articulate a rule forced district courts and special masters to fill the void. Case by case, the district courts hammered out the definition of a minimally adequate law library.²⁷⁵ Some special masters became so involved that they spelled out such details as the maximum allowable noise level, the hours of operation, and the minimal educational requirements for prison librarians.²⁷⁶ But, for obvious reasons, the line between adequate and inadequate libraries was difficult to draw. After all, the two sides in the adversarial system will inevitably have different resources, so it is not easy to say how much of an imbalance is too much.

Nor is it clear whether libraries are supposed to educate inmates about the law or merely provide them with fill-in-the-blank forms to file fact-based claims. One school of thought, alluded to in *Lewis v. Casey*, is that prisoners should use these fill-in-the-blank forms to plead the facts of their cases and then rely on the courts to supply the appropriate causes of action.²⁷⁷ Several states have adopted this approach, alluded to in dicta in *Lewis v. Casey*.²⁷⁸ In Arizona, for example, inmates are not allowed access to any cases except *Lewis v. Casey*.²⁷⁹

Denying inmates the ability to read up on the law is particularly problematic

274. Transcript of Oral Argument at 22, *Younger v. Gilmore*, 404 U.S. 15 (1971) (No. 70-9), in *THE COMPLETE ORAL ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES, 1971 TERM* (University Publications of America 1972). In the *Bounds v. Smith* oral arguments, the deputy attorney general of North Carolina mentioned several times that judges in his state did not have their own law libraries, so inmates should not either. See Transcript of Oral Argument, *Bounds v. Smith*, 430 U.S. 817 (1977) (No. 75-915), available at http://www.oyez.org/cases/1970-1979/1976/1976_75_915.

275. See, e.g., *Casey v. Lewis*, 43 F.3d 1261, 1265 (9th Cir. 1994), *rev'd*, 518 U.S. 343 (1996); *Dilley v. Gunn*, 64 F.3d 1365, 1367 (9th Cir. 1995); *Gluth v. Kangas*, 951 F.2d 1504, 1511-12 (9th Cir. 1991).

276. See *Lewis v. Casey*, 518 U.S. 343, 347 (1996); Transcript of Oral Argument at 28, 40, *Lewis v. Casey*, 518 U.S. 343 (1996) (No. 94-1511), 1995 U.S. Trans. LEXIS 130.

277. See 518 U.S. at 352.

278. This approach had been flatly rejected in *Bounds v. Smith*, 430 U.S. 817, 826 (1977) ("It is not enough to answer that the court will evaluate the facts pleaded in light of the relevant law. Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation.").

279. ARIZONA DEPARTMENT OF CORRECTIONS, INMATE LEGAL ACCESS TO THE COURTS, Attachment A (2011), available at <http://www.azcorrections.gov/Policies/900/0902.pdf>.

in light of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Prison Litigation Reform Act (PLRA). AEDPA's complicated filing requirements make it essential for inmates to understand the law to avoid defaulting their claims. And because the PLRA penalizes inmates who file three "frivolous" claims, it becomes even more important for inmates to know the law before they file.²⁸⁰ Yet the law library doctrine cannot even provide a clear answer about whether inmates must have access to information about the law or whether fill-in-the-blanks forms will do.

D. CIRCUIT SPLIT: DO PRETRIAL, PRO SE INMATES HAVE A LAW LIBRARY RIGHT?

The library doctrine is even more muddled in its relationship to the field of criminal procedure. For example, the circuits are split on whether library access is required for an inmate who invokes his Sixth Amendment right to represent himself at trial.²⁸¹ Such a defendant might seem the poster child for library access for two reasons. First, he has not been convicted, so he should retain the full rights of any free member of society. Second, he has an obvious need for access to legal materials; if preparing for trial does not qualify as a legal need, it is hard to imagine what would. Notwithstanding those two compelling reasons, six circuits hold that pretrial, pro se inmates do not have a right to law library access.²⁸² Only the Ninth Circuit holds that they do.²⁸³

The six circuits that deny a law library right to pro se, pretrial inmates have offered several rationales. First, some circuits say that the states have met their access-to-court obligations by offering the defendant the assistance of counsel.²⁸⁴ If the defendant elects to represent himself, there is no need for the state to offer further assistance in the form of a library. The Seventh Circuit made this clear: "[N]o constitutional right exists mandating that the prisoner in the alternative be provided access to a law library should he choose to refuse the

280. See Gerken, *supra* note 6, at 508–09.

281. See, e.g., *Faretta v. California*, 422 U.S. 806, 807 (1975) (posing the question of whether a pro se defendant has a right to law library access prior to trial).

282. See *United States v. Taylor*, 183 F.3d 1199, 1204 (10th Cir. 1999); *Degrate v. Godwin*, 84 F.3d 768, 769 (5th Cir. 1996); *United States v. Smith*, 907 F.2d 42, 44 (6th Cir. 1990) ("[T]he Magistrate concluded that the defendant's reliance on *Bounds* was misplaced, and found that it was not the prerogative of the defendant to decide whether he would accept either the state's offer of legal counsel or instead insist that the state provide him with access to the same facilities that a bar association lawyer would have."); *United States ex rel. George v. Lane*, 718 F.2d 226, 227 (7th Cir. 1983) ("[W]hen a defendant (pretrial detainee) is offered the assistance of appointed counsel and refuses the same, no constitutional right exists mandating that the prisoner in the alternative be provided access to a law library should he choose to refuse the services of court-appointed counsel."); *Kelsey v. Minnesota*, 622 F.2d 956, 958 (8th Cir. 1980); *United States v. Chatman*, 584 F.2d 1358, 1360 (4th Cir. 1978). The Supreme Court acknowledged the split in 2005, but declined to resolve it. See *Kane v. Espitia*, 546 U.S. 9, 10 (2005).

283. See *Bribiesca v. Galaza*, 215 F.3d 1015, 1020 (9th Cir. 2000) ("An incarcerated criminal defendant who chooses to represent himself has a constitutional right to 'law books . . . or other tools' to assist him in preparing a defense.").

284. *United States ex rel. George v. Lane*, 718 F.2d at 231–33.

services of court-appointed counsel.”²⁸⁵ Second, several circuits have relied on the fact that a defendant seeking to represent himself must undergo a *Faretta* hearing to satisfy the judge that his waiver of counsel is knowing and voluntary.²⁸⁶ At the hearing, the judge is required to warn about the many disadvantages of self-representation. Lack of library access is just one of the inherent disadvantages of self-representation, these circuits have held, so if a defendant nonetheless chooses to represent himself, that inmate cannot later claim that he was harmed by this lack of library access.²⁸⁷

The Ninth Circuit is the sole circuit to take the opposite position. Its cases hold that a critical part of representing oneself is being able to conduct legal research. An inmate who chooses to represent himself “cannot be confined to his jail [cell] simply to look at the four walls and appear on the day of trial to defend himself.”²⁸⁸ He must receive some resources to assist him in his case—at least in the Ninth Circuit.

This circuit split is particularly interesting because of what it says about the connection between libraries and the right to counsel, a connection emphasized throughout this Article. Are libraries substitutes for the right to counsel or complements to it? In *Bounds* and its lower court progeny, the claim has always been one of equivalence: Libraries and lawyers each satisfy the requirement of legal assistance. But in discussing this circuit split, several circuits have cast doubt on any possible equivalence. As the Sixth Circuit held, library access “would never suffice as a constitutionally permissible replacement” for the right to counsel in the criminal context.²⁸⁹ The Sixth Circuit held that “it would cut against the entire grain of our criminal justice system” to suggest that, instead of the assistance of counsel, a state could “merely . . . give that defendant access to an adequate law library.”²⁹⁰ In other words, states cannot substitute libraries for lawyers at a criminal trial, even though they can make that substitution at the postconviction stage. It is true that the Constitution provides a right to trial counsel and not a right to postconviction or civil rights counsel, but what is interesting about this circuit split is that it gives the lie to the supposed equivalence between lawyers and libraries. Law libraries are no substitute for the right to counsel because they are not up to the task.

A CONCLUDING NOTE: TECHNOLOGICAL CHANGES TO THE PRISON LAW LIBRARY

Thanks to sweeping technological changes, Stateville Prison’s Maurice Meyer would not recognize the prison law libraries of today. Neither would Cecil “The

285. *Id.* at 227.

286. *See, e.g., Smith*, 907 F.2d at 45.

287. *See United States ex rel. George v. Lane*, 718 F.2d at 233 (“The petitioner’s choice to proceed *pro se* was intelligently and voluntarily made with the knowledge that access to unlimited legal research facilities away from his place of detention would not be allowed due to his incarceration.”).

288. *Milton v. Morris*, 767 F.2d 1443, 1448 (9th Cir. 1985) (Hug, J., concurring).

289. *Smith*, 907 F.2d at 44.

290. *Id.*

Brain of Alcatraz" Wright. Nor would the *Lewis v. Casey* Court. Computerization has changed the face of legal research inside and outside of prison. In so doing, it has put enormous pressure on a doctrine that never had a sturdy foundation. What is required of prison law libraries? Why do they exist? Which inmates must they serve? Which may they write off? These difficult questions are inherent in the library doctrine, but they have become even more difficult with the advent of computerization. This Article concludes by looking at the future of the prison law library in light of its oddball past.

One possible conclusion is that the computerization of prison law libraries makes no difference to the doctrine. Sure, the search engines developed by LexisNexis and Westlaw make it easier to locate a case and any conflicting opinions. Some of these programs even provide interfaces, such as spelling wheels, that are designed for readers with low literacy skills. But none of these functions make the core tasks of legal analysis any less complicated. Judicial opinions and practitioner treatises are still not designed for a sixth-grade reading level. Under this view, the computerization of the prison law library is merely a cosmetic improvement with no substantive impact. If that is true, then there is no need to update the law library doctrine, despite these technological changes.

Another way to think about the changes is that computerization makes a profound difference. For all the reasons that lawyers have embraced electronic legal research, prisoners would benefit from computerization, too. But computerization is a double-edged sword, which is where the doctrinal updating comes in. Computers make research easier for the computer literate, but they add another hurdle for those inmates without computer skills. "Research on Lexis and other online computer services is not straight forward or easy," said Bryan Stevenson, director of the Equal Justice Initiative in Alabama, "and switching to a computer service may save the state money but it may not necessarily improve access for prisoners."²⁹¹

In fact, a number of inmates have already filed suit, alleging, among other things, that the conversion of libraries from print to electronic form has prevented them from accessing the courts. As noted earlier, a forty-seven-year-old "computer-illiterate" prisoner in Ohio sued last year over his prison's switch to an electronic version of Westlaw.²⁹² In 2010, a New Jersey inmate filed suit when he could not figure out how to search the LexisNexis electronic collection.²⁹³ Other recent suits relating to computer-based research include one where inmates were given access to a library computer but denied "physical access to the key[b]oard or mouse,"²⁹⁴ and another where an inmate was barred from the library after entering sexually explicit terms into the LexisNexis search

291. *Prison Law Libraries To Get Computers for Inmates; No Net Access*, ASSOCIATED PRESS (Feb. 7, 2005, 1:45 AM), <https://wdun.com/detail.php?n=151971>.

292. Martz, *supra* note 16.

293. *Brown v. Hooper*, No. 10-0291 (DMC), 2010 WL 3210697, at *1 (D.N.J. Aug. 11, 2010).

294. *Hicks v. Rowe*, No. CV 11-0680 CJC (FMO), 2011 WL 1648604, at *1 (C.D. Cal. Mar. 21, 2011).

function—terms he said were essential to researching his sexual assault conviction.²⁹⁵ In a recent law review article, Thomas C. O'Bryant, a Florida inmate, complains that prisoners "are not allowed to use the computers in the law libraries for research purposes."²⁹⁶ The prisoner must give a citation to a law clerk in the library, who then pulls up the case on the computer screen and scrolls up and down while the prisoner reads it.²⁹⁷ "At no time during this process is the pro se prisoner allowed to touch the keyboard," O'Bryant explains.²⁹⁸ These and other complaints demonstrate the downside of computerizing legal materials. But because of the new standing requirements set out in *Lewis v. Casey*, these lawsuits are bound to fail, and thus the policies are unlikely to change.

It is not just computer-illiterate inmates who have run into problems with the electronic search functions. When librarians at the Oregon Department of Corrections tested the LexisNexis system, they ran into a number of difficulties. An internal review by Oregon prison librarians described a dozen "problems" with the LexisNexis prison search engine, including the catchall assessment: "Confusing to users that are familiar with researching and those who are not."²⁹⁹

What makes things even worse is that many prisons do not seem to be checking whether the switchover from print to electronic format is actually improving access for inmates. Representatives of both Westlaw and LexisNexis confirmed that when prison officials purchase library products, the officials are concerned with the bottom line, not with inmate access. "It's not their problem that the inmate is computer-illiterate," said Jane Newman, director of LexisNexis's prison sales department. "They're providing what the state is requiring and it's up to the inmate to learn the system."³⁰⁰ LexisNexis does not conduct surveys to see whether inmates are satisfied with their products because prison officials "don't really care," Newman said. "They just want to make sure that they're in compliance and that they can do it economically."³⁰¹ She added that, unlike professional users who make purchasing decisions based on "the volume of what they can get" and "how quickly they can get it," speed is not at a premium for inmates. "They're in there for thirty years, so if it takes them a month or a year or five years to understand why they're in there it doesn't make much difference to the people that are buying the solution," that is, the prison officials.³⁰²

295. *Johnson v. Poulin*, No. 07-CV-161-PB, 2007 WL 4380051, at *2 (D.N.H. Dec. 10, 2007).

296. Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299, 326 (2006).

297. *Id.*

298. *Id.*

299. E-mail from Erin N. Solomon, Or. Dep't of Corr., to Bonnie I. Hommon, Procurement/Contract Specialist, Or. Dep't of Corr., (June 25, 2008, 8:58 PST) (on file with author).

300. Telephone Interview with Jane Newman, *supra* note 7.

301. *Id.*

302. *Id.*

Colin MacKay, vice-president of government sales at Westlaw's parent company, Thomson Reuters, echoed those sentiments. He said prison officials are not primarily concerned with the quality of the product. When MacKay sells to other government agencies, the purchaser is always concerned with getting the best features, MacKay said, but when he sells to prisons, the main concern is cost. "The wardens don't go to the prisoners and say, 'What is your preference in terms of online tools?' . . . I don't know if I've ever heard of a prison complaining about the utility of our tool or about content gaps," he said. "[I]t's more [a matter] of dollars and cents."³⁰³ This ambivalence about the libraries' effectiveness is troubling, but it is also in keeping with the long tradition of not caring about the effectiveness of prison law libraries. As this Article has argued, no one has ever seen prison libraries as effective tools for accessing the courts, but these libraries proliferated nonetheless.

This may seem to bring us back to the first conclusion: Sweeping technological changes in the field of legal research do not make a difference to the law library doctrine. But one place where the technological changes do make a difference is in the application of the noninterference principle. For sixty years, the noninterference principle has been used to justify the decision to provide no legal assistance to inmates or at least no assistance beyond what the state would provide to nonprisoners. This principle rests on the putative equivalence between the resources given to prisoners and the resources given to nonprisoners.³⁰⁴ But technological improvements on the outside have exploded any possible equivalence between prison and nonprison law libraries. For example, public law libraries on the outside are now set up to accommodate the very people—illiterates and non-English speakers—whom Arizona's attorney general claimed would be unable to gain access to legal materials.³⁰⁵ Even putting aside these outside law libraries, a nonprisoner with a basic Internet connection now has access to legal resources that far outstrip those available to inmates.³⁰⁶

A further irony of this revolution in access is that many of the legal resources that non-inmates would find most helpful are available free of charge on the

303. Telephone Interview with Colin MacKay, Vice President, Gov't Segment, Thomson Reuters (Dec. 1, 2011).

304.

[O]n the outside, if a person is illiterate, if a person doesn't speak English, and they live in Phoenix . . . they can go to the law library, public library. If they can't use it because of their own personal deficiencies, they can use family, friends, they can try to get a lawyer, they can use prisoner groups, and we facilitate that in Arizona. We allow them to do all of those sort of things so they are not disadvantaged, and that's the point behind *Bounds*.

Transcript of Oral Argument at 11–12, *Lewis v. Casey*, 518 U.S. 343 (1996) (No. 94-1511), 1995 U.S. Trans. LEXIS 130.

305. See *supra* note 256 and accompanying text.

306. Law libraries on the outside have always had the advantage over prison libraries of being staffed by professional librarians who can offer a higher level of assistance than the prison guards who often staff prison law libraries. And law libraries in places with large Spanish-speaking populations have taken steps to provide translations of critical legal texts.

Internet, while prisons pay millions of dollars for Westlaw and LexisNexis systems that inmates are not capable of using. Websites such as Justia.com, AllLaw.com and Wikipedia provide basic resources for legal novices, and Cornell University's online law library suggests an additional 146 free Internet sources for information on criminal law alone.³⁰⁷ In addition, Google Translate and other similar programs can convert English text into dozens of foreign languages, expanding legal access for non-English speakers in a way not possible with a prison library collection.³⁰⁸ These technological changes undermine any claim that the prison law library has put inmates in the same position as non-inmates, a key claim of those who attempt to justify inadequate libraries with the noninterference principle.

None of this is to say that inmates should be turned loose on the Internet, although some commentators—and a few inmates—have made that argument.³⁰⁹ Even Justice John Paul Stevens, a dissenter in *Lewis v. Casey*, nonetheless acknowledged that a prisoner would lose a suit demanding “access to on-line computer databases.”³¹⁰ Nor is it realistic to expect that prison law libraries can provide all the services that outside law libraries provide. Prison libraries operate under different constraints than the libraries on the outside. But the point still stands: If prison officials want to defend the ineffectiveness of their libraries by pointing to an equivalent ineffectiveness of outside law libraries, that task has become much more difficult in light of technological changes.

307. *Archived annotations on topic: Criminal Law*, CORNELL UNIV. LAW LIBR., http://library2.law.school.cornell.edu/insiteasp/public/toparc.asp?style=st_browse&topic=Criminal%20Law (last visited May 23, 2012).

308. GOOGLE TRANSLATE, <http://translate.google.com> (last visited May 23, 2012).

309. One commentator has argued that Due Process and Equal Protection require that inmates be given the ability to do legal research online, using selected websites that are pre-approved by the prisons. See Dryden, *supra* note 38, at 819.

310. *Lewis v. Casey*, 518 U.S. 343, 408 n.5 (1996) (Stevens, J., dissenting); see also *United States ex rel. George v. Lane*, 718 F.2d 226, 232 (7th Cir. 1983) (“[N]either does the defendant have a constitutional right to access to a computerized legal research system, paralegal training or a full-fledged law school education.”).

