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Constitutional Law - Corrections - Prisoners' Constitutional Right of Access to Courts Imposes Duty on State to Provide Prison Law Libraries

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interest."[113] It is suggested that giving pay cablecasting room to grow is more consonant with these directives than hindering it with highly restrictive rules and regulations.

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CONSTITUTIONAL LAW — CORRECTIONS — PRISONERS' CONSTITUTIONAL RIGHT OF ACCESS TO COURTS IMPOSES DUTY ON STATE TO PROVIDE PRISON LAW LIBRARIES.

Bounds v. Smith (U.S. 1977)

North Carolina prison inmates filed three separate actions against state officials under section 1983,[1] alleging that they had been denied access to the courts in violation of their fourteenth amendment rights by the state's failure to provide legal research facilities.[2] The actions were eventually consolidated in the District Court for the Eastern District of North Carolina[3] which granted the inmates' motion for summary judgment.[4] The court determined that the state's only prison library was "severely inadequate" and that the inmates had no other available legal assistance.[5] Therefore, the court concluded that the inmates' rights of access to the courts and equal protection of the laws had been infringed.[6] In view of the difficulty of devising a remedy for this situation caused by North Carolina's decentralized prison system,[7] the district court accordingly "charge[d] the Department of Correction with the task of devising a Constitutionally sound program" to assure inmate access to the courts.[8] The state's proposed plan[9]

113. *Id.* § 303(g).

1. Bounds v. Smith, 430 U.S. 817, 818 (1977). Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970).

2. 430 U.S. at 818.

3. The opinion of the district court was unreported. Upon its first consideration of one of the consolidated actions, the district court had granted summary judgment against the prisoners. 430 U.S. at 818 n.2. When the case was appealed, however, the circuit court remanded, suggesting consolidation with the other two cases which were pending in the district court at the time. *Id.*

4. 430 U.S. at 818.

5. *Id.*

6. *Id.*

7. The 13,000 inmates in North Carolina are housed in 77 prison units, in 67 counties. Sixty-five of the units hold fewer than 200 inmates. *Id.* at 818 n.3, *citing* Brief for Petitioners at 7 n.3.

8. 430 U.S. at 818-19.

9. *Id.* at 819 & n.4. The state's plan called for seven libraries in prisons across the state with smaller facilities at the Central Prison Segregation Unit and the

for seven prison libraries across the state was accepted by the district court[10] over the inmates objections.[11] On appeal by both parties,[12] the Court of Appeals for the Fourth Circuit affirmed.[13] The United States Supreme Court granted certiorari[14] and affirmed the decision of the Fourth Circuit, *holding* that states are constitutionally required to protect the right of prisoners to access to the courts by providing them with libraries or alternative sources of legal knowledge. *Bounds v. Smith,* 430 U.S. 817 (1977).

Traditionally, the courts have been reluctant to review prison regulations or the acts of prison officials, an attitude termed the "hands off" doctrine.[15] This reluctance of the judiciary to become involved in the corrections field appears to be based upon three rationales: 1) the theory of separation of powers;[16] 2) the lack of judicial expertise in the field of

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Women's Prison. Inmates would make appointments to use the library and be given transportation and housing for a full day's work. *Id.* at 819. Books, legal forms, writing paper, typewriters and copy machines would be available. Inmates trained as legal assistants and typists would also be present. *Id.* The state estimated that eventually 350 inmates per week would be able to use the library, although those inmates not facing a court deadline might have to wait three to four weeks before going to the library. *Id.*

The list of books included in the state's proposal was in compliance with the list approved as the minimum collection for prison law libraries by the American Correctional Association, American Bar Association and the American Association of Law Libraries except for the omission of Shephard's Citations and local rules of court. *Id.* at 819-20 n.4.

10. *Id.* at 820. The district court ordered two changes in the plan: 1) that extra copies of the USCA Habeas Corpus and Civil Rights Act volumes be provided, and 2) that no reporter advance sheets be discarded so that the libraries would slowly build up duplicate sets. *Id.* at 820 n.6.

11. *Id.* at 819-20. The inmates claimed that the plan was totally inadequate, and urged establishment of a library in each prison, inclusion of additional legal materials and creation of a central circulating library. *Id.*, at 820 & n.5.

12. Smith v. Bounds, 538 F.2d 541 (4th Cir. 1975). Both parties appealed from orders adverse to them. The inmates asserted that the plan submitted by the state was inadequate in that it failed to provide for an attorney's office to supplement the library and that the library was not sufficiently extensive. *Id.* at 542. The state contended that it was not obligated to provide prisoners with libraries or alternative methods of obtaining such information and that the grant of summary judgment requiring it to submit a plan for legal assistance was without merit. *Id.*

13. *Id.* at 545. The circuit court did not affirm in one respect. The Fourth Circuit found that the plan denied women the same right of access as men, and ordered the discrimination eliminated since it had no justification. *Id.* The state did not subsequently challenge the sex discrimination ruling. 430 U.S. at 821 n.7.

14. 425 U.S. 910 (1976).

15. *See, e.g.,* Banning v. Looney, 213 F.2d 771 (10th Cir.), *cert. denied,* 348 U.S. 859 (1954); *In re* Taylor, 187 F.2d 852 (9th Cir.), *cert. denied,* 341 U.S. 955 (1951); Stroud v. Swope, 187 F.2d 850 (9th Cir.), *cert. denied,* 342 U.S. 829 (1951); Sturm v. McGrath, 177 F.2d 472 (10th Cir. 1949); Powell v. Hunter, 172 F.2d 330 (10th Cir. 1949); Numer v. Miller, 165 F.2d 986 (9th Cir. 1948).

According to several commentators, this phrase was first used in a paper prepared for federal prisons, FRITCH, CIVIL RIGHTS OF FEDERAL PRISON INMATES 31 (1966); Goldfarb & Singer, *Redressing Prisoners' Grievances,* 39 G.W.L. REV. 175, 181 n.20 (1970). *See generally* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts,* 72 YALE L.J. 506 (1963).

16. *See, e.g.,* Banning v. Looney, 213 F.2d 771, (10th Cir.), *cert. denied,* 348 U.S. 859 (1954) (court does not have power to supervise prison administration or to interfere with prison rules); *In re* Taylor, 187 F.2d 852, 853 (9th Cir.), *cert. denied,* 341

penology;[17] and 3) the fear that intervention by the courts would subvert prison discipline.[18] The first erosion of the "hands off" doctrine occurred in the area of prisoners' right of access to the courts.[19]

This right was first expressly recognized in 1941 by the Supreme Court in *Ex parte Hull.*[20] In *Hull,* the Court invalidated a Michigan state prison regulation which required that all documents that a prisoner wished to file with a court be approved by the parole board's legal investigator before being forwarded to the court.[21] Hull's petition for a writ of habeas corpus was found improperly drawn and therefore was not transmitted to the court.[22] In holding that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus"[23] the Supreme Court emphasized that only the judiciary could determine whether a petition was properly drawn.[24] Furthermore, the Court concluded that although the state may have had a reasonable aim in promulgating this rule, the individual's right of access to the courts must be accorded paramount consideration.[25]

U.S. 955 (1951) (not within province of courts to supervise treatment of federal prisoners); Sturm v. McGrath, 177 F.2d 472, 473 (10th Cir. 1949) (court is without power to superintend administration of or discipline in a penitentiary); Numer v. Miller, 165 F.2d 986, 987 (9th Cir. 1948) (responsibility for prison discipline is vested in the Bureau of Prisons, not in the courts).

17. *See* Gilmore v. Lynch, 319 F. Supp. 105, 112 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971) (correctional officials considered more fit than judges to make decisions regarding prison administration). *Cf.* Carouthers v. Follette, 314 F. Supp. 1014, 1023 (S.D.N.Y. 1970) (court noted the greater experience of prison administrators although holding in favor of the prisoners in their suit against the officials).

18. *See, e.g.,* Williams v. Steele, 194 F.2d 32 (8th Cir. 1952) (courts without power to supervise or interfere with discipline of prisoners, they may only release those illegally detained); Golub v. Krimsky, 185 F. Supp. 783 (S.D.N.Y. 1960) (prisoner denied right to sue warden of federal prison for failure to provide proper medical care because allowing such actions would subvert prison discipline); Peretz v. Humphrey, 86 F. Supp. 706 (M.D. Pa. 1949) (not within province of court to interfere with prison discipline).

For a discussion of the rationales for the "hands off" doctrine, *see* Fox, *Criminal Law — The First Amendment Rights of Prisoners,* 63 J. CRIM. L.C.&P.S. 162 (1972); *Goldfarb & Singer, supra* note 15, at 181.

19. *See, e.g.,* Johnson v. Avery, 393 U.S. 483 (1969); Griffin v. Illinois, 351 U.S. 12 (1956); *Ex parte* Hull, 312 U.S. 546 (1941). *See also* Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation,* 23 STAN. L. REV. 473, 478 (1971).

20. 312 U.S. 546 (1941). The right of access to the courts has been described as:

> the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein, and to send and receive communications to and from judges, courts and lawyers concerning such matters.

Hatfield v. Bailleaux, 290 F.2d 632, 637 (9th Cir. 1961).

21. 312 U.S. at 548-49.

22. *Id.* at 547-48 n.1.

23. *Id.* at 549.

24. *Id.*

25. *Id.*

The principle announced in *Hull* was subsequently expanded by the Supreme Court in *Johnson v. Avery*.[26] *Johnson* involved a Tennessee prisoner who had been transferred to a maximum security cell as punishment for violation of a prison regulation prohibiting inmates from assisting other prisoners in the preparation of writs.[27] In reversing the decision of the Court of Appeals for the Sixth Circuit, the Supreme Court held that the regulation was void because it effectively barred illiterate prisoners from obtaining writs of habeas corpus.[28] Thus, unlike the total denial of access involved in *Hull*,[29] *Johnson* invalidated an impediment to access to the courts by prisoners.[30] The *Johnson* Court stated that "it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints not be denied or obstructed."[31] This right was found to be superior to the state interest in preventing the admittedly undesirable aspects of allowing "jailhouse lawyers" to function.[32] The Court concluded that inmate writ writing must be permitted "unless and until the state provides some reasonable alternative."[33]

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26. 393 U.S. 483 (1968). Many of the barriers to indigent prisoners' access to the courts were removed in the interim between *Hull* and *Johnson*. However, this result was accomplished by a series of cases that did not deal with the right of access of prisoners to the court. The leading decision in this series is Griffin v. Illinois, 351 U.S. 12 (1956). In *Griffin*, the Supreme Court held that the Constitution requires that an indigent prisoner be afforded the same opportunity to secure review of his conviction as one who can afford to pay the costs of such review. *Id.* at 19. Therefore, the Court determined that an indigent prisoner had to be provided with a free trial transcript or other means of obtaining the same information. *Id.* at 20. In expanding the instances in which indigents must be provided with free transcripts or alternative means of obtaining an equivalent report, the cases which followed *Griffin* emphasized the equal protection, rather than the due process, basis of that decision. *See, e.g.*, Mayer v. Chicago, 404 U.S. 189 (1971); Williams v. Oklahoma City, 395 U.S. 458 (1969); Gardner v. California, 393 U.S. 367 (1969); Roberts v. LaValee, 389 U.S. 40 (1967); Long v. District Court of Iowa, 385 U.S. 192 (1966); Draper v. Washington, 372 U.S. 487 (1963); Lane v. Brown, 372 U.S. 477 (1963); Eskridge v. Washington Prison Bd., 357 U.S. 214 (1958). During this time period, the Court also removed the barrier of filing fees for appeals and habeas corpus actions by indigent prisoners on equal protection grounds. *See* Smith v. Bennett, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959). An additional right was afforded indigent prisoners in Douglas v. California, 372 U.S. 353 (1963). In *Douglas*, the Supreme Court held that counsel must be appointed on direct appeal for indigent inmates in order to provide them with the same "meaningful appeal" available to those with funds. *Id.* at 357-58.

27. 393 U.S. at 484.

28. *Id.* at 487.

29. *See* notes 20-25 and accompanying text *supra*.

30. 393 U.S. at 490.

31. *Id.* at 485.

32. *Id.* at 488. The Court in articulating the problem of prison writ-writers stated: "It is indisputable that prison 'writ writers' like petitioner are sometimes a menace to prison discipline and that their petitions are often so unskillful as to be a burden on the courts which receive them." *Id.* (citation omitted). *See* Spector, *A Prison Librarian Looks at Writ-Writing*, 56 CALIF. L. REV. 365, 365-67 (1968).

33. 393 U.S. at 490. The alternatives noted by the Court included plans in effect in other states under which public defenders assist inmates, senior law students interview and advise them, local attorneys provide assistance on a volunteer basis, or an inmate is designated official prison writ-writer. *Id.* at 489 & n.10. The Court, however, expressly declined to give an opinion upon these methods, *id.*, merely stating that "their existence indicates that techniques are available to provide alternatives if the State elects to prohibit mutual assistance among inmates." *Id.* at 490.

Since *Johnson,* the scope of the right to access to the courts has been further defined by other Supreme Court decisions. *Procunier v. Martinez*[34] invalidated a regulation which restricted prisoners' access to legal assistance to members of the bar and absolutely barred the use of law students and paralegals to interview inmates.[35] In *Wolff v. McDonnell,*[36] the Court ruled that the right of access extends to civil rights actions brought under section 1983 as well as to habeas corpus actions.[37]

With regard to access to lawbooks and libraries, lower federal courts had held that inmates had no right to engage in legal research.[38] As a result, courts had refused to require prison officials to furnish prisoners with legal materials or to allow them to use their own books.[39] This line of reasoning was overturned by a per curiam decision of the Supreme Court in *Younger v. Gilmore.*[40] In *Gilmore,* the Court affirmed the holding of a district court which enjoined the enforcement of a prison rule establishing an exclusive

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34. 416 U.S. 396 (1974).

35. *Id.* at 420–21. The Supreme Court reasoned that this rule restricted adequate representation of indigent inmates since it is more expensive for a lawyer to interview prisoners than for the lawyer's representative to do so. *Id.* at 420. Thus, indigent inmates would be less likely to be able to obtain counsel and a substantial burden would be imposed upon their right of access to the court. *Id.* For a more extensive treatment of this case, *see* 52 J. URBAN L. 188 (1974).

36. 418 U.S. 539 (1974).

37. *Id.* at 580. In *Wolff,* the Court remanded a section 1983 action brought by prison inmates for determination of whether an inmate legal assistance program, limiting prisoner aid to the prison legal assistant or others with the warden's permission, met constitutional standards. *Id.* at 577–78. The Court answered petitioner's claim that the holding in Johnson v. Avery, 393 U.S. 483 (1968), was limited to habeas corpus actions by pointing out that the demarcation line between the two actions is not always clear since there are instances in which the same constitutional rights may be redressed under either form of action. 418 U.S. at 579. Thus, finding "no reasonable distinction between the two forms of actions," the Supreme Court held that on remand the district court was to apply the "reasonable alternative" standard established in *Johnson. Id.* at 580. *See also* Nolan v. Scafiti, 430 F.2d 548 (1st Cir. 1970) (right of access recognized in *Hull* and *Johnson* extended to inmates using § 1983 action).

For a discussion of *Wolff, see* 9 U. RICH. L. REV. 345 (1975). For a discussion of both *Procunier* and *Wolff, see* 46 U. COLO. L. REV. 377 (1975).

38. *See, e.g.,* Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied,* 368 U.S. 862 (1961); cases cited in note 39 *infra.*

For example, in *Hatfield,* inmates of a state penitentiary brought an action under § 1983 seeking to enjoin officials from enforcing prison regulations limiting the time and a place in which they could engage in legal research on the ground that it denied their right of reasonable access to the courts. 290 F.2d at 634. While recognizing such a right, the Ninth Circuit declined to hold that it had been violated in *Hatfield. Id.* at 640. The court also noted in dictum that state authorities were under no constitutional obligation to provide libraries for prisoners' use. *Id. See Goldfarb & Singer, supra* note 15, at 240.

39. *See, e.g.,* Page v. Sharpe, 487 F.2d 567 (1st Cir. 1973) (county sheriff not required to supply law books so long as access to available books is not denied); Lee v. Tahash, 352 F.2d 970 (8th Cir. 1965) (prison not required to provide materials to prisoner for purpose of attacking presumptively valid conviction); Robinson v. Birzgalis, 311 F. Supp. 908 (W.D. Mich. 1970) (state not required to furnish legal materials to prisoners); United States *ex rel.* Wakeley v. Pennsylvania, 247 F. Supp. 7 (E.D. Pa. 1965) (where prisoner was permitted to obtain and retain his own legal materials, lack of a library at prison was not a denial of access to courts).

40. 404 U.S. 15 (1971).

list of lawbooks permitted in the prison.[41] The Court offered no reasoning for its decision,[42] however, it has been suggested that by citing *Johnson,* the Court established a connection between the right of access to the courts and the right of access to legal materials and law libraries.[43]

Against this historical background, the Court in *Bounds* began its analysis by acknowledging that prisoners have a clearly established constitutional right of access to the courts.[44] Justice Marshall, writing for the majority, reasoned that not only must prisoners be assured a right of access, but the access provided for must also be "meaningful."[45] Therefore, the Court asserted that the state may be required to take on affirmative obligations in order to assure prisoners' meaningful access to the courts.[46]

In applying this reasoning to the instant case the majority rejected in turn each of the petitioners' arguments. First, in response to the state's assertion that a habeas corpus petition or civil rights complaint consists only of a statement of facts giving rise to a cause of action and therefore requires no research, the Court stated that since a lawyer would need to do preliminary research before filing an initial pleading, so necessarily would a *pro se* prisoner.[47] The Court similarly dismissed the state's claim that prisoners would be unable to make good use of a law library by stating that its experience had demonstrated that prisoners are capable of using lawbooks to raise serious claims.[48] The majority also rejected the state's

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41. *Id. See* Gilmore v. Lynch, 319 F. Supp. 105, 111-12 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971). The district court accepted the inmates' claim that indigent prisoners were denied meaningful access to the court as a result of these regulations. 319 F. Supp. 108, 111. The court rejected the state's assertion, based on Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir.), *cert. denied,* 368 U.S. 862 (1961), that access to lawbooks is a privilege rather than a right, stating that the right-privilege distinction is eroding and that a prisoner is no longer regarded as a slave of the state. *Id.* at 108-09. The state's claim that the regulations were valid because they were based upon a legitimate state interest was similarly dismissed by the court on the grounds that the right of access to the courts outweighed the state interest. *Id.* at 108, 111. The court concluded that " '[a]ccess to the courts', then, is a larger concept than that put forward by the State. It encompasses 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." *Id.* at 110. The state then appealed directly to the United States Supreme Court. 404 U.S. at 15.

42. The two paragraph opinion of the Court merely noted jurisdiction and stated that the district court's judgment was affirmed. 404 U.S. at 15.

43. Resource Center on Correctional Law and Legal Services, *Providing Legal Services to Prisoners,* 8 GA. L. REV. 363, 365 (1974) [hereinafter cited as *Legal Services*]. *See* text accompanying notes 26-33 *supra.*

44. 430 U.S. at 821, *citing Ex parte* Hull, 312 U.S. 546 (1941). *See* note 20 and accompanying text *supra.*

45. 430 U.S. at 822. The majority reemphasized the principle that " 'meaningful access' to the courts is the touchstone." *Id.* at 823, *citing* Ross v. Moffitt, 417 U.S. 600, 611-12, 615 (1974). *See* note 26 *supra; see also* note 49 *infra.*

46. 430 U.S. at 824.

47. *Id.* at 825-26.

48. *Id.* at 826. The Court noted that this claim was inconsistent with the representations which the state made in its application for funding from the Federal Law Enforcement Assistance Administration which it had filed after the District Court decision. *Id.* In that application, the state claimed that libraries would benefit inmates and reduce the number of groundless petitions and complaints. *Id.* at

position that libraries or legal assistance are unnecessary to assure meaningful access in light of *Ross v. Moffitt*,[49] where the Supreme Court had refused to extend indigents' right to "meaningful appeal"[50] to include appointment of counsel for discretionary appeals.[51] The Court distinguished *Ross* from the instant case, observing that the former dealt with discretionary review, while *Bounds* was concerned with collateral attack.[52] The majority concluded that on discretionary review, the prisoner is likely to have briefs from prior appeals and therefore has less need for legal assistance than the inmate commencing an original action in order to collaterally attack his conviction.[53]

In addition, the Court stated that the instant decision was merely a reaffirmation of its holding in *Younger v. Gilmore*.[54] The majority reasoned that *Gilmore* had clearly decided the issue of whether the state had an affirmative duty to provide the means for access to the courts.[55] The Court noted that its experience under *Gilmore* had been satisfactory and suggested no reason to change its mandate.[56] The majority supported its decision not to overrule *Gilmore* by citing cases in which the prisoner's right of access was upheld in reliance on the holding in *Gilmore*.[57] The Court also noted

821, *citing* Brief for Respondents at 3a. The majority also pointed out that this proposition was inconsistent with the state's claim that prisoner access to the courts is adequately protected by allowing inmates to help each other. *Id.* For a discussion of whether inmates in fact derive a benefit from the state's provision of legal materials without other forms of legal aid, *see* notes 79 & 80 and accompanying text *infra*.

49. 417 U.S. 600 (1974). In *Ross*, an indigent prisoner had been assisted at trial and on appeal as of right by appointed counsel. *Id.* at 603. The prisoner sought to have appointed counsel for his subsequent discretionary appeal to the state's highest court and for his petition of certiorari to the U.S. Supreme Court. *Id.* at 603-04. The Court denied his request, holding that the due process and equal protection clauses of the fourteenth amendment do not require appointment of counsel for discretionary appeals because the indigent is not thereby being denied meaningful access to the criminal appeals system because of poverty. *Id.* at 610, 612, 615.

50. *See* note 49 *supra*.

51. 417 U.S. at 612.

52. 430 U.S. at 827.

53. *Id.* at 827-28.

54. 404 U.S. 15 (1971). For a discussion of *Gilmore*, *see* notes 40-43 and accompanying text *supra*. *See also* notes 56 & 57 and accompanying text *infra*.

55. 430 U.S. at 829. Notwithstanding this express reference to its holding in *Gilmore*, the Court stated that *Gilmore* was not a necessary element of its analysis. *Id.* at 828-29.

56. *Id.* at 829. The Court noted that most states have tried to fulfill *Gilmore*'s mandate by establishing law libraries, prison legal assistance programs, or both, and that correctional administrators have supported the programs. *Id.* at 829-30 n.18 (citations omitted). *See, e.g.*, Bluth, *Legal Services for Inmates: Coopting the Jailhouse Lawyer*, 1 CAP. U. L. REV. 59 (1972); Carderelli & Finkelstein, *Correctional Administrators Assess the Impact of Prison Legal Services Programs in the United States*, 65 J. Crim. L.C.&P.S. 91 (1974); Sigler, *A New Partnership in Corrections*, 52 NEB. L. REV. 35 (1972).

57. 430 U.S. at 829, *citing* Wolff v. McDonnell, 418 U.S. 539, 578-79 (1974) (although differing on other issues, the Court reaffirmed that *Gilmore* requires provision of law libraries to prisoners); Chaffin v. Stynchcombe, 417 U.S. 17, 34 n.22 (1973) (Court cited *Gilmore* approvingly as removing barriers to appeal); Cruz v. Beto, 405 U.S. 319, 321 (1972) (*Gilmore* cited with Court's approval as support for inmates' right of access to courts); Cruz v. Hauck, 404 U.S. 59 (1971) (issue of whether county jails must provide prisoners with legal materials remanded summarily for consideration in light of *Gilmore*).

that law libraries were not the sole means of assuring meaningful prisoner access to courts and that the rule developed in *Gilmore* did not foreclose other alternatives.[58] In conclusion, the majority reiterated that the "hands off" doctrine "cannot encompass any failure to take cognizance of valid constitutional claims."[59]

The *Bounds* decision contains three dissenting opinions. Chief Justice Burger submitted a separate dissent and also joined with Justice Stewart and Justice Rehnquist in their dissents.[60] Chief Justice Burger's dissent launched a two-pronged attack on the majority's reasoning. The Chief Justice initially argued that since there exists no constitutional right to collaterally attack a conviction rendered by a court of competent jurisdiction, there can be no constitutional right of access to the court for such collateral attack.[61] Chief Justice Burger further maintained that if the right of collateral attack is statutory in nature, the Supreme Court cannot impose an affirmative duty upon the states to ensure that right.[62] In such a situation, the Chief Justice concluded, the duty imposed upon the states is merely negative — not to interfere with the prisoners' exercise of the right.[63]

Justice Stewart, in dissent, stated that even if there is a constitutional right of access to the courts, providing untutored prisoners with law libraries would not contribute towards making access "meaningful."[64] Alternatively, Justice Stewart maintained that if there were no constitutional right of access then there can be no duty on the state to make access meaningful.[65] Justice Stewart also concluded that *Gilmore* was unpersuasive precedent because of the unexplained analytical gap between the cited authority — *Johnson* — and *Gilmore's* actual holding.[66]

Justice Rehnquist stated in his dissent that there is no constitutional right of prisoner access to the courts to attack convictions rendered by courts of competent jurisdiction.[67] He rejected the majority's analysis on the basis that the Court misinterpreted the cases upon which it relied, none of which

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58. 430 U.S. at 830. The alternatives suggested by the Court included: training of inmates as legal assistants, use of paralegals and law students, organization of volunteer attorneys, and the hiring of lawyers on a part-time or full-time basis. *Id.* at 831. The Court added that while experimentation would be encouraged, the plan must remain within constitutional standards. *Id.* at 832.

59. *Id., quoting* Procunier v. Martinez, 416 U.S. at 405. Justice Powell concurred in the majority opinion, adding only the caveat that the *Bounds* decision "does not purport to pass on the kinds of claims that the Constitution requires state or federal courts to hear." *Id.* at 833 (Powell, J., concurring).

60. *Id.* at 833-41.

61. *Id.* at 835 (Burger, C.J., dissenting). The Chief Justice stated that "it is now clear that there is no broad federal *constitutional* right to such collateral attack." *Id.* (emphasis in original) *citing* Stone v. Powell, 428 U.S. 465 (1976). For a discussion of *Stone, see* note 71 *infra.*

62. *Id.* at 834-35 (Burger, C.J., dissenting).

63. *Id.* at 834 (Burger, C.J., dissenting) (citation omitted).

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

65. *Id.* at 836-37. Justice Stewart posited this situation due to its advancement by Justice Rehnquist. *Id. See* text accompanying note 67 *infra.*

66. 430 U.S. at 836 (Stewart, J., dissenting).

67. *Id.* at 837 (Rehnquist, J., dissenting).

recognized more than a physical right of access to the court.[68] In his view, lawful incarceration results in a justified restriction of prisoners' constitutional liberties[69] and does not give rise to a right to collateral attack of that conviction in a federal court.[70]

It is submitted that the *Bounds* decision presents several problems. The first question that arises is whether there is in fact a *constitutional* right of access to the courts.[71] Although the Court bases its decision upon precedent recognizing a right of access, the majority failed to elucidate the constitutional source of that right.[72] Most cases have emphasized equal

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68. *Id.* at 838-39 (Rehnquist, J., dissenting). In Justice Rehnquist's interpretation, *Hull* established only a physical right of access to the court. *Id. See* text accompanying notes 20-25 *supra.* He further asserted that the later cases relied on by the majority depended either upon the theory that indigent convicts must be given an opportunity to exercise a state-created right to appeal, *see* note 26 *supra,* or upon the concept that the authorities cannot limit the prisoner's contacts with others, beyond the fact of incarcerating him, simply because such contacts would aid him in preparing a petition. *Id. See* text accompanying notes 26-33; notes 35 & 37 and accompanying text *supra.* Since neither of these theories would apply to the provision of law libraries, Justice Rehnquist concluded that the majority holding was not supported by these earlier decisions. 430 U.S. at 839 (Rehnquist, J., dissenting). Justice Rehnquist added that had the state argued on equal protection grounds, "they would nonetheless fail under *Ross.*" *Id.* (citation omitted). For a discussion of *Ross, see* note 49 and accompanying text *supra.*

69. 430 U.S. at 840 (Rehnquist, J., dissenting), *citing* Pell v. Procunier, 417 U.S. 817, 822 (1974) (prisoners retain only those rights consistent with status as prisoner and with the penal objectives of the prison); Price v. Johnston, 334 U.S. 266, 285 (1948) (considerations underlying penal system justify restriction of many of prisoners' privileges and rights).

70. 430 U.S. at 839-40 (Rehnquist, J., dissenting).

71. Chief Justice Burger contended that the majority's recognition of a constitutional right of access contradicted the Court's holding in Stone v. Powell, 428 U.S. 465 (1976). 430 U.S. at 835 (Burger, C.J. dissenting). In *Stone,* the Court held that where a state has provided an opportunity for full and fair litigation of a fourth amendment claim, a state prisoner may not be granted habeas corpus relief on the ground that unconstitutionally obtained evidence was introduced at his trial. 428 U.S. at 494. However, it is submitted that *Stone* did not make it "clear that there is no broad federal constitutional right to collateral attack" as Chief Justice Burger maintained, but rather placed limits upon the instances in which the habeas corpus remedy in particular may be used. Indeed, the majority in *Stone* stated in a footnote that its holding was limited to the particular fourth amendment issue at hand. *Id.* at 494 n.37.

Moreover, it is submitted that Justice Rehnquist's interpretation of the cases would subject them to a very narrow reading. While *Hull* may be read as requiring merely a provision for physical access to the courts, the meaning of "physical access" must be determined. If it is simply the right to have a petition of some sort delivered to the court, then the *Bounds* holding would be unnecessary under *Hull.* If, however, the right of physical access includes the right to have an intelligible, legally proper petition delivered to the court, then *Bounds* is clearly mandated by the Court's decision in *Hull.*

The *Johnson* case, which favors the latter interpretation of the right of access, is dismissed by Justice Rehnquist as depending upon the principle that the state may not limit a prisoner's contacts beyond the fact of incarceration. 430 U.S. at 838-39 (Rehnquist, J., dissenting). While *Johnson* is certainly amenable to such an interpretation on its facts, the opinion of the Court focused on the meaningfulness of the inmate's right to petition for post-conviction relief in the absence of some sort of assistance. 393 U.S. at 489.

72. The source of the right of access to the courts has been viewed differently in the various cases which have involved this question. Griffin v. Illinois, 351 U.S. 12

protection as its basis,[73] but the *Bounds* majority did not rely on this rationale.[74] Although it is generally accepted that a right of access exists, this failure to identify its constitutional source weakens the reasoning of the Court in reaffirming *Gilmore's* extension of that right to impose an affirmative duty upon the states.[75]

Assuming that the constitutional right of access exists, a second troublesome question is whether the Supreme Court may impose an affirmative duty upon a state to ensure the exercise of a federal right. *Bounds* is subject to criticism for its deviation from the traditional assumption that although a state may be required to refrain from interfering with a federal right, it is not required affirmatively to ensure it.[76] Several Supreme Court decisions, however, have recognized an exception to the states' passive role by requiring them to correct violations of a federal right where the relief sought is prospective, such as would be the case in providing prison libraries.[77] However, the *Bounds* majority did not rely on the cases

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(1956), and its progeny emphasized the equal protection guarantee as the basis for the requirement of meaningful access to courts for indigents. *See* note 26 *supra. See also* Procunier v. Martinez, 416 U.S. 396, 419 (1974) (prisoners' right of access to the courts based on due process); Cruz v. Beto, 405 U.S. 319, 321 (1972) (dictum) (prisoners have right to access to petition for redress of grievances); Goodwin v. Oswald, 462 F.2d 1237, 1241 (2d Cir. 1972) (prisoners retain sixth and fourteenth amendment right of access to the courts).

73. *See, e.g.,* Johnson v. Avery, 393 U.S. 483 (1968); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

74. The *Bounds* majority did mention that equal protection was one of the bases for the decision of the district court but did not utilize equal protection as the basis for its own holding. 430 U.S. at 818.

75. Both Chief Justice Burger and Justice Rehnquist criticized the majority for failing to identify the source of the right of access. 430 U.S. at 833-34. (Burger, C.J., dissenting); *id.* at 839. (Rehnquist, J., dissenting).

76. Chief Justice Burger took this position in his dissenting opinion. *Id.* at 834 (Burger, C.J., dissenting). In support of this proposition, the Chief Justice referred to National League of Cities v. Usery, 426 U.S. 833 (1976) (1974 amendments to Fair Labor Standards Act which extended its minimum wage and maximum hour provisions to state employees not within power granted Congress by the Commerce Clause).

77. *Ex parte* Young, 209 U.S. 123 (1908), is regarded as the original recognition of this exception. In *Young,* the eleventh amendment did not bar an action in federal court seeking to enjoin the Attorney General of Minnesota from enforcing a statute that allegedly violated the fourteenth amendment. *Id.* at 156-57. The injunctive relief awarded, however, was merely prospective; the Attorney General was ordered to conform his future conduct to the fourteenth amendment. *Id.*

This exception has been recently reaffirmed by the Supreme Court. *See, e.g.,* Milliken v. Bradley, 97 S. Ct. 2749 (1977); Edelman v. Jordan, 415 U.S. 651 (1974). In *Milliken,* an undivided Court stated that the exception "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." *Id.* at 2762, *citing* Edelman v. Jordan, 415 U.S. at 667.

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), while supporting the holding in *Bounds,* does not resolve the confusion over the Court's position on imposing an affirmative duty upon the states. The award of retirement benefits to male employees of the state who were discriminated against on the basis of sex was permitted in *Fitzpatrick* despite the fact that such relief was retroactive. *Id.* at 456. The Court held that Congress has the power to enter an award against a state for a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (Supp. V 1975), as a means of enforcing the substantive guarantees of the fourteenth amendment in spite of

that established this exception in addressing the affirmative duty issue; rather the Court cited cases that had imposed such a duty without explaining the source of the Court's power to make such an imposition.[78]

Moreover, even if there is a constitutional right of access which the state must ensure by its own expenditures, it is submitted that supplying prisons with law libraries is not likely to achieve the goal of providing prisoners with meaningful access to the courts.[79] Many inmates are functionally illiterate or ill-equipped to make use of a law library.[80] Although the majority suggested and even encouraged several "reasonable alternatives" to provision of libraries,[81] legal aid is not mandated by the *Bounds*

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eleventh amendment sovereign immunity. *Id.* However, *Fitzpatrick* may be distinguished from *Bounds* and *Milliken* because it dealt with congressional power to enforce the fourteenth amendment by allowing suits against the state rather than the courts' power to impose a burden upon the state. Milliken v. Bradley, 97 S. Ct. 2749, 2762 (1977); Bounds v. Smith, 430 U.S. 817, 824 (1977); Fitzpatrick v. Bitzer, 427 U.S. 445, 448 (1976).

For a discussion of the entire problem, *see* Beaird & Ellington, *A Commerce Power Seesaw: Balancing National League of Cities,* 11 GA. L. REV. 35 (1976). There, the authors suggest that the Court should adopt a balancing test in tenth and eleventh amendment cases in order to give effect to both federalism concerns and individual rights, thus avoiding the confusion stemming from these cases. *Id.* at 71-72.

The Supreme Court apparently took a different stance on the affirmative duty issue in Maher v. Roe, 97 S. Ct. 2376 (1977), decided shortly after *Bounds*. The *Maher* case was brought by two indigent women who attacked a Connecticut Welfare Department regulation that conditions receipt of medicaid benefits for abortions upon a determination that they are medically necessary. *Id.* at 2378-79. These woman had been unable to obtain a physician's certificate of medical necessity. *Id.* at 2379. The Court held that the equal protection clause does not invalidate the regulation merely because the state provides medicaid funds for childbirth. *Id.* at 2380-81. According to the *Maher* Court, the state's only duty is to refrain from unduly burdening a woman's constitutional right to freely choose whether to terminate her pregnancy. *Id.* at 2382. The regulation did not, according to the Court, place obstacles to an abortion in the woman's path and therefore the state had no further affirmative obligation. *Id.* at 2382-83.

78. 430 U.S. at 825. The Court cited Argersinger v. Hamlin, 407 U.S. 25 (1972) (state must provide lawyers for indigent defendants at trial for misdemeanor); Douglas v. California, 372 U.S. 353 (1963) (state must provide indigents with counsel on appeals as of right); and Gideon v. Wainwright, 351 U.S. 12 (1956) (indigent criminal defendants have a constitutional right to appointed counsel at their trial in state court). The Court also implicitly referred to Griffin v. Illinois, 351 U.S. 12 (1956), when it acknowledged that "[s]tates must forgo collection of docket fees otherwise payable to the treasury and expend funds for transcripts." 430 U.S. at 825. *See* note 26 *supra.*

79. *See, e.g.,* Alpert, *Prisoners' Right of Access to Courts: Planning for Legal Aid,* 51 WASH. L. REV. 563, 662-63 (1976); American Bar Association Joint Comm. on the Legal Status of Prisoners, *Tentative Draft of Standards Relating to the Legal Status of Prisoners,* 14 AM. CRIM. L. REV. 377, 431 (1977); *Legal Services, supra* note 43, at 375; Goldfarb & Singer, *supra* note 15, at 236-38; Remington, *State Prisoner Litigation and the Federal Courts,* 1974 ARIZ. L.J. 549, 554-55.

80. In 1967, 82% of all prisoners had not completed high school and 55% had not finished eighth grade. *Legal Services, supra* note 43, at 375 (citation omitted).

81. 430 U.S. at 830-32. *See* note 58 and accompanying text *supra.* Regarding programs providing professional or quasi-professional assistance, the Court in *Bounds* stated: "Such programs . . . may have a number of advantages over libraries alone . . . . Legal services plans not only result in more efficient and skillful handling of prisoner cases, but also avoid the disciplinary problems associated with writ writers." 430 U.S. at 831 (citations omitted).

decision.[82] It is submitted that the logical extension of the *Bounds* reasoning would be to require that professional or quasi-professional assistance be given to prisoners seeking to collaterally attack their convictions;[83] the right of access to the courts is a meaningless one if the tools provided for its exercise are unusable by those most in need of its assurance.

Since *Bounds* is a reaffirmation of what most federal courts perceived to be the mandate of *Gilmore* — that the state must provide law libraries or some reasonable alternative to assure access to the courts — it is unlikely that this decision will impose substantial new burdens upon state treasuries.[84] The fact that a state may have the alternative of employing volunteer programs to aid prisoners further supports this prediction. If, however, the *Bounds* reasoning is extended in the future to its logical conclusion that there is a right to appointed counsel for collateral attack,[85] the impact upon state treasuries would be considerable.

The *Bounds* decision, although a reaffirmation of a prior decision, articulates for the first time the nature of the duty imposed upon the state in assuring prisoner access to the courts. Because it places an affirmative duty on the state to assure a federal right, the case may well have ramifications beyond the corrections field.[86] Thus, the right of the individual to require

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82. *Id.* at 832. Although not mandated, it is submitted that legal services programs may well be the "reasonable alternative" chosen by many of those states without prison law libraries at present since volunteer programs may be less expensive.

83. If *Bounds* were extended to provision of counsel for collateral attack, it is likely, as suggested by Justice Rehnquist, that a conflict would arise with the holding in Ross v. Moffitt, 417 U.S. 600 (1974). 430 U.S. at 840-41 (Rehnquist, J., dissenting). *Ross* held that there is no constitutional right to appointed counsel for discretionary appeals. 417 U.S. at 618-19. *See* note 49 *supra*. The criterion for obtaining the discretionary review sought in *Ross* is a showing that the case is jurisprudentially significant. 417 U.S. at 615-17. The Court in *Bounds* suggested that a prisoner is likely to have briefs from prior appeals which could be reused to seek discretionary review. 430 U.S. at 827, *citing* Ross v. Moffitt, 417 U.S. 600, 615 (1974). A complaint initiating a collateral attack, however, need only set forth a statement of the facts of the case. Bounds v. Smith, 430 U.S. 817, 825 (1977). It is submitted that the prisoner is equally unlikely to have an appellate brief addressed to the significance of his case as he is to be able to articulate the facts of that case, and that the Court's distinction is, therefore, an unpersuasive one.

84. The Court noted in *Bounds* that most states have made an effort to comply with *Gilmore* by establishing law libraries or legal aid programs. 430 U.S. at 829. *See also Legal Services, supra* note 43, at 423.

85. *See* 430 U.S. at 840-41 (Rehnquist, J., dissenting). Justice Rehnquist reasoned that since the Court in *Ross* refused to extend the right to counsel to discretionary appeals, it could be assumed that there is no constitutional right to counsel in a collateral attack proceeding. *Id.* However, since under the majority's reasoning access to the courts comprises the right to law libraries to pursue a collateral attack, he saw "no convincing reason why it should not also include lawyers appointed at the expense of the State." *Id.* at 841. *See also* note 49 *supra*.

86. The possibly limiting effect of Maher v. Roe, 97 S. Ct. 2376 (1977), upon the impact of *Bounds* outside the field of corrections will need to be clarified by future decisions. *See* note 77 *supra*. It is submitted that by holding in *Maher* that the state merely has a duty not to interfere with a federal right but no duty to assure the exercise of that right, 97 S. Ct. 2383-84, the Court would seem to be contradicting the majority in *Bounds*.