UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 66 | Number 3 Article 5

3-1-1988

North Carolina County Jail Inmates' Right of Access to Courts

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NOTES

North Carolina County Jail Inmates' Right of Access to Courts

The 1977 case of *Bounds v. Smith*[1] requires prison authorities to take affirmative measures ensuring inmates' meaningful right of access to the courts to present alleged constitutional violations.[2] In *Bounds* the United States Supreme Court held that prison officials could provide meaningful access to courts by supplying prisoners with adequate law libraries or assistance from persons trained in the law.[3] Over the last ten years, many federal circuit courts have extended the holding in *Bounds* to county jails.[4] These courts typically have not engaged in any detailed analyses to apply *Bounds* to jails or developed any firm guidelines to assist county jailers in deciding when they have a duty under *Bounds* or, once established, how to fulfill it.[5]

Access litigation against North Carolina county jails has been sparse. The State has nearly one hundred county jails,[6] yet inmates have filed access claims

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1. 430 U.S. 817 (1977).

2. *Id.* at 828. Access is defined as "encompass[ing] all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him." Gilmore v. Lynch, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd per curiam sub nom.*, Younger v. Gilmore, 404 U.S. 15 (1971). Inmates clearly relinquish certain personal liberties when they are incarcerated. As this fact relates to access, Justice Douglas noted, " 'Prisoners, having real or imagined grievances, cannot demonstrate in protest against them. The right peaceably to assemble is denied to them. The only avenue open to prisoners is taking their case to court.' " Johnson v. Avery, 393 U.S. 483, 497 (1969) (Douglas, J., concurring) (quoting Larsen, *A Prisoner Looks at Writ-Writing*, 56 CALIF. L. REV. 343, 347 (1968)). The need for access is especially crucial when an inmate's claim is a habeas corpus or civil rights action. The United States Supreme Court consistently has treated these actions as vital in our constitutional scheme "because they directly protect our most valued rights." *Bounds*, 430 U.S. at 827; *see* Wolff v. McDonnell, 418 U.S. 539, 579 (1974) (emphasizing the importance of civil rights claims); *Johnson*, 393 U.S. at 485 (emphasizing the importance of the writ of habeas corpus); *infra* note 33. A number of factors led federal courts to take the lead in protecting inmates' fundamental right to pursue potentially valid constitutional claims. First, prison officials sometimes adopt regulations to promote effective prison administration that interfere with inmates' right of access. *See, e.g.*, *Johnson*, 393 U.S. at 487-88 (regulation prohibiting inmates from helping fellow inmates file habeas corpus petitions denied illiterate inmates any opportunity to be heard by court); Griffin v. Illinois, 351 U.S. 12 (1956) (inmates' chance of appeal foreclosed by requiring an indigent inmate to pay for copy of trial transcript as a condition of receiving an appeal of right). Second, inmates generally have little political or lobbying power. Ducey, *Survey of Prisoner Access to the Courts: Local Experimentation a'* Bounds, 9 NEW ENG. J. CRIM. & CIV. CONFINEMENT 47, 50-51 (1983). Third, society tends to be rather apathetic about prisons. *Id.* at 51. On a more practical level, at least one commentator has argued that inmates need to have the ability to gain access to the courts during their confinement, rather than on release, in order to avoid statute of limitations problems, decreases in the chances of raising successful suits, and increases in tensions in the prison environment resulting from unresolved grievances. Potuto, *The Right of Prisoner Access: Does* Bounds *Have Bounds?*, 53 IND. L.J. 207, 221-22, 226 (1977).

3. 430 U.S. at 828.

4. *See infra* notes 48-81 and accompanying text.

5. *See infra* notes 50-81, 112-54 and accompanying text.

6. The most recent United States Department of Justice census on jails indicated North Carolina had 95 county jails. UNITED STATES DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CENSUS OF JAILS, 1978: VOL. III DATA FOR INDIVIDUAL JAILS IN THE SOUTH 46 (1981). Changes since 1978 have brought the total number of county jails to 97. North Carolina Department of

under section 1983 of Title 42 of the United States Code against only three of them.[7] In each case the jail agreed to provide inmates with law library facilities. The remainder of the State's jails are not providing substantive legal assistance.[8]

A number of factors may increase dramatically the amount of litigation inmates will bring against county jails. In 1979 the North Carolina General Assembly passed legislation authorizing jails to house convicted inmates for up to 180 days.[9] The Safe Roads Act of 1983 increased the probability of jail sentences for drinking and driving offenses.[10] Convicted misdemeanants can serve sentences of up to two years[11] and the State authorizes a sentencing court to assign these misdemeanants to work release programs.[12] A 1987 bill created satellite jails to encourage counties to be more active using and supporting the work release program.[13] Operating together, these measures should result in more inmates in county jails for longer periods of time.[14] This could lead to overcrowding with a corresponding increase in the number of suits initiated by inmates against jails.[15] Inmates' access to courts is one area of potential litigation.

This Note analyzes the *Bounds* and other federal court decisions that have

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Human Resources, Division of Facility Services, Jail and Detention Branch, Compilation developed for use by the Jail Committee of the Governor's Crime Commission (1987).

7. *See* Custer v. Harnett County, No. 86-603-CRT-86 (E.D.N.C. Apr. 2, 1987) (consent judgment) (Harnett County Jail); Clay v. Wall, No. C-C-81-521-M (W.D.N.C. Feb. 24, 1984) (consent judgment) (Mecklenburg County Jail); Parnell v. Waldrep, 511 F. Supp. 764 (W.D.N.C. 1981) (Gaston County Jail). Section 1983 provides a remedy against any "person . . . under color of any statute . . . of any State . . . [who] causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution." 42 U.S.C. § 1983 (1982).

8. In one survey, North Carolina public libraries were asked to indicate whether they provided service to correctional facilities in North Carolina. Approximately 15 libraries indicated they served these facilities. Of these 15, 5 libraries indicated they provided legal services to county jails—those in Charlotte, Greenville, Washington, Waynesville, and Wilson. AMERICAN LIBRARY ASS'N, SURVEY OF LIBRARY SERVICE IN LOCAL CORRECTIONAL FACILITIES 185, 187-88 (1980). North Carolina has fewer than a dozen county law libraries. Telephone interview with Mrs. Louis Stafford, Assistant Librarian of the North Carolina Supreme Court Library (Sept. 25, 1987). None of the county jail inmate information pamphlets reviewed for purposes of this Note mentioned library or legal assistance services or rights.

9. Act of April 24, 1979, ch. 456, § 1, 1979 N.C. Sess. Laws 412, 412-13 (codified at N.C. GEN. STAT. § 15A-1352(a) (1983)).

10. Act of June 3, 1983, ch. 435, § 29, 1983 N.C. Sess. Laws 332, 354-60 (codified as amended at N.C. GEN. STAT. § 20-179 (1983 & Supp. 1987)).

11. N.C. GEN. STAT. § 14-3(a) (1986).

12. *Id.* § 15A-1352(a) (Supp. 1987).

13. Act of May 18, 1987, ch. 207, §§ 1-4, 1987 N.C. Adv. Legis. Serv. 64, 64-68 (codified at N.C. GEN. STAT. §§ 153A-230 to -230.4 (1987)). The State defines a satellite jail as a "building or designated portion of a building primarily designed, staffed, and used for the housing of misdemeanants participating in a work release program. N.C. GEN. STAT. § 153A-230.1 (1987). Satellite jails are to be created and operated by a county or a group of counties. *Id.* §§ 153A-230.2, 230.3(b).

14. Raleigh News & Observer, Oct. 4, 1987, at 33A, col. 1.

15. *Id.* col. 1-2 (citing Mr. Michael Smith, Ass't Dir., Inst. of Gov't, Univ. of North Carolina at Chapel Hill). Other sources support this opinion. Commentators have cited prison population and overcrowding as significant factors causing increases in prisoners' suits. Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 626-27 (1979). A North Carolina authority on prisons attributed increases in prisoner litigation in the 1970s, in part, to overcrowding. *Id.* at 627 n.91 (citing letter to author from Mr. Barry Nakell, Professor of Law, University of North Carolina School of Law and counsel for appellant in *Bounds* (Nov. 29, 1977)).

addressed the access issue. In light of those decisions the Note proposes workable access guidelines for county jails. It concludes that all North Carolina county jails are obligated to provide inmates with reasonable means to present potentially valid claims of alleged constitutional violations. This Note also evaluates how and when jails might provide such assistance most effectively.

Bounds[16] was the last in a series of United States Supreme Court decisions that established an inmate's constitutional right of access to the courts and the states' duty to facilitate the exercise of that right.[17] The Court in *Bounds* examined whether states must provide prison inmates with law libraries or with assistance from nonprisoners trained in the law in order to provide inmates a fair opportunity to present claims of alleged constitutional violations.[18] The case involved a section 1983 class action suit brought by inmates of North Carolina's prison system against the North Carolina Department of Corrections. The inmates alleged, in part, that they were denied access to the courts.[19] The United States District Court for the Eastern District of North Carolina found that, in the absence of a reasonable alternative, the State was not providing adequate means for inmates to conduct legal research, and ordered the State to develop a plan for meaningful access.[20] The State responded with a proposal to create legal research facilities at its two main prisons[21] and seven other libraries strategically located to serve the State's eighty prisons. Inmates not confined at one of these prisons would be transported to a facility with a library where they would be entitled to a day of research.[22] The plan also included a provision to train inmates to function as legal research assistants.[23] The United States Court of Appeals for the Fourth Circuit affirmed the district court's decision with the modification that access for women prisoners be made equal to that for men.[24] The United States Supreme Court concluded that the proposed program was required.[25]

Bounds reaffirmed[26] the earlier Supreme Court decision of *Younger v. Gil-*

16. 430 U.S. 817 (1977); *see supra* notes 1-5 and accompanying text.

17. *See* cases cited *infra* note 30.

18. *Bounds*, 430 U.S. at 817, 825.

19. *Id.* at 818.

20. Record at app. 26, Harrington v. Holshouser, 741 F.2d 66 (4th Cir. 1984) (No. 83-6271) (case consolidated with *Bounds*).

21. These prisons were Central Prison and North Carolina Correctional Center for Women. *Id.* at app. 28 (office memorandum titled Proposed Plans for Inmate Law Libraries, Dec. 19, 1973).

22. *Id.*

23. *Id.* at app. 29.

24. Smith v. Bounds, 538 F.2d 541, 545 (4th Cir. 1975) *aff'd*, 430 U.S. 817 (1977). In support of its decision the court of appeals simply stated that in the absence of an adequate alternative method for inmates to obtain access to the courts, the State was obligated to provide legal research facilities. *Id.* at 544. The court cited Young v. Gilmore, 404 U.S. 15 (1971), in support of its decision to reject petitioners' contention that the State was obligated to supplement the library with a legal assistance program. *Bounds*, 538 F.2d at 544.

25. *Bounds*, 430 U.S. at 819-21, 833. The Court was asked to rule not on the adequacy of the library plan, but rather on whether a library or some reasonable alternative was necessary to ensure access. *Id.* at 825.

26. *Id.* at 828.

more.[27] In *Gilmore* the United States District Court for the Northern District of California defined access to the courts as "encompass[ing] all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him."[28] The *Bounds* Court ruled it was essential for states to provide inmates with either adequate law libraries or assistance from nonprisoners trained in the law in order for the prisoners to achieve meaningful access.[29]

In reaching its decision, the Court first reviewed the development of the right of access to the courts.[30] The Court explained that inmates needed legal assistance to prepare and file claims properly and, even more importantly, to rebut an opposing party's response to inmates' pleadings.[31] This distinction was significant because it established a qualitative difference between obtaining access to a court merely by filing papers and the more meaningful access achieved when inmates become capable of effectively presenting their claims.[32] The Court was most concerned with inmates' ability to file habeas corpus and civil rights suits and emphasized that these actions often had not been addressed in inmates' earlier criminal trials.[33] To protect these claims, which the Court considered of " 'fundamental importance . . . in our constitutional scheme,' " inmates had to be able to conduct research on the fresh legal issues underlying the claims.[34]

Courts and commentators have characterized the *Bounds* decision as vague.

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27. 404 U.S. 15 (1971) (per curiam), *aff'g*, Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970).

28. *Gilmore*, 319 F. Supp. at 110.

29. *Bounds*, 430 U.S. at 827-28.

30. *See id.* at 821-25. The earlier cases included Wolff v. McDonnell, 418 U.S. 539 (1974) (allowing inmates to assist one another in preparing civil rights suits); Johnson v. Avery, 393 U.S. 483 (1969) (allowing inmates to assist one another in writing habeas corpus petitions); Griffin v. Illinois, 351 U.S. 12 (1956) (ordering states to provide inmates with copy of their trial transcripts); *Ex parte* Hull, 312 U.S. 546 (1941) (prohibiting parole board review and approval of inmates' habeas corpus petitions as prerequisite for filing).

31. *Bounds*, 430 U.S. at 825-26; *see also Gilmore*, 319 F. Supp. at 110 (more than a statement of facts needed to file adequate petition; rules concerning venue, jurisdiction, remedies, and legal significance of facts are important elements to know in filing petitions).

32. *Bounds*, 430 U.S. at 827-28.

33. *Id.* at 827-28. The writ of habeas corpus is a right protected by the United States Constitution. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. 1, § 9, cl. 2. "[T]he basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom . . . . " Johnson v. Avery, 393 U.S. 483, 485 (1969). The vital importance of the writ has been discussed repeatedly. The writ's "root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." Fay v. Noia, 372 U.S. 391, 402 (1963). "The writ of habeas corpus is [a] precious safeguard of personal liberty" of inmates and should not be impaired. Bowen v. Johnston, 306 U.S. 19, 26 (1939). The United States Supreme Court has voiced similar concern for protecting civil rights actions and has declared that there is no significant "distinction between the two forms of action." Wolff v. McDonnell, 418 U.S. 539, 580 (1974). "[B]oth actions serve to protect basic constitutional rights." *Id.* at 579. If inmates were unable to petition the courts with grievances concerning violations of these rights, these rights would be "diluted." *Id.* One study concluded that prisoners' § 1983 claims most often address grievances related to medical care, access to the courts, and damage or loss of property. Turner, *supra* note 15, at 622.

34. *Bounds*, 430 U.S. at 827 (quoting Johnson v. Avery, 393 U.S. 483, 485 (1969)).

According to the critics, the Court did not enunciate the constitutional basis of the right of access or sufficiently define its parameters.[35] The opinion's language was broad enough to allow federal courts to imply that the holding was not restricted to convicted state inmates.[36] The decision did limit the scope of the obligation, however, to providing legal assistance to those "original actions seeking new trials, release from confinement, or vindication of fundamental civil rights."[37] The Court did not dictate how prisons were to comply with its ruling. Rather, it encouraged "local experimentation"[38] and stated that prison authorities did not have to provide both law libraries and legal assistance.[39] Although the Court stated that prison officials could consider cost in deciding which method to select, it emphasized that cost could not justify noncompliance with the Court's ruling.[40]

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35. Chief Justice Burger's dissenting opinion in *Bounds* emphasized the lack of a solid constitutional footing for the right of access. *Bounds*, 430 U.S. at 833 (Burger, C.J., dissenting). He viewed the nature of prisoners' collateral attacks on their state convictions as statutory in origin, and he could find no basis on which the federal government could compel the states to provide affirmative methods of supporting that statutory right. *Id.* at 834-35. Justice Rehnquist's dissent also emphasized the lack of any constitutional grounding for a right of access in the fourteenth amendment's equal protection clause. *Id.* at 839-40 (Rehnquist, J., dissenting). He believed that the logical extension of the Court's decision would be to require the states to provide counsel to inmates who had exhausted all direct appeals in order to enable collateral attacks on convictions, an extension he viewed as not constitutionally required. *Id.* at 841. Providing counsel is, in fact, what the United States District Court for the Eastern District of North Carolina required subsequent to the Supreme Court decision in *Bounds*. *See* Smith v. Bounds, 657 F. Supp. 1322 (E.D.N.C. 1986) (ordering State of North Carolina to implement legal assistance program); Smith v. Bounds, 610 F. Supp. 597 (E.D.N.C. 1985) (requiring State of North Carolina to develop legal assistance program).

A number of federal courts have commented on the vagueness of the *Bounds* decision. *See* Mann v. Smith, 796 F.2d 79, 84 (5th Cir. 1986) (*Bounds* did not delineate how right of access was triggered, but clearly did not require state to provide attorneys for civil actions); Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985) (source of right of access unclear); Harris v. Young, 718 F.2d 620, 623-24 (4th Cir. 1983) (granting immunity from liability to Department of Correction director because scope of *Bounds* was unclear); Williams v. Leeke, 584 F.2d 1336, 1343 (4th Cir. 1978) (Hall, J., concurring in part and dissenting in part) (interpreting *Bounds* as applying only to state prisons and county jails that serve functions of state prisons), *cert. denied*, 442 U.S. 911 (1979); Brown v. Manning, 630 F. Supp. 391, 396 (E.D. Wash. 1985) (constitutional basis of right of access was unclear); *see also* Contemporary Studies Project, *Standards for Local Detention Facilities: An Attempt at Statewide Management of Iowa County Jails*, 66 IOWA L. REV. 1071, 1156 (1981) (court declared access to be a fundamental right without further definition) [hereinafter Contemporary Study Project]; Kelly, *Prison Law Library Service: Questions and Models*, 72 L. LIBR. J. 598, 599-600 (1979) (*Bounds* left unanswered what was constitutionally adequate access through law libraries); Potuto, *supra* note 2, at 216, 245 (right of access lacks firm constitutional basis and defined parameters); Note, *The Impact of Bounds v. Smith on City and County Jail Facilities*, 67 KY. L.J. 1064, 1067 (1979) (suggesting the right of access is based on equal protection and due process clauses of fourteenth amendment).

36. *Bounds*, 430 U.S. at 828. Throughout the decision the Court referred to "prisoners" or "inmates." It never used a modifier to restrict the scope of those words. *See* Harris v. Young, 718 F.2d 620, 626 (4th Cir. 1983) (Murnaghan, Circuit Judge, dissenting) ("denomination of an institution as a 'prison' or 'jail' is irrelevant for purposes of determining . . . obligat[ion] to provide . . . prisoner[s] adequate legal resources"); Note, *supra* note 35, at 1072-73 (stating that *Bounds* was not limited to state prisoners).

37. *Bounds*, 430 U.S. at 827. *But see* Straub v. Monge, 815 F.2d 1467, 1470 (11th Cir.) (access requirements of *Bounds* apply to civil forfeiture cases as well as constitutional and civil rights claims), *cert. denied*, 108 S. Ct. 336 (1987); Martino v. Carey, 563 F. Supp. 984, 993-94 (D. Or. 1983) (showing that an inmate was unable to respond to a divorce suit because of lack of law library helped to establish deprivation of constitutional right of access to the courts).

38. *Bounds*, 430 U.S. at 830-32.

39. *Id.* at 828, 830-31.

40. *Id.* at 825.

Counties have argued that *Bounds* does not apply to jails for a number of reasons. First, county jail inmates generally have criminal attorneys working for them.[41] Second, county jails serve different functions than state prisons.[42] Third, county jail inmate sentences are too short to enable inmates to process claims.[43] Fourth, limited staff and budgets foreclose the jails' ability to provide access.[44] A number of sources have countered these arguments and concluded that *Bounds* does apply to county jails. The *Bounds* Court, for example, favorably cited the prior decision of *Cruz v. Hauck*,[45] an access case that involved a county jail. In *Cruz* the Supreme Court vacated and remanded the lower court's dismissal of the access claim for reconsideration in light of its ruling in *Gilmore*.[46] The *Bounds* Court also noted that, after *Gilmore*, the National Sheriffs' Association declared that all inmates "are entitled to have access to legal materials."[47]

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41. *See* Hawthorne v. Froelich, 575 F. Supp. 314, 315 n.2 (D. Mont. 1983); Wilson v. Wittke, 459 F. Supp. 1345, 1346 (E.D. Wis. 1978).

42. *See* Williams v. Leeke, 584 F.2d 1336, 1343 (4th Cir. 1978) (Hall, J., concurring in part and dissenting in part), *cert. denied*, 442 U.S. 911 (1979). The distinction is largely that jails do not function as long-term incarceration facilities. *Id.* at 1343, 1345; Cruz v. Hauck, 515 F.2d 322, 332-33 (5th Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).

43. *See* Harris v. Young, 718 F.2d 620, 623 (4th Cir. 1983).

44. *See* Love v. Summit County, 776 F.2d 908, 909 (10th Cir. 1985), *cert. denied*, 107 S. Ct. 66 (1986); Parnell v. Waldrep, 538 F. Supp. 1203, 1205 (W.D.N.C. 1982).

45. 404 U.S. 59 (1971) (per curiam) (cited in *Bounds*, 430 U.S. at 829).

46. *Id.* at 59. On remand, the United States District Court for the Western District of Texas held that the jail regulation prohibiting inmates from keeping hardbound legal books in their cells was a valid response to an institutional need for security. Cruz v. Hauck, 345 F. Supp. 189, 190 (W.D. Tex. 1972). Because inmates could keep other legal materials in their cells, the judge found no constitutional violation. He stated further that the jail had no obligation to provide a law library, and that indigent inmates could use the public defender services. *Id.* On appeal, the United States Court of Appeals for the Fifth Circuit stated that "ready access to the courts is one of, perhaps *the*, fundamental constitutional right." Cruz v. Hauck, 475 F.2d 475, 476 (5th Cir. 1973). Because the lower court had not heard the petitioners' objections to its ruling, the case was remanded. *Id.* at 476-78. Not until a subsequent appeal was there any substantive discussion of county jail inmates' right to access. *See* Cruz v. Hauck, 515 F.2d 322 (5th Cir. 1975), *cert. denied*, 424 U.S. 917 (1976). Citing *Gilmore* the court stated that "[t]he fundament underlying the right of access to legal materials is the right of access to the courts. This is the lodestar which guides our course. Access to legal materials is but one source, albeit an important one, of providing an adequate pathway to the courts." *Id.* at 331. Finding the evidence insufficient to determine whether all inmates had adequate ways of reaching court without resort to legal materials, the court again remanded the case. *Id.* at 331-32. Significantly, the court of appeals stated that the district court may exclude from consideration "those inmates whose confinement is of a very temporary nature or for purposes of transfer to other institutions." *Id.* at 333. The court justified this exclusion on the basis that state prisons and county jails served different functions. *Id.* at 332-33. The *Cruz* litigation lasted 12 years. For a history of the case, see Cruz, *Cruz v. Hauck: Prisoners' Struggle with the Judicial System*, 9 NEW ENG. J. CRIM. & CIV. CONFINEMENT 145 (1983).

47. NATIONAL SHERIFFS' ASS'N, A HANDBOOK ON INMATES' LEGAL RIGHTS 33 (1974) (cited in *Bounds*, 430 U.S. at 829 n.18). Other prison authorities have also adopted *Bounds* standards. For example, the Department of Justice has espoused "access to an appropriate law library and to supplies and services related to legal matters" as a right of jail inmates. UNITED STATES DEP'T OF JUSTICE, FEDERAL STANDARDS FOR PRISONS AND JAILS § 1.05 (1980). The Department further specified that detention facilities—those institutions confining adult pretrial detainees and convicted inmates for up to two years—"should provide access to a full range of legal . . . materials . . . ." *Id.* § 18.01. On the other hand, these provisions do not require holding facilities that house inmates for 48 hours or less to provide such materials. *Id.* The American Bar Association standard would extend legal assistance to actions beyond the limits expressed in *Bounds*. AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: LEGAL STATUS OF PRISONERS, Standards 23-2.1 to -2.3 (1983).

In addition to these Supreme Court statements in *Bounds*, federal courts routinely have interpreted *Bounds* as standing for the general proposition that all inmates, regardless of where they are incarcerated or whether they are classified as convicted inmates or pretrial detainees, have a right of access to the courts.[48] Federal courts have restricted this proposition, however, by adopting the view that *Bounds* does not apply to short-term inmates and inmates awaiting transfer to other prisons because those inmates would not have "sufficient time . . . to petition the courts" on constitutional claims.[49] Few courts have taken the step of defining the minimal period of incarceration after which inmates obtain a right of access. Instead, most courts have reviewed on a case-by-case basis how long inmates in a particular facility have been incarcerated. If the period of time was long enough for an inmate to be able to prepare and present a claim, courts have found the jail had a duty to provide access.

Federal courts in the Fourth Circuit have adopted this approach of determining whether a jail houses inmates long enough to entitle them to a right of access. The decisions avoid establishing a minimal trigger time. Plaintiff in *Williams v. Leeke*[50] was a convicted inmate in the Richmond City Jail.[51] The jail's law library was adequate for his research needs, but regulations limited his library time to forty-five minutes three times a week.[52] The Fourth Circuit Court of Appeals, therefore, was not asked to determine whether the jail had to provide access at all, but rather whether the access allowed was meaningful. In ruling on that issue, the court announced that "misdemeanants serving sentences of up to 12 months in local jails should not be left wholly without resources to prosecute potentially valid habeas claims or claims challenging the conditions of confinement . . . ."[53] The court concluded by stating that "prisoner[s] in a city jail [are] entitled to reasonable access to the courts."[54] This

48. The following is a list of some of the access cases that have involved county jails: Straub v. Monge, 815 F.2d 1467 (11th Cir.) (upholding damage award to inmate for violation of right to access), *cert. denied*, 108 S. Ct. 336 (1987); Penland v. Warren County Jail, 797 F.2d 332 (6th Cir. 1986) (*Bounds* applies to jails); Hooten v. Jenne, 786 F.2d 692 (5th Cir. 1986) (explicitly stating reason for incarceration is irrelevant to right of access); Morrow v. Harwell, 768 F.2d 619 (5th Cir. 1985) (bookmobile checkout system does not meet *Bounds* requirements); Love v. Summit County, 776 F.2d 908 (10th Cir. 1985) (court acknowledged pretrial detainees have right of access, but on facts shown no constitutional violation was presented), *cert. denied*, 107 S. Ct. 66 (1986); Harris v. Young, 718 F.2d 620 (4th Cir. 1983) (holding that *Bounds* applied to jail, but affirming summary judgment against inmate on basis of jail officials' immunity); Leeds v. Watson, 630 F.2d 674 (9th Cir. 1980) (jail inmate's right of access violated); Brown v. Manning, 630 F. Supp. 391 (E.D. Wash. 1985) (indigent inmates incarcerated more than three days have fundamental right of access); Noren v. Straw, 578 F. Supp. 1 (D. Mont. 1982) (county jail violated inmates' right of access); Delgado v. Sheriff of Milwaukee County Jail, 487 F. Supp. 649 (E.D. Wis. 1980) (individual suit brought by pretrial detainee); Hutchings v. Corum, 501 F. Supp. 1276 (W.D. Mo. 1980) (*Bounds* applies to jail), *aff'd in relevant part*, 641 F.2d 488 (7th Cir. 1981); Lock v. Jenkins, 464 F. Supp. 541 (N.D. Ind. 1978) (extending right of access to both convicted inmates and pretrial detainees); O'Bryan v. County of Saginaw, 437 F. Supp. 582 (E.D. Mich. 1977) (right of access applies to jails; proposed library inadequate).

49. Cruz v. Hauck, 515 F.2d 322, 333 (5th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976); *see supra* note 46 and accompanying text.

50. 584 F.2d 1336 (4th Cir. 1978), *cert. denied*, 442 U.S. 911 (1979).

51. *Id.* at 1338.

52. *Id.*

53. *Id.* at 1340.

54. *Id.*

language implies that jails holding misdemeanants serving sentences of up to one year have an institutional duty to comply with *Bounds*.

In *Dawson v. Kendrick*[55] inmates brought a class action suit under section 1983 against the Mercer County Jail in West Virginia.[56] Seventy-five to eighty-five percent of the inmates were pretrial detainees.[57] Although over ninety-six percent of the inmates were incarcerated for less than thirty days, the United States District Court for the Southern District of West Virginia concluded that enough inmates were jailed a sufficient length of time for constitutional claims to arise and for preparation, filing, and presentation of such claims.[58] The *Dawson* court ordered the jail to submit a plan that would ensure access for those inmates jailed long enough for claims to arise.[59] The court did not specify that period of confinement.

In *Parnell v. Waldrep*[60] the United States District Court for the Western District of North Carolina found that the Gaston County Jail's only access provision was a regulation allowing inmates to telephone attorneys.[61] The jail was authorized to hold convicted inmates for up to 180 days.[62] Although acknowledging that telephone privileges might be sufficient for most pretrial detainees, the *Parnell* court reasoned that telephone use did not ensure that all inmates, regardless of their classification, would be able to present petitions on constitutional issues.[63] In response to the court's order to submit an access plan, Gaston County agreed to provide law library assistance by a combination book checkout system and direct access to the Gaston County Law Library.[64] The approved plan provided: "Inmates . . . not represented by private counsel or the Public Defender [may use legal materials] for purposes of filing a writ of habeas corpus, a motion for appropriate relief or a civil rights action . . . ."[65]

The Mecklenburg and Harnett County Jails in North Carolina have entered into and agreed to consent judgments that are similar to Gaston County's plan for access. Both cases involved inmate claims under section 1983 for deprivation of access.[66] The Mecklenburg plaintiff was a pretrial detainee who had been

55. 527 F. Supp. 1252 (S.D. W. Va. 1981).

56. *Id.* at 1258. The class was composed of one subclass of convicted inmates and a second subclass of pretrial detainees. *Id.* at 1259.

57. *Id.* at 1262.

58. *Id.* at 1313. Specifically, the court found that of 1,303 inmates who entered the jail during a six-month period, 59.33% remained less than one day; 16.89% remained up to three days; 9.37% for up to five days; 6.53% for up to ten days; 3.45% for one month; 1.06% for sixty days; .46% for up to ninety days; 1.15% for six months; .31% for two-hundred and seventy days; and .15% for a greater period of time. *Id.* at 1262.

59. *Id.* at 1314.

60. 511 F. Supp. 764 (W.D.N.C. 1981).

61. *Id.* at 769.

62. *Id.* at 767. This period is uniform for all North Carolina county jails. *See supra* text accompanying note 9.

63. *Parnell*, 511 F. Supp. at 769.

64. *See* Parnell v. Waldrep, 538 F. Supp. 1203, 1205-06 (W.D.N.C. 1982).

65. County response to May 20, 1982 court order at exhibit B, Parnell v. Waldrep, 538 F. Supp. 1203 (W.D.N.C. 1982) (No. C-C-79-136).

66. Custer v. Harnett County, No. 86-603-CRT-86 (E.D.N.C. Apr. 2, 1987) (consent judg-

held in jail for about 166 days.[67] The consent judgment stated that pretrial detainees have a right of access[68] that entitled inmates without counsel to legal materials for purposes of researching habeas corpus and civil rights claims.[69] Rather than establish a minimal length of time in jail that would trigger an inmate's right of access, the Mecklenburg County Jail established a priority use provision, which granted priority to those prisoners with "deadlines and/or scheduled court appearances in civil or habeas corpus cases."[70] The Harnett County plan provided access to all inmates, without regard to status or length of incarceration, and contained no priority system for library use.[71]

These district court decisions from the Fourth Circuit demonstrate that county jails have an obligation to provide inmates a right of access. The decisions do not differentiate between pretrial detainees and convicted inmates. They also do not create a minimum length of confinement that would trigger *Bounds*. The decisions, however, restrict access to inmates who do not have counsel and who have a need to research habeas corpus and civil rights claims.

These decisions are consistent with decisions in other federal circuits. In *O'Bryan v. County of Saginaw*[72] the county jail housed an average of 170 inmates, seventy-five percent of whom were pretrial detainees. The average stay was 7.7 days.[73] The United States District Court for the Eastern District of Michigan held that all inmates had a right of unlimited access to the proposed law library, but established a priority system. Under this system, first priority was given to pretrial detainees without counsel, second priority to convicted inmates without counsel who sought postconviction relief on the offenses for which they were confined, and last priority to all other inmates.[74]

The United States Court of Appeals for the Fifth Circuit has used an analysis identical to that in *Dawson*. In *Morrow v. Harwell*[75] the court of appeals reviewed the length of incarceration for inmates admitted during a certain period. The court found that 33 out of 482 inmates were jailed for at least 90 days, and an additional two inmates were incarcerated for a longer period.[76] The court concluded that this evidence allowed an inference that some inmates were housed long enough to obtain a right of access.[77] Although the court of appeals believed the number of inmates entitled to access might be only one per month,

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ment) (Harnett County); Clay v. Wall, No. C-C-81-521-M (W.D.N.C. Feb. 24, 1984) (consent judgment) (Mecklenburg County).

67. Consent judgment at 1, *Clay* (No. C-C-81-521-M).

68. *Id.* at 3 (citing Williams v. Leeke, 548 F.2d 1336 (4th Cir. 1978)).

69. *Id.* at exhibit B.

70. *Id.*; *see infra* notes 120-21 (discussing library holdings).

71. Consent judgment at 4, 24-25, *Harnett County*, No. 86-603-CRT-86.

72. 437 F. Supp. 582 (E.D. Mich. 1977), *remanded*, 620 F.2d 303 (6th Cir. 1980).

73. *Id.* at 589.

74. O'Bryan v. County of Saginaw, 446 F. Supp. 436, 442 (E.D. Mich. 1978), *remanded*, 620 F.2d 303 (6th Cir. 1980).

75. 768 F.2d 619 (5th Cir. 1985).

76. *Id.* at 624.

77. *Id.* The court stated that the right of access was individual in nature and therefore, as long as the magistrate could reasonably have concluded an individual would qualify for the right, the jail was obligated to provide a means by which that inmate could reach the court. *Id.*

it nonetheless found the jail's checkout system an inadequate means of providing that potential inmate with access.[78] In *Leeds v. Watson*[79] the United States Court of Appeals for the Ninth Circuit similarly held that all inmates had a fundamental right of access to the courts.[80] The court ruled that the jail was required to provide access to all its inmates—composed of pretrial detainees, convicted adult inmates, and juveniles—without regard to their length of stay.[81]

Taken together, these cases demonstrate that county jails housing convicted inmates or pretrial detainees have an institutional duty to establish an adequate means of access to the courts.[82] In a similar vein North Carolina county jails have an absolute duty to provide inmates with reasonable access to the courts. All North Carolina county jails are authorized to hold convicted inmates for up to six months and, at the request of the sheriff or county commissioners, may hold state inmates serving longer sentences.[83] Satellite jails are authorized to hold misdemeanants on work release programs for up to two years.[84] Moreover, a recent study issued by the Governor's Crime Commission[85] found that county jails hold a significant number of pretrial detainees for extended periods. According to the study, seventy-two percent of county jail admissions were pretrial detainees.[86] Although their average stay was 6.5 days, those inmates not released within one week of admission could expect to remain in jail, on the average, for thirty-five days.[87] As a result the State's county jails have been holding inmates for long enough periods to enable an inmate to prepare and file a constitutional claim against the jail.

Although all North Carolina county jails have an obligation to comply with *Bounds*, not every county jail inmate is automatically entitled to request and receive access to legal assistance. Cases that have involved individual prisoners' claims for denial of access—as well as the consent judgments approved for the Gaston, Mecklenburg, and Harnett County Jails—demonstrate the practical limits jailers can impose on an individual inmate's request for access.

Pretrial detainees who are receiving assistance from their criminal attorney

78. *Id.*

79. 630 F.2d 674 (9th Cir. 1980).

80. *Id.* at 676-77.

81. *Id.*

82. The same conclusion has been reached with regard to Iowa's county jail system. Contemporary Studies Project, *supra* note 35, at 1160, 1204. In 1980 Iowa had 89 county jails, each holding between 4 and 140 inmates. *Id.* at 1082. The study concluded that sentenced county jail inmates would have a need for access to petition on civil rights, federal habeas corpus claims, and extradition proceedings, although the need might be infrequent. *Id.* at 1158-59. Pre-trial detainees would need access for civil rights and extradition claims. *Id.* at 1159-60. The study found that most Iowa jails had only a copy of the state statutes available for inmates. *Id.* at 1165. Absent alternative methods of providing access, the study concluded that many Iowa jails "could be named as defendants in access suits." *Id.* at 1168.

83. N.C. GEN. STAT. § 15A-1352(a), (b) (1983).

84. *See supra* notes 11-13 and accompanying text.

85. JAIL COMM., GOVERNOR'S CRIME COMM'N, SURVEY OF 1986 JAIL ADMISSIONS (Oct. 1987) (unpaginated) [hereinafter SURVEY].

86. *Id.* 1986 Jail Admissions (chart).

87. *Id.* Average L.O.S. [Length of Stay] for Inmates Remaining (chart).

on a civil matter are not entitled to *Bounds* access.[88] If an inmate can show, however, either that statutes bar the criminal attorney from providing assistance on a civil rights matter or that the criminal attorney has refused to assist him with a civil rights matter, jailers cannot deny the inmate legal assistance.[89] Moreover, jailers can deny access to those inmates who receive statutorily authorized, court-appointed attorneys for their criminal cases, but who reject them in order to proceed *pro se*.[90] The state fulfills its duty under *Bounds* by its offer of counsel. Finally, the United States Court of Appeals for the Fourth Circuit has ruled that convicted inmates housed temporarily in a county jail pending transfer to a state-operated facility can be categorized as "short-term" inmates for whom the jail is not required to provide access.[91] In *Magee v. Waters*[92] plaintiff was jailed for twenty-nine days before being transferred to a correctional facility.[93] The court of appeals held it was not unreasonable for plaintiff to wait until he was transferred to use a law library, particularly when he had no trial pending and had not shown any actual harm resulting from the lack of access.[94]

Because the *Magee* court was dealing with a convicted inmate awaiting transfer, it did not directly address the question of the length of stay in jail that would trigger an inmate's right of access. This question is significant for county jails in which inmates are housed for relatively short periods of time when compared to state prison inmates. North Carolina county jails can adopt one of two approaches to this issue. The first approach is to define a specific length of incarceration that will trigger an inmate's access right. Two courts have employed this approach.

In *Brown v. Manning*[95] the United States District Court for the Eastern District of Washington ruled that any county jail inmate housed longer than seventy-two hours was entitled to access for the purpose of pursuing constitutional claims.[96] This decision was based on the due process and equal protection clauses of the fourteenth amendment and a state-created liberty interest.[97] The

88. Dooley v. Sprinkle, No. 86-7270, slip op. at 2 (4th Cir. Mar. 6, 1987); *accord* Mann v. Smith, 796 F.2d 79, 83 (5th Cir. 1986); Love v. Summit County, 776 F.2d 908, 910, 914 (10th Cir. 1985), *cert. denied*, 107 S. Ct. 66 (1986).

89. *Dooley*, slip op. at 2; *accord Mann*, 796 F.2d at 84; *Love*, 776 F.2d at 910, 914.

90. United States v. Chatman, 584 F.2d 1358, 1360 (4th Cir. 1978); Falzerano v. Collier, 535 F. Supp. 800, 803 (D.N.J. 1982); *see* Bell v. Hopper, 511 F. Supp. 452, 453 (S.D. Ga. 1981).

91. Magee v. Waters, 810 F.2d 451, 452 (4th Cir. 1987).

92. 810 F.2d 451 (4th Cir. 1987).

93. *Id.* at 451.

94. *Id.* at 451-52; *accord* Cruz v. Hauck, 515 F.2d 322, 333 (5th Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).

95. 630 F. Supp. 391 (E.D. Wash. 1985).

96. *Id.* at 396.

97. *Id.* at 396, 398-99. The court accepted the inference in *Bounds* that a constitutional right of access to the courts arose out of the fourteenth amendment. *Id.* at 396 (referring to *Bounds*, 430 U.S. at 821). The state administrative code stated that all prison standards were mandatory, unless otherwise specified. Because one standard dictated that all jails had to provide access to legal materials when no other form of help was offered, the court viewed the statutes as creating a liberty interest. The only statutory exception to access applied to inmates housed less than three days at the jail. *Id.* at 398-99.

facility in *Rucker v. Grider*[98] was an assessment center whose function was to classify prisoners before their transfer to a permanent holding facility. The process lasted no longer than seventeen days.[99] The center's policy generally denied inmates direct access to the law library, but provided assistance from a law librarian and direct access in emergency situations.[100] The United States District Court for the Western District of Oklahoma held that the facility's need for an efficient, orderly processing outweighed the temporarily housed inmate's need for direct access and, as a result, found no constitutional violation.[101]

Defining a trigger time inevitably is somewhat arbitrary. This problem can be minimized, however, by examining statistics on North Carolina county jail admissions. In North Carolina the average length of incarceration for convicted inmates, who comprise approximately twenty-three percent of the county jail population, is fourteen days.[102] About fifty-six percent of all inmates are jailed for traffic violations, drunkenness, and probation violations.[103] Most of them are in jail less than one week.[104] Seventy-two percent of jail prisoners are pretrial detainees whose average stay is 6.5 days.[105] Twenty percent of all pretrial detainees are not released within one week of their admission; consequently, they face longer jail terms, which can exceed one month.[106] Based on these figures, incarceration for longer than one week would be a reasonable trigger time, after which an inmate must be allowed a right of access. One week would eliminate the claims of a substantial number of convicted inmates whose sentences are very short, as well as those of the vast majority of pretrial detainees. A one-week trigger time would grant access to those convicted inmates whose sentences are most likely to reach statutory limits and to pretrial detainees whose stays are uncertain. One week would also be consistent with the guidelines provided in the *Brown* and *Rucker* decisions.[107]

A second option available to jails is illustrated by the Mecklenburg and Gaston County consent judgments[108] and by the *O'Bryan* decision.[109] These decisions avoided creating an arbitrary trigger time by developing a priority use system for inmates who needed to obtain legal assistance. Each system provided access only for habeas corpus relief and civil rights actions.[110] Priority use was

98. 526 F. Supp. 617 (W.D. Okla. 1980).

99. *Id.* at 620.

100. *Id.* at 619.

101. *Id.* at 620-21. This decision was consistent with the court's instructions in Cruz v. Hauck, 515 F.2d 322, 333 (5th Cir. 1975), *cert. denied*, 424 U.S. 917 (1976); *see supra* note 46 and accompanying text.

102. SURVEY, *supra* note 85, 1986 Jail Admissions (chart).

103. SURVEY, *supra* note 85, Sentenced Jail Admission by Offense (chart).

104. SURVEY, *supra* note 85, Sentenced Jail Admission by Offense (chart).

105. SURVEY, *supra* note 85, 1986 Jail Admissions Chart, Average L.O.S. [Length of Stay] for Inmates Remaining (chart)

106. SURVEY, *supra* note 85, Percent Remaining Over Time (chart).

107. *See supra* notes 95-101 and accompanying text.

108. *See supra* notes 66-73 and accompanying text.

109. 437 F. Supp. 582 (E.D. Mich. 1977), *remanded*, 620 F.2d 303 (6th Cir. 1980).

110. Consent judgment at exhibit B, Clay v. Wall, No. C-C-81-521-M (W.D.N.C. Feb. 24, 1984).

based on inmate classification or approaching court deadlines. This approach has strong administrative advantages for jailers. Because all jails must provide access, this approach may also lead to more frequent use of legal assistance by inmates and a greater feeling among jailers that providing legal assistance is economically justifiable. By focusing on the claim that underlies the need for legal assistance, this alternative also does more to realize the Supreme Court's concern for protecting claims of fundamental constitutional rights than does the length of incarceration approach.[111]

After concluding that *Bounds* applies to North Carolina's county jails, the next issue is how jails can provide "meaningful" access. *Bounds* presented two options: the availability of law libraries to inmates or assistance from individuals trained in the law.[112] Although jail size was not an important factor in determining whether *Bounds* applied to a particular jail, inmate population is an important element in deciding what constitutes an adequate remedy.[113] When the number of inmates entitled to legal assistance is small, the jail need not establish elaborate means of providing access.[114] Presumably, cost effectiveness is the justification. How jail size affects the adequacy of the remedy is most clearly demonstrated by reviewing the adequacy of law libraries.

Many jails have chosen to provide law libraries.[115] A county jail law library need not be the equivalent of a fully stocked law school library.[116] Certain volumes, however, are considered essential to enable an inmate to conduct even the most rudimentary research.[117] A subcommittee of the American Library Association (ALA) has promulgated recommended minimal collection listings for correctional facilities.[118] The ALA list is somewhat larger than the collection Harnett County, which has one of the smaller county jails in the state,[119] has agreed to provide. The ALA list of sources includes *Shepard's United States Citations*, *Shepard's Federal Citations*, *Shepard's* state citations, several treatises, and a manual of criminal forms.[120] The ALA has recommended a different

111. *See supra* text accompanying notes 31-34.

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

113. Morrow v. Harwell, 768 F.2d 619, 624 (5th Cir. 1985); Cruz v. Hauck, 627 F.2d 710, 719 (5th Cir. 1980): Dawson v. Kendrick, 527 F. Supp. 1252, 1313 (S.D. W. Va. 1981).

114. *Morrow*, 768 F.2d at 624.

115. The jails discussed in several federal cases contained law libraries. *See, e.g.*, *Cruz*, 627 F.2d at 720; Tuggle v. Barksdale, 641 F. Supp. 34, 39 (W.D. Tenn. 1985); Mawby v. Ambroyer, 568 F. Supp. 245, 248 (E.D. Mich. 1983).

116. Fluhr v. Roberts, 460 F. Supp. 536, 537 (W.D. Ky. 1978) (stating that a full-scale law library is unnecessary).

117. *Cruz*, 627 F.2d at 720 (requiring FEDERAL SUPPLEMENT to be added to collection); L. BAYLEY, L. GREENFIELD, F. NOGUEIRA, JAIL LIBRARY SERVICE 94-95 (1981) [hereinafter JAIL LIBRARY SERVICE].

118. JAIL LIBRARY SERVICE,, *supra* note 117, at 94; *see* AMERICAN ASS'N OF LAW LIBRARIES, RECOMMENDED COLLECTIONS FOR PRISON AND OTHER INSTITUTION LAW LIBRARIES (revised ed. 1980) [hereinafter RECOMMENDED COLLECTIONS] (listing recommended sources for jail libraries).

119. GOVERNOR'S CRIME COMM'N PROPOSAL FOR STUDY ON NORTH CAROLINA COUNTY JAILS, JAILS IN NORTH CAROLINA § 1 (drafted in 1987) (stating average capacity of North Carolina jails is 44, which is small by any standard; Harnett County's official capacity is 28).

120. RECOMMENDED COLLECTIONS, *supra* note 118, at 5-6. Harnett County agreed to provide two copies of the following books in the jail: NORTH CAROLINA RULES OF COURT, FEDERAL

collection for jails that house accused felons and inmates awaiting appeal. This expanded listing more nearly approximates what the North Carolina Department of Corrections agreed to provide in *Bounds* and in the Gaston and Mecklenburg County collections.[121]

A jail cannot satisfy *Bounds* merely by buying books. Inmates must be capable of using them effectively. Inmates must receive guidance in how to use legal materials and, in instances of illiterate inmates, more extensive assistance in preparing claims.[122] If jails do not provide such assistance, meaningful access to courts is not achieved.[123] As a result jailers who provide law libraries in their

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RULES OF COURT; PRISONER SELF HELP LITIGATION MANUAL, and FOURTH CIRCUIT PRISONER LITIGATION MANUAL. The Harnett County Jail provided one copy of the following: STRONG'S NORTH CAROLINA INDEX 3D, VOLUMES 1A-1C (PART III) OF THE NORTH CAROLINA GENERAL STATUTES, BLACK'S LAW DICTIONARY, LAFAVE & SCOTT, CRIMINAL LAW, and COHEN, LEGAL RESEARCH. The County further agreed to provide photocopies of specifically requested items from the following reporters: NORTH CAROLINA REPORTS (volume 200-present), NORTH CAROLINA COURT OF APPEALS REPORTS, FEDERAL REPORTER (1965-present), FEDERAL SUPPLEMENT (1965-present), UNITED STATES SUPREME COURT REPORTER (Lawyers' Ed. 2d), and the UNITED STATES CODE. Consent judgment at 24-25, Custer v. Harnett County, No. 86-603-CRT-86 (E.D.N.C. Apr. 2, 1987).

In addition to what Harnett County offered, the American Association of Law Libraries would provide the UNITED STATES CODE ANNOTATED (Constitution, Titles 18 and 28 only), SHEPARD'S volumes for federal, state, and Supreme Court cases, BAILEY AND ROTHBLATT, COMPLETE MANUAL OF CRIMINAL FORMS, nutshells on legal research, criminal procedure, and juvenile courts (instead of the criminal law treatise), SOKOL, FEDERAL HABEAS CORPUS (2d ed.), AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES, and a state criminal practice and procedure treatise. *See* RECOMMENDED COLLECTIONS, *supra* note 118, at 1-3.

121. The expanded list would add the following materials to those listed *supra* note 120: MODERN FEDERAL PRACTICE DIGEST, WRIGHT, FEDERAL PRACTICE AND PROCEDURE, one of several treatises on criminal law, one of several prisoner rights periodicals, MARTINDALE-HUBBELL LEGAL DICTIONARY, WEST'S FEDERAL FORMS, and a subscription to the CRIMINAL LAW BULLETIN. RECOMMENDED COLLECTIONS, *supra* note 118, at 4-6. The Department of Corrections in *Bounds* agreed to provide all the listed materials, or their equivalents, except the federal practice treatises and the SHEPARD'S materials. *See Bounds*, 430 U.S. at 819-20 n.4. Gaston County's collection included check-out provisions for A.L.R.2D, A.L.R.3D, A.L.R.4TH, A.L.R. FEDERAL, CORPUS JURIS SECUNDUM, AMERICAN JURISPRUDENCE 2D, and FEDERAL PRACTICE AND PROCEDURE. The Gaston County Jail also provided access to all the reporters previously mentioned. In the jail, the County agreed to maintain copies of NORTH CAROLINA GENERAL STATUTES, NORTH CAROLINA RULES OF COURT, FEDERAL HABEAS CORPUS, LAFAVE & SCOTT, CRIMINAL LAW, COHEN, LEGAL RESEARCH, and CONSTITUTIONAL RIGHTS OF PRISONERS. *See* County response to May 20, 1982 court order at exhibit B, Parnell v. Waldrep, 538 F. Supp. 1203 (W.D.N.C. 1982) (No. C-C-79-136). Mecklenburg County agreed to the *Bounds* listing, but substituted a federal digest for federal reporters. It also added copies of FEDERAL RULES OF CIVIL AND CRIMINAL PROCEDURE, MANVILLE, PRISONERS' SELF-HELP LITIGATION MANUAL, and PRISONER PETITIONS IN THE FOURTH CIRCUIT. *See* Clay v. Wall, No. C-C-81-521-M, slip op. at 3-4 (W.D.N.C. Feb. 24, 1984).

122. Cruz v. Hauck, 627 F.2d 710, 721 (5th Cir. 1980) (remanded to determine if access was available to non-English speaking and illiterate inmates without library use assistance or use of writ writers). One judge described the substantive problem of providing inmates, literate or illiterate, with law libraries:

> To expect untrained laymen to work with entirely unfamiliar books, whose content they cannot understand, may be worthy of Lewis Carroll, but hardly satisfies the substance of the constitutional duty. Access to full law libraries makes about as much sense as furnishing medical services through books like: "Brain Surgery Self-Taught" or "How to Remove Your Own Appendix", along with scalpels, drills, hemostats, sponges and sutures.

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

123. "Library books, even if 'adequate' in number, cannot provide [meaningful] access to the courts for those persons who do not speak English or who are illiterate." *Cruz*, 627 F.2d at 721. The Fifth Circuit advocated a totality-of-the-circumstances approach to determine whether illiterate or non-English speaking inmates received the necessary assistance to achieve meaningful access. *Id.* at 720-21. *See generally* Smith v. Bounds, 610 F. Supp. 587, 604-06 (E.D.N.C. 1985) (discussing

jails must be prepared either to accept responsibility for learning how to conduct legal research in order to assist inmates, or to hire a part-time librarian.[124] Meaningful access is also denied by request systems that force inmates to ask for materials and cases without the aid of digests or prisoner self-help manuals.[125] Finally, jails must update their legal collections[126] and provide inmates with sufficient time to conduct research.[127] The United States Court of Appeals for the Fourth Circuit has held that forty-five minutes of research time three times a week is inadequate.[128]

In addition to these legal questions on access, jailers selecting the library option must make a number of policy decisions. Will the library be maintained in the jail or in a nearby building, such as a courthouse?[129] Will changes in staffing be required?[130] What additional security considerations will emerge? For counties without county law libraries and whose facilities, staff, and funding may be dwindling, these questions may present overwhelming obstacles.[131] As a result, it may be more cost effective for small jails to provide legal assistance from persons trained in the law.

Legal assistance programs include training inmates as paralegal assistants and using paraprofessionals or law students, all of whom work under the supervision of a licensed attorney.[132] Such programs can also include a county's contracting with legal service agencies or establishing a group of local volunteer

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how State's library plan failed to effect meaningful access), *aff'd*, 813 F.2d 1299 (4th Cir. 1987). For discussion of the more recent evaluation of the program that arose from the Supreme Court decision in *Bounds*, see *infra* notes 148-61 and accompanying text.

124. At least one case required the hiring or assignment of staff to maintain jails' law libraries. *See* Tuggle v. Barksdale, 641 F. Supp. 34, 39 (W.D. Tenn. 1985). The ALA division of Specialized and Cooperative Library Agencies has recommended that, for jails with average daily populations under 25, a jail official maintain the library; for those between 25 and 100, a half-time librarian be hired; for those between 100 and 150, a three-fourths time librarian be hired; and for jails with average daily populations between 150 and 500, a full-time librarian be hired. These recommendations assume full compliance with the Association's standards not only for legal materials, but also for all other reading materials. JAIL LIBRARY SERVICE, *supra* note 117, at 95.

125. Martino v. Carey, 562 F. Supp. 984, 993 (D. Or. 1983). It appears that the Fourth Circuit will accept a request system that both provides inmates with the materials necessary to develop specific requests and operates without unnecessary delay. *Accord* Fluhr v. Roberts, 460 F. Supp. 536, 540 (W.D. Ky. 1978) (request system accepted by the court); Stewart v. Gates, 450 F. Supp. 583, 589 (C.D. Cal. 1978) (request system accepted by the court), *remanded*, 618 F.2d 117 (9th Cir. 1980). *Contra* Green v. Ferrell, 801 F.2d 765, 772 (5th Cir. 1986) (request system without direct access to materials inadequate); Morrow v. Harwell, 768 F.2d 619, 624 (5th Cir. 1985) (request system inadequate without case digests or personal assistance from individuals certified to give legal advice); Johnson v. Galli, 596 F. Supp. 135, 138 (D. Nev. 1984) (request system without direct access to materials inadequate).

126. Tuggle v. Barksdale, 641 F. Supp. 34, 39 (W.D. Tenn. 1985).

127. Jones v. Wittenburg, 509 F. Supp. 653, 683-84 (N.D. Ohio 1980).

128. Williams v. Leeke, 584 F.2d 1336, 1340-41 (4th Cir. 1978), *cert. denied*, 442 U.S. 911 (1979).

129. *See* O'Bryan v. County of Saginaw, 437 F. Supp. 582, 601 (E.D. Mich. 1977) (ordering jail to develop room for legal research), *remanded*, 620 F.2d 303 (6th Cir. 1980). For those few counties that have county law libraries, jailers might consider establishing a program to transport inmates who are entitled to law library access to that library. Such an arrangement would probably be upheld, as long as sufficient time was permitted for research and essential volumes and librarian help were available.

130. *See supra* note 124.

131. *See supra* note 8.

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

attorneys to provide assistance.[133] Because North Carolina law does not authorize court-appointed counsel or public defenders to assist inmates in filing federal habeas corpus suits or civil rights actions,[134] jailers cannot rely on statutorily authorized programs of assistance. Furthermore, jailers cannot rely on the federal Civil Rights Act as a means for providing legal assistance to inmates.[135] Although section 1988 of the Act provides for the prevailing attorney in a civil rights suit to receive attorneys' fees, it does not operate to provide counsel.[136] Moreover, section 1988 does not provide strong incentives for attorneys to take on inmates' civil rights suits.[137] As a result of these statutory limitations jailers will have to develop their own plans for providing legal assistance.

Two models of county jail assistance programs are worth noting. The Norfolk County Jail in *Carter v. Fair*[138] did not have a law library. Instead, the jail contracted with the Norfolk County Bar Advocates Program to provide one attorney once a week for three hours.[139] The attorney was paid fifty dollars for this weekly session. Inmates with legal questions scheduled appointments through jail staff to see the attorney. The legal assistance was restricted to helping inmates make clear, factually oriented, meritorious claims on a variety of issues, and assisting inmates in understanding legal forms. The attorneys conducted minimal amounts of legal research for inmates and did not generally provide them with listings of citations.[140] The United States Court of Appeals for the First Circuit held that this legal assistance program provided an adequate mechanism for helping inmates gain access to the courts, in the absence of evidence that the assistance was insufficient.[141]

In *Morrow v. Hartwell*[142] the McLennan County Jail combined a bookmobile checkout system with legal assistance from Baylor University law students.[143] Initially, the United States Court of Appeals for the Fifth Circuit found these efforts inadequate because the jail had no digests for inmates to use in requesting legal materials they needed, and the law students were not permitted by law to provide any legal advice.[144] Because the inmates had no direct legal assistance, the court of appeals stated the jail had to provide a better equipped library.[145] The jail subsequently upgraded the paralegal assistance by

133. *Id.*

134. Loren v. Jackson, 57 N.C. App. 216, 219, 291 S.E.2d 310, 312 (1982) (North Carolina law does not authorize plaintiff with § 1983 claim to receive court-appointed counsel); N.C. GEN. STAT. §§ 7A-450, -451 (1986) (court-appointed counsel); *id.* § 7A-452 (public defenders).

135. 42 U.S.C. § 1988 (1982).

136. *Id.*

137. FEDERAL JUSTICE CENTER, RECOMMENDED PROCEDURES FOR HANDLING PRISONER CIVIL RIGHTS CASES IN THE FEDERAL COURTS 67-69 (1980) (discussing the shortcomings of relying on § 1988) [hereinafter PROCEDURES].

138. 786 F.2d 433 (1st Cir. 1986).

139. *Id.* at 434. Approximately 25 attorneys participated in the program. *Id.*

140. *Id.*

141. *Id.* at 435.

142. 768 F.2d 619 (5th Cir. 1985); *see supra* notes 75-78 and accompanying text.

143. *Id.* at 622.

144. *Id.* at 622-23.

145. *Id.* at 624.

arranging for the students to be certified to provide legal assistance under an attorney's supervision; the plan received court approval.[146] Most of the students' efforts with inmates focused on acting as "ombudsmen" or answering questions from pretrial detainees that their lawyers could have handled. Inmates rarely raised civil rights or habeas corpus questions.[147]

The United States District Court for the Eastern District of North Carolina revisited the *Bounds* litigation recently to evaluate a legal assistance plan that became necessary when the state failed to follow through on its law library program.[148] Following the Supreme Court's decision in *Bounds*, plaintiffs attempted to monitor the State's efforts to institute its library plan.[149] Plaintiffs identified numerous failures and moved the district court to issue a finding that the State had not complied with its duty to provide inmates with an adequate means of access through a law library facility.[150] The District Court for the Eastern District of North Carolina granted plaintiffs' motion because it found a number of deficiencies in the State's plan.[151] First, the State had failed to provide indigent inmates with free copies of legal materials, including affidavits and memoranda.[152] Second, the State had failed to implement an inmate paralegal training program.[153] Third, a large percentage of inmate requests to use the law library facilities had been denied without satisfactory explanation.[154] The district court concluded that the State had to provide a legal assistance program and ordered the parties to submit proposals.[155]

Plaintiffs then submitted a proposal calling for the State to contract for legal services with Legal Services of North Carolina (LSNC).[156] The State's plan proposed that it hire one supervising attorney, who would in turn hire a staff of attorneys to operate as independent contractors.[157] The court ruled that the State's plan did "not afford the attorneys involved the requisite independence to provide inmates adequate representation and that their responsibilities to the Department of Correction [were] . . . so great that the plan . . . would force the attorneys to violate . . . the Code of Professional Conduct."[158] The court approved the adoption of plaintiffs' proposal for the State to fund a contract between the Department of Corrections and LSNC. Under this contract LSNC would hire one supervising attorney and nine other lawyers, who would be as-

146. Morrow v. Harwell, 640 F. Supp. 225, 227-28 (W.D. Tex. 1986).

147. *Id.* at 227.

148. Smith v. Bounds, 610 F. Supp. 597, 603 (E.D.N.C. 1985), *aff'd*, 813 F.2d 1299 (4th Cir. 1987).

149. *Id.* at 599.

150. *Id.* at 600.

151. *Id.* at 601.

152. *Id.* at 602.

153. *Id.* at 602-03.

154. *Id.* at 603.

155. *Id.* at 606.

156. Smith v. Bounds, 657 F. Supp. 1327, 1328 (E.D.N.C. 1986). The court expressly refused plaintiffs' attempt to expand the scope of their plan to include county jail pretrial detainees. *Id.* at 1328 n.3.

157. *Id.* at 1329.

158. *Id.* at 1331.

sisted by five secretaries.[159]

The court specifically called attention to several benefits of plaintiffs' plan. First, LSNC had a history of experience with indigent and inmate clients. Second, LSNC could offer statewide support services and office space. Third, LSNC could supplement its program with law school clinic programs. Fourth, because LSNC would have the authority to hire and fire attorneys, the independence of the attorneys from the State was guaranteed.[160] On the basis of these strengths, and particularly the guarantee of independence, the legal assistance plan approved by the district court should be upheld on appeal.[161]

The legal assistance program that North Carolina's state prisons ultimately may offer greater substantive help than the *Carter* or *Morrow* plans in terms of availability of lawyers and quality of assistance they could provide. The three plans are similar in that they all employ attorneys or paralegals who operate independently of the prison or jail. They also incorporate the support of existing programs—for example, LSNC, a county bar association, or a law school's clinical program.

The plan demonstrates the general advantages legal assistance plans have over law library programs. In the long run such plans may be more cost effective and require less staff time and effort. They certainly provide more effective legal assistance than a law library. Attorneys can weed out frivolous inmate claims[162] and can mediate or negotiate substantive issues with jailers, thereby reducing litigation.[163] Lawyers can also conduct more effective investigations with witnesses outside the jail.[164] A legal assistance service can reduce the problems of conflict of interest and preferential status that arise with writ writers.[165] Contracts with legal aid agencies have the added benefit of providing inmates with attorneys who have the backing of an agency and expertise in civil rights litigation.[166] These characteristics of legal assistance programs may make them a more reasonable and appealing choice for county jails.

Regardless of what method jailers select, however, it is imperative that they give inmates clear notice of the service. It is not sufficient for jails to provide access on paper, granting it only when an inmate asks about legal assistance. Jails must provide routine notification of access services and procedures to all

159. *Id.* at 1332. At the time of plaintiffs' proposal, LSNC had already been operating a legal services program for ten years. Thus, the hiring under the proposed contract would supplement LSNC's existing staff—four attorneys and one secretary—who were operating the existing legal services program for prisoners.

160. *Id.* at 1332-32.

161. The district court stayed implementation of the plan to give the State the opportunity to appeal. The United States Court of Appeals for the Fourth Circuit affirmed the district court. *Smith v. Bounds*, No. 86-7579, (available on LEXIS) (March 3, 1988). *See Imnates Must be Given Lawyers, Court Says*, Raleigh News & Observer, March 5, 1988, at 12 col. 4.

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

163. *Id.*

164. *Id.*

165. *Id.* "Writ-writers" are jail house lawyers. Inmates who attain the status of writ-writers can disrupt prison discipline and become a nuisance to the court when they file an excessive number of poorly drafted petitions. Johnson v. Avery, 393 U.S. 483, 488-89 (1968).

166. *Smith*, 657 F. Supp. at 1331.

eligible inmates.[167] Placing this information in existing inmate guides and rule brochures should suffice.

The final question is who is responsible for providing a right of access to county jail inmates. The North Carolina General Assembly has placed responsibility on a number of individuals: the county sheriff[168] and chief jailer[169] who are responsible for the operations of county jails, and county commissioners who hold funding authority for jails.[170] Arguably, the Department of Human Resources is also potentially liable for a failure to provide adequate access. This office has responsibility for promulgating minimal jail standards that ensure the health, safety, and welfare of inmates.[171] Lawyers in some North Carolina counties are refusing to represent indigent clients, who are likely to include county jail inmates.[172] When combined with the unreliability of 42 U.S.C. section 1988 as an incentive for attorneys to take on civil rights suits and inadequate staffing and funding for legal service agencies,[173] the situation could evolve that the only real source of legal protection for inmates who wish to challenge conditions of their confinement is from inmates themselves. A court, therefore, could find the Department of Human Resources liable for endangering the welfare of inmates by failing to provide them with an adequate means of pursuing potentially legitimate constitutional claims.[174]

Inmates undoubtedly have a constitutional right of access to the courts which requires that prison authorities take affirmative action to provide them with an adequate means of exercising that right. Some North Carolina county jails may have failed to fulfill their obligations under *Bounds* because of a belief that the Supreme Court's holding does not apply to them or because of uncertainty about the measures they must take. Given the changing role of jails in North Carolina, it is important that state and county governments develop plans for providing inmates with access. They can begin by reviewing the issues discussed in this Note and adapting the methods that courts have approved to their particular situations. By taking action, jailers can better protect inmate rights, improve their facilities and services, and avoid unnecessary and costly litigation.

ANNE R. BOWDEN

167. Leeds v. Watson, 630 F.2d 674, 676-77 (9th Cir. 1980); Heitman v. Gabriel, 524 F. Supp 622, 628 n.5 (W.D. Mo. 1981). Jailers would be well advised to keep accurate and complete written records of all requests received for use of legal materials and assistance and their specific response so they could demonstrate implementation of a *Bounds* access program.

168. N.C. GEN. STAT. § 162-22 (Supp. 1985).

169. *Id.* § 162-55.

170. *Id.* § 153A-218 (1987) (county operates and funds county jails).

171. *Id.* § 153A-221(a)(10).

172. *Courts Panel Seeks to Ensure Justice for Poor*, Raleigh News & Observer, Oct. 31, 1987, at 13A, col. 4.

173. PROCEDURES, *supra* note 137, at 67-69.

174. A draft of "Proposed Standards" for North Carolina county jails includes a statement that their operations programs must include information about access to the courts through legal assistance or legal materials. However, the draft contains no guidelines on what might be an adequate means of doing this. NORTH CAROLINA DEP'T OF HUMAN RESOURCES, MINIMUM STANDARDS FOR THE OPERATION AND CONSTRUCTION OF LOCAL CONFINEMENT FACILITIES (Draft No.4, May 20, 1987).