THE LIBRARY IS CLOSED: DISAGREEMENT OVER A PRISONER'S RIGHT TO ACCESS THE COURTS

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ABSTRACT

As a result of their confinement, prisoners are vulnerable to physical violence, deficient health care, inadequate nutrition, and a whole host of abuses. Due to the often-impenetrable walls of a prison, these abuses remain out of public sight. Because prisoners are frequently stripped of their right to vote, they are unable to find remedy through the political processes. Instead, one of the most powerful tools a prisoner can wield to bring attention to the abuses within prison walls and improve the conditions of their confinement is litigation.

Prisoners have a constitutional right to access the courts. To render that right meaningful, the Supreme Court held in Bounds v. Smith *that prisons have an affirmative obligation to provide legal assistance to prisoners bringing habeas corpus or civil rights actions, and one such way of doing so is to establish law libraries. Often without the help of a lawyer, prisoners must rely on the law libraries to effectively build a case, navigate discovery and motion practice, and potentially try the case. Unfortunately, the Courts of Appeals are split on the temporal scope of a prison's obligation to provide assistance. The Ninth Circuit held that obligation ends after a civil rights complaint is filed, depriving prisoners of the means to prepare for trial, and in effect, silenced prisoners. The Third and Seventh Circuits held the obligation persists through trial. Restricting prisons' obligation to provide legal assistance to prisoners to the pleading stage is just another item among the long list of barriers to prison litigation.*

This Note argues the Ninth Circuit's decision erroneously relied on Lewis v. Casey*, a case the Supreme Court was without jurisdiction to hear and that provides no constitutional authority on the scope of a prisoner's right to access the courts. Anticipating the issue coming before the federal appellate courts that have yet to rule on the question, this Note provides an answer that not only finds constitutional and legal support, but fulfills the demands of* Bounds*: the right to access the courts must be meaningful.*

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INTRODUCTION

On August 27, 2015, Michael Rivera, a prisoner at Dallas State Correctional Institution in Pennsylvania, filed a pro se 42 U.S.C. § 1983 complaint against three correctional officers.[1] In his complaint, Mr. Rivera alleged the officers used excessive force by "punching, kicking, and kneeing him in the head, face, and body while he was subdued and handcuffed behind his back."[2] The matter went to trial, where Mr. Rivera represented himself. Before trial, Mr. Rivera was temporarily transferred to a different prison facility, State Correctional Institution Retreat ("S.C.I. Retreat"), and, shortly after arriving, he submitted a request to the staff asking to use the facility's law library, explaining in the request that he needed continuous access while litigating his case.[3] Later that day, staff granted Mr. Rivera's request and gave him access to the prison's law library.[4]

Although the library did not have any physical books, there were two computers. However, the computers were "completely inoperable," and remained so throughout the entirety of Mr. Rivera's trial.[5] In search of alternatives, Mr. Rivera asked prison staff if he could borrow legal materials from a different library, but officials denied his request.[6] Mr. Rivera proceeded to trial without ever having accessed any legal materials from S.C.I. Retreat.[7] According to Mr. Rivera, he attempted to admit medical records and an unsworn declaration into evidence at his trial, but because Mr. Rivera did not lay a foundation for the documents while testifying on the stand, the judge ruled that the documents were inadmissible hearsay.[8] The jury entered a verdict in favor of the prison officials.[9]

Mr. Rivera subsequently filed a second pro se § 1983 action against staff members at S.C.I. Retreat, alleging they "intentionally denied him meaningful access to the courts by preventing him from conducting legal research before and during his trial."[10] Mr. Rivera believed had he been able to access legal

[1] Complaint at 1, Rivera v. O'Haire, No. 15-cv-01659 (M.D. Pa. Aug. 27, 2015) (requesting declaratory and injunctive relief for deprivation of Mr. Rivera's constitutional rights).

[2] *Id.* at 4.

[3] Opening Brief of Appellant Michael Rivera and Joint Appendix Vol. I at 3, Rivera v. Monko, 37 F.4th 909 (3d Cir. 2020) (No. 20-2531).

[4] *Id.* at 4.

[5] *Id.*

[6] *Id.* at 5.

[7] *Id.* at 6 ("In sum, in the days leading up to his trial, and even through his trial, Mr. Rivera was denied access to all online and print legal materials.").

[8] Rivera v. Monko, No. 19-CV-00976, 2020 WL 3441430, at *2 (M.D. Pa. June 23, 2020) (explaining judge's ruling of evidence as hearsay resulted from failure to testify to documents on stand).

[9] *See* Special Verdict Slip at 2-4, Rivera v. O'Haire, No. 15-cv-01659 (M.D. Pa. July 11, 2017).

[10] *Rivera*, 2020 WL 3441430, at *1.

materials while in prison, specifically the Federal Rules of Evidence, he would have succeeded in getting his documents into evidence and the jury would have weighed the documents in his favor, possibly changing the outcome of his trial.[11] However, the lower court granted the defendants' motion to dismiss Mr. Rivera's access to the courts claim on grounds of qualified immunity, finding that it was not "clearly established that a prisoner had a right to assistance in the form of a law library or other legal assistance in presenting a claim *at trial* in a civil rights case."[12] Mr. Rivera appealed.

At issue in Mr. Rivera's appeal was his well-settled constitutional right to access the courts. A prisoner's right to access the courts places numerous obligations and restrictions on prison officials, including the obligation to furnish a law library in the absence of any other legal assistance.[13] Mr. Rivera's appeal specifically focused on the temporal scope of a prison's obligation to provide access to legal materials. The Third Circuit had to decide whether the prison had an affirmative obligation to provide Mr. Rivera with access to legal materials after he had submitted his complaint and while he litigated his civil rights action at trial.[14] The respondents argued that a prisoner's right to access the courts is not implicated after filing a complaint.[15] Unfortunately for Mr. Rivera, the Third Circuit affirmed the lower court's order based on qualified immunity, finding that the law in the Third Circuit had not clearly established a prisoner's right to access the courts extended past the pleading stage.[16] But fortunately for future prisoners, the Third Circuit rejected the respondents' argument and held the right to access legal materials does extend past the pleading stage while a prisoner is preparing for trial.[17] By answering this question, the Third Circuit joined the Seventh and Ninth Circuit as the only courts of appeals to determine the temporal scope of a prison's obligation to

[11] Complaint at 6-7, *Rivera* 2020 WL 3441430 ("Plaintiff avers that Defendants' actions in denying him access to the RHU mini-law library has caused him actual injury by frustrating and impeding Plaintiff's ability to properly research his excessive force claim . . . .").

[12] *Rivera*, 2020 WL 3441430, at *7 (emphasis added).

[13] *See* Bounds v. Smith, 430 U.S. 817, 830 (1977) ("[A]dequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts, our decision here, as in *Gilmore*, does not foreclose alternative means to achieve that goal."). Some of the additional features of the right are discussed in Part I.B. However, this Note often refers to a prison's obligation to provide prisoners with a law library simply as the right to access the courts generally.

[14] *See Rivera*, 2020 WL 3441430, at *7.

[15] Brief for Appellees at 17, Rivera v. Monko, 37 F.4th 909 (3d Cir. 2022) (No. 20-02531) ("[S]ince any court date would have been after the filing of the complaint, the right of access to the courts is not implicated.").

[16] *See Rivera* v. Monko, 37 at 913 ("Precedent forces us to agree with the District Court: existing Supreme Court and Third Circuit Court of Appeals law had not clearly established a prisoner's right to access the courts after he or she filed a complaint.").

[17] *Id.* (detailing basic legal materials that prisoners, going forward, are entitled to as part of right to access courts).

provide legal materials to a prisoner. However, the courts are split. The Third Circuit joined the Seventh Circuit in holding the right to access the courts extends past the pleading stage,[18] but the Ninth Circuit held a prison's obligation to provide the prisoner with legal materials "ends once a prisoner has brought his petition or complaint to the court."[19]

To date, there is little literature acknowledging this emerging circuit split or advocating for a particular outcome in future litigation.[20] This Note attempts to fill the gap by arguing that courts should adopt the Third and Seventh Circuits' holding that a prisoner's right to access the courts persists after the pleading stage, and that prisoners should have access to legal materials before and during a civil rights trial. Part I of this Note examines the development of prisoners' rights generally and the specific right to access the courts by exploring how courts moved away from a "hands-off" approach to alleged violations of prisoners' constitutional rights and towards embracing and protecting prisoners' rights. This Part lays out the line of cases that established the modern conception of a prisoner's right to access the courts, and it concludes with an introduction to *Lewis v. Casey*,[21] the Supreme Court case that severely limited that right.

Part II examines the emerging circuit split in response to *Lewis* over the temporal scope of a prison's obligation to provide prisoners with access to law libraries and whether failure to do so after a prisoner's complaint is filed results in a violation of a prisoner's right to access the courts. This Part also discusses the practical effect of restricting the right to the pleading stage in the context of the numerous other barriers to prison litigation.

Part III argues courts should adopt the position taken by the Third and Seventh Circuits: A prisoner's right to access the courts persists after the pleading stage. In Part III, this Note argues *Lewis* cannot be relied upon as constitutional authority for restricting a prisoner's right to access the courts, and instead, courts must look to the standard set out in *Bounds v. Smith*[22]—that a prison must assure "meaningful access." Using clues offered by the court, this Note defines meaningful access as the access to legal materials that would be necessary to fulfill the minimum level of preparation that a lawyer would need to provide competent and effective representation.

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[18] *See* Marshall v. Knight, 445 F.3d 965, 969 (7th Cir. 2006) (holding prisoner may bring access to courts claim when denied access to legal materials after filing complaint).

[19] *See* Silva v. Di Vittorio, 658 F.3d 1090, 1101-02 (9th Cir. 2011).

[20] *See* MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 12:7 (5th ed. 2017) ("[T]here is a persuasive argument that the correct rule is one that recognizes a right of access to assistance following the filing of a complaint."); JOHN BOSTON, OVERVIEW OF PRISONERS' RIGHTS 152 (2013) ("[I]t makes sense that the obligation to assist prisoners with their legal claims extends to all stages of the litigation.").

[21] 518 U.S. 343, 351 (1996) (holding prisoner plaintiffs must show alleged inadequacies in prison law library actually hindered efforts to pursue action against prison).

[22] 430 U.S. 817, 830 (1977) ("[A]dequate law libraries are one constitutionally acceptable method to assure meaningful access to the courts.").

I. HOW A PRISONER CAME TO BE HEARD

A prisoner's constitutional right to access the courts has existed for just over five decades. Its creation was a result of the Supreme Court's gradual expansion of prisoners' rights over the twentieth century. Through a series of cases, the Supreme Court abandoned the "hands-off doctrine" and developed a prisoner's constitutional right to meaningful access to the courts. The scope of a prisoner's right to meaningful access to the courts began as simply a right to be free from interference by prison officials when filing a habeas corpus petition but has grown to include prisons providing access to law libraries or other forms of legal assistance.

A. *The Rise and Fall of the Hands-Off Doctrine*

For most of American history, prisoners were treated as having no constitutional rights.[23] Indeed, courts refused to intervene in prisoner matters believing "it [was] not the function of the courts to superintend treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined."[24] This hesitant and dismissive approach to alleged violations of prisoners' constitutional rights became known as the "hands-off doctrine."[25] Courts provided several justifications for their perceived inability to hear the claims of prisoners. In one court's view, prisoners were simply "slaves of the state" with no rights to assert in court.[26] However, most courts refused to hear the claims of prisoners on less barbaric grounds, namely (1) separation of powers, (2) federalism concerns, and (3) the court's lack of expertise on prison operations.[27]

Under the separation of powers rationale, courts held Congress or a state legislature delegated prison administration exclusively to the executive branch by statute.[28] As an exclusive function of the executive branch, courts reasoned

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[23] MUSHLIN, *supra* note 20, at § 1:3 ("The Constitution did not breach prison walls for over 170 years . . . .").

[24] Stroud v. Swope, 187 F.2d 850, 851-52 (9th Cir. 1951).

[25] For further discussion on the hands-off doctrine generally, see Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal To Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

[26] Ruffin v. Commonwealth, 62 Va. 790, 796 (1871) ("He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State."); *see also* Kenneth C. Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine*, 1977 DETROIT COLL. L. REV. 795, 797 (describing early justification for hands-off policy as simply general hostility to prisoners as class of people).

[27] *See* Haas, *supra* note 26, at 797.

[28] *See* Ira P. Robbins, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY 211, 212 (1980) (explaining separations of power rationale for hands-off doctrine); *see also* 18 U.S.C.

any judicial scrutiny of prison operations would violate the separation of powers doctrine.[29] Under the federalism justification, federal courts refused to exercise their jurisdiction over petitions filed by state prisoners.[30] In *Siegal v. Ragen*,[31] the Seventh Circuit held "[t]he Government of the United States is not concerned with, nor has it power to control or regulate the internal discipline of the penal institutions of its constituent states. All such powers are reserved to the individual states."[32] Finally, courts were generally reluctant to supersede the expert judgment of prison officials because of their lack of expertise on issues related to prison administration.[33] Regardless of which justification was put forth by a court, the hands-off doctrine resulted in prisoners left without a forum to bring their claims.[34]

Beginning in the middle of the twentieth century, courts started to move away from the hands-off doctrine for several reasons. Increased publicity about the horrible conditions in prisons contributed to the growth of the prison reform movement.[35] Bolstering the success of the prison reform movement, major changes in the law provided new avenues for redress. In 1962, the Supreme Court held that the Eighth Amendment's prohibition against cruel and unusual punishment applied to the states through the Fourteenth Amendment.[36] Additionally, the Court greatly expanded the reach of 42 U.S.C. § 1983, giving prisoners a cause of action in federal court to challenge alleged violations of

§ 4001 ("The control and management of Federal penal and correctional institutions . . . shall be vested in the Attorney General . . . .").

[29] Haas, *supra* note 26, at 798 (discussing separations of power rationale for hands-off doctrine); *see also* Williams v. Steele, 194 F.2d 32, 34 (8th Cir. 1952) ("Since the prison system of the United States is entrusted to the Bureau of Prisons under the discretion of the Attorney General . . . the courts have no power to supervise the discipline of the prisoners nor to interfere with their discipline . . . .").

[30] *See* Haas, *supra* note 26, at 803 (explaining federalism rationale for hands-off doctrine).

[31] 180 F.2d 785 (7th Cir. 1950).

[32] *Id.* at 788.

[33] *See* Haas, *supra* note 26, at 806-07 (explaining lack of expertise rationale for hands-off doctrine).

[34] *Id.* at 796 ("[T]he hands-off doctrine . . . made it virtually impossible for [prisoners] to seek judicial relief from alleged mistreatment and harsh living conditions while serving their terms.").

[35] *See* Roberta M. Harding, *In the Belly of the Beast: A Comparison of the Evolution and Status of Prisoners' Rights in the United States and Europe*, 27 GA. J. INT'L & COMPAR. L. 1, 11 (1998) (providing factors that led courts to move away from hands-off doctrine); Robert T. Sigler & Chadwick L. Shook, *The Federal Judiciary and Corrections: Breaking the Hands-Off Doctrine*, 7 CRIM. JUST. POL'Y REV. 245, 247 (1995) ("[E]xtreme conditions existing in some prisons were so severe that they could not withstand public scrutiny in even the most conservative social settings.").

[36] Robinson v. California, 370 U.S. 660, 667 (1962) (explaining infliction of cruel and unusual punishment is violative of Fourteenth Amendment).

their constitutional rights by state prison officials.[37] With such a broad interpretation of § 1983, courts could no longer deny jurisdiction to hear prisoners' claims.

In 1974, the Supreme Court expressly endorsed the abandonment of the hands-off doctrine in *Procunier v. Martinez*.[38] Prisoners brought a class action against the Director of the California Department of Corrections, seeking injunctive relief from a rule restricting the prisoners' use of mail.[39] At issue was an alleged violation of the prisoners' First Amendment rights.[40] In rejecting the hands-off doctrine, the majority held that "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."[41] Put another way, "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."[42] The end of the hands-off doctrine paved the way for the recognition, development, and protection of prisoners' constitutional rights.[43]

B. *A Prisoner's Right To Access the Courts*

Although the deprivation of some of a prisoner's rights is a "necessary implication . . . [of] law,"[44] a prisoner does not forfeit all of their constitutional rights.[45] For example, in *Cruz v. Beto*,[46] the Supreme Court held prisoners retain

[37] *See* Monroe v. Pape, 365 U.S. 167, 172 (1961) (holding 42 U.S.C. § 1983 grants individuals cause of action against state official for deprivation of constitutional rights by state officials acting either in violation of state law or under state authorization); *see also* Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape*, and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 278 (1965) ("Since the court's ruling in *Monroe*, there has been an explosion of [§ 1983] actions in the lower federal courts . . . ."); Ashley Dunn, *Flood of Prisoner Rights Suits Brings Effort To Limit Filings*, N.Y. TIMES (Mar. 21, 1994), https://www.nytimes.com/1994/03/21/nyregion/flood-of-prisoner-rights-suits-brings-effort-to-limit-filings.html (explaining how *Monroe v. Pape* contributed to large growth in civil rights lawsuits brought by prisoners).

[38] 416 U.S. 396, 405-06 (1974) (refusing to follow hands-off doctrine where prisoner alleged violation of his First Amendment rights).

[39] *Id.* at 398 (detailing case brought by prisoners challenging censorship of prisoner mail and ban against use of law students and legal paraprofessionals).

[40] *Id.* at 406 ("The issue before us is the appropriate standard of review for prison regulations restricting freedom of speech.").

[41] *Id.* at 405-06 (citing Johnson v. Avery, 393 U.S. 483, 486 (1969)).

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

[43] *See* MUSHLIN, *supra* note 20, § 1:4 ("[T]he stage was set for the courts to begin the development of the prisoners' rights law.").

[44] Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944).

[45] *See* Bell v. Wolfish, 441 U.S. 520, 545 (1979) (listing various rights Court held that prisoners retain).

[46] 405 U.S. 319 (1972).

their First Amendment right of free exercise of religion.[47] Additionally, the Supreme Court has held prisoners retain their due process rights[48] and the Eighth Amendment prohibition against cruel and unusual punishment extends to conditions of confinement.[49] This list is not exhaustive.

Arguably, the most fundamental of the rights retained by a prisoner is the right to access the courts—without it, a prisoner may be unable to vindicate all other rights. In *McCarthy v. Madigan*,[50] the Supreme Court stated, "[b]ecause a prisoner ordinarily is divested of the privilege to vote, the right to file a court action might be said to be his remaining most 'fundamental political right, because preservative of all rights.'"[51] Indeed, the recognition of other rights is often the result of a prisoner having the ability to raise issues in court.[52] A prisoner's right to access the courts and its scope underwent drastic elaborations in the Court over several decades.

1. *Early Development of the Right To Access the Courts*

In *Ex parte Hull*,[53] the Supreme Court first recognized a prisoner's right to access the court. In *Hull*, the Court struck down a Michigan prison regulation that required prison officials to review habeas corpus petitions before they were submitted to the court.[54] Writing for the majority, Justice Frank Murphy held states cannot interfere with a prisoner's right to apply to a federal court for a writ of habeas corpus.[55] In recognizing this right, the Court did not point to any specific constitutional provision. With *Hull* as a foundation, the Supreme Court went on to further define and expand a prisoner's constitutional right to access the courts in subsequent decisions.

[47] *See id.* at 320-21 (holding reasonable opportunities must be afforded to all prisoners to exercise religious freedom).

[48] *See* Wolff v. McDonnell, 418 U.S. 539, 556 (1974) ("Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law.").

[49] *See* Estelle v. Gamble, 429 U.S. 97, 103 (1976) (explaining infliction of suffering due to failure to address inmate medical needs is inconsistent with Eighth Amendment).

[50] 503 U.S. 140 (1992).

[51] *Id.* at 153 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

[52] *See* JIM THOMAS, PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER 5 (1988) ("Perhaps more than any other single mechanism, prisoner litigation has contributed to prison reform, and even when a suit is lost, litigation opens the windows of prisons just a bit wider to make their historically dark interiors just a bit more visible to those on the outside.").

[53] 312 U.S. 546, 548-49 (1941) (invalidating prison regulation requiring prisoners to submit all petitions for writ of habeas corpus to prison administrative office).

[54] *Id.* (describing subject of stricken regulation as "questions for [the] court alone to determine").

[55] *Id.* at 549 ("[O]fficers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus.").

The next major decision was *Johnson v. Avery*.[56] In *Avery*, the Supreme Court struck down a Tennessee prison regulation that prohibited prisoners from assisting each other in completing habeas corpus petitions.[57] In striking down the "jailhouse lawyer" regulation, the Court held "it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."[58] Again, the opinion is silent on the constitutional source of a prisoner's constitutional right to access the court.[59] The Supreme Court first identified a possible constitutional source of a prisoner's right to access the courts in *Procunier v. Martinez*.[60] In *Procunier*, the Court described a prisoner's access to the courts as a "corollary" to the guarantee of due process, suggesting the right is derived from the Due Process Clauses of the Fifth and Fourteenth Amendments.[61] However, the Court has elsewhere identified the First Amendment right to petition all branches of government for a redress of grievances, and the Equal Protection Clause of the Fourteenth Amendment, as sources of the right.[62] Regardless, a prisoner's right to access the courts enjoys constitutional authority.

Each of the earlier decisions defined a prisoner's right to access the courts in the context of states' interfering with a prisoner seeking habeas corpus relief, but in *Wolff v McDonnell*,[63] the Supreme Court extended this right to civil rights actions against prison officials.[64] In *Wolff*, the Supreme Court rejected the State's argument that *Avery* was limited to the assistance of habeas corpus

[56] 393 U.S. 483 (1969).

[57] *Id.* at 490 ("[The State] may not validly enforce a regulation . . . barring inmates from furnishing such assistance to other prisoners.").

[58] *Id.* at 485.

[59] Courts have addressed the ambiguity of the right's constitutional source. Judge Patrick E. Higginbotham, writing an opinion for the Fifth Circuit, stated the right's "textual footing in the Constitution is not clear." Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985). Indeed, Justice Clarence Thomas, concurring in *Lewis v. Casey*, wrote, "[t]he weakness in the Court's constitutional analysis in *Bounds* is punctuated by our inability, in the 20 years since, to agree upon the constitutional source of the supposed right." 518 U.S. 343, 367 (1996) (Thomas, J., concurring).

[60] 416 U.S. 396, 419 (1974) (grounding right to access courts in due process).

[61] *Id.*; *see also* Wolff v. McDonnell, 418 U.S. 539, 579 (1974) ("The right of access to the courts . . . is founded in the Due Process Clause . . . .").

[62] *See* Cruz v. Beto, 405 U.S. 319, 321 (1972) ("[P]ersons in prison . . . have the right to petition the Government for redress of grievances which . . . includes 'access of prisoners to the courts for the purpose of presenting their complaints.'" (quoting Johnson v. Avery, 393 U.S. 483, 485 (1969))); Gilmore v. Lynch, 319 F. Supp. 105, 109 (N.D. Cal. 1970) (noting Court's reinforcement of "the right under the equal protection clause of the indigent and uneducated prisoner"), *aff'd*, 404 U.S. 15 (1971).

[63] *Wolff*, 418 U.S. at 539.

[64] *Id.* at 579 (finding Civil Rights Act of 1871 would be diluted if prisoners were "unable to articulate their complaints to the courts").

petitions, stating it was "too narrow a view."[65] The Court reasoned "[t]he recognition by this Court that prisoners have certain constitutional rights which can be protected by civil rights actions would be diluted if inmates, often 'totally or functionally illiterate,' were unable to articulate their complaints to the courts."[66]

The next major decision that expanded a prisoner's right to access the courts came in a two-sentence per curiam opinion.[67] In *Younger v. Gilmore*,[68] the Supreme Court affirmed the lower court's decision to enjoin a California Department of Corrections rule that limited the legal materials in the prison law library, finding it violated a prisoner's right of access to the courts.[69] In doing so, the Court endorsed the lower court's position that the California Department of Corrections would need to utilize state resources to improve the prison's law library. The lower court opinion stated "Johnson v. Avery . . . 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."[70] By affirming the lower court decision, the Supreme Court, for the first time, held the state had an affirmative obligation to assure a prisoner's access to the courts via adequate law libraries, even if doing so meant taking on significant costs.[71] However, because the opinion was a two-sentence affirmation of the lower court, prisons' precise obligations were unclear.[72] The Supreme Court took the opportunity to clarify *Younger* in *Bounds v. Smith*.[73]

2. *Bounds v. Smith* and Meaningful Access

In *Bounds v. Smith*, the Supreme Court had the opportunity to more emphatically declare its holding in *Younger*.[74] In *Bounds*, prisoners brought civil rights actions against the prison, alleging that they were denied access to the courts due to the prison's lack of legal research facilities.[75] There was one prison

[65] *Id.*

[66] *Id.*

[67] *See* Younger v. Gilmore, 404 U.S. 15, 15 (1971).

[68] *Id.* at 15.

[69] *Id.*

[70] Gilmore v. Lynch, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd*, 404 U.S. 15 (1971).

[71] *See id.* at 111 ("[C]onstitutional requirements are not . . . to be measured or limited by dollar considerations . . . .").

[72] Brief for Petitioners at 11, Bounds v. Smith, 430 U.S. 817 (1977) (No. 75-915) ("[T]he per curiam decision in *Gilmore* is something less than a clear precedent to be accorded the full weight of stare decisis.").

[73] 430 U.S. 817, 828 (1977).

[74] *Id.* ("Our holding today is, of course, a reaffirmation of the result reached in *Younger v. Gilmore*.").

[75] *Id.* at 818 ("Respondents alleged . . . that they were denied access to the courts . . . by the State's failure to provide legal research facilities.").

law library for the entire prison population in the state of North Carolina.[76] The lower court agreed with the prisoners, charging the Department of Correction with the responsibility of "devising a Constitutionally sound program."[77] The State responded with a plan that included, in part, establishing seven libraries in prisons across the state.[78] The district court approved the plan, finding it would "[e]nsure each inmate the time to prepare his petitions."[79]

Both sides appealed from various portions of the lower court order, but the Court of Appeals for the Fourth Circuit affirmed.[80] North Carolina petitioned the Supreme Court for review, arguing the state's constitutional obligation was simply to not interfere with the filing of complaints and that there was no constitutional requirement to affirmatively provide assistance by creating prison law libraries despite the per curiam opinion in *Younger v. Gilmore*.[81]

The Supreme Court disagreed. In the 6-3 decision, Justice Thurgood Marshall declared that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[82] In his opinion, Justice Marshall reaffirmed the Court's holding in *Younger v. Gilmore* that "a state ha[s] an affirmative federal constitutional duty to furnish prison inmates with extensive law libraries or, alternatively, to provide inmates with professional or quasi-professional legal assistance[.]"[83] Importantly, the Court wanted to assure that prisoners will have "meaningful access" to the courts,[84] as "'[m]eaningful access' to the courts is the touchstone."[85] While the facts in *Bounds* involved an inadequate law library, the Court emphasized that establishing law libraries need not be the only "constitutionally acceptable method" to assure prisoners' access to the courts.[86] Indeed, the constitutional right is access to the courts, not access

[76] *Id.* (recounting lower court's finding that "sole prison library" was inadequate).

[77] *Id.* at 818-19.

[78] *Id.* at 819 (recounting State's proposal for seven libraries located "so as to serve best all prison units").

[79] *Id.* at 820.

[80] *See* Smith v. Bounds, 538 F.2d 541, 545 (4th Cir. 1975), *aff'd*, 430 U.S. 817 (1977).

[81] Brief for Petitioners at 12, *Bounds* 430 U.S. (No. 75-915) ("[A] state executes its constitutional duty, such as it is, to assist prisoners merely by not interfering with inmates assisting each other.").

[82] *Bounds*, 430 U.S. at 828.

[83] *Id.* at 829.

[84] *Id.* at 824 ("[O]ur decisions have consistently required States to shoulder affirmative obligations to assure all prisoners meaningful access to the courts.").

[85] *Id.* at 823 (citing Ross v. Moffit, 417 U.S. 600, 611, 612, 615 (1974)).

[86] *Id.* at 830.

to a law library.[87] But the *Bounds* opinion wisely points out that the right is worthless without some form of assistance. The Court reasoned that prisoners would lack a "reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts" without a law library or other forms of legal assistance.[88] Other constitutionally acceptable methods that the Court offered include providing prisoners with professional legal assistance, using law students through a legal clinic, or hiring full-time staff attorneys.[89] The Court encouraged "local experimentation."[90]

For the next nineteen years, prisons and their staff, especially the law librarians, grappled with the holding in *Bounds* and tried to ascertain what constitutionally sound access to the courts looked like. The Court did not explicitly list what kinds of resources were required in a prison law library but affirmed the lower court's approval of the plan proposed by North Carolina.[91] The plan included various legal treatises and sources such as North Carolina General Statutes, United States Code Annotated, *Supreme Court Reporter (1960-present)*, *Federal 2d Reporter (1960-present)*, *Federal Supplement (1960-present)*, and a copy of *Black's Law Dictionary*.[92] Although *Bounds* did not provide specific requirements, subsequent opinions demonstrate that an adequate law library should have the necessary books, space, and lighting, and that inmates should be given ample time to utilize the resource.[93] The American

[87] *See* Wayne Ryan, *Access to the Courts: Prisoners' Right to a Law Library*, 26 HOWARD L.J. 91, 105 (1983) ("[T]he Supreme Court has never held that prisoners possess a fundamental constitutional right to a law library.").

[88] *Bounds*, 430 U.S. at 825.

[89] *Id.* at 831.

[90] *Id.* at 832.

[91] *Id.* at 833 (acknowledging "wide discretion" of prison administrators in outfitting prison law libraries).

[92] *Id.* at 819 n.4.

[93] *See* MUSHLIN, *supra* note 20, at § 12.16 ("Even if the collection is ample and space is proper, however, more is required."). One commentator compiled a list of what a law library should provide at a minimum:

1. A complete set of Shepard's Federal Citations and State Citations from 1960-present;
2. A complete set of state statutes;
3. Circuit court reporters;
4. State supplements;
5. Shepard's U.S. Citations from 1960-present;
6. A complete set of either U.S. Supreme Court Reporters, Official Reports of the Supreme Court, or Lawyers' Edition from 1960-present;
7. Federal Reporter 2d (West) 1960-present;
8. Federal Supplement 1960-present;
9. A complete and up-to-date set of U.S. Code Annotated Title 18 (including the Rules volume);
10. U.S.C.A. Title 28—Rules of Appellate Procedure;
11. U.S.C.A. Title 28—Rules of Civil Procedure;

Association of Law Libraries ("A.A.L.L.") published lists of recommended minimum collections to assist prison law libraries in meeting the requirements for an adequate law library.[94] However, the A.A.L.L. stopped publishing the lists in 1996. Indeed, everything changed for prison law libraries in 1996 following the Supreme Court's decision in *Lewis v. Casey*.[95]

3. *Lewis v. Casey* and the Actual Injury Requirement

In *Lewis v. Casey*, Justice Antonin Scalia, writing for the majority, limited a prisoner's ability to bring access to the courts claims by establishing a stringent actual injury requirement.[96] In *Lewis*, twenty-two inmates at prisons operated by the Arizona Department of Corrections ("A.D.O.C.") filed a class action pursuant to § 1983 on behalf of all prisoners incarcerated by A.D.O.C. alleging that A.D.O.C. officials were depriving them of their right to access the courts.[97] The United States District Court for the District of Arizona ruled in favor of the inmates, holding that the A.D.O.C. failed to provide prisoners meaningful access to the courts.[98] The court pointed to several systemic shortcomings to support its conclusion, including instances of denying prisoners physical access to a law library,[99] inadequate library staff training,[100] and failure to update library

12. U.S.C.A. Title 28 § 2253;
13. U.S.C.A. Title 42 §§ 1891-2010;
14. A complete set of Criminal Law Reporters (Bureau of National Affairs);
15. Palmer, Constitutional Rights of Prisoners;
16. Kadish and Paulsen, Criminal Law and its Processes;
17. Carter, Probation and Parole: Selected Readings;
18. LaFave and Scott: Criminal Law Hornbook;
19. Cohen: Legal Research;
20. Black's (or some other) Law Dictionary;
21. Sokol: Federal Habeas Corpus;
22. Access to photocopying machine(s);
23. Typewriter and typing paper;
24. Paper, pens, pencils, and other such materials; and
25. Notorial services.

Ryan, *supra* note 87, at 103-04.

[94] AM. ASS'N L. LIBRS., RECOMMENDED COLLECTIONS FOR PRISON AND OTHER INSTITUTION LAW LIBRARIES (1990) ("[A]ny legal collection consisting only of statutes and court reports is not sufficient in striving for meaningful access to the courts by prisoners.").

[95] 518 U.S. 343 (1996).

[96] *Id.* at 349.

[97] *Id.* at 346.

[98] Casey v. Lewis, 834 F. Supp. 1553, 1569 (D. Ariz. 1992).

[99] *Id.* at 1556 ("Lockdown prisoners are routinely denied physical access to the law library.").

[100] *Id.* at 1560-61 ("ADOC has no training program for prisoners or civilians who provide legal services . . . .").

inventories.[101] The court issued an injunction, setting forth detailed requirements to bring the A.D.O.C. into compliance with *Bounds*.[102] The Ninth Circuit affirmed.[103]

The Supreme Court, however, reversed, holding "the success of respondents' systemic challenge was dependent on their ability to show widespread actual injury, and that the court's failure to identify anything more than isolated instances of actual injury renders its finding of a systemic *Bounds* violation invalid."[104] To satisfy the actual injury requirement to have standing to sue, the Court required more than just a showing of some shortcoming in a prison's law library, holding "*Bounds* did not create an abstract, freestanding right to a law library or legal assistance."[105] A prisoner must also show the shortcoming "hindered his efforts to pursue a legal claim."[106] Of the twenty-two named plaintiffs, only two were found to have suffered an actual injury; thus, Justice Scalia concluded there was an insufficient showing of system-wide actual injury to warrant system-wide relief for the plaintiffs.[107] The plaintiffs did not have standing.[108]

Critics of *Lewis* argue the actual injury requirement is an impossible barrier to bringing access to the courts claims.[109] Describing the dilemma posed by *Lewis*, one commentator wrote, "[b]ecause of their minimal access to legal information, prisoners may not know to articulate their problems with law library access in terms of thwarted legal claims. In fact, they may not know which of the harms they have suffered are actionable."[110] As noted by the Seventh Circuit, this suggests "the paradox that ability to litigate a denial of access claim is evidence that the plaintiff has no denial of access claim!"[111] Other commentators suggest that the heighted standing requirement was "based

[101] *Id.* at 1561-62 ("The defendants do not assure that library inventories are updated and self-help manuals and other needed legal materials are available to prisoners.").

[102] *Id.* at 1569 (discussing justifications for court grant of injunctive relief).

[103] *See* Casey v. Lewis, 43 F.3d 1261, 1272 (9th Cir. 1994) (affirming district court's grant of injunctive relief).

[104] Lewis v. Casey, 518 U.S. 343, at 349 (1996).

[105] *Id.* at 351.

[106] *Id.*

[107] *Id.* at 360 ("The constitutional violation has not been shown to be systemwide, and granting a remedy beyond what was necessary to provide relief to Harris and Bartholic was therefore improper.").

[108] *See id.* at 358.

[109] Joseph L. Gerken, *Does* Lewis v. Casey *Spell the End to Court-Ordered Improvement of Prison Law Libraries?*, 95 LAW LIBR. J. 491, 504 (2003) ("[I]t will be virtually impossible to identify plaintiffs in sufficient numbers to support a claim for systemic relief, even where a prison's law library or advocacy services are abysmal.").

[110] Jessica Feierman, *Creative Prison Lawyering: From Silence to Democracy*, 11 GEO. J. ON POVERTY L. & POL'Y 249, 267 (2004).

[111] Walters v. Edgar, 163 F.3d 430, 436 (7th Cir. 1998).

on fear of increased prisoner litigation."[112] Whether that was the majority's intention, *Lewis* appears to have had such an effect.

The language in *Lewis* that *Bounds* did not "create an abstract, freestanding right to a law library"[113] and its heightened standard for actual injury had a significant impact on access to the courts, litigation, and prison law libraries. The most obvious effect was an increase in access to the courts claims being dismissed for lack of standing.[114] For some cases decided before *Lewis* where district courts ordered injunctions for sweeping improvements to prison law libraries, the injunctions were vacated.[115] In addition to hampered litigation, prison law libraries themselves were severely impacted. In 2006, a national survey of state prison librarians attempted to measure the impact of *Lewis* on prison law libraries.[116] Over 50% of the survey respondents reported that *Lewis* affected resource allocation, most prominently the loss of legal resources.[117] Examples included "cutting law library hours," "narrowing the scope of the legal collection to materials dealing with conditions of confinement," and reduced funding.[118] Some states got rid of law libraries entirely.[119] For example, in Arizona, the state at the center of *Lewis*, the A.D.O.C. shut down thirty-four libraries following the 1996 opinion.[120] On June 2, 1997, the director of the A.D.O.C. wrote in a memo issued to all inmates that "the law libraries are being

[112] David Steinberger, Note, Lewis v. Casey*: Tightening the Boundaries of Prisoner Access to the Courts*, 18 PACE L. REV. 377, 413 (1998).

[113] *Lewis*, 518 U.S. at 351.

[114] *See* Gerken, *supra* note 109, at 502.

[115] *See, e.g.*, Hadix v. Johnson, 182 F.3d 400, 406 (6th Cir. 1999) ("[W]e hold that the district court's grant of final injunctive relief must be reversed and the case remanded for a determination of 'actual injury' as required by *Lewis v. Casey*."); Walters v. Edgar, 973 F. Supp. 793, 804 (N.D. Ill. 1997) (dismissing prisoner's access to courts claim in light of *Lewis* after already finding violation in previous opinion).

[116] *See generally* Michael J. Sabath & William Payne, *Providing Inmate Access to the Courts: U.S. Prison Strategies for Complying with Constitutional Rights*, 92 PRISON J. 45 (2012).

[117] *Id.* at 56 (reporting 52.1% of survey respondents indicated *Lewis* had affected resource allocation in their library).

[118] *Id.* at 57.

[119] *See Iowa To Close Prison Law Libraries*, PRISON LEGAL NEWS (July 15, 1999), https://www.prisonlegalnews.org/news/1999/jul/15/iowa-to-close-prison-law-libraries/ [https://perma.cc/R3SF-LL6S] ("Iowa now joins Arizona, Idaho, North Carolina and Utah, as states which do not provide law libraries for prisoners. . . . This is part of the trend begun by the U.S. [S]upreme [C]ourt ruling in Lewis v. Casey . . . .").

[120] *See* Larry E. Sullivan, *The Least of Our Brethren: Library Service to Prisoners*, 31 AM. LIBRS., May 2000, at 56, 58 (2000) (lamenting decline of prison libraries following restrictive legislation and *Lewis v. Casey*).

eliminated because the U.S. Supreme Court has said that they are not required for inmate legal access."[121]

II. THE LIBRARY IS CLOSED TO PRISONER PLAINTIFFS

The view that *Lewis* eliminated a prison's obligation to furnish law libraries is arguably based on an overreading of the opinion. *Lewis* did not hold that prisons no longer have a duty to provide inmates access to legal materials or assistance. Rather, the opinion severely limited when prisoners can challenge alleged violations of their right to access the courts. However, if it becomes nearly impossible for prisoners to challenge a prison's inadequate law library, prisons are surely tempted to save resources by providing nothing at all.

After concluding that the plaintiffs lacked standing, Justice Scalia proceeded to discuss the merits of the case and the contours of a prisoner's access to the courts under *Bounds*. The pertinent language in *Lewis* states:

> It must be acknowledged that several statements in *Bounds* went beyond the right of access recognized in the earlier cases on which it relied, which was a right to bring to court a grievance that the inmate wished to present. These statements appear to suggest that the State must enable the prisoner to discover grievances, and to litigate effectively once in court. These elaborations upon the right of access to the courts have no antecedent in our pre-*Bounds* cases, and we now disclaim them.[122]

In addition to creating a restrictive actual injury requirement to have standing to bring access to the courts claims, some courts have read the above-quoted language in *Lewis* to also restrict the scope of a prisoner's right to access legal materials, limiting it to the pleading stage only.[123] These courts declare that once a prisoner has filed their complaint, a prison no longer has an affirmative obligation to provide the prisoner access to a law library or legal assistance. But not every court is persuaded by the language of *Lewis*. The Third and Seventh Circuits read *Lewis* differently.[124] Thus, a federal circuit split has emerged.

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[121] Joan Dayan, *Held in the Body of the State: Prisons and the Law*, *in* HISTORY, MEMORY, AND THE LAW 183, 244 (Austin Sarat & Thomas R. Kearns eds., 2002) (citation omitted).

[122] Lewis v. Casey, 518 U.S. 343, 354 (1996) (emphasis omitted) (citations omitted).

[123] *See, e.g.*, Silva v. Di Vittorio, 658 F.3d 1090, 1102 (9th Cir. 2011) (holding that right to legal assistance is limited to pleading stage); Rivera v. Monko, No. 19-CV-00976, 2020 WL 3441430, at *2 (M.D. Pa. June 23, 2020) (same).

[124] *Compare* Marshall v. Knight, 445 F.3d 965, 969 (7th Cir. 2006) (holding prisoner may bring access to courts claim when denied access to legal materials after filing complaint), *with* Rivera v. Monko, 37 F.4th 909, 913 (3d Cir. 2022) (holding prisoner's right to access courts extends past pleading stage).

A. *The Circuits Are Split*

1. The Ninth Circuit

Relying on *Lewis*, the Ninth Circuit in *Silva v. Di Vittorio*[125] restricted a prisoner's right to access the courts by holding that, in cases involving prisoners' affirmative right to assistance, the constitutional right is limited to the pleading stage.[126] Matthew Silva, a prisoner in Washington state, filed a pro se § 1983 action alleging various state officials and the Washington Department of Corrections violated his right to access the courts.[127] In his complaint, Silva alleged the defendants were aware that Silva was involved in litigating numerous civil rights actions challenging the conditions of his confinement, yet the defendants transferred him to Arizona and confiscated his legal materials.[128] Silva alleged his civil rights actions were dismissed because of the loss of his legal materials. Nonetheless, the lower court dismissed his access to the courts claim and, relying on *Lewis*, held the right to access the courts "is only a right to bring petitions or complaints to the federal court and not a right to discover such claims or even to litigate them effectively once filed with a court."[129] Silva appealed to the Ninth Circuit.

The Ninth Circuit recognizes two kinds of access to the courts claims: a right to affirmative assistance (i.e., access to legal materials) and a right to litigate without interference.[130] Silva's case involved the latter. But the Ninth Circuit took the opportunity to set forth the temporal limitations of each type of access to the courts claim. The court stated that the right to litigate without interference extends beyond the pleading stage, but for the right to affirmative legal assistance, the Ninth Circuit was less generous.[131] Relying on *Lewis v. Casey*, the Ninth Circuit held that the right to legal assistance is limited to the pleading stage.[132]

2. The Seventh Circuit

In *Marshall v. Knight*,[133] the Seventh Circuit diverged from the Ninth Circuit when it reversed a lower court opinion that dismissed a prisoner's access to the courts complaint.[134] A pro se prisoner alleged that a restrictive prison library

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[125] *Silva*, 658 F.3d at 1090.

[126] *Id.* at 1103.

[127] *Id.* at 1096.

[128] Civil Rights Complaint with Jury Demand at 4-A, Silva v. Olson, No. CV 07-1696, (D. Ariz. Jan. 16, 2008) (describing supporting facts for access to the court claim).

[129] *See Silva*, 658 F.3d at 1096.

[130] *See id.* at 1102.

[131] *Id.* ("Critical to the issue here, the right to legal assistance is also limited to the pleading stage.").

[132] *Id.*

[133] 445 F.3d 965 (7th Cir. 2006).

[134] *Id.* at 971.

policy prohibited him from conducting legal research for upcoming postconviction and probation revocation proceedings in violation of his right to access the court.[135] The prison's law library policy stated that "offenders will not be scheduled for more than one session per day until all offenders are given timely access to the library, i.e., within one week of their request."[136] The policy made no exceptions for inmates with upcoming judicial proceedings.[137] The district court held that "state actors have no duty to assure that prisoners can litigate those claims effectively once they have been raised in court. The right to access, goes no further than access."[138] In doing so, the lower court cited the same language in *Lewis* as the Ninth Circuit. In its reversal, the Seventh Circuit held *Lewis* does not confine access to the court claims to the pleading stage.[139] The Seventh Circuit further stated, "*Lewis* explained that a prisoner could prove a denial of access to the courts by showing that a complaint he prepared *and filed* 'was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known.'"[140] Interestingly, the Seventh Circuit, like the Ninth Circuit in *Silva*, relied on the language of *Lewis* to come to a different conclusion. The Seventh Circuit determined the use of "filed" in the above quoted line meant a prisoner can state an access to the courts claim even after the filing of a complaint.[141]

3. The Third Circuit

The Third Circuit in *Rivera v. Monko*[142] did not rely on language in *Lewis* to reach the same conclusion as the Seventh Circuit—that a prisoner's right to access the courts extends past the pleading stage. Instead, the Third Circuit stated that "it would be perverse if the right to access courts faded away after a prisoner successfully got into court by filing a complaint or petition."[143] The court further stated that the "need to access legal material is just as great—if not greater—than" during the pleading stage.[144] Rather than focusing on any specific language

[135] Brief of Plaintiff-Appellant Kenneth A. Marshall at 3, *Marshall*, 445 F.3d 965 (No. 04-1062) (explaining underlying circumstances of prisoner's access to courts claim).

[136] Marshall v. Knight, No. 03-CV-460, 2006 WL 3354700, at *3 (N.D. Ind. Nov. 17, 2006).

[137] Brief of Plaintiff-Appellant Kenneth A. Marshall at 5, *Marshall*, 445 F.3d 965 (No. 04-1062) (discussing restrictive prison policy that limited plaintiff's ability to conduct legal research).

[138] *Marshall*, 445 F.3d at 967-68.

[139] *Id.* at 969 ("We do not agree that *Lewis* confines access-to-courts claims to situations where a prisoner has been unable to file a complaint or an appeal.").

[140] *Id.*

[141] *Id.* (describing nondispositive nature of ability to file complaint).

[142] 37 F.4th 909 (3d Cir. 2022).

[143] *Id.* at 922.

[144] *Id.* at 922-23.

of a case, the Third Circuit grounded its decision on the guarantee of "meaningful access" to the courts as required by *Bounds* and in doing so, warned that limiting the right to the pleading stage would render the right "illusory."[145]

B. *The Impact of Restricting Access to the Pleading Stage*

Beyond a simple disagreement on interpreting language, these decisions have real-world impacts on prisoners, especially pro se prisoners. In 2020, the total incarcerated population in the United States was 1,789,244.[146] In that same year, prisoners filed 26,217 civil rights actions related to the conditions of their confinement in federal district court, a nearly 17% increase in filings per capita from 2019 and over 50% increase in filings per capita from 2007.[147] Although there has been a gradual decline in the total incarcerated population, the demand for legal materials has increased. This is especially true for prisoners who litigate pro se.[148] Of the 26,217 prisoner filings in 2020, 92.4% were filed pro se.[149] Most of the civil rights actions filed in 2020 were disposed of before trial, largely in favor of the defendant.[150] Indeed, only 0.6% of the actions proceeded to trial.[151] But that amounts to over 150 civil rights actions related to prison conditions surviving the summary judgment phase in 2020. Undoubtedly, many of those actions were brought by pro se litigants, and if those actions were in the Ninth Circuit, the prisons had no affirmative duty to provide the pro se litigants access to legal materials to prepare for trial.

Prisoners often have no choice but to litigate pro se. There is no constitutional right to counsel in civil actions.[152] Further, most prisoners are unable to afford

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[145] *Id.* at 913.

[146] Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE tbl.A (Apr. 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html [https://perma.cc/WPJ4-GFJE].

[147] *Id.*

[148] *See* Feierman, *supra* note 110, at 264 ("Access to legal information is vital to prisoners, who frequently must represent themselves pro se."); *see also* David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2048 (2018) ("The prisoner civil rights category of federal litigation has a higher pro se rate than any other type of case.").

[149] Fenster & Schlanger, *supra* note 146, tbl.B (noting only 7.6% of incarcerated civil rights plaintiffs had attorneys in 2020, compared to 71.3% of civil rights plaintiffs not incarcerated).

[150] *Id.* tbl.C (finding 81.6% of federal civil rights cases in 2020 were decided in favor of defendant pretrial).

[151] *Id.*

[152] *See* Turner v. Rogers, 564 U.S. 431, 441 (2011) ("But the Sixth Amendment does not govern civil cases.").

an attorney despite the availability of attorney's fees.[153] As a result, pro se prisoners must "build a case, strategize in accordance with a case theory, avoid pleading and discovery pitfalls, survive motion practice, and tell a persuasive story to the jury" without the expertise of an attorney.[154] At a minimum, pro se prisoners need access to legal materials to overcome these barriers. By restricting access to legal materials to the pleading stage, pro se litigants are at a disadvantage when their actions proceed to trial. In effect, the restriction is a means of silencing prisoners, another item among a long list of barriers to prisoners trying to improve their conditions of confinement by bringing civil rights litigation against their prisons.[155]

Prisoners already face numerous obstacles when bringing civil rights violations challenging conditions of confinement, including judicial deference to prison officials and the procedural requirements of the Prison Litigation Reform Act ("P.L.R.A.").[156] For example, when prisoners challenge their conditions of confinement as a violation of the Eighth Amendment, the mere fact of inhumane conditions is insufficient to prevail.[157] A prisoner must also prove a prison official's state of mind, showing that the prison official acted with "deliberate indifference."[158] Beyond the difficulty of proving a claim, simply bringing a claim in the first place is difficult under the P.L.R.A. The exhaustion requirement under the P.L.R.A. states "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a

[153] *See* Free v. United States, 879 F.2d 1535, 1539 (7th Cir. 1989) (Coffey, J., concurring) ("[T]he vast majority of prisoners are indigent, necessitating the filing of their complaints in forma pauperis . . . ."); Jonathan D. Rosenbloom, *Exploring Methods To Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 FORDHAM URB. L.J. 305, 326 (2002) (summarizing case study where around "95% of inmates filed an in forma pauperis application before and after the PLRA"); 42 U.S.C. § 1997e(d) (placing numerous restrictions on availability of attorney's fees for § 1983 action brought by prisoner); Karen M. Klotz, Comment, *The Price of Civil Rights: The Prison Litigation Reform Act's Attorney Fee-Cap Provision as a Violation of Equal Protection of the Laws*, 73 TEMP. L. REV. 759, 790 (2000) ("The PLRA's fee-cap provision has fundamentally altered an attorney's decision to represent prisoners by adding a heavy financial burden that impacts public and private attorneys alike.").

[154] Michael W. Martin, *Foreword: Root Causes of the Pro Se Prisoner Litigation Crisis*, 80 FORDHAM L. REV. 1219, 1226 (2011).

[155] Shapiro & Hogle, *supra* note 148, at 2036-37 (describing how deferential case law to prison officials, substantive and procedural requirements resulting in easy dismissals, and prisoners' limited access to legal materials result in "practical immunity" for prisons).

[156] *Id.* at 2037-42 (noting exhaustion requirement forces prisoners to exhaust all internal prison procedures before filing claim in court).

[157] *See* Wilson v. Seiter, 501 U.S. 294, 299 (1991) ("These cases mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment.").

[158] *Id.* at 302-03 (noting courts must consider circumstances leading to prison official's actions, such as pressure to keep other prisoners safe, and consider deliberate indifference as proper interpretation of wantonness for liability).

prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."[159] This provision requires a prisoner to complete a prison's grievance process before they can sue the prison. But the P.L.R.A. does not require a prison to adopt any specific structure for the grievance process.[160] "[T]he sky's the limit for the procedural complexity or difficulty of the exhaustion regime."[161] How are prisoners to know how to prove the deliberate indifference standard or that they must follow strict procedural requirements imposed by the P.L.R.A. if, after filing a complaint, they no longer have access to research the law in their prison's law library?

Prison litigation serves as one of the most effective tools to raise awareness of the abuses that occur within often-impenetrable prison walls.[162] Yet, the Ninth Circuit severely weakened the tool for pro se litigants. Without access to legal materials while preparing for trial, prisoners like Mr. Rivera may be left without the knowledge and information required to effectively present their claims. "[P]risoners with meritorious claims—claims for which concrete evidence likely exists—may well be forced to navigate both summary judgment and trial with nothing but their own testimony to counter the prison's version of events."[163] As a result, claims of physical abuse like Mr. Rivera's are left unaddressed. The Ninth Circuit was incorrect in its ruling. Fortunately, the Seventh and Third Circuit disagreed with the Ninth Circuit and ruled otherwise. Future courts should do the same.

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[159] 42 U.S.C. § 1997e(a).

[160] *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1650 (2003) ("[T]he PLRA imposes no constraints on the structure or rules of any grievance processing regime.").

[161] *Id.* (noting how P.L.R.A. allows for unreasonable deadlines and overly time-consuming review processes by failing to constrain prison's internal processes).

[162] *See* Feierman, *supra* note 148, at 269 ("Although court access is severely limited, it remains one of the most effective ways for prisoners to have their voices heard."). Describing the invisibility of prisons, Professor Susan Herman wrote:

> The isolation of the prisons is also an important factor contributing to the public's ignorance of the number of serious problems in the prisons. Prisons tend to be physically isolated and difficult to reach, and it is therefore easy for the public to remain unaware of what is happening inside. Prison security, as well as isolation, can make it difficult for journalists to see first-hand what is happening. The Supreme Court has also contributed to the difficulty, with case law supporting the right of prison administrators to limit the media's access to prisons and their inmates.

Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1299 (1998).

[163] Shapiro & Hogle, *supra* note 148, at 2052 (highlighting how legally knowledgeable prisoners with strong cases remain disadvantaged due to insufficient resources and accessibility).

III. MEANINGFUL ACCESS TO THE COURTS IS THE TOUCHSTONE

As Justice Marshall stated in *Bounds*, "'[m]eaningful access' to the courts is the touchstone."[164] Yet, lower courts look not to *Bounds* as binding authority when assessing the access to the courts claims brought by prisoners. Instead, courts cite *Lewis* and its alleged restriction of the right to the pleading stage. Some cite to *Lewis* as supporting the opposite holding—that the right does extend past the pleading stage. Regardless, this reliance on *Lewis* is misplaced.

A. *Improper Reliance on Lewis*

Of the three circuits to decide the temporal scope of a prisoner's right to access the courts, two specifically relied on Justice Scalia's opinion in *Lewis* to reach their decisions. In restricting a prisoner's access to the courts to the pleading stage, the Ninth Circuit quoted *Lewis*, stating "the Constitution does not require the State to 'enable the prisoner to discover grievances, and to litigate effectively once in court.'"[165] The Seventh Circuit, however, held *Lewis* itself demonstrates that the right to access the courts persists after filing a complaint.[166] In *Lewis*, the Court stated a prisoner could prevail by showing "a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known."[167] Because the example in *Lewis* involved the dismissal of a complaint that had already been filed, the Seventh Circuit held "[a] prisoner states an access-to-courts claim when he alleges that even though he successfully got into court by filing a complaint . . . his denial of access to legal materials caused a potentially meritorious claim to fail."[168]

John Boston, the former director of the Prisoners' Rights Project of the New York City Legal Aid Society, also argues *Lewis* did not restrict the right to the pleading stage, but he based his conclusion on a different part of the opinion than the portion relied on by the Seventh Circuit.[169] Specifically, *Lewis* stated, "[i]t is the role of courts to provide relief to claimants, in individual or class

[164] Bounds v. Smith, 430 U.S. 817, 823 (1977) (citing Ross v. Moffitt, 417 U.S. 600 (1974)) (noting despite court's decision to deny indigent defendants access to counsel for discretionary appeals, court did protect indigent defendant's opportunity to present claims).

[165] Silva v. Di Vittorio, 658 F.3d 1090, 1097 (9th Cir. 2011) (citing Lewis v. Casey, 518 U.S. 343 (1996)).

[166] Marshall v. Knight, 445 F.3d 965, 969 (7th Cir. 2006) (noting prisoner's ability to file complaint does not end inquiry if their claim was dismissed based on technicality they could not have known from limited resources in prison).

[167] *Lewis*, 518 U.S. at 351.

[168] *Marshall*, 445 F.3d at 969.

[169] BOSTON, *supra* note 20, at 151-52 (arguing government has no duty to make prisoners effective litigators but that prison's obligation to provide legal assistance is not confined to pleading stage).

actions, who have suffered, or will imminently suffer, actual harm."[170] Boston argues that a court cannot "provide relief" solely relying on a complaint. Boston also points to *Lewis*'s definition of the right to access the courts—"to bring to court a grievance that the inmate wishe[s] to present"[171]—and argues presenting a claim requires "defending the claim . . . and moving it toward judgment,"[172] actions that occur well after the pleading stage. Like the Third Circuit in *Rivera*, Boston appears to advocate for what "meaningful access," as required under *Bounds*, means.[173]

Regardless of how one chooses to parse through the opinion to frame its holding, *Lewis* provides no constitutional authority on the question of whether a prisoner's right to access the courts extends past the pleading stage.[174] *Lewis* ultimately was a decision about standing, and Justice Scalia, writing for the majority, found that the plaintiffs lacked standing to bring their access to the courts claim in federal court.[175] When a party bringing a claim is found to be without standing, a court, including the Supreme Court, is without jurisdiction to hear the case. When in doubt, the Supreme Court has stated that a party's standing is "a threshold question that must be resolved in [the party]'s favor before proceeding to the merits."[176] In *Steel Co. v. Citizens for a Better Environment*,[177] the Court was critical of lower courts that proceeded to the merits before determining jurisdiction, or what he called "the doctrine of hypothetical jurisdiction."[178] Justice Scalia stated, "[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning."[179]

Nevertheless, the Court in *Lewis*, led by Justice Scalia, proceeded to the merits of the case and discussed the scope of *Bounds* and a prisoner's right to access the courts after finding the prisoners lacked standing. Because the prisoners were without standing, the Court was without jurisdiction to hear the case. Thus, the Court's discussion of *Bounds* was nothing more than an advisory

[170] *Lewis*, 518 U.S. at 349 (contrasting court's role of providing relief for past or imminent harms with political branches' responsibility to prevent future harms by managing prisons effectively).

[171] *Id.* at 354.

[172] BOSTON, *supra* note 20, at 152.

[173] *Id.*; Rivera v. Monko, 37 F.4th 909, 918 (3d Cir. 2022).

[174] Steinberger, *supra* note 112, at 403 (noting *Lewis* found respondents lacked standing based on failure to show actual injury and did not consider alleged constitutional violation further).

[175] *Id.*

[176] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 88-89 (1998).

[177] *Steel Co.*, 523 U.S. at 83.

[178] *Id.* at 94.

[179] *Id.* at 101; *see also* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 645 (1992) (listing "[a]ny decision on the merits of a case . . . in which one of the parties lacks standing" as example of advisory opinion).

opinion, carrying no constitutional authority. Moreover, Justice Stevens in his dissenting opinion in *Lewis*, characterized the majority's discussion of the scope of *Bounds* as dicta.[180] Like advisory opinions, courts are not bound by the Supreme Court's dicta.[181] Indeed, dicta itself may as well be categorized as an advisory opinion.[182] Whether the discussion of *Bounds*' scope in *Lewis* is an advisory opinion or dicta, any subsequent decisions regarding the scope of the right to access the courts find no constitutional authority from *Lewis*.

Nevertheless, many lower courts, including the Ninth Circuit in *Silva*, incorrectly rely on the language of *Lewis* as binding authority when holding that a prisoner's right to access the courts is limited to the pleading stage.[183] Circuits that have yet to decide the issue should not make the same mistake. Instead, the constitutional authority rests in *Bounds*, where the Court held that "'[m]eaningful access' to the courts is the touchstone."[184]

B. *What Is Meaningful Access?*

Bounds reaffirmed the holding in *Younger* and declared a prisoner's "fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[185] The Court clarified that although giving prisoners access to law libraries is not necessarily required, it is "one constitutionally acceptable method to assure meaningful access to the courts," and that "our decision here . . . does not foreclose alternative means to achieve that goal."[186] Prisons are free to experiment with different plans as long as they comply with the constitutional standard—meaningful access.[187] The threshold question then is what meaningful access means. *Bounds* offers clues.

First, *Bounds* requires assistance to inmates in the "preparation and filing of meaningful legal papers."[188] Although the opinion does not define "meaningful papers," it provides several examples of when a prisoner may need a law library. The Court rejects the argument that a law library would not be essential to

[180] Lewis v. Casey, 518 U.S. 343, 409 n.6 (1996) (Stevens, J., dissenting) ("[G]iven its subsequent finding that only two plaintiffs have met its newly conjured rule of standing, its conclusion regarding the scope of the right is purely dicta." (citation omitted)).

[181] *See* Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. 219, 221 (2010) (arguing courts should not treat dicta as holding); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1274 (2006) ("The Supreme Court's dicta are not law.").

[182] *See* Lee, *supra* note 179, at 645.

[183] *See* Silva v. Di Vittorio, 658 F.3d 1090, 1102 (9th Cir. 2011).

[184] Bounds v. Smith, 430 U.S. 817, 823 (1977).

[185] *Id.* at 828.

[186] *Id.* at 830.

[187] *Id.* at 832.

[188] *Id.* at 828.

"frame such documents" as a habeas corpus petition and a civil rights complaint.[189] These papers relate to the pleading stage and thus, access to a law library while preparing them is not controverted in the courts of appeals. The Court did state its "main concern here is 'protecting the ability of an inmate to prepare a petition or complaint,'" but it did not explicitly foreclose access to the preparation and filing of other documents.[190] Indeed, the Court also anticipated the possibility of the State responding to a pro se pleading.[191] In such an event, the Court stressed the need to access a law library to "rebut the State's argument."[192] Thus, *Bounds* itself acknowledged a prisoner's right to access legal materials after the pleading stage.

The opinion offers another clue on what constitutes "meaningful access" by demonstrating how essential a pro se prisoner's access to a law library is by analogizing a prisoner's preparation to the work of a lawyer.[193] In his analogy, Justice Marshall acknowledges that failure of a lawyer to research issues like jurisdiction, venue, and standing before filing a pleading would "verge on incompetence. . . . If a lawyer must perform such preliminary research, it is no less vital for a pro se prisoner."[194] The lawyer analogy seems to suggest that prisons cannot deny pro se prisoners the access to legal materials necessary to fulfill the minimum level of preparation that a lawyer would need to provide competent representation to a client. Surely, the minimum level of preparation includes knowing the Federal Rules of Evidence and conducting some degree of research before trial, a level of preparation that the prison denied Mr. Rivera. Indeed, this framing of meaningful access is supported by the American Bar Association's Model Rules of Professional Conduct[195] and the Supreme Court's own standard for proving a claim of ineffective assistance of counsel.[196]

1. The Duties of Competence and Diligence

The Model Rules of Professional Conduct provide a helpful measure of what meaningful access is under Justice Marshall's lawyer-law library analogy. To demonstrate how denying a prisoner access to legal materials while preparing for trial falls short of meaningful access as required under *Bounds*, it's useful to consider a hypothetical. Imagine Mr. Rivera is represented by a lawyer for his

[189] *Id.* at 825.

[190] *Id.* at 828 n.17.

[191] *Id.* at 826 ("[I]f the State files a response to a pro se pleading, it will undoubtedly contain seemingly authoritative citations.").

[192] *Id.*

[193] *Id.* at 825-26 (describing attorneys need to research jurisdiction, venue, standing, and available relief before initially pleading to provide competent legal services).

[194] *Id.* at 825-26.

[195] MODEL RULES OF PRO. CONDUCT r. 1.1, 1.3 (AM. BAR ASS'N 2023) (imposing duties of competence and diligence on lawyers).

[196] *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (creating two-prong test for proving ineffective assistance of counsel under Sixth Amendment).

access to the courts claim described in the Introduction and that the lawyer must abide by the Model Rules of Professional Conduct. However, the lawyer must also operate under the same limits as Mr. Rivera, namely an inability to conduct legal research or prepare for trial, which results in exclusion of important evidence. Under such restrictions, a lawyer would undeniably violate several of the Model Rules, but most obviously, the duties of competence and diligence.

Model Rule 1.1 states that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[197] Among the named factors to assess a lawyer's duty of competence is "the preparation and study the lawyer is able to give the matter."[198] Model Rule 1.3 states "[a] lawyer shall act with reasonable diligence and promptness in representing a client."[199] Courts have consistently found that a lawyer violates their duties of competence and diligence when they lack basic knowledge of the relevant legal issues and fail to adequately prepare for trial or other court proceedings.[200]

The case of *Matter of Padilla*[201] is illustrative of how the failure in having evidence admitted at trial can be a violation of the duties of competence and diligence. In *Padilla*, the Supreme Court of New Mexico suspended Mr. Padilla, a criminal defense attorney, for numerous violations of the New Mexico Rules of Professional Conduct during his representation of a criminal defendant, including Rules 16-101[202] and 16-103[203] which respectively incorporate the language of Model Rules 1.1 and 1.3 in their entirety.[204] Mr. Padilla's client was charged and found guilty of "criminal sexual penetration of a minor, criminal

[197] MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2023).

[198] *Id.* at r. 1.1 cmt. 1.

[199] MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2023).

[200] *See* Matter of Padilla, 456 P.3d 1057, 1059 (N.M. 2019) (finding attorney violated rules of competence and diligence by failing to admit evidence that would have impeached victim during trial); *In re* Disciplinary Action Against Pilch, 994 N.W.2d 390, 392 (N.D. 2023) (finding attorney violated duty of competence by being "unprepared to conduct trial"); Att'y Grievance Comm'n of Md. v. Snyder, 793 A.2d 515, 531 (Md. 2002) (finding attorney failed to provide competent representation by not researching whether his client needed to be present at initial appearance).

[201] *Padilla*, 456 P.3d at 1057.

[202] N.M. R. Ann. 16-101 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.").

[203] N.M. R. Ann. 16-103 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

[204] *Padilla*, 456 P.3d at 1058 ("The Court was presented with this case upon the recommendation of the Disciplinary Board . . . based on the Board's conclusion that Padilla violated Rules 16-101 (competence), 16-103 (diligence), and 16-804(D) (engaging in the administration of justice).").

sexual contact of a minor, and bribery of a witness."[205] At trial, Mr. Padilla sought to attack the alleged victim's credibility by introducing a report that stated the alleged victim had made unsubstantiated claims of abuse in the past.[206] However, because Mr. Padilla failed to call a witness to authenticate the report each of the three times he attempted to have the report admitted into evidence, the court denied the report's admission.[207] In its decision to suspend Mr. Padilla, the Supreme Court of New Mexico wrote "[h]is failure to provide such a witness and his failure to thoroughly gather and review evidence prior to trial shows a lack of competence and diligence."[208]

Mr. Rivera attempted to get medical records and an unsworn declaration admitted into evidence at his trial, but because he did not lay a foundation for the documents while testifying on the stand, they were rejected as inadmissible hearsay.[209] The requirements for the documents' admissibility were unknown to Mr. Rivera because he was denied any opportunity to research the Federal Rules of Evidence while in prison. As demonstrated by *Padilla*, a hypothetical attorney representing Mr. Rivera would have violated their duties of competence and diligence by failing to get such probative evidence admitted due to a lack of preparation. Thus, by denying Mr. Rivera access to any legal materials, the prison denied Mr. Rivera the minimum level of preparation that a lawyer would need to provide competent representation. Under Justice Marshall's analogy, this is a denial of meaningful access.

2. The Right to Effective Assistance of Counsel

Although Mr. Rivera alleges he was denied access to the courts while preparing his own pro se civil action against the prison, it is helpful to assess the practical effect of the alleged denial under an ineffective assistance of counsel analysis which is used when assessing the constitutional quality of a criminal defendant's representation. To be clear, there is no right to counsel in a civil action, and thus, Mr. Rivera had no right to effective assistance of counsel. However, applications of *Strickland v. Washington*[210] help elucidate basic expectations of a lawyer that in turn can help define "meaningful access" under Justice Marshall's lawyer analogy. If Mr. Rivera was represented by counsel and his counsel failed to get useful evidence admitted due to an ignorance of the

[205] *Id.*

[206] *See id.* at 1059 (noting Children, Youth & Families Department had investigated prior allegations made by alleged victim).

[207] *See id.* at 1063.

[208] *Id.*

[209] *See* Rivera v. Monko, No. 19-CV-00976, 2020 WL 3441430, at *2 (M.D. Pa. June 23, 2020) (noting that Mr. Rivera specifically asked for access to Federal Rules of Evidence and Civil Procedure but was denied).

[210] 466 U.S. 668, 686-88 (1984) (discussing requirements for ineffective assistance of counsel in capital punishment context).

Federal Rules of Evidence or did not do any research before trial, there would be a strong claim for ineffective assistance of counsel in a criminal setting.

Claims of ineffective assistance of counsel are assessed under a two-prong test, laid out in *Strickland*.[211] First, the representation must be "deficient."[212] Second, the deficiency must prejudice the defense "as to deprive the defendant of a fair trial."[213] Relating to the potential claims in the hypothetical posed above, courts have found both ignorance of the law and failure to perform basic legal research to be deficient representation under *Strickland*. In *Kimmelman v. Morrison*,[214] the defense counsel failed to raise a timely motion to suppress under a New Jersey court rule.[215] The defense counsel first learned of inculpatory evidence during trial and objected to its introduction.[216] He only learned of the evidence at trial because he never requested any discovery prior to trial.[217] The defense counsel incorrectly believed that the prosecution had an affirmative obligation to turn over any discovery, so he made no effort to acquire the inculpatory evidence.[218] On a petition for habeas corpus, the Supreme Court held that the defense counsel's performance, as a result of his ignorance of the law, was deficient.[219]

Courts have also found failure to perform basic legal research to be deficient representation.[220] In *Hinton v. Alabama*,[221] the Supreme Court found an attorney's performance deficient where the attorney failed to request additional funds for an expert witness because he mistakenly believed he had maxed out on available funding.[222] The attorney incorrectly believed that Alabama law

[211] *See id.* at 687.

[212] *Id.*

[213] *Id.*

[214] 477 U.S. 365 (1986).

[215] *Id.* at 368-69 ("Because the 30-day deadline had long since expired, the trial judge ruled that counsel's motion [to suppress] was late.").

[216] *Id.*

[217] *Id.* at 369.

[218] *Id.*

[219] *Id.* at 386-87 (emphasizing that overall representation rather than performance at trial alone is subject of ineffective assistance inquiry).

[220] *See* Hinton v. Alabama, 571 U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*."); *see also* Garmon v. Lockhart, 938 F.2d 120, 121 (8th Cir. 1991) (finding representation deficient where "[m]inimal research" would have discovered correct parole eligibility date); United States v. Carthorne, 878 F.3d 458, 469 (4th Cir. 2017) (finding presumption that counsel's decisions were part of trial strategy was defeated by counsel's failure to conduct basic legal research).

[221] *Hinton*, 571 U.S. at 263.

[222] *Id.* at 274.

capped funding for expert witnesses at $1,000.[223] However, the law provided reimbursement for "any expenses reasonably incurred in such defense to be approved in advance by the trial court."[224] The Supreme Court found the attorney's failure to "make even the cursory investigation of the state statute" amounted to deficient performance.[225] If Mr. Rivera's hypothetical counsel could have prevented evidence being excluded by conducting minimal research on the Federal Rules of Evidence, the failure to do so would rise to the level of deficient performance. In *Bounds*, the Supreme Court stated, "[i]f a lawyer must perform such preliminary research, it is no less vital for a pro se prisoner."[226]

Both the failure to get evidence admitted and to conduct basic legal research have also satisfied the second prong under *Strickland*—prejudice. For example, in *Rompilla v. Beard*,[227] the Supreme Court held that an attorney's failure to present mitigating evidence at the sentencing phase of a capital murder case was prejudicial to the client.[228] In Mr. Rivera's case, he alleged that prison staff used excessive force against him.[229] Documentation of his injuries could be highly probative evidence for such a claim. Thus, a hypothetical counsel's failure to get evidence admitted would be prejudicial.

Further, an attorney's failure to conduct legal research generally has been prejudicial.[230] In *United States v. Carthorne*,[231] the defendant's attorney failed to object to probation's designation of Carthorne as a career offender under the U.S. Sentencing Guidelines.[232] In his presentence report, the probation officer considered Carthorne's prior conviction of assault and battery on a police officer as a predicate offense for the career offender enhancement.[233] When pressed on whether the conviction was a predicate offense by the trial judge, Carthorne's attorney discussed whether the facts underlying the assault and battery on the police offer actually constituted assault, rather than addressing the question posed.[234] The Fourth Circuit held his comments "illustrate[d] his basic failure to comprehend the relevant legal analysis" and that such failure to "conduct basic

[223] *Id.* at 273 (reciting how defendant needed competent expert to prove his case but attorney "felt stuck" and used poor expert).

[224] *Id.* (quoting ALA. CODE § 15-12-21(d) (1984)).

[225] *Id.* at 274.

[226] Bounds v. Smith, 430 U.S. 817, 825-26 (1977).

[227] 545 U.S. 374 (2005).

[228] *See id.* at 393 (referencing evidence of defendant's parental neglect and learning disability which counsel did not present to jury).

[229] Rivera v. Monko, No. 19-CV-00976, 2020 WL 3441430, at *8 n.1 (M.D. Pa. June 23, 2020) (taking judicial notice of Rivera's claims in underlying case).

[230] *See* United States v. Carthorne, 878 F.3d 458, 469-70 (4th Cir. 2017) (holding failure to identify key precedent constituted prejudice).

[231] *Carthorne*, 878 F.3d at 458.

[232] *Id.* at 461.

[233] *Id.*

[234] *Id.* at 462.

legal research" prejudiced his client.[235] In Mr. Rivera's case, he was unable to research any issue whatsoever due to the lack of access to legal materials.[236] Surely, a hypothetical lawyer in Mr. Rivera's shoes who fails to conduct any relevant research on the case would prejudice their client. Thus, by denying Mr. Rivera access to adequate legal materials like the Federal Rules of Evidence throughout the entirety of his trial, the prison denied Mr. Rivera the minimum level of preparation that a lawyer would need to provide competent and effective representation to their client. Under Justice Marshall's analogy in *Bounds*, this is a denial of meaningful access to the courts.

Beyond reading the *Bounds* opinion for clues on how to define meaningful access, common sense tells us that cutting off access to legal materials after a prisoner has filed a complaint is not meaningful access. Indeed, "[i]t does inmates little good to give them entry to court and then deprive them of the means of pressing their claim for relief through the myriad legal proceedings that occur from commencement of a suit until its conclusion."[237] To meet the demand of *Bounds*—to give prisoners a reasonably adequate opportunity to present their claims—a prison must provide access to a law library or some other form of legal assistance even after the pleading stage.

CONCLUSION

A court's refusal to admit evidence of excessive force used by prison officials does not make the constitutional violation any less real. For pro se plaintiffs like Mr. Rivera, that failure is evidence of a complex evidentiary scheme that requires a specific set of skills and knowledge that is inaccessible to most prisoners without some study of the law. Recognizing this hurdle, the Supreme Court in *Bounds v. Smith* placed an affirmative duty on prisons to furnish prisoners with access to that knowledge, either by establishing law libraries or some other form of legal assistance program.[238] The Court did so as an extension of a prisoner's constitutional right to access the courts. By imposing such affirmative obligations on prisons, the Court sought to make the fundamental constitutional right to access the courts meaningful.[239] Denying a prisoner access to a law library or legal materials to prepare for a trial after they have filed a civil rights complaint is not meaningful access to the courts. Nevertheless, the Ninth

[235] *Id.* at 469.

[236] *See generally* Rivera v. Monko, No. 19-CV-00976, 2020 WL 3441430 (M.D. Pa. June 23, 2020) (suing prison officials for barring prisoner access to law library).

[237] MUSHLIN, *supra* note 20, at § 12:7.

[238] *See* Bounds v. Smith, 430 U.S. 817, 828 (1977) ("We hold . . . that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.").

[239] *Id.* at 824 ("'[M]eaningful access' to the courts is the touchstone." (alteration in original) (quoting Ross v. Moffit, 417 U.S. 600, 611 (1974))).

Circuit held that a prisoner's right to access the courts ends once their complaint is filed.[240]

For prisoners, litigation is one of the most powerful tools they possess to improve the conditions of their confinement. Litigation does not end with the filing of the complaint. Indeed, it has only just begun. To deprive a prisoner of the necessary preparation for litigation is to silence prisoners. In essence, it is a return to the era of the hands-off doctrine, a time where prisoners were nothing but mere "slaves of the [s]tate."[241] Fortunately, the Supreme Court rejected such a doctrine before[242] and can do so again. The Court can resolve the emerging circuit split by siding with the Third and Seventh Circuits and holding that a prisoner's constitutional right to access the courts extends past the pleading stage. And until then, every other court of appeals that takes up this question for the first time should do the same. "Meaningful access is the touchstone."[243]

[240] *See* Silva v. Di Vittorio, 658 F.3d 1090, 1102 (9th Cir. 2011).

[241] Ruffin v. Commonwealth, 62 Va. 790, 796 (1871).

[242] *See* Procunier v. Martinez, 416 U.S. 396, 405-06 (1974) ("[A] policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution.").

[243] *Bounds*, 430 U.S at 824 (internal alterations and quotations omitted).