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Josephine R. Potuto
University of Nebraska

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The Right of Prisoner Access: Does *Bounds* Have Bounds?

JOSEPHINE R. POTUTO*

In *Bounds v. Smith*¹ the United States Supreme Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."² This article focuses on the source of the right as a means of defining its scope as well as its particular application with respect to the law library alternative under *Bounds*.³

RIGHT OF ACCESS: FROM WHENCE DOES IT COME?

*Ex parte Hull*⁴ is generally singled out as the first case in which the Supreme Court found a right of access⁵ by prisoners⁶ to the federal courts.⁷

*B.A. 1967, Douglass College; M.A. 1971, Seton Hall; J.D. 1974, Rutgers. Assistant Professor of Law University of Nebraska. Project Director and Reporter, Uniform Sentencing and Corrections Act (First and Second Tentative Drafts were titled Uniform Corrections Act).

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

²*Id.* at 828.

³In *Bounds*, North Carolina proposed to assure access by providing law libraries rather than legal services. See *id.* at 826-27, 833. The *Bounds* majority thus concerned itself with whether the state's law library proposal was adequate. *Id.* at 817-33. It did not have before it and did not focus, therefore, on what would constitute adequate legal services. This Article, as did the Court, will concentrate on the law library alternative. For a discussion of the adequacy and appropriate structuring of legal services programs see notes 117, 128, and 129 *infra*.

⁴312 U.S. 546 (1941).

⁵The right of access is developing in more areas than the prisoner or even criminal justice context. See note 63 *infra*. It has been described as "the right upon which the integrity of every other constitutional right necessarily rests." *Johnson v. Anderson*, 370 F. Supp. 1373, 1383 (D. Del. 1974). Accord, Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Free Access to the Courts*, 50 IOWA L. REV. 223, 253 (1970) [hereinafter cited as Goodpaster].

⁶The class of incarcerated persons includes pretrial detainees, defendants incarcerated during trial, and convicted persons sentenced to a term of imprisonment. For purposes of this Article, "prisoner" refers to all incarcerated persons except the incarcerated pro se defendant seeking legal materials to prepare his defense at trial.

⁷See *Bounds v. Smith*, 430 U.S. 817, 821-22 (1977). The cases have dealt, so far, with prisoners seeking access to federal court. *E.g.*, *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Younger v. Gilmore*, 404 U.S. 15 (1971), *affg* *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970); *Johnson v. Avery*, 393 U.S. 483 (1969); *Ex parte Hull*, 312 U.S. 546 (1941); *Bounds v. Smith*, 430 U.S. 817 (1977). The right is similarly applicable to claims in state court. See *id.* at 833 (Powell, J., concurring).

In *Hull*, prison officials had refused to notarize or mail the prisoner's petition for writ of habeas corpus.⁸ The Court there held 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. Whether a writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to determine.⁹

Although cited as the first right of access case,¹⁰ the *Hull* Court seemed as much, if not more, concerned with asserting a court's traditional jurisdictional prerogative to pass on the form and merits of a claim addressed to it¹¹ than with prisoner rights generally or even with the "fundamental importance"¹² of the "great writ."¹³ In concluding that *Hull* could not be prevented from petitioning it, the Court did state, however, a basic, and essentially unarguable proposition—a state may not actively impede persons incarcerated in its prisons from petitioning a court to review the legality of the incarceration.¹⁴ It is from this basic proposition that the right of access evolved.

The next major prisoner right of access case was *Johnson v. Avery*.¹⁵ In *Avery*, prisoners were prohibited from assisting each other in preparing writs and other legal documents.¹⁶ The prohibition against such "jailhouse lawyers" developed from a distrust of their dedication and competence and a fear of the power base they might create for themselves within facilities.¹⁷ The Court

⁸312 U.S. at 547-48. *Hull's* father, acting as his "agent," filed the papers with the Court. *Id.* at 548.

⁹312 U.S. at 549.

¹⁰*Bounds v. Smith*, 430 U.S. 817, 821-22 (1977).

¹¹*See, e.g., Bell v. Hood*, 327 U.S. 678, 681-82 (1946); *Louisville & N. R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

¹²*Johnson v. Avery*, 393 U.S. 483, 485 (1969). *See United States v. Hayman*, 342 U.S. 205 (1952).

¹³*Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807).

¹⁴It is a proposition agreed to by even the dissenters in *Bounds*, 430 U.S. at 834-35 (Burger, C.J., dissenting) and 840 (Rehnquist, J., dissenting). It is, in fact, an aspect of the more encompassing proposition—persons may not be impeded from reaching a court with their claims. *See* note 39 *infra* & text accompanying.

¹⁵393 U.S. 483 (1969). This case was described as the most important decision with respect to weakening the hands-off doctrine of federal courts considering prisoner claims. Champagne & Haas, *The Impact of Jonson v. Avery on Prison Administration*, 43 TENN. L. REV. 275, 275 (1976) [hereinafter cited as Champagne & Haas]. For discussion of the hands-off doctrine, *see Cruz v. Beto*, 405 U.S. 319, 321 (1972); Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473, 503-04 (1971) [hereinafter cited as Turner].

¹⁶393 U.S. at 484.

¹⁷*See, e.g., Bluth, Legal Services for Inmates: Coopting the Jailhouse Lawyer*, 1 CAP. U. L. REV. 59, 59 (1972); [hereinafter cited as Bluth]; Brierley, *The Legal Controversy as it Relates to Correctional Institutes—A Prison Administrator's View*, 16 VILL. L. REV. 1070, 1071-72 (1971); Champagne & Haas, *supra* note 15, at 298; Fousekis, *Prisoner Mutual Legal Assistance and Access to the Courts: Recent Developments and Emerging Problems*, 23 HASTINGS L.J. 1089, 1093 (1972); Spector, *A Prison Librarian Looks at Writ-Writing*, 56 CALIF. L. REV. 365, 365 (1968) [hereinafter cited as Spector]; 56 CALIF. L. REV. 342, 342-43 (1968). In a survey of wardens conducted to determine the impact of *Avery* on prison administration no clear consensus emerged as

found, however, that prohibiting jailhouse lawyers from assisting other prisoners prevented, "for all practical purposes," illiterate prisoners from having their claims heard.¹⁸ *Avery*, then, proceeded one step beyond *Hull*. It equated the practice of preventing jailhouse lawyers from assisting prisoners to petition the Court with the actual prevention of prisoners from petitioning the Court that was operative in *Hull*. The two cases had much in common. In each, the Court was concerned with an official correctional policy that acted to prohibit particular prisoner activity. In each, the Court defined the scope of a state's duty with respect to the right of access as a duty to eliminate state-created impediments to a prisoner's ability to assert his claim in a federal court.¹⁹ And in each, the Court had under consideration prisoner access to the court by way of the writ of habeas corpus. In fact, the *Avery* Court in construing the right of access in a practical sense relied heavily upon the importance of the writ of habeas corpus to the American constitutional system.²⁰ It concluded that, "since the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."²¹ Thus the *Avery* Court did not change the basic import of the *Hull* right of access. That right of access was an admonition to the states that they must stand neutral when prisoners seek entrance to federal court by writ of habeas corpus.

The *Avery* Court, however, in apparent recognition of the distrust of jailhouse lawyers by many correctional administrators,²² went on to offer the

to whether jailhouse lawyers have increased the incidence of prison disciplinary problems. See Champagne & Haas, *supra* note 15, at 284. The wardens were divided almost equally on whether jailhouse lawyers after *Avery* attained an increased power base in the prisons. *Id.* at 291, 292-93.

¹⁸*Johnson v. Avery*, 393 U.S. at 487 (Quoting the district court, 252 F. Supp. 783, 784 (1966)). See Champagne & Haas, *supra* note 15, at 276.

¹⁹Turner, *supra* note 15, at 478. State-created impediments can include fees which the indigent cannot pay. See cases cited at note 33 *infra*.

²⁰393 U.S. 485.

²¹*Id.*

²²See authorities cited at note 17 *supra*. This distrust is not universal. For discussion of the merits and demerits of the jailhouse lawyer see, ABA JOINT COMMITTEE ON THE LEGAL STATUS OF PRISONERS, STANDARDS RELATING TO THE LEGAL STATUS OF PRISONERS (Tent. Draft 1977), reprinted in 14 AM. CRIM. L. REV. 377, 434 (1977) [hereinafter cited as ABA JOINT COMM.]; ABA RESOURCE CENTER ON CORRECTIONAL LAW AND LEGAL SERVICES, PROVIDING LEGAL SERVICES TO PRISONERS, reprinted in 8 GA. L. REV. 363, 413-14 (1974) [hereinafter cited as ABA RESOURCE CENTER]; Wexler, *The Jailhouse Lawyer As A Paraprofessional: Problems and Prospects*, 7 CRIM. L. BULL. 139, 139-53 (1971) [hereinafter cited as Wexler]; Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157, 174-75 (1972) [hereinafter cited as Zeigler & Hermann]; Note, *Trial Court and Prison Perspectives on the Collateral Post Conviction Relief Process in Florida*, 21 U. FLA. L. REV. 503, 507 (1969). For reasons asserted in support of the operation of jailhouse lawyers, see *Johnson v. Avery*, 393 U.S. at 496-98 (Douglas, J., concurring); *Bolick v. State*, 127 Ga. App. 542, 542, 194 S.E.2d 302, 303 (1972). See Larsen, *A Prisoner Looks at Writ-Writing*, 56 CALIF. L. REV. 343, 348-49 (1968) [hereinafter cited as Larsen]; Comment, *Prisoners' Rights—Access to Courts*, 42 U. COLO. L. REV. 275, 291 (1970) [hereinafter cited as *Prisoners' Rights*]; Note, *Legal Services for Prison Inmates*, 1967 WIS. L. REV. 514, 514 [hereinafter cited as *Inmate Legal Services*].

states an alternative to permitting the operation of jailhouse lawyers: a state could choose to provide adequate legal assistance itself. The Court indicated that its only interest was to assure illiterate prisoners access to the courts. A state could meet this interest by providing an "available alternative"²³ to the operation of jailhouse lawyers. The available alternative in *Avery* would require the states to expend funds but only as an alternative since a state unwilling to so obligate funds had only to permit jailhouse lawyers to operate within its prisons.

In *Gilmore v. Lynch*²⁴ the scope of the right of access increased dramatically. The district court talked of "meaningful access."²⁵ "Meaningful access" meant that a state had to expend funds to provide either law libraries or legal services to prisoners.²⁶ Thus what was, under *Avery*, an admonition to the states not to impede access and an opportunity for the states to choose to do more became, under *Gilmore*, an affirmative state burden²⁷ requiring a state to spend money where previously it had merely to stand neutral. The Court described this new right of access as a "constitutional imperative"²⁸ but did not provide its constitutional derivation.

The Court did find, however, that the equal protection clause of the fourteenth amendment required the states to provide indigent prisoners with "the tools necessary to receive adequate hearing in the courts . . ."²⁹ It cited three cases as supportive of an equal protection rationale for its result: *Douglas v. California*,³⁰ *Griffin v. Illinois*,³¹ and *Gideon v. Wainwright*.³² The

²³393 U.S. at 488.

²⁴319 F. Supp. 105 (N.D. Cal. 1970), *aff'd sub nom*, *Younger v. Gilmore*, 404 U.S. 15 (1971). The United States Supreme Court affirmed *Gilmore v. Lynch* in a per curiam opinion that merely cited *Johnson v. Avery*.

²⁵319 F. Supp. at 109.

²⁶*Id.* at 112. See generally *Farrington v. State of North Carolina*, 391 F. Supp. 714, 720 (M.D.N.C. 1975); *Johnson v. Anderson*, 370 F. Supp. 1373, 1385 (D. Del. 1974); *Hampton v. Schauer*, 361 F. Supp. 641, 643 (D. Colo. 1973); ABA RESOURCE CENTER, *supra* note 22, at 365; Reeves, *The Evolving Law of Prison Law Libraries*, 3 NEW ENGLAND J. PRISON L. 131, 137 (1976) [hereinafter cited as Reeves]; Comment, *Prisoners' Right to Access to Legal Material*, 8 GONZ. L. REV. 340, 350-51 (1973); *Prisoner Rights*, *supra* note 22, at 276. Under *Gilmore*, the prisoner has to demonstrate that the correctional regulation unduly burdens his right of access. 319 F. Supp. at 109. It then becomes the state's burden to show that available legal services are adequate and that there is no obligation to provide law libraries. *E.g.*, *Noorlander v. Ciccone*, 489 F.2d 642, 650-51 (8th Cir. 1973); *Novak v. Beto*, 453 F.2d 661, 664 (5th Cir. 1971), *cert. denied*, 409 U.S. 968 (1972); ABA RESOURCE CENTER, *supra* note 22, at 367; Werner, *The Present Legal Status and Conditions of Prison Law Libraries*, 66 LAW LIB. J. 259, 260 (1973) [hereinafter cited as Werner]. Whether a state meets its obligation to assure access is an evaluation to be made by considering the state's program as a whole. *Bounds v. Smith*, 430 U.S. 817, 832 (1977).

²⁷The Court, however, saw its approach as placing no more burden on the states than was already required under *Avery*. 319 F. Supp. at 110.

²⁸319 F. Supp. at 109.

²⁹*Id.*

³⁰372 U.S. 353 (1963).

³¹351 U.S. 12 (1956).

³²372 U.S. 335 (1963).

Douglas and *Griffin* line of cases,³³ however, prevents states from imposing financial impediments between indigents and a state-created right. The underpinning of these cases is that once the state sets up a procedure such as appellate review it must treat indigents on an equal basis with non-indigents.³⁴

In *Gilmore*, however, the state obligation arises by court dictate not by state choice; the state, after all, did not create the right of federal habeas review. *Gilmore* would be apposite, then, if the state, for example, chose to provide legal services to prisoners seeking to file writs of habeas corpus—and charged fees of prisoners using such services.³⁵ The *Gideon* line of cases³⁶ deals specifically with the fundamental nature of the right to counsel to

³³These cases derive from an equal protection or due-process—equal protection analysis. See *Ross v. Moffitt*, 417 U.S. 600, 608-09 (1974); *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). They deal either with post-conviction procedures or with what must be supplied indigents pre- and post-trial. *E.g.*, *Griffin v. Illinois*, 351 U.S. 12 (1956) (state may not charge costs precluding indigent from acquiring trial transcript or adequate alternative for appellate review) [*See Draper v. Washington*, 372 U.S. 487 (1963) (state must provide indigent with record of sufficient completeness to challenge trial judge denial of free trial transcript for appellate review); *Mayer v. City of Chicago*, 404 U.S. 189 (1971) (alternative to trial transcript adequate)]; *Smith v. Bennett*, 365 U.S. 708 (1961) (state may not charge filing fee precluding indigent from appellant or habeas review); *Burns v. Ohio* 360 U.S. 252 (1959) (state may not charge filing fee precluding indigent from second, discretionary appeal); *Long v. District Court of Iowa*, 385 U.S. 192 (1966) (per curiam) (state may not charge costs precluding indigent from acquiring habeas hearing transcript or adequate alternative for appellate review of writ denial) [*See Lane v. Brown*, 372 U.S. 477 (1963) (transcript of hearing denying writ of error coram nobis); *Gardner v. California*, 393 U.S. 367 (1969) (transcript of first habeas hearing for use at subsequent habeas hearing)]; *Roberts v. LaVallee*, 389 U.S. 40 (1967) (per curiam) (state may not charge costs precluding indigent from obtaining pretrial transcript or adequate alternative for use at trial); *Douglas v. California*, 372 U.S. 353 (1963) (state may not preclude indigent from full scope of appellate review by denying counsel on appeal). See also *Chaffin v. Stynchcombe*, 412 U.S. 17, 24 n.11 (1973); *People v. Shipman*, 62 Cal. 2d 226, 397 P.2d 993, 996, 142 Cal.Rptr. 1, See generally *Goodpaster*, *supra* note 6, at 254; Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545, 560 (1967) [hereinafter cited as *Counsel in Civil Cases*]. But see Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054, 1073-77 (1963). The Court appears unwilling to extend this line of cases any further. See, *e.g.*, *Ross v. Moffitt*, 417 U.S. 600, 610 (1974) (state need not appoint counsel for discretionary appeal following appeal as of right). Cf. *United States v. MacCollom*, 426 U.S. 317, 325-26 (1976) (federal government need not provide indigent with trial transcript for § 2255 motion prior to finding of "not frivolous"). See also Note, *The Indigent's "Right" to Counsel in Civil Cases*, 43 *FORDHAM L. REV.* 989, 991 (1975) [hereinafter cited as *"Right" to Counsel*]; Note, *Criminal Procedure—No Right to Counsel on Discretionary Appeal*, 53 N.C. L. REV. 560, 561-71 (1975).

³⁴See *Bounds v. Smith*, 430 U.S. 817, 838. (Rehnquist, J., dissenting). But see Note, *Criminal Procedure—No Right to Counsel on Discretionary Appeal*, 53 N.C. L. REV. 560, 562-63 (1975). Meeting the requirements of equal protection has never meant affording "identity of treatment." *Hardy v. United States*, 375 U.S. 277, 291 (1964) (Goldberg, J., concurring). It only requires that indigents be afforded similar opportunities for the assertion of rights. See *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969); *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966).

³⁵See, *e.g.*, *Griffin v. Illinois*, 351 U.S. 12, 22 (Frankfurter, J., concurring); *Page v. Sharpe*, 487 F.2d 567, 569 (1st Cir. 1973).

³⁶See cases cited at note 132 *infra*.

assure a fair trial under the 6th amendment.³⁷ It is not an equal protection case and thus seems irrelevant to the equal protection analysis in *Gilmore*. Further, since habeas corpus is not a sixth amendment right³⁸ *Gideon* cannot, on a 6th amendment theory, be extended to include prisoners petitioning for writ of habeas corpus. It is support, however, for the general proposition that the Court can direct states to expand funds in furtherance of constitutional rights.³⁹ Thus, to the extent that meaningful access in *Gilmore* is restricted to the assertion of constitutional rights,⁴⁰ or at least those constitutional rights as fundamental as the right to counsel at a criminal trial, then *Gilmore*, although an extension from *Avery*, may well have been on firm ground.

Because the *Gilmore* case for finding an obligation on the states to expend funds to assist prisoners filing petitions for writ of habeas corpus can be seen to center on the constitutional magnitude of the writ, the question becomes whether and to what extent the writ of habeas corpus is constitutional. The writ of habeas corpus *ad subjiciendum*,⁴¹ while not a due pro-

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In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

³⁸It would seem possible to argue that the right of prisoner access to the courts derives from the sixth amendment right to a fair trial on the theory that an allegation of illegal confinement sufficiently implicates the fairness of the trial that a sixth amendment right of access arises to challenge the confinement. The major obstacle to finding such a derivation for the right of access is that the Court has consistently described the writ of habeas corpus as initiating a civil proceeding and has denied that its underpinnings lie in the sixth amendment. *Ex parte Tom Tong*, 108 U.S. 556, 559 (1883) ("Resort to [the writ of habeas corpus] sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. . . . The prosecution against him is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution."). *Accord*, e.g., *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). See generally *Wolff v. McDonnell*, 418 U.S. 539 (1974); Werner, *Law Library Service to Prisoners—The Responsibility of Nonprison Libraries*, 63 LAW LIB. J. 231, 232 (1970); Comment, *Right to Counsel in Criminal Post-Conviction Review Proceedings*, 51 CALIF. L. REV. 970, 979 (1963); Note, *Prisoner Assistance on Federal Habeas Corpus Petitions*, 19 STAN. L. REV. 887, 889 (1967) [hereinafter cited as *Prisoner Assistance*]. It is, of course, true that the Court in other contexts has refused to find the criminal-civil distinction controlling but has, instead, considered the consequences of an activity in determining whether it should be treated as if it were a sixth amendment right. See cases and authorities cited at note 108 *infra*.

³⁹This is, again, a proposition with which the dissent does not quarrel. *Bounds v. Smith*, 430 U.S. at 834 (Burger, C.J., dissenting). For examples of the proposition in action, see, e.g., *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁴⁰This restriction also seems implicit in *Bounds*.

⁴¹The writ is commonly referred to as the writ of habeas corpus. See *Stone v. Powell*, 428 U.S. 474-75 n.6 (1975).

cess⁴² or sixth⁴³ amendment right, is, of course, embodied in the Constitution.⁴⁴ The Court in *Fay v. Noia*⁴⁵ found that a prisoner had a constitutional right to petition for review by writ of habeas corpus to challenge the legal and constitutional merits of his confinement.⁴⁶ The Court there described the writ as grounded on the principle that:

[I]n 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. Thus there is nothing novel in the fact that today habeas corpus in the federal courts provides a mode for the redress of denials of due process of law.⁴⁷

The Court discussed whether Congress could deny the full common law scope to the writ—the scope, that is, of the constitutional provision—without unconstitutionally suspending the writ.⁴⁸ It did not answer the question since it concluded that the statutory federal habeas jurisdiction⁴⁹ was fully com-

⁴²*E.g.*, *United States v. MacCollom*, 426 U.S. at 323. *See Smith v. Bennett*, 365 U.S. 708 (1961); Note, *Adequate Appellate Review for Indigents: A Judicial Blend of Adequate Transcript and Effective Counsel*, 52 IOWA L. REV. 902, 904 (1967). It thus may appear a strained argument that finds a due process right of access requiring a state to expend funds so that a prisoner can file a habeas corpus petition that he has no due process right to file. But the argument remains tenable if the Article I habeas right is of the constitutional scope afforded it by *Fay v. Noia*, 372 U.S. 391 (1963). *See notes 46 & 55 infra* & text accompanying.

⁴³*See note 38 supra* & text accompanying.

⁴⁴U.S. CONST. art. 1 § 9 ch. 2: "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."

⁴⁵372 U.S. 391 (1963).

⁴⁶*Id.* at 400. *See United States v. MacCollom*, 426 U.S. 317, 334 (1976) (Stevens, J., dissenting).

⁴⁷372 U.S. at 402. The writ originally applied to persons imprisoned under federal law. Judiciary Act of 1789, c.20 § 14, 1 Stat. 81. It was later extended to include state prisoners. Act of Feb. 5, 1867, c.28 § 1, 14 Stat. 385. Its historical use was to review questions of jurisdiction of the sentencing court. *E.g.*, *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830); *In re Wood*, 140 U.S. 278 (1891). Its use was gradually expanded by the Supreme Court until, in *Fay*, federal courts were mandated to consider, with some limited exceptions, the merits of all prisoner claims that incarceration resulted from the violation of their federal rights. 372 U.S. at 430-34. In the past several years the *Fay* holding has undergone some retrenchment. Today, federal courts will not entertain a state prisoner's claim that evidence obtained unconstitutionally was introduced at trial if the prisoner had an opportunity to fully and fairly litigate the claim at trial. *Stone v. Powell*, 428 U.S. 465, 482 (1976). A similar claim by a federal prisoner may be entertained to the extent it derives not from the constitutional scope of the writ but from the Court's supervisory powers under 28 U.S.C. § 2255 (1970). 428 U.S. at 481 n.16. Failure to timely challenge the admission at trial of inculpatory statements will also bar federal habeas review. *Wainwright v. Sykes*, 97 S.Ct. 2497 (1977). And absent a showing of cause and actual prejudice a prisoner failing to timely challenge grand jury composition may not obtain habeas review. *Francis v. Henderson*, 425 U.S. 536, 542 (1976). *Cf. Johnson v. Avery*, 393 U.S. at 458.

⁴⁸372 U.S. at 406.

⁴⁹*Id.* The statutory grant for federal habeas corpus jurisdiction for federal prisoners is 28 U.S.C. § 2241 (1970); for state prisoners it is 28 U.S.C. § 2254 (1970). A procedure alternative to that used under habeas corpus, a motion to vacate the sentence, was provided to federal prisoners in 1948. 28 U.S.C. § 2255 (1970). This procedure must be used in lieu of the writ of habeas corpus unless it is "inadequate or ineffective." *Id. See Swain v. Pressley*, 430 U.S. 372,

mensurate with the scope of the common law writ.⁵⁰ It is today being argued that the federal statute is not merely commensurate with the scope of the common law writ but is, in fact, much broader⁵¹ and that the obligation of the federal courts to collaterally review convictions is either not a constitutional obligation⁵² or is one only to the extent that it reflects the historical use of the writ to review questions of the jurisdiction of the sentencing court.⁵³ The resolution of the constitutional scope of the writ is significant, of course, since on it turns a determination of whether the *Gilmore* right of prisoner access states a new constitutional rule.

While it is true that there has been expansion in the scope of the writ over time⁵⁴ it does not necessarily follow that the expansion cannot be constitutional in magnitude, reflecting a modern, yet constitutional view of the writ.⁵⁵ And whatever the constitutional scope of the writ, to that extent, certainly, a constitutional obligation could have been placed on the states to expend funds to assist prisoners to assert this constitutional right.⁵⁶ Read this way, the *Gilmore* decision requires a finding of the constitutional scope of the writ of habeas corpus; but it is otherwise not a particularly novel decision. Then came *Wolff v. McDonnell*.⁵⁷

378 n.10 (1977); Note, *Discretionary Appointment of Counsel at Post-Conviction Proceedings: An Unconstitutional Barrier to Effective Post-Conviction Relief*, 8 GA. L. REV. 434, 437 (1974).

The § 2255 motion was enacted by Congress to expedite and make more convenient habeas corpus review. See, e.g., *United States v. Hayman*, 342 U.S. 205, 219 (1952). The scope of § 2255 is as broad as that of habeas corpus. *United States v. MacCollom*, 426 U.S. 317, 334 (1976) (Stevens, J., dissenting); *Davis v. United States*, 417 U.S. 333, 343 (1974). The essential difference between §§ 2255 and 2241 is that under § 2255 the prisoner applies to the sentencing court while under § 2241 he applies to the federal district court nearest the prison in which he is incarcerated.

⁵⁰372 U.S. at 405-06, 417.

⁵¹This is based on the view that the *Fay* holding described the scope of the federal habeas statute and not the constitutional provision. See cases cited at note 53 *infra*. The dissenters in *Fay*, of course, argued, and rightly, that the common law scope of the writ was restricted to sentencing court jurisdictional questions. 372 U.S. at 448-63 (Harlan, J., dissenting). See note 47 *supra* for a discussion of the expansion in the scope of the writ.

⁵²See *Bounds v. Smith*, 430 U.S. 817, 835 (1977) (Burger, C.J., dissenting); *Swain v. Pressley*, 430 U.S. 372, 384 (1977) (Burger, C.J., concurring) ("The sweep of the Suspension Clause must be measured by reference to the intention of the Framers and their understanding of what the writ of habeas corpus meant at the time the Constitution was drafted.").

⁵³E.g., Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgment*, 38 U. CHI. L. REV. 142, 170 (1970).

⁵⁴See note 47 *supra*.

⁵⁵*Cf. Fareta v. California*, 422 U.S. 806, 851-52 (1975) (Blackmun, J., dissenting) (advising against ignoring the historical development of a constitutional right by attempting to employ the right, in its historical form, in a modern and quite different procedural context). This is an opinion in which the Chief Justice concurred. *Id.* at 843 (Burger, C.J., dissenting). See *Fay v. Noia*, 372 U.S. 391, 405-15 (1963). The view that the full scope of the writ is not constitutional does not command a majority of the Court. Mr. Justice Stevens, for example, writing for the majority in *Swain v. Pressley*, 430 U.S. 372, 380 n.13 (1977), although expressly declining to consider the extent to which the scope of the writ is constitutional, indicated dissatisfaction with the view that the writ is not constitutional in scope.

⁵⁶See cases cited at note 39 *supra*.

⁵⁷418 U.S. 539 (1974).

In *Wolff* the Court extended the right of access to section 1983⁵⁸ actions and finally and explicitly fixed the derivative of the right: "[t]he right of access to the courts, upon which *Avery*⁵⁹ was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."⁶⁰ Since due process, whose "fundamental requisite . . . is the opportunity to be heard,"⁶¹ requires basic fairness in government's dealings with individuals,⁶² it seems an eminently reasonable constitutional derivative of the right of access.⁶³ But this due process right of access described in *Wolff* was the right enunciated in *Avery*—a right assuring a prisoner that a state will not impede his ability to address a court with his claims—and not "the full breadth of the right of access"⁶⁴ which receives the Supreme Court's imprimatur in *Bounds*. Thus the *Wolff* inclusion of section 1983 actions asserting fundamental constitutional rights within the ambit of the right of access is a development that is not only comprehensible but essentially unarguable⁶⁵ since basic fairness requires that a state not impede a person, whether prisoner or not, from seeking what Mr. Justice Rehnquist calls "physical access"⁶⁶ to the courts. And this would, of course, hold true for the assertion of not just fundamental constitutional rights but for the assertion of any legal claim.

The pre-*Bounds* prisoner right of access decisions, then, could have been explained as finding that the due process right of prisoner access required (1) affirmative state aid when constitutional habeas claims were asserted and (2)

⁵⁸Every 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.

28 U.S.C. § 1983 (1970). Section 1983 was originally enacted as Section 1 of the Act of April 20, 1871, ch. 22, 7 Stat. 3. The Constitution provides specific authorization for enactment of such legislation. U.S. CONST. amend. XIV § 5.

⁵⁹*Johnson v. Avery*, 393 U.S. 483 (1969).

⁶⁰418 U.S. at 579. *Accord*, *Corpus v. Estelle*, 409 F. Supp. 1090, 1097 (S.D. Tex. 1975), *aff'd*, 542 F.2d 573 (5th Cir. 1976).

⁶¹*See, e.g.*, *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). *Accord*, *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

⁶²*See, e.g.*, Note, *Criminal Procedure—No Right to Counsel on Discretionary Appeal*, 53 N.C. L. REV. 560, 563 (1975).

⁶³*See* note 60 *supra*. *See, e.g.*, 401 U.S. at 375-76; *Guajardo v. McAdams*, 349 F. Supp. 211 S.D. Tex. 1972), *vacated and remanded sub nom.*, *Sands v. Wainwright*, 491 F.2d 417 (5th Cir. 1973), *cert. denied*, 421 U.S. 948 (1974); 56 CALIF. L. REV. 342, 342 (1968). *Cf. Prisoner Assistance*, *supra* note 38, at 889. *But see* *United States v. MacCollom*, 426 U.S. 317 (1976). The right of access in other contexts has also been located in the due process clause. *E.g.*, 401 U.S. at 377 409 F. Supp. at 1096-97. *See, e.g.*, *Meltzer v. G. Buck LeCraw & Co.*, 402 U.S. 954, 955 (1971); *United States v. Kras*, 409 U.S. 434 (1973).

⁶⁴*Bounds v. Smith*, 430 U.S. 817, 824 (1977).

⁶⁵*See* note 14 *supra* and text accompanying.

⁶⁶*Bounds v. Smith*, 430 U.S. 817, 838 (Rehnquist, J., dissenting).

that the states not impede prisoners pursuing section 1983 actions asserting fundamental constitutional rights or, for that matter, any other legal claim. The different treatment of habeas corpus could have been explained as relating to the constitutional scope of the writ as well as to the fact that habeas corpus allegations, allegations which go exclusively to the legality of the confinement, bear a closer relationship to the confinement than would any other constitutional claim. This would seem to have been a reasoned, and reasonable, way to describe the scope of the right of access. The virtues of describing the right in these terms are that its scope would have been clearcut and its constitutional underpinnings unarguable. Additionally, this right of access would not have unduly interposed the federal courts in the operation of state government.⁶⁷ The Court in *Bounds v. Smith*,⁶⁸ unfortunately, did not so describe the right. It chose, instead, to include all section 1983 actions within the states affirmative obligation to provide legal assistance or law libraries.

Thus the right of access progressed from a right asserted by the Court essentially in protection of its own jurisdictional prerogatives to a constitutional imperative requiring the expenditure of state funds to implement it. In so describing this right of access, the *Bounds* Court left unanswered questions as to its appropriate scope. Worse, it described a right of access which not only cannot be easily contained but a right that seems logically to demand expansion beyond its present scope.

Bounds v. Smith

In *Bounds v. Smith* North Carolina prisoners filed section 1983 actions claiming that the State's failure to provide legal research facilities for prisoners violated their right of access to the courts. Mr. Justice Marshall, writing for the Court, agreed with the prisoners that the states have a due process obligation to provide some type of legal assistance to prisoners. He found no difference between habeas corpus and section 1983 actions for purposes of requiring such affirmative state assistance, described the Court directive to the states to spend money to implement section 1983 and habeas corpus rights as no different than other obligations that the Court has placed on the states,⁶⁹ and noted the obligation of the states to provide indigents with trial counsel⁷⁰ and with transcripts of the trial and other stages of the criminal proceeding as well as the obligation of the states to waive docket

⁶⁷That federal courts, in the interests of comity and federalism, should, whenever possible, refrain from intruding in state matters is a well-known doctrine. See, e.g., *Apodaca v. Oregon*, 406 U.S. 404, 366 (1972). (Powell, J., concurring); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *Rizzo v. Goode*, 423 U.S. 362, 377 (1976).

⁶⁸430 U.S. 817 (1977).

⁶⁹*Id.* at 824-25.

⁷⁰*E.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972). For other instances in which the states are required by the sixth amendment to provide counsel to indigents see note 132 *infra*.

fees⁷¹ and to provide indigent prisoners with writing material, notary services, and free mailing for their legal documents.⁷² These cases, however, derive either from a specific constitutional provision, the 6th amendment in the right to counsel cases,⁷³ the first amendment in the cases dealing with writing materials,⁷⁴ or in general they do no more than require that the state operate its own procedures fairly⁷⁵ and not impede the implementation of federal statutory rights.⁷⁶ To the extent that the writ of habeas corpus is constitutional, it falls within these cases; unlike habeas corpus, however, a section 1983 action is not, in itself, of constitutional magnitude.

Section 1983 was enacted to provide a federal remedy and a federal forum for the violation of federal civil rights occurring under color of state law.⁷⁷ Although section 1983 actions often involve claims of violation of constitutional rights,⁷⁸ the right asserted may derive from a federal statute and not the Constitution.⁷⁹ Since a section 1983 action is not in itself a constitutional right it seems to represent the most extreme case that could be fit under the affirmative right of access. Its inclusion suggests, in other words, the "novel and doubtful"⁸⁰ proposition that the Court can direct states to

⁷¹430 U.S. at 825. Mr. Justice Marshall did not set forth the cases requiring this. For a list of many of them see note 33 *supra*.

⁷²For an example of such a case, see *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976). Many states have independently assumed such a burden. *E.g.*, Manual for Alas. State Adult Correc. Inst. § 705 (1972); Administration Plan Manual, N.J. Div'n of Correc. and Parole Std. 291.277 (1975); Pa. Bureau of Correc., Admin. Dir. BC-ADM 803 (1972); Ill. Correc. Adult Div'n Admin. Reg. § 823 (1975). For a discussion of the Illinois regulation see *Bach v. Coughlin*, 508 F.2d 303, 308 (7th Cir. 1974). *See also Morales v. Turman*, 364 F. Supp. 166, 180 (E.D. Tex. 1973) (describing Texas correctional policy of providing paper and postage for 3 letters weekly pursuant to an order of the district court that was partly provoked by the numerous beatings of prisoners). There is little dispute that the ability to communicate with the outside world aids in the prisoner's "adjustment to life inside the facility as well as to his ability to readjust to life outside." Comment to UNIFORM CORRECTIONS ACT § 4-101, at 296 (2d Tent. Draft, with comments, 1977) [hereinafter cited as UCA]. *See G. SYKES, THE SOCIETY OF CAPTIVES 122-29 (1958); D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 378-80 (1964); POLICY GUIDELINES, ASSOCIATION OF STATE CORRECTIONAL ADMINISTRATORS (1972).*

⁷³See cases cited at note 132 *infra*.

⁷⁴*E.g.*, *Brenneman v. Madigan*, 343 F. Supp. 128, 141-42 (N.D. Cal. 1972). *See Wilkinson v. Skinner*, 462 F.2d 670, 671-72, n.3 (2d Cir. 1972).

⁷⁵See notes 33 & 34 *supra*.

⁷⁶See, *e.g.*, *Bounds v. Smith*, 430 U.S. 817, 834-35 (1977) (Burger, C.J., dissenting).

⁷⁷*Monroe v. Pape*, 365 U.S. 167, 173 (1961) (Section 1983 requires override of state law inappropriately inconsistent with federal law and provides federal remedy when state remedy is either inadequate or available only in theory). *See, e.g.*, *Nahmod, Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 7 (1974); Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. CHI. L. REV. 537, 552-53 (1974); Note, *A Limitation on Actions for Deprivation of Federal Rights*, 68 COLUM. L. REV. 763, 763 (1968).

⁷⁸See, *e.g.*, 365 U.S. 167. In the context of prisoner litigation claims of violation of constitutional rights are often the basis of section 1983 actions. *E.g.*, *Haines v. Kerner*, 404 U.S. 519 (1971); *Wilwording v. Swenson*, 404 U.S. 249 (1971).

⁷⁹See, *e.g.*, *Nahmod, Section 1983 and the "Background" of Tort Liability*, 50 IND. L.J. 5, 8-9 & n.22 (1974).

⁸⁰*Bounds v. Smith*, 430 U.S. 817, 835 (Burger, C.J., dissenting). The expansion of the right of access to § 1983 actions is an expansion in an area in which prison officials are most sensitive since these claims are directed at the treatment afforded prisoners by correctional employees or

spend money to implement federal statutory rights. Moreover, if that is the import of the *Bounds* holding, then it is difficult to frame a supportable reason for the inclusion of section 1983 actions that does not also include every other federal right, whether constitutional or statutory, within the right of prisoners access. Since the *Bounds* opinion sounds in terms of constitutional rights, it is possible, but unlikely, that the import of the holding is that an allegation of abridgement of any federal statutory right gives rise to a right of access that is to be implemented by state expenditures. How, then, is the opinion to be read?

First, it is possible to argue for inclusion of section 1983 claims, even those deriving from a statutory rather than a constitutional source, within a right of access because of the overlap between claims which are raised in a section 1983 action and those which require a writ of habeas corpus.⁸¹ This approach would limit the scope of the right of access to section 1983 and habeas claims. The Court, however, has not only asserted that there is a difference between the two actions⁸² but will probably continue to assert this difference so long as a state prisoner filing for writ of habeas corpus must exhaust state remedies⁸³ while a prisoner bringing a section 1983 claim need not.⁸⁴ This is not determinative of the issue, however, since the fact that the two actions are different for purposes of an exhaustion requirement need not mean that they cannot be sufficiently intermingled for purposes of the right of access.

A second possible way to read the *Bounds* opinion would be to limit the reach of *Bounds* to habeas actions and to the assertion of not all Section 1983 claims but only those that are claims of violation of fundamental constitutional rights. This approach, although not explicitly taken by the Court in *Bounds*, has the virtue of excluding statutory section 1983 claims from the

through the operation of correctional regulations. See, e.g., Jacob & Sharma, *Justice After Trial: Prisoners' Needs for Legal Services in The Criminal-Correctional Process*, 18 U. KAN. L. REV. 493, 519 (1970) [hereinafter cited as Jacob & Sharma].

⁸¹See *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

⁸²The Court recently described a habeas petition as the appropriate procedure when the legality of the custody or its duration is at issue. *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973). The appropriate habeas remedy is release from the unconstitutional incarceration. *Id.* at 484. Section 1983 cases, on the other hand, are ones in which the prisoner challenges the conditions of confinement. *Id.* at 489. Thus, in a § 1983 action a prisoner may not seek restoration of good time credits since this remedy affects the duration of confinement, a claim cognizable only in a habeas action. 418 U.S. at 554. A prisoner may, however, seek a declaratory judgment concerning the legality of the procedures in which good time is lost and damages for the lost good time. 418 U.S. at 554-55.

⁸³372 U.S. at 19. The exhaustion requirement is a court-made procedure developed for the sake of comity. *Id.* at 419-20. It does not include petitioning the United States Supreme Court for writ of certiorari. *Id.* at 435-37.

⁸⁴A § 1983 action does not require exhaustion at present. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Monroe v. Pape*, 365 U.S. 167, 183 (1971). The Court, however, may be moving toward an exhaustion requirement. See *Gibson v. Berryhill*, 411 U.S. 564 (1973).

purview of the affirmative right of access.⁸⁵ It does seem unduly limiting, however, since once the *Bounds* Court found that the *Gilmore* due process right of access⁸⁶ encompassed more than just federal habeas corpus actions there seems no particular reason, with the possible exception of cost considerations, to limit the scope of the right to only those constitutional claims that can be raised by section 1983 or habeas corpus review. Consistent with the reasoning in *Bounds*, however, it seems more appropriate to describe the scope of the right broadly enough to include the assertion by a prisoner of at least any fundamental right whether or not it is raised in a section 1983 action.⁸⁷

The due process clause, which protects life, liberty, and property,⁸⁸ is often described as governing a flexible concept whose parameters depend on the context in which it is asserted.⁸⁹ After *Bounds*, then, the issue with respect to the right of prisoner access becomes whether the life, liberty, or property interest asserted encompasses a fundamental right.⁹⁰

⁸⁵This, however, does not appear completely consistent with the reason that the *Wolff* Court gave for including § 1983 actions within the *Avery* right of access in the first place. *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

⁸⁶The *Gilmore* right requires states to expend funds to assist prisoner access. See note 26 *supra* & text accompanying.

⁸⁷Certainly the *Avery* right of access, which prevents a state from impeding a prisoner from reaching the court with claims, should reach well beyond habeas and § 1983 actions to include any claim that a prisoner can lawfully make. As one court recently put it:

the right of free access to the courts is no less important in general civil matters than it is in habeas and civil rights cases. While the decisions dealing with habeas and civil rights actions have not reached this question, they have not foreclosed it. It is apparent that the sphere of constitutional rights to be accorded to prison inmates has been increasing and that the logical extension of a holding that inmates must be permitted to aid each other in the preparation of habeas and civil rights actions is that they should also be permitted to help each other in general civil matters. . . . This Court is of the opinion that such reasonable access should extend to general civil matters . . .

Corpus v. Estelle, 409 F. Supp. 1090, 1097 (S.D. Tex. 1975), *aff'd*, 551 F.2d 68 (5th Cir. 1977). *Accord*, ABA RESOURCE CENTER, *supra* note 22, at 395.

⁸⁸*E.g.*, Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1330 (1966); Note, *Towards a Constitutional Right to Counsel in Matrimonial Litigation*, 4 FORDHAM URB. L.J. 515, 517 (1976); *Counsel in Civil Cases*, *supra* note 33, at 48.

⁸⁹*Danforth v. State Dept. of Health & Welfare*, 303 A.2d 794, 797-98 (Me. 1973).

⁹⁰It is, perhaps, unnecessary to characterize the interest as a fundamental "right." See, *e.g.*, *Graham v. Richardson*, 403 U.S. 365, 374 (1971). For examples of fundamental rights—or interests—see, *e.g.*, *Boddie v. Connecticut*, 401 U.S. 371 (1971) (divorce); *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) (travel). For an example of a right that is not fundamental, see, *e.g.*, *Lindsey v. Normat*, 405 U.S. 56, 74 (1972).

Some interests, like child custody, have been recognized by state courts as fundamental; others have been considered fundamental by the United States Supreme Court. See *Danforth v. State Dept. of Health & Welfare*, 303 A.2d 794 (Me. 1973); Comment, *Constitutional Law—Fourteenth Amendment Due Process—Appointment of Counsel is Required for Indigent Parents Faced with a Dependency—Neglect Proceeding* 6 RUT.—CAM. L.J. 623, 662-63 (1975); Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U. MICH. J. L. REF. 554, 558 (1976). These cases find a constitutional right in parents to have custody of their children. *Cf. Meyer v. Nebraska*, 262 U.S. 390, 399 (1922) (right to rear children is due process right and includes right to instruct them in foreign languages). Several state courts require the appointment of counsel in such proceedings. *E.g.*, *Crist v. New Jersey Div'n of Youth and Family*

The United States Supreme Court in *Boddie v. Connecticut*,⁹¹ for example, found a right of access⁹² to obtain a divorce by describing divorce as "the adjustment of a fundamental human relationship"⁹³ and finding that the state "pre-empted" the procedures for achieving an adjustment of that relationship.⁹⁴ Thus under *Boddie* there is a right of access in civil cases at least when the right asserted is fundamental and⁹⁵ the procedures available for exercise of that right are state-controlled and exclusive.

Dealing first with the *Boddie* exclusivity requirement, there is persuasive support for the proposition that since the state ultimately controls the ability to enforce all rights, all that should be required to enforce a right of access is the existence of a fundamental right.⁹⁶ It is also possible that in those cases where a state court itself finds a fundamental right under state law that the exclusivity factor would be irrelevant since this is a case where a state court is telling its own state legislature to spend money. It would seem to be freer to do this than the United States Supreme Court.⁹⁷ Yet, even if exclusivity of control must be shown, in the prisoner access cases it may be found in the fact that the state in the incarceration of prisoners and in the establishment and operation of its prisons controls the ability of an indigent prisoner to reach the courts just as much as it does when it interposes a financial barrier between the indigent and his ability to obtain a divorce.⁹⁸

Services, 135 N.J. Super. 573, 575, 343 A.2d 815, 817 (App. Div'n 1975); 303 A.2d at 797-99; *In re Ella B.*, 30 N.Y.2d 253, 285 N.E.2d 288, 334 N.Y.S.2d 133 (1972); *State v. Jamison*, 251 Ore. 114, 444 P.2d 15 (1968); *Munkelwitz v. Hennepin County Welfare Dept.*, 280 Minn. 377, 159 N.W.2d 402 (1968); *Chambers v. District Court*, 261 Iowa 31, 152 N.W.2d 818 (1967). Note, *Right to Assigned Counsel at Welfare "Fair" Hearings*, 40 ALB. L. REV. 676, 680 (1976); *"Right" to Counsel*, *supra* note 33, at 995. States requiring the appointment of counsel in such proceedings are in the minority. Note, *Parents Right to Counsel in Dependency and Neglect Proceedings*, 49 IND. L.J. 167, 167-68 (1973).

⁹¹401 U.S. 371 (due process violation to assess fee of indigent seeking divorce).

⁹²The right of access there meant that the state could not assess fees against indigent seeking divorce.

⁹³401 U.S. at 382. See *United States v. Kras*, 409 U.S. 434, 444-45 (1973).

⁹⁴401 U.S. at 382; 409 U.S. at 441-42.

⁹⁵It has been suggested, moreover, that the *Boddie* rationale should not be restricted to cases in which fundamental rights are asserted. E.g., *"Right" to Counsel*, *supra* note 33, at 995. *Contra*, *Powell v. Alabama*, 287 U.S. 45, 67 (1932). See note 96 *infra*.

⁹⁶401 U.S. at 390-91 (Black, J., dissenting); *Meltzer v. G. Buck Le Craw & Co.*, 402 U.S. 954, 955-56 (Black, J., dissenting); *Goodpaster*, *supra* note 5, at 244-63. See ABA RESOURCE CENTER, *supra* note 22, at 368-69; *Prisoners' Rights*, *supra* note 22, at 290; Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U. MICH. J. L. REF. 554, 564 (1976).

⁹⁷The evolution in New Jersey of financing the right to education is an example of what appears to be an extreme involvement of a state court in state legislative expenditures. See *Robinson v. Cahill*, 62 N.J. 473, 303 A.2d 273 (1973), *cert. denied*, 414 U.S. 976, *modified*, 63 N.J. 196 (1973); *Robinson v. Cahill*, 69 N.J. 133, 351 A.2d 713 (1975) (corrected reprint of 67 N.J. 333, 339 A.2d 1973), *cert. denied*, 423 U.S. 913, *vacated*, 69 N.J. 449, 335 A.2d 129 (1975); *Robinson v. Cahill*, 70 N.J. 155, 358 A.2d 457, *modified*, 70 N.J. 464, 360 A.2d 400 (1976); N.J. STAT. ANN. §§ 54 A:9-28 (Supp. 1977). See, e.g., *Payne, Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning*, 29 RUTGERS L. REV. 803 (1976).

⁹⁸*Corpus v. Estelle*, 409 F. Supp. 1090, 1096-97 (S.D. Tex. 1975), *aff'd*, 551 F.2d 68 (5th Cir. 1977); ABA JOINT COMM., *supra* note 22, at 433; ABA RESOURCE CENTER, *supra* note 22, at

The solution, it could be argued, would be for a prisoner to wait to bring suit until released. But this neither solves the difficulty he faces as a defendant in a civil lawsuit nor considers the burden placed on the free defendant waiting to be sued by the released prisoner. A person's posture as a plaintiff, moreover, does not indicate that he is acting voluntarily or that the matter does not warrant immediate attention.⁹⁹ In any case, it is not always practical for a prisoner to wait to bring suit since waiting oftentimes will decrease his

376-77. See Brief for Respondents at 8-9, *Bounds v. Smith*, 430 U.S. 817 (1977); Comment, *Resolving Civil Problems of Correctional Inmates*, 1969 WIS. L. REV. 574, 577; Cardarelli & Finkelstein, *Correctional Administrators Assess the Adequacy and Impact of Prison Legal Services Programs in the United States*, 65 J. CRIM. L. & CRIMINOLOGY 91, 96 (1974) [hereinafter cited as Cardarelli & Finkelstein].

It is the state, after all, that placed by deliberate choice its correctional facilities in areas remote to population centers. *E.g.*, S. CHANELS, *THE OPEN PRISON*, 53-54, 194-205 (1973); ABA RESOURCE CENTER, *supra* note 22, at 370-71, 408-09. See U.S. BUREAU OF PRISONS, *HANDBOOK OF CORRECTIONAL INSTITUTION DESIGN AND CONSTRUCTION* 8 (1949); Jacob & Sharma, *supra* note 80, at 615; *Prisoners' Rights*, *supra* note 22, at 290. This distance makes access to the courts more burdensome. One burden placed on access, for example, is that attorneys and law school clinics may be less able because of the distance between their base of operations and the prison. See *United States ex rel. Stevenson v. Mancusi*, 325 F. Supp. 1028, 1031 (W.D.N.Y. 1971). Personal interviews will probably occur infrequently. Yet personal interviews are extremely important when representing prisoners. ABA RESOURCE CENTER, *supra* note 22, at 416, Bluth, *supra* note 17, at 67. Distance may also affect the quality of the legal assistance rendered. See *e.g.*, ABA RESOURCE CENTER, *supra* note 22, at 416.

Most states do not pay prisoner-employees a living wage. For information as to wages presently paid prisoners see HOUSE SELECT COMM. ON CRIME, REFORM OF OUR CORRECTIONAL SYSTEMS, H.R. REP. NO. 93-329, 93d Cong., 1st Sess. 31 (1973). The inability to earn a living wage makes it more difficult for the prisoner to assert his rights without state assistance. ABA JOINT COMM., *supra* note 22, at 433; ABA RESOURCE CENTER, *supra* note 22, at 368. The state may also oppose the employment of prisoners (and, thus, payment of a living wage) by private enterprise. See Letter from W. J. Estelle, Jr., Director of the Texas Department of Corrections to J. R. Potuto (Dec. 29, 1976) [on file in Uniform Correc. Act Project Office, University of Nebraska Law College, Lincoln, Neb.]. This economic picture is now changing; several authorities are now proposing payment of a prevailing minimum or prevailing wage to prisoners. *E.g.*, UCA, *supra* note 72 § 4-408; ABA JOINT COMM., *supra* note 22, Std. 4.2, at 393; NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS, Std. 16.13 & Commentary at 583-84 (1973) [hereinafter cited as NAC]; PRESIDENT'S TASK FORCE ON PRISONER REHABILITATION, *THE CRIMINAL OFFENDER—WHAT SHOULD BE DONE?* 12 (1970); Barnes & Teeters, *Inmate Labor in the Correctional Program*, in *NEW HORIZONS IN CRIMINOLOGY* 741-42 (2d ed. 1963). A successful prevailing wage system is used in Sweden. N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 131 (1970). See also ECON, INC., *ANALYSIS OF PRISON INDUSTRIES AND RECOMMENDATIONS FOR CHANGE*, VI, *STUDY OF THE ECONOMIC AND REHABILITATIVE ASPECTS OF PRISON INDUSTRY* (Sept. 24, 1976). There is also movement to encourage private industry to employ prisoners. See MINN. STAT. ANN. § 243.88 (Supp. 1976); UCA, *supra* note 72, at 388-89. For the present, however, it is true that prisoner are not paid a living wage and that, therefore, their indigency derives, at least in part, from the direct involvement of the state.

Other difficulties, see, *e.g.*, *Ortiz v. La Valle*, 442 F.2d 912 (2d Cir. 1971), exist, including the possibility that the prisoner may not be allowed to appear in the action he brings. See, *e.g.*, *Potter v. McCall*, 433 F.2d 1087 (9th Cir. 1970). But see *Saladino v. Federal Prison Indus.*, 404 F. Supp. 1054 (D. Conn. 1975). The Uniform Corrections Act directs the court to determine whether a prisoner should be ordered to appear in court. UCA *supra* note 72 § 4-115.

⁹⁹See *Boddie v. Connecticut*, 401 U.S. 371, 376-77 (1971); *Counsel in Civil Cases*, *supra* note 33, at 555.

chances of success in the suit he brings.¹⁰⁰ And even if waiting would not harm his case, the applicable statute of limitations may prevent him from waiting nonetheless.¹⁰¹

Thus, incarceration itself, since it involves the state's exclusive control over a prisoner, increases the burden on an indigent prisoner to gain access. The state may therefore have a concomitantly increased duty to assist prisoners in reaching the courts.¹⁰² This in turn may aid in defining a fundamental right for purposes of finding a prisoner right of access and may result in a right of access under the *Boddie* rationale that can be found in the prison context when it would not be available to non-prisoner indigents asserting those same rights.¹⁰³

¹⁰⁰*E.g.*, *Peterson v. Nadler*, 452 F.2d 754, 756 (8th Cir. 1971) (per curiam) ("To delay the action until plaintiff is released from prison could conceivably forever deny his securing presently available evidence which he alleges is necessary to prove his claim. . . . And to arbitrarily deny even the bare opportunity to process his claim for an indefinite number of years could well render the legal process meaningless for the plaintiff."). *Accord*, *Delorme v. Pierce Freightlines Co.*, 353 F. Supp. 258, 260 (D. Ore. 1973). *But see* *Fay v. Noia*, 372 U.S. 391, 445 (Clark, J., dissenting); *Peak v. United States*, 353 U.S. 43 (1957). *See also* *Burnett v. New York Cent. R.R.*, 380 U.S. 424 (1965).

¹⁰¹A few states have specific provisions tolling applicable statutes of limitations during a prisoner's term of imprisonment. *E.g.*, KY. REV. STAT. ANN. § 413.310 (Bobbs-Merrill 1972); CODE OF VA. § 8.01-229.A3 (1977) (limited to claims against his committee. *See* MISS. CODE ANN. § 15-1-57 (1972). Other states toll the statute of limitations for a prisoner only for a specified period of time; the time period means that a prisoner serving a longer sentence is not covered during his full term of imprisonment. *E.g.*, KAN. STAT. ANN. § 60-515 (1977) (for a term less than life there is an eight-year limit). More often, however, tolling only occurs if the cause of action accrues while the prisoner is incarcerated. *E.g.*, ARIZ. REV. STAT. ANN. § 12-502 (West Supp. 1977); CAL. CIV. PROC. CODE § 352 (West Supp. 1977) (applies to a term less than life); COLO. REV. STAT. § 13-80-116 (Supp. 1976); IDAHO CODE § 5-230 (Supp. 1977) (for a term less than life there is a 6-year limit); ILL. REV. STAT. ch. 83 § 22 (Smith-Hurd Supp. 1977); ME. REV. STAT. ANN. tit. 14 § 853 (West Supp. 1977); ANN. LAWS OF MASS. ch. 260 § 7 (Michie 1968); MICH. COMP. LAWS ANN. § 600.5851 (West Supp. 1977-1978); MINN. STAT. ANN. § 541.15 (West Supp. 1977) (applies to a term less than life; NEB. REV. STAT. § 25-213 (Reissue 1975) (there is a twenty-year limit); WIS. STAT. ANN. § 893.33 (West 1966) (for a term less than life there is a 5-year limit). Moreover, in the absence of a tolling statute courts have refused to imply a tolling of the statute of limitations. *E.g.*, *Battle v. Lawson*, 352 F. Supp. 156, 158 (W.D. Okla. 1972); *Williams v. Hollins*, 428 F.2d 1221, 1221-22 (6th Cir. 1970). *But cf.* *Kaiser v. Cahn*, 510 F.2d 282 (2d Cir. 1974).

¹⁰²It is possible to argue, of course, that it is the prisoner by committing the crime, and not the state, that is responsible for the incarceration and the further restrictions that attend on it and that, therefore, the state is under no greater duty to aid the indigent prisoner than to aid indigents generally. This argument, however, applies equally well at least to the section 1983 action. It hindered neither the *Wolff* nor *Bounds* Court from requiring that the state provide assistance.

¹⁰³*See*, ABA JOINT COMMITTEE, *supra* Note 22, at 433. Of course, thus defined the right will cost more to implement. And these potential costs may well dictate caution to a court attempting to determine the constitutional scope of the right. Yet, if the right is constitutionally mandated the cost to implement it will be irrelevant since "constitutional requirements are not, in this day, to be measured or limited by dollar considerations . . ." *Jackson v. Bishop*, 404 F.2d 571, 580 (8th Cir. 1968) (Blackman, J.). *Cf.* *James v. Strange*, 407 U.S. 128, 141-42 (1972) (Kansas statute for recovering defense fees from indigent defendants violates equal protection because no protective exemptions available); *Meltzer v. C. Buck Le Cra & Co.*, 402 U.S. 954, 956 (1971) (Black, J., dissenting to denial of certiorari) (poverty cases). There is some evidence that even the cost of full legal services programs affording counsel to all indigents may not be prohibitive. *Counsel in*

If the possibility exists that the exclusive control of the state over the prisoner might broaden the class of fundamental actions for which prisoner access must be assured, it seems even more necessary to develop a standard for determining what constitutes a fundamental right in the prison context. The court in *Bounds*, however, failed to provide such a standard.

One test for determining whether a right is fundamental is, of course, whether appointment of counsel is required. It has been argued that to have a meaningful due process civil hearing the assistance of counsel is as crucial as in a criminal trial since the procedures can be just as complex¹⁰⁴ and the consequences equally severe.¹⁰⁵ Thus it is argued that counsel should be appointed for indigents in all civil proceedings just as counsel is appointed for indigents in criminal trials.¹⁰⁶ Although there is not now a due process right to counsel in civil proceedings generally¹⁰⁷ for some hearings due process does indeed require the appointment of counsel.¹⁰⁸

Civil Cases, *supra* note 34, at 551. See also Utton, *The British Legal Aid System*, 76 YALE L.J. 371 (1967); Schweinburg, *Legal Assistance Abroad*, 17 U. CHI. L. REV. 270, 280-91 (1950).

¹⁰⁴E.g., Note, *The Right To Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1322-23, 1331 (1966); Note, *Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U. MICH. J. L. REF. 554, 554-58 (1976); *Counsel in Civil Cases*, *supra* note 33, at 548. Cf. *Powell v. Alabama*, 287 U.S. 45 (1932). It has been argued that the civil litigant at trial has more need of the assistance of counsel than the criminal defendant on appeal. E.g., *Counsel in Civil Cases*, *supra* note 33, at 550. See "Right" to Counsel, *supra* note 33, at 993. Cf. Note, *right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054, 1074-75 (1963).

¹⁰⁵*Danforth v. State Dept. of Health & Welfare*, 303 A.2d 794, 800 (Me. 1973); Note, *Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1332-33 (1969); 6 RUT.-CAM. L.J. 623, 662 (1975); Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U. MICH. J. L. REF. 554, 558 (1976). See *Goss v. Lopez*, 419 U.S. 565, 576 (1975) ("as long as a property deprivation is not *de minimus*, its gravity is irrelevant to the question whether account must be taken of the Due Process clause."); *Goodpaster*, *supra* note 5, at 248; *Counsel in Civil Cases*, *supra* note 33, at 550.

¹⁰⁶See *Meltzer v. G. Buck LeCraw & Co.*, 402 U.S. 954, 959 (1971) (Black, J., dissenting); "Right" to Counsel, *supra* note 33, at 994; Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U. MICH. J. L. REF. 554, 554-57 (1976); *Counsel in Civil Cases*, *supra* note 33, at 545-49. Historically, counsel was appointed for indigents in civil proceedings; it was the criminal defendant who was unassisted at trial. See, e.g., Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322, 1327-30 (1966); Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U. MICH. J. L. REF. 554, 554 (1976).

¹⁰⁷*Peterson v. Nadler*, 452 F.2d 754, 757 (8th Cir. 1971) (per curiam); "Right" to Counsel, *supra* note 33, at 989; *Counsel in Civil Cases*, *supra* note 33, at 545; Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U. MICH. J. L. REF. 554 (1976). See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare termination hearing). *Accord*, *Matter of Brown v. Lavine*, 37 N.Y.2d 317, 333 N.E.2d 374, 372 N.Y.S.2d 75 (1975). See Note, *Right to Assigned Counsel at Welfare "Fair" Hearings*, 40 ALB. L. REV. 676, 677 (1976).

¹⁰⁸See Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U. MICH. J. L. REF. 554, 558 (1976). Cf. Note, *Prisoner Assistance*, *supra* note 38, at 889. The United States Supreme Court has required the appointment of counsel at juvenile proceedings in which a loss of liberty may result. *In re Gault*, 387 U.S. 1, 36 (1967). See Note, *Parents' Right to Counsel in Dependency and Neglect Proceedings*, 49 IND. L.J. 167, 169 (1973). These proceedings are civil in nature. *Kent v. United States*, 383 U.S. 541, 554 (1966). The Court has also required the appointment of counsel at probation and parole revocation hearings when it is called for in the interests of fundamental fairness in the particular case. *Gagnon v. Scarpelli*, 411 U.S. 778, 789-90 (1973). See *Morrissey v. Brewer*, 408 U.S. 471 (1972). Again, these proceedings are civil in nature. *Id.* There is no right to counsel at a prison disciplinary hearing, however,

If the due process necessity for appointment of counsel is any test, then, there are civil proceedings in which the rights asserted are as fundamental as those in a criminal trial—or those that are asserted in a habeas corpus or section 1983 action. It is clear, of course, that in those cases in which a prisoner is provided the assistance of counsel the legal services alternative under the *Bounds* right of access has been met.¹⁰⁹ But what of other civil cases in which neither the state nor the United States has found a due process right to an attorney¹¹⁰ but in which the interest asserted is a liberty or property interest requiring due process protection?¹¹¹ These cases are relevant because, although there is likewise no due process right to an attorney when filing a section 1983 action¹¹² or when petitioning for writ of habeas corpus,¹¹³ the Court in *Bounds* nonetheless found that the importance of the substantive claims involved in those actions required affirmative action on the part of the state. Thus, the fact that the right asserted is not so important as to require the appointment of counsel may make it an even clearer case for attachment of the right of prisoner access.¹¹⁴

even though the imposition of good time loss increases the time served. *Wolff v. McDonnell*, 418 U.S. 539 (1974). *Cf. Montayne v. Haymes*, 427 U.S. 236 (1976); *Meachum v. Fano*, 427 U.S. 215 (1976); *Middendorf v. Henry*, 425 U.S. 25 (1976). The Court has intimated that counsel must be appointed in proceedings in which the privilege against self-incrimination may need to be asserted to avoid the possibility of later criminal prosecution. *Maness v. Meyers*, 419 U.S. 449, 466 (1975) (assertion of privilege "often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion."). *See Note, Right to Assigned Counsel at Welfare "Fair" Hearings*, 40 ALB. L. REV. 676, 680 (1976); "*Right*" to Counsel, *supra* note 33, at 995. The privilege may be asserted in a civil proceeding. *See, e.g., Maness v. Meyers*, 419 U.S. 449 (1975); *Kastigar v. United States*, 406 U.S. 441, 444 (1972); *Lefkowitz v. Turley*, 414 U.S. 70, 71 (1973). Its assertion is complicated by the fact that a defendant risks punishment for contempt if an appellate court later determines that the privilege, although asserted in good faith, did not cover the transaction at issue. *See, e.g., United States v. Ryan*, 402 U.S. 530, 532-33 (1971). For cases in which state courts have required the appointment of counsel for civil matters see note 90 *supra*.

¹⁰⁹As to whether this means that the state is under no obligation to provide law libraries, see note 199 *infra* & text accompanying.

¹¹⁰There can, of course, exist statutory authority to appoint counsel in civil cases. *E.g., 28 U.S.C. § 1915* (1970); N.Y. CIV. PRAC. LAW § 1102(a) (McKinney 1976); ARK. STAT. ANN. § 27-401 to -403 (1962). *See Peterson v. Nadler*, 452 F.2d 754, 757 (8th Cir. 1971); "*Right*" to Counsel, *supra* note 33, at 998-99. There is also power in the courts to do so in appropriate cases. *See, e.g., In re Smiley*, 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975); "*Right*" to Counsel, *supra* note 33, at 998-99; Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U. MICH. J. L. REF. 554, 567 (1976).

¹¹¹For cases in which such an interest is recognized, see, *e.g., Bishop v. Wood*, 426 U.S. 341 (1976) (dismissal of policeman); *Perry v. Sindermann*, 408 U.S. 593 (1972) (dismissal of teacher); *Goss v. Lopez*, 419 U.S. 565 (1975) (suspension of student); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (property repossession). An interest in one's reputation was recently held to be neither a due process liberty nor property interest. *Paul v. Davis*, 424 U.S. 693 (1976).

¹¹²There is presently no constitutional right under the seventh amendment for appointment of counsel in civil actions.

¹¹³*See* cases cited at notes 166, 167 & 170.

¹¹⁴It would seem, in fact, that those rights that are so fundamental as to require the appointment of counsel cannot be encompassed by the right of access rationale. On the one hand,

There is, as yet, no clear indication from the Court, however, as to whether—and which—civil cases will give rise to a right of access for prisoners broader than that afforded generally to the citizens. It is nonetheless safe to assert that whenever under the *Boddie* test, a “fundamental human relationship”¹¹⁵ is found to give rise to a right of access, prisoners will be entitled to an exercise of that right that is at least equivalent to that afforded free citizens. This will hold true whether the fundamental right is found to exist by the Supreme Court or by a state court since it is, after all, the state that is footing the bill.

Unless and until the time arrives that civil legal problems, at least when of constitutional magnitude, are included within the *Bounds* right of access a state may, of course, choose not to provide prisoners with legal services or access to law books and other legal materials adequate to research civil legal problems. Yet even if the constitutional scope of the right is expressly found not to include an affirmative duty to assist prisoners in pursuing civil legal claims, this should not end the matter for a state considering the appropriate scope of its prison legal services and library system. For surely there can be and frequently is a difference between constitutional minimum standards and what is dictated by sound policy.¹¹⁶ And in this case there are very strong policy arguments that can be made in favor of providing prisoners with comprehensive legal services¹¹⁷ and law libraries.

if there is a constitutional right to the appointment of counsel if indigent then the law library alternative, although adequate to satisfy the *Bounds* right of access, could never satisfy that independent constitutional right to counsel. On the other hand, if a prisoner already had a constitutional right to the appointment of counsel if indigent then the *Bounds* right of access need never have developed.

¹¹⁵See note 94 *supra*.

¹¹⁶On the difference between what the Constitution requires and what, although perhaps wise policy, is not required by the Constitution, see *Ferguson v. Skrupa*, 372 U.S. 726, 729-30 (1963); *Jones v. North Carolina Prisoner's Labor Union, Inc.*, 97 S.Ct. 2532, 2544 (1977) (Burger, C.J., concurring).

¹¹⁷There are many considerations involved in providing legal services to prisoners. One question is whether a program functions better inside or outside the department of corrections. Compare, e.g., Comment, *Resolving Civil Problems of Correctional Inmates*, 1969 WIS. L. REV. 574, 585-86 (resident legal counsel advised) and *Inmate Legal Services*, *supra* note 22, at 528-30 (resident legal counsel advised) with Krause, *A Lawyer Looks at Writ-Writing*, 56 CALIF. L. REV. 371, 377 (1968) (public defender should handle post-conviction relief proceedings) and ABA RESOURCE CENTER, *supra* note 22, at 407 (non-resident legal counsel advised). Law College prison projects have also engendered both criticism and plaudits. See e.g., ABA RESOURCE CENTER, *supra* note 22, at 399-403. Another question is whether such programs can or should attempt to eliminate jailhouse lawyers. See, e.g., Bluth, *supra* note 17, at 68-80; Brierley, *The Legal Controversy as it Relates to Correctional Institutes—A Prison Administrator's View*, 16 VILL. L. REV. 1070, 1075 (1971); Champagne & Haas, *supra* note 15, at 297; Wexler, *supra* note 22, at 153-54. More than 80% of correctional administrators believe that prisoner legal services are useful. See ABA JOINT COMM., *supra* note 22, at 430. They are often critical, however, of the particular lawyers who handle prisoner cases. See Cardarelli & Finkelstein, *supra* note 98, at 100. It seems clear that, properly administered, legal services programs will aid the courts as well as prisoners since reduced court time should result if prisoners receive such assistance. See, e.g., *United States v. Simpson*, 436 F.2d 162, 167 (D.C. Cir. 1970). There is, thus, a societal interest in providing legal services. See, e.g., Cardarelli & Finkelstein, *supra* note 98, at 95; Werner, *supra* note 26, at 268. See Jacob & Sharma, *supra* note 80, at 519.

It is very clear that unresolved legal problems create worry and tension among prisoners.¹¹⁸ Worry and tension can only exacerbate the strain placed on prisoners by the prison setting itself.¹¹⁹ Thus, anything that can be done to minimize the tension should be encouraged as a way to avoid violence and other problems at the prisons.¹²⁰ Civil legal problem areas cover a wide range of subjects and include domestic relations,¹²¹ financial¹²² or probate¹²³ matters, recovery of personal property,¹²⁴ preconfinement contract and tort claims,¹²⁵ and even patent, admiralty, and tax problems.¹²⁶ Since their number constitutes approximately one-third of all prisoner legal problems¹²⁷ these civil legal problems are significant enough to impact on the overall prison environment. Providing legal services and law libraries and thus alleviating some of the tensions caused by these problems is all to the good; and a decision to do so represents a wise policy choice by a state.¹²⁸ And evidence, if evidence is needed, that it is possible for a state to handle these

¹¹⁸E.g., ABA RESOURCE CENTER, *supra* note 22, at 377; Cardarelli & Finkelstein, *supra* note 98, at 95; Comment, *Resolving Civil Problems of Correctional Inmates*, 1969 WIS. L. REV. 574, 577.

¹¹⁹See, e.g., NAC, *supra* note 98, at Std 2.14 & Commentary, p. 56-57; ABA JOINT COMM. *supra* note 22, at 433. Cf. THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMM'N. ON ATTICA, ATTICA, ch. 2 (1972).

¹²⁰See UCA, *supra* note 72, at 101-04; ABA JOINT COMM., *supra* note 22, at 574-82.

¹²¹Souza Travisono, 498 F.2d 1120, 1124 (1st Cir. 1974); ABA RESOURCE CENTER, *supra* note 22, at 395; Bluth, *supra* note 17, at 74; Jacob & Sharma, *supra* note 80, at 578; Reeves, *supra* note 26, at 142; Werner, *Law Library Service to Prisoners—The Responsibility of Non-prison Libraries*, 63 L. LIB. J. 231, 231 (1970); Comment, *Resolving Civil Problems of Correctional Inmates*, 1969 WIS. L. REV. 574, 574-75.

¹²²See Souza v. Travisono 498 F.2d 1120, 1124 (1st Cir. 1974); Flannery & Robbins, *The Misunderstood Pro Se Litigant: More than a Pawn in the Game*, 41 BROOKLYN L. REV. 769, 772 (1975); Jacob & Sharma, *supra* note 80, at 578; Werner, *Law Library Service to Prisoners—The Responsibility of Non-prison Libraries*, 63 LAW LIB. J. 231, 231 (1970).

¹²³498 F.2d at 1124; Bluth, *supra* note 17, at 74.

¹²⁴ABA RESOURCE CENTER, *supra* note 22, at 377; Bluth, *supra* note 17, at 63; Reeves *supra* note 26, at 142.

¹²⁵Bluth, *supra* note 17, at 74.

¹²⁶Flannery & Robbins, *The Misunderstood Pro Se Litigant: More than a Pawn in the Game*, 41 BROOKLYN L. REV. 769, 772 (1975).

¹²⁷Bluth, *supra* note 17, at 74; ABA RESOURCE CENTER, *supra*, note 22, at 383 (30%); Alpert, *Prisoners' Right of Access to Courts: Planning for Legal Aid*, 51 WASH. L. REV. 653, 673 (1976) (37%). The estimates do not include petitions for post-conviction relief.

¹²⁸Most commentators advise that prison legal services include civil matters. E.g., ABA JOINT COMM., *supra* note 22, Std. 2.2.(c), at 433; NAC, *supra* note 98, § 2.2; *Prisoners' Rights*, *supra* note 22, at 290. See generally notes 1-8 *supra*. Cf. UCA, *supra* note 72, (legal assistance when prisoner is a defendant or "may be bound by a proceeding he did not initiate"). The need for civil legal assistance to indigents in general has been recognized as a societal problem. ABA JOINT COMM., *supra* note 22, at 433; *Counsel in Civil Cases*, *supra* note 33, at 545-46. Society is now attempting to meet that need. See Legal Services Corporation Act of 1974, Pub. L. 83-355, 88 Stat. 378 (codified at 42 U.S.C. §§ 2996-2961. It could be argued that legal services for prisoners should be no better than what is available to indigents generally. But there is strong support for the proposition that prisoner legal needs are more serious by virtue of their incarceration and that, thus, the state has a concomitantly increased responsibility to provide assistance. See note 102 *supra* & text accompanying.

problems can be found in the fact that several legal service systems already routinely handle civil legal matters for prisoners.¹²⁹ But whatever the eventual constitutional scope, in terms of subject matter, of the right of prisoner access and whatever a state as a matter of policy chooses to provide, the *Bounds* right at present only requires states to provide *either* law libraries *or* legal assistance—and the choice as to which is provided is left to the states. Thus under *Bounds* a prisoner needing legal materials has an enforceable right only in the absence of an alternative and adequate means of access to the courts.¹³⁰ Access to legal materials, however, may well be a fundamental—and infeasible—due process right in itself.¹³¹

LAW LIBRARY RIGHT ONLY IN THE ALTERNATIVE:
IS IT CONSTITUTIONALLY SUFFICIENT?

The Pro Se Defendant

A defendant in a criminal trial has a constitutional right to the assistance of counsel¹³² if there is the possibility of incarceration upon conviction.¹³³ Until recently assistance of counsel was considered essential to a fair trial because, in addition to the handicap most defendants carry of little or no

¹²⁹See, e.g., ABA RESOURCE CENTER, *supra* note 22, at 405-06 (describing Texas, Washington, and Wisconsin programs); Alpert, *Prisoners' Right of Access to Courts: Planning for Legal Aid*, 51 WASH. L. REV. 653, 673 (1976) (describing Washington program); Brief for Respondents, Exhibit B, *Bounds v. Smith*, 430 U.S. 817 (1977) (describing Baltimore, Chicago, Connecticut, Florida, Georgia, Kansas, Minnesota, Montana, New York, Texas, and Washington programs). Final Report, Consortium of States to Furnish Legal Counsel to Prisoners (Sept. 21, 1976) (LEAA grant 75-DF-99-0013) (describing Florida, Georgia, Kansas, South Carolina, and Vermont programs).

¹³⁰*Bounds v. Smith*, 430 U.S. 817, 829 (1977).

¹³¹See *Prisoners' Rights*, *supra* note 22, at 297. See, e.g., Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "the Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 33 (1962). Most commentators recommend establishment of adequate law libraries even if legal services are provided. See, e.g., ABA JOINT COMM., *supra* note 22, at 426/42; UCA, *supra* note 72, at 316-320; NAC, *supra* note 115, Std. 2.3 at 29-30; Poe, *A Spark of Hope for Prisoners*, 66 LAW LIB. J. 59 (1973).

¹³²The right to counsel is found in the sixth amendment. *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). It requires the appointment of counsel for indigent defendants. *Gideon v. Wainwright* 372 U.S. 335 (1963). The right to counsel may attach at pretrial. *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961) (arraignment); *White v. Maryland*, 373 U.S. 59, 60 (1963) (preliminary hearing); *Miranda v. Arizona*, 384 U.S. 436 (1966) (custodial interrogation or when suspect is focus of investigation); *Hawk v. Olsen*, 326 U.S. 271, 278 (1945) (preparation for trial); *United States v. Wade*, 388 U.S. 218, 236-37 (1967) (post-indictment lineup). *But see* *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972) (the right to counsel does not attach at identification prior to initiation of adversary process). The right to be represented by counsel does not, however, encompass all pretrial proceedings. See *People v. Innello*, 21 N.Y.2d 418, 423-25, 235 N.E.2d 439, 442-44, 288 N.Y.S.2d 462 (1968) (grand jury).

¹³³*Argersinger v. Hamlin*, 407 U.S. 25 (1972). A distinction is sometimes made between a criminal proceeding and other proceedings in which incarceration or extended incarceration may result. See cases and authorities cited at note 108 *supra*.

education and an inability to articulate,¹³⁴ the defendant would also have to contend with a lack of legal expertise which would make him unable to comprehend the intricacies of trial procedure and the substantive law.¹³⁵ Thus the Supreme Court over time progressed to its present position that every criminal defendant is entitled to the assistance of counsel because without this assistance a defendant would be effectively prevented from presenting his case in court.¹³⁶

In *Faretta v. California*¹³⁷ the Supreme Court, while not denying that a pro se defendant would find himself severely disadvantaged at trial,¹³⁸ never-

¹³⁴E.g., *Powell v. Alabama*, 287 U.S. 45 (1932); *People v. Rhinehart*, 9 Cal. 3d 139, 507 P.2d 642, 107 Cal. Rptr. 34 (1973). See *Johnson v. Avery*, 393 U.S. 483, 496-97 (1969) (Douglas, J., concurring); *A Jailhouse Lawyer's View*, *supra* note 17, at 139; *Jacob & Shrama*, *supra* note 80, at 508. *Larsen*, *supra* note 22, at 352; *Zeigler & Hermann*, *supra* note 22, at 181-82.

¹³⁵

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. 287 U.S. at 68-69. *Accord*, *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938).

¹³⁶304 U.S. at 462-63; 287 U.S. at 68-69; *Kamisar*, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "the Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962); *Comment*, *Faretta v. California: An Examination of Its Procedural Deficiencies*, 7 COLUM. HUMAN RIGHTS L. REV. 553, 567 (1975); *Note*, *The Right to Defend Pro Se—Faretta v. California: Due Process and Beyond*, 11 U. TULSA L.J. 365, 366 (1976); *Note*, *The Jailed Pro Se Defendant and The Right to Prepare A Defense*, 86 YALE L.J. 292, 292 (1976). [hereinafter cited as *The Jailed Pro Se Defendant*].

¹³⁷*Faretta v. California*, 422 U.S. 806 (1975).

¹³⁸422 U.S. at 834. It would be extremely difficult to deny that a pro se defendant would be disadvantaged. See *Gideon v. Wainwright*, 372 U.S. 335 (1963). There is, in any case, some empirical evidence to support the fact that a defendant fares better at trial when assisted by counsel. See *Nagel*, *Effects of Alternative Types of Counsel on Criminal Procedure Treatment*, 48 IND. L.J. 404, 409 (1973) (results of survey showed 27% of represented defendants were acquitted; 0% of pro se defendants were acquitted). Assistance of counsel may also be helpful in obtaining release on bond (*See id.* at 408) and in obtaining a suspended sentence or probation. *See id.* at 410. The assistance of counsel may not be as useful in obtaining a suspended sentence or probation under a presumptive or flat sentencing scheme. For examples of presumptive sentencing schemes, see UCA §§ 3-111 to 3-115, *supra* note 72; TWENTIETH CENTURY FUND TASK FORCE ON SENTENCING, *FAIR AND CERTAIN PUNISHMENT* (1976). For examples of flat sentencing schemes, see, ME. REV. STAT. ANN. tit. 17-A (Supp. 1975). Such schemes limit judicial sentencing discretion and would thus limit an attorney's ability to obtain a lesser sentence for his client. For an illustration of the limitations on sentencing discretion, see UCA, *supra* note 72. Under the Act, the legislature classifies offenses and designates the maximum sentence for each class of offenses. *Id.* § 3-103. The Sentencing Commission is to construct a guideline, or presumptive sentence, for each offense within a class; the punishment is to be proportionate to the seriousness of the offense with the most serious offenses assigned a presumptive sentence equal to the maximum sentence allowed for that class of offense. *See id.* § 3-112. The guidelines are to be based on the underlying facts of the offense and not the offense charged. *Id.* § 3-114. Thus, if a lawyer succeeded in having the charge reduced to an offense in a class of offenses carrying a lesser statutory maximum term, the sentence required under the guideline might very well require imposition of the maximum term for an offense of that class.

theless found that a defendant has the constitutional right to proceed pro se if he so chooses.¹³⁹ The Court cited the English¹⁴⁰ and American¹⁴¹ common law traditions,¹⁴² the existence of the right in most state constitutions,¹⁴³ its enactment as a federal statutory right,¹⁴⁴ and the language of the sixth amendment,¹⁴⁵ as supporting the "nearly universal conviction on the part of our people as well as our courts"¹⁴⁶ that there is a constitutional right to conduct a pro se defense.¹⁴⁷ The Court recognized the self-evident truth that in defending pro se the defendant was probably trading away the effective assistance of counsel that a trained professional could bring to the courtroom.¹⁴⁸ This effective assistance of counsel is today often described as requiring counsel to be reasonably likely to provide—and to, in fact, provide—adequate legal assistance.¹⁴⁹ It is clear that it is this kind of assistance that the pro se defendant trades away since the pro se defendant would most likely not be reasonably likely to provide himself adequate legal assistance.¹⁵⁰ A

¹³⁹422 U.S. at 836.

¹⁴⁰*Id.* at 821-26.

¹⁴¹*Id.* at 826-30.

¹⁴²*But see id.* at 843-44 (Burger, C.J., dissenting) ("We are well reminded that this Court once employed an exhaustive analysis of English and colonial practices regarding the right to counsel to justify the conclusion that it was fundamental to a fair trial and, less than 10 years later, used essentially the same material to conclude that it was not.").

¹⁴³*Id.* at 813-14.

¹⁴⁴18 U.S.C. § 1654 (1970).

¹⁴⁵See note 37 *supra*. *But see* 422 U.S. at 844 (Burger, C.J., dissenting) (questioning the need for a federal statute if the sixth amendment already protected the pro se right).

¹⁴⁶422 U.S. at 817.

¹⁴⁷*Id.* at 836.

¹⁴⁸*Id.* at 834. See note 138 *supra*. When represented by counsel effective assistance includes a discussion with the client of trial strategies and tactical choices, an investigation of the factual and legal issues relevant to making a case for the defense, and acting promptly to advise the defendant of his rights and to preserve those rights by appropriate action. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES § 7.3 (App'd Draft 1968). See, e.g., *United States v. DeCoster*, 487 F.2d 1197, 1203 (D.C. Cir. 1973), *modified after remand*, 45 U.S.L.W. 2216 (D.C. Cir. Oct. 19, 1976); *Coles v Peyton*, 389 F.2d 224, 226 (4th cir.), *cert. denied*, 393 U.S. 849 (1968).

¹⁴⁹See *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974); Stone, *Ineffective Assistance of Counsel and Post-Conviction Relief in Criminal Cases: Changing Standards and Practical Consequences*, 7 COLUM. HUMAN RIGHTS L. REV. 427, 431 (1975). See, e.g., *United States ex rel. Williams v. Twomey*, 510 F.2d 634 (7th Cir.), *cert. denied* 423 U.S. 876 (1975); *Herring v. Estelle*, 491 F.2d 125 (5th Cir. 1974); *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973), *modified after remand*, 45 U.S.L.W. 2216 (D.C. Cir. Oct. 19, 1976); *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970); *Coles v. Peyton*, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968); *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir.), *modified*, 289 F.2d 928 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961); *McMann v. Richardson*, 397 U.S. 759 (1970). See Note, *Effective Assistance of Counsel: A Constitutional Right in Transition*, 10 VAL. U. L. REV. 509, 531 (1976).

¹⁵⁰The pro se defendant, then, may not obtain reversal based on his own lack of professional competence, at least when the trial is not a complete "mockery of justice." This "mockery of justice" standard is also a standard that is used to test the effectiveness of counsel. E.g., *United States v. Jones*, 512 F.2d 347, 349 (9th Cir. 1975); *United States v. Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *Dunker v. Vinzant*, 505 F.2d 503 (1st Cir. 1974); *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974); *Lorraine v. United States*, 444 F.2d 1, 2 (10th Cir. 1971); *Diggs v.*

represented defendant is entitled to a new trial if his counsel fails to meet this test; a pro se defendant should not be entitled to a new trial on these grounds since to thus evaluate his pro se defense would invariably give him two bites at the trial apple.¹⁵¹

The test for what makes an effective counsel clearly suggests one necessary factor in the pro se right—the right, and need, to prepare. Preparation is so crucial for an attorney that the question whether there was adequate preparation is the crux of most allegations of ineffective assistance of counsel.¹⁵² Thus, if the right to proceed pro se means anything, it must encompass the due process right, even for an incarcerated pro se defendant, to prepare.¹⁵³ As has been said,

an adequate opportunity to prepare is a fundamental component of due process, guaranteed by the Fifth and Fourteenth Amendments. Put another way, the state cannot prevent a jailed pro se defendant from preparing his defense merely because he has chosen to exercise his constitutional right of self-representation.¹⁵⁴

Welch, 148 F.2d 667, 669 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945). *Cf.* Wainwright v. Sykes, 97 S.Ct. 2497, (1977) (Brennan, J., dissenting). It is perhaps most often applied in cases where the defendant retains his own attorney and, therefore, presumably suffers the consequences of his choice. *E.g.*, Hamilton v. Wilkinson, 271 F.2d 278 (5th Cir. 1959) (*per curiam*); Anderson v. Bannan, 250 F.2d 654 (6th Cir. 1958) (*per curiam*); People v. Vitale, 3 Ill. 2d 99, 119 N.E.2d 784 (1954). *See, e.g.*, Note, *Effective Assistance of Counsel*, 49 VA. L. REV. 1531, 1532-33 (1963). In deciding to defend pro se, the defendant, in essence, has retained himself.

It is not even clear whether the "mockery of justice" test, as applied in cases where defendant was represented by counsel, could apply to the situation where the pro se defendant elects, in the face of warnings about his potential difficulties at trial, to proceed without counsel. It would seem that if a pro se defense becomes a mockery of justice then he should never have been permitted to proceed pro se in the first place. In that case it would seem that a mockery of justice results whenever the defendant is incapable of meeting the *Faretta* requirement of making a knowing and intelligent choice. 422 U.S. at 807.

¹⁵¹422 U.S. at 834-35 n.46.

¹⁵²*See* United States v. DeCoster, 487 F.2d 1197, 1203 (D.C. Cir. 1973), *modified after remand*, 45 U.S.L.W. 2216 (D.C. Cir. Oct. 19, 1976); Stone, *Ineffective Assistance of Counsel and Post-Conviction Relief in Criminal Cases: Changing Standards and Practical Consequences*, 7 COLUM. HUMAN RIGHTS L. REV. 427, 439 (1975); Note, *Effective Assistance of Counsel*, 49 VA. L. REV. 1531, 1543 (1963); *The Jailed Pro Se Defendant*, *supra* note 136, at 294. *See also* Martinez Rodriguez v. Jimenez, 409 F. Supp. 582, 594 (D.P.R.), *aff'd* on other grounds, 551 F.2d 877 (1977); Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968); People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).

¹⁵³*See* Martinez Rodriguez v. Jimenez, 409 F. Supp. 582, 594 (D.P.R.), *aff'd* on other grounds 551 F.2d 877 (1977); *The Jailed Pro Se Defendant*, *supra* note 145, at 296-306. *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942); Powell v. Alabama, 287 U.S. 45, 59 (1932); Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "the Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 33 (1962); Comment, *Prisoners' Right to Access to Legal Material*, 8 GONZ. L. REV. 340, 353 (1973). *Cf.* ABA RESOURCE CENTER, *supra* note 16, at 374. *See* note 140 *supra*. *Contra*, Lee v. Stynchcombe, 347 F. Supp. 1076, 1079 (N.D. Ga. 1972); Walle v. Sigler, 329 F. Supp. 1278, 1282 (D. Neb. 1971), *aff'd*, 456 F.2d 1153 (8th Cir. 1972); People v. Noah, 5 Cal. 3d 469, 479, 487 P.2d 1009, 1015-16, 96 Cal. Rptr. 441, 447-48 (1971); People v. Pearson, 150 Cal. App. 2d 811, 311 P.2d 142, 144 (public defender sat with defendants during trial).

¹⁵⁴*The Jailed Pro Se Defendant*, *supra* note 136, at 296. *Cf.* Adams v. United States *ex rel.* McCann 317 U.S. 269 (1942); 409 F. Supp. 582, 594; ABA RESOURCE CENTER, *supra* note 22, at

Preparation means having adequate time in which to work and having materials available to do the legal research necessary to prepare the defense. If the result were otherwise, the incarcerated pro se defendant would be foreclosed from even attempting to prepare an adequate defense or to learn enough trial procedure so that he can "play with the same ground rules that anybody plays."¹⁵⁵ Not to allow the pro se incarcerated defendant to prepare would also have the result of placing him at a disadvantage in relation to an unincarcerated pro se defendant since the unincarcerated defendant does have the opportunity to prepare.¹⁵⁶ This result would be most unfortunate; both defendants are, after all, presumptively innocent and the incarceration pretrial of one and not the other may relate as much to indigence as to any security risk factor.¹⁵⁷

Since it is clear that the pro se right acclaimed by the *Faretta* Court cannot be met if access to legal materials is cut off by virtue of the defendant's incarceration pretrial or during trial, as a due process right access to legal materials must be provided to the pro se incarcerated defendant.¹⁵⁸ It is error to conclude, therefore, that representation by an attorney, certainly adequate

374; Comment, *The Pro Se Defendant: No Right to Say No*, 23 EMORY L.J. 523, 530-31 (1974); Note, *Effective Assistance of Counsel: A Constitutional Right in Transition*, 10 VAL. U. L. REV. 509, 543 (1976).

¹⁵⁵422 U.S. at 808 n.2 The Court quoted with favor the trial judge's admonition to Faretta that Faretta would receive no special favors and would be held to the same standards as an attorney. Judges commonly assert that no favors will be afforded pro se defendants. *E.g.* *Minor v. United States*, 375 F.2d 170, 172-73 (8th Cir.), cert. denied, 389 U.S. 882 (1967); *Carothers v. Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970); Note, *The Right to Defend Pro Se: Faretta v. California and Beyond*, 40 ALB. L. REV. 423, 442 (1976). Quaere, however, whether courts will be able to live up to this philosophy. See, e.g., *The Failed Pro Se Defendant*, supra note 136, at 312-13.

¹⁵⁶*Prisoners' Rights*, supra note 22, at 300.

¹⁵⁷The bail system is intended to assure the presence of a defendant at trial. See *Stack v. Boyle*, 342 U.S. 1, 5 (1951). It sometimes results, however, in the incarceration of indigent defendants who cannot make bail. See, e.g., Nagel, *Effects of Alternative Types of Counsel on Criminal Procedure Treatment*, 48 IND. L.J. 404, 408 (1973); Foote, *The Coming Constitutional Crisis in Bail* (pts. 1 & 2) 113 U. PA. L. REV. 959, 1125 (1965). The Federal Bail Reform Act, 18 U.S.C. § 3146 (1970), is an attempt to correct this. See *Pugh v. Rainwater*, 21 Cr. L. R. 2497 Aug. 22, 1977).

¹⁵⁸Further support for the proposition that a pro se defendant must be allowed to prepare can be found in the warnings given to a potential pro se defendant. The list of consequences attendant upon his choice to proceed pro se does not include the warning that, if incarcerated pretrial, he is foregoing an opportunity to prepare a case. See, e.g., 422 U.S. at 808 n.2, 835-836; Note, *The Right to Defend Pro Se—Faretta v. California: Due Process and Beyond*, 11 U. TULSA L.J. 365, 385-90 (1976).

There is no consensus as to whether a defendant should be informed of his right to proceed pro se. *E.g.*, Comment, *The Pro Se Defendant: No Right to Say No*, 23 EMORY L.J. 523, (1974). Several authorities recommend that the waiver of counsel be made in consultation with an attorney. *E.g.*, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES § 7.3 (App'd Draft 1968). The American Bar Association also recommends renewing the offer of counsel to pro se defendants at each stage of the proceedings. *Id.*

to meet the legal services alternative under *Bounds*,¹⁵⁹ can satisfy a state's obligation to provide legal materials to an incarcerated pro se defendant since to so conclude would obviate the pro se right.¹⁶⁰ Of course there are difficulties associated with the costs of providing legal materials to,¹⁶¹ and appropriate security for, an incarcerated pro se defendant preparing a defense; but the security problems, if such there are,¹⁶² are being met at the prisons which, under *Bounds*, are providing law libraries for prisoners.¹⁶³ Access to legal materials, moreover, does not mean releasing a defendant so that he may use the local law library; legal materials may be brought to him instead.¹⁶⁴ Finally, the difficulties thrust on the state when confronted with the problem of providing access to the incarcerated pro se defendant pale in

¹⁵⁹It is also error to conclude, as the court did in *Walle v. Sigler*, 456 F.2d 1153, 1156 (8th Cir. 1972), that the provision of stand-by counsel satisfies any obligation to provide a pro se defendant with access to legal materials to prepare his defense. Provision of stand-by counsel has often been recommended as a way to assist the pro se defendant. 422 U.S. at 834-35 n.46; *United States v. Dougherty*, 473 F.2d 1113, 1124-26 (D.C. Cir. 1972); Note, *The Sixth Amendment—Self-Representation and the Assistance of Counsel*, 29 ARK. L. REV. 546, 551-52 (1976); Comment, *Faretta v. California: An Examination of Its Procedural Deficiencies*, 7 COLUM. HUMAN RIGHTS L. REV. 553, 567 (1975); Note, *A Fool For A Client: The Supreme Court Rules on the Pro Se Right*, 37 U. PITT. L. REV. 403, 404 (1975); Cf. *Drapeer v. Washington*, 372 U.S. 487, 492 (1963) (Counsel provided to pro se petitioner at hearing on request for free transcript).

¹⁶⁰Several cases decided prior to *Faretta* did just that, however. These cases recognized the constitutional right to a pro se defense but nonetheless denied access to legal materials to the pro se defendant. *E.g.*, *Lee v. Stynchombe*, 347 F. Supp. 1076, 1079 (N.D. Ga. 1972); *Walle v. Sigler*, 329 F. Supp. 1278, 1282 (D. Neb. 1971), *aff'd*, 456 F.2d 1153 (8th Cir. 1972) (affirmed on ground that stand-by counsel was provided). Cf. *People v. Noah*, 5 Cal. 3d 469, 479, 487 P.2d 1009, 1015-16, 96 Cal. Rptr. 441, 447-48 (1971) (defendant chose representation by counsel after being denied access to legal materials). Other pre-*Faretta* cases found that incarcerated defendants were not entitled to access to a law library if adequate legal services were offered. *Walle v. Sigler*, 456 F.2d 1153 (8th Cir. 1972) *aff'g* 329 F. Supp. 1278, 1282 (D. Neb. 1971); *Miller v. Carson*, 401 F. Supp. 835, 885 (M.D. Fla. 1975); *Farrington v. North Carolina*, 391 F. Supp. 714 (M.D. N.C. 1975). See *Cruz v. Hauck*, 515 F.2d 322, 331-32 (5th Cir. 1975) (decided on same day as *Faretta*) (prior history omitted), *cert. denied*, 424 U.S. 917 (1976). In these cases, however, the courts primarily were concerned with habeas corpus or Section 1983 actions and did not have before them consideration of a constitutional right to defend pro se at trial and the impact of that right on access to legal materials. In one pre-*Faretta* case the court refused even to find that there was any obligation whatsoever to provide either legal services or legal materials to inmates of county jails. *Page v. Sharpe*, 487 F.2d 567, 569 (1st Cir. 1973).

In at least one case since *Faretta* the pro se right has been found to encompass the right to access to legal materials. *Martinez Rodriguez v. Jimenez*, 409 F. Supp. 582, 594 (D.P.R.), *aff'd on other grounds*, 537 F.2d 1 (1st Cir. 1976), *aff'd*, 551 F.2d 877 (1977). Cf. *Bailey v. Pitchess*, No. 72-1957-F (C.D. Cal. Nov. 20, 1972). *But see Tate v. Kassulke*, 409 F. Supp. 651, 657-59 (W.D. Ky. 1976) (court "inclined" to hold law libraries unnecessary; did not cite *Faretta* nor discuss constitutional pro se right).

¹⁶¹*Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). See *Mayer v. City of Chicago*, 404 U.S. 189, 201 (1971) (Burger, C. J., concurring). These costs may fall particularly heavily on local jails. There are many recommendations now to have the state assume responsibility for the operation and maintenance of local jails. *E.g.*, UCA, § 2-404 *supra* note 72.

¹⁶²*People v. Noah*, 5 Cal. 3d 469, 487 P.2d 1009, 1015-16, 96 Cal. Rptr. 441 (1971); ABA RESOURCE CENTER, *supra* note 22, at 428.

¹⁶³See, *e.g.*, ABA RESOURCE CENTER, *supra* note 22, at 428.

¹⁶⁴See note 207 *infra* & text accompanying. See, *e.g.*, UCA, § 4-108 *supra* note 72.

comparison to the insurmountable burden placed on the pro se defendant unable to prepare because he is incarcerated.

The Prisoner

If the incarcerated defendant has a right of access to legal materials, not in the alternative but as a necessary corollary to his right to conduct his own defense, what, if anything, does this mean for the prisoner? Unlike the right to a criminal trial and to an attorney at that trial, there is no federal constitutional right to an appeal¹⁶⁵ or to the assistance of an attorney when appealing¹⁶⁶ or collaterally attacking a conviction.¹⁶⁷ Once a state elects to provide for appeal as of right from a criminal conviction, however, it must provide counsel for indigents.¹⁶⁸

Although many states and the federal government provide by statute for appointment of counsel when a prisoner makes a prima facie showing of good cause,¹⁶⁹ there are still many appellate and collateral proceedings today in

¹⁶⁵*E.g.*, McKane v. Durston, 153 U.S. 684, 687 (1894).

¹⁶⁶Johnson v. Avery, 393 U.S. 483, 488 (1969). See United States v. MacCollom, 426 U.S. 317, 323 (1976).

¹⁶⁷Johnson v. Avery, 393 U.S. 483, 488 (1969); Werner, *Law Library Service to Prisoners—The Responsibility of Nonprison Libraries*, 63 LAW LIB. J. 231, 232 (1970). See People v. Shipman, 62 Cal. 2d 226, 229, 397 P.2d 993, 996 42 Cal. Rptr. 1, 4 (1965). Cf. Note, *Criminal Procedure—Post-Conviction Right to Counsel*, 77 W. VA. L. REV. 571, 589 (1975).

¹⁶⁸Ross v. Moffitt, 417 U.S. 600, 607 (1974); Douglas v. California, 372 U.S. 353 (1963); Note, *Criminal Procedure—Post-Conviction Right to Counsel*, 77 W. VA. L. REV. 571, 576-77 (1975). In connection with indigents appealing their convictions, the Supreme Court also has held that an attorney representing an indigent on appeal cannot withdraw from what he considers a frivolous case without first preparing a brief setting forth defendant's points. *Anders v. California*, 386 U.S. 738 (1967). The *Anders* rule created what many consider ethical and practical problems for attorneys representing clients with frivolous claims. *E.g.*, Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U. L. REV. 701, 703-04; Note, *Withdrawal of Appointed Counsel From Frivolous Indigent Appeals*, 49 IND. L.J. 740, 740-46 (1974). Most state courts have followed the *Anders* procedures without comment. *E.g.*, McCracken v. State, 439 P.2d 448, 449 (Alas. 1968); Walker v. Brewer, 189 N.W.2d 605, 607 (Iowa 1971); State v. Franklin, 78 N.M. 127, 428 P.2d 982 (1967). Other state courts were critical of the procedure but found themselves bound by it. *E.g.*, Williams v. State, 44 Ala. App. 618, 217 So.2d 830 (1969); People v. Brown, 106 Ill. App.2d 477, 245 N.E.2d 548 (1969); Commonwealth v. McMillan, 212 Pa. Super. 48, 240 A.2d 380 (1968); State v. Romano, 29 Utah 2d 237, 507 P.2d 1025 (1973). Still other courts have varied the *Anders* procedure. *E.g.*, Bolick v. State, 127 Ga. App. 542, 194 S.E.2d 302 (1972); *In re Hoffman*, 382 Mich. 66, 168 N.W.2d 229 (1969); Sanchez v. State, 85 Nev. 95, 450 P.2d 793 (1969); Cleghorn v. State, 55 Wis. 2d 466, 198 N.W.2d 577 (1972). Several state courts have refused to permit the appointed attorney to withdraw. *E.g.*, McClendon v. People, 174 Colo. 7, 481 P.2d 715 (1971); Dixon v. State, 154 Ind. App. 603, 284 N.E.2d 102 (1972); States v. Gates, 466 S.W.2d 681 (Mo. 1971).

¹⁶⁹See, *e.g.*, Johnson v. Avery, 393 U.S. 483, 493 (Douglas, J., concurring); Brief for Respondents at 29, *Bounds v. Smith*, 420 U.S. 817 (1977); People v. Shipman, 62 Cal. 2d 226, 397 P.2d. 993, 997, 42 Cal. Rptr. 1, (1965); Bluth, *supra* not 17, at 59. For a sampling of such statutes, see 28 U.S.C. § 1915 (1970); N.J. STAT. ANN. § 2A:158A-5 (West. 1971) and N.J. CRIM. PRAC. R. 3.22-6; MONT. REV. CODE ANN. § 95-1004 *et seq.* (1947); NEV. REV. STAT. § 177.345 (1973); ILL. ANN. STAT. ch. 38 § 122-4 (Smith-Hurd 1973) and ILL. SUP. CT. R. 651; CAL. GOV'T CODE §§ 15421 and 27706 (West 1976); TEX. CIV. CODE ANN. tit. 4A, § 1917 (Vernon 1964); WIS. STAT. ANN. § 967.06 (West 1975). See People v. Shipman, 62 Cal. 2d 226-29,

which a prisoner has no constitutional or statutory right to appointment of counsel.¹⁷⁰ It is in this context, of course, that the prisoner right of access to either adequate legal services or adequate legal materials developed. Since supplying enough lawyers to meet the caseload demand of prisoners will be extremely costly,¹⁷¹ at least in the foreseeable future this will mean establishment and maintenance by the states of law libraries at correctional facilities.¹⁷² Assuming that the day arrives in a particular state when adequate legal services are provided, will a prisoner truly be foreclosed from asserting that he prefers to proceed, as, historically, he would have been compelled to proceed, without the assistance of counsel? The underpinnings of the *Faretta* decision would seem to indicate that the answer to that question should be no.¹⁷³

Although the pro se right in *Faretta* was found in the sixth amendment the Court also spoke in language that sounded in due process terms and it is not completely clear to what extent, if any, the *Faretta* Court relied on due process concepts in reaching its result.¹⁷⁴ The right of free choice, described in *Faretta* as a right of "inestimable worth,"¹⁷⁵ is most often found in due

397 P.2d 993, 996, 42 Cal. Rptr. 1, 4 (1965). In a few states an indigent need only request state-appointed counsel in a habeas proceeding. *E.g.*, *People v. La Vallee*, 26 App. Div. 2d 8, 270 N.Y.S. 2d 340 (1966). Moreover, counsel must be provided an indigent who challenges a trial judge's certification that his appeal is not taken in good faith. *Johnson v. United States*, 352 U.S. 565, 566 (1957). A prisoner has no due process right, however, to argue his case on appeal. *Price v. Johnston*, 334 U.S. 266, 285-86 (1948). The writ of habeas corpus may be used to obtain the presence of a prisoner at the hearing if his presence is reasonably necessary to achieve justice. *Id.* at 280-84.

¹⁷⁰For example, there is no obligation to provide counsel to indigents for a discretionary appeal after an appeal as of right or when seeking certiorari from the United States Supreme Court. *See Ross v. Moffitt* 417 U.S. 600, 610, 617 (1974). Left unanswered is whether there is a right to counsel at a discretionary appeal in the absence of procedures for appeal as of right in the State.

¹⁷¹*E.g.*, ABA RESOURCE CENTER, *supra* note 22, at 423; Wexler, *supra* note 22, at 153. The State has the burden of showing that the demand has been met. *See* note 26 *supra*.

¹⁷²The immediate state response to the *Bounds* decision was "a marked increase in inquiries and purchases of legal materials for prison law libraries." Letter from Charles Kitzen, Executive Director, Special Projects, West Publishing Co., Inc., to J. R. Potuto (Aug. 25, 1977) [on file in Uniform Corrections Act Project Office, University of Nebraska Law College, Lincoln, Neb.].

¹⁷³The answer, in any case, should be consistent with the scope of the right to prepare that is afforded to pro se incarcerated defendants. If the court were to decide that the pro se trial right does not include any right to use law books to prepare a case then neither would the pro se prisoner, who could have been assisted by counsel, have that right. A reverse argument has been made: since the pro se prisoner is seen to have a due process need of legal materials, then so should the pro se defendant. *The Jailed Pro Se Defendant*, *supra* note 136, at 300 n.38. This argument, however, overlooks the fact that the pro se prisoner is given the right to legal materials expressly because he has no right to be represented by counsel.

To the extent that the prisoner right of access includes civil cases, it would be similarly true that the civil litigant should be able to proceed pro se whether or not counsel is available. And again, if the right to proceed pro se as an incarcerated defendant includes the right to prepare then a prisoner representing himself in a civil case to which the right of access attaches should have that same due process right.

¹⁷⁴422 U.S. at 818, 829-30.

¹⁷⁵*Id.* at 834. The Court said that this right was highly prized by the founding fathers. *See id.* at 833-34.

process.¹⁷⁶ The Court believed that the defendant's free choice to proceed pro se must be honored out of "that respect for the individual which is the lifeblood of the law."¹⁷⁷ This deference to individual determinism, again, sounds in due process terms:

[individual determinism] may be judicially derived from extra-constitutional, natural law sources embodied in the due process clauses of the fifth and fourteenth amendments, in an effort to prevent unduly burdensome interferences with individual liberties. . . . [D]ue process may be employed to articulate fundamental rights affording respect for individual autonomy not expressly reflected by the Bill of Rights¹⁷⁸

Whether the pro se right at the criminal trial derives from the fifth or sixth amendment, it would not appear to be necessary to duplicate the evolution of the sixth amendment pro se trial right—by first finding a constitutional right to the appointment of counsel and then finding that an individual has the right to forego that right and proceed pro se¹⁷⁹—before it is possible to find a pro se right. This is an illogical way to proceed to find a pro se right and points up the fact that those cases in which there is a right to appointed counsel present the hardest case for even finding the pro se right.

An investigation of the reasons why the *Faretta* Court found it repugnant to force an attorney on an unwilling defendant demonstrates that those same reasons exist for the prisoner. The *Faretta* Court felt that a defendant forced to have a lawyer represent him will distrust the criminal justice system and feel that he has been treated unfairly by it.¹⁸⁰ Certainly that sense of distrust and unfairness would be equally prevalent among prisoners who, in the first instance, were probably indigent defendants¹⁸¹ represented¹⁸² by appointed

¹⁷⁶See Comment, *Faretta v. California: An Examination of Its Procedural Deficiencies*, 7 COLUM. HUMAN L. REV. 553, 554 (1975); Comment, *The Pro Se Defendant: No Right to Say No*, 23 EMORY L. J. 523, 530-31 (1974); Comment, *Examination of the Sixth Amendment Right to Choose Retained Counsel*, 60 IOWA L. REV. 328, 331-32 (1974); Note, *A Fool For a Client: The Supreme Court Rules on the Pro Se Right*, 37 U. PITT. L. REV. 403, 409 (1975); Note, *The Right to Defend Pro Se—Faretta v. California: Due Process and Beyond*, 11 TULSA L. J. 365, 381-82 (1976). Cf. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942) (waiver of jury trial by per se defendant).

¹⁷⁷422 U.S. at 834 (Quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 Brennan, J., concurring). See *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942).

¹⁷⁸Note, *The Right to Defend Pro Se—Faretta v. California: Due Process and Beyond*, 11 TULSA L.J. 365, 381-82 (1976). See *Rochin v. California*, 342 U.S. 165 (1952). See also cases and authorities cited at note 176 *supra*.

¹⁷⁹The Court has rejected the theory that a constitutional right necessarily includes its converse. See, e.g., *Singer v. United States*, 380 U.S. 24, 34-35 (1965); Comment, *Faretta v. California: An Examination of Its Procedural Deficiencies*, 7 COLUM. HUMAN L. REV. 553, 556 (1975).
¹⁸⁰422 U.S. at 834.

¹⁸¹See, e.g., Jacob & Sharma, *supra* note 80, at 510-11; note 98 *supra*. There is some evidence to suggest that defendants with retained counsel are more likely to avoid prison sentences. See Nagel, *Effects of Alternative Types of Counsel on Criminal Procedure Treatment*, 48 IND. L.J. 404, 414-16 (1973).

¹⁸²The great majority of defendants at trial choose, and will undoubtedly continue to choose, to be represented by counsel. It can be argued, moreover, that the stricter the standard

counsel at trial¹⁸³ and, with the assistance of appointed counsel, lost their cases.¹⁸⁴ The prisoner, just like the pro se defendant,¹⁸⁵ will suffer the consequences of representing himself. And certainly if the possibility exists, however remote the *Faretta* Court thought the possibility was, that a pro se defendant could present a better defense for himself than a licensed attorney,¹⁸⁶ that possibility should be at least as good for the prisoner.¹⁸⁷ It is often asserted, after all, that the trial itself is too complex and fraught with legal technicalities to be easily understood by the layperson.¹⁸⁸ There is, moreover, little time during the trial to consider legal questions and ponder arguments at leisure. This too puts the layperson at a disadvantage. When contesting a conviction, however, whether on direct appeal or by collateral attack, the need for familiarity with legal issues may be less acute¹⁸⁹ and, at the same time, a prisoner has more opportunity to prepare, if not perfect, his claim.¹⁹⁰ Further, the reasons generally given to explain why a person would

for evaluating the effectiveness of counsel, the fewer the defendants who will choose to proceed pro se. Cf. Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U. L. REV. 701, 715-20 (1972) (Effectiveness of counsel on appeal).

¹⁸³Indigent defendants are provided with either assigned private counsel or with an attorney from the public defender's office. Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73, 77 (1974). An indigent defendant has no right to select an attorney of his choice. *United States ex rel. Fletcher v. Maroney*, 280 F. Supp. 277, 279 (W.D. Pa.), *aff'd* 413 F.2d 15 (3d Cir.), *cert. denied*, 393 U.S. 873 (1968); *Conroy v. United States*, 296 F. Supp. 693, 695 (N.D. Okla. 1969). See *Wainwright v. Sykes*, 97 S. Ct. 24, 97, 2520-21 (Brennan, J., dissenting). This is true even when alternative counsel of the indigent's choice is available and willing to proceed under the same arrangements as appointed counsel. See Comment, *Examination of the Sixth Amendment Right to Choose Retained Counsel*, 60 Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73, 81 (1974). See *Powell v. Alabama*, 287 U.S. 45, 53 (1932). Several courts, in their discretion, have appointed an attorney chosen by an indigent defendant. See, e.g., *State v. Taborsky*, 147 Conn. 194, 158 A.2d 239, 243 (1960).

¹⁸⁴See generally ABA RESOURCE CENTER, *supra* note 22, at 423-24.

¹⁸⁵422 U.S. at 834.

¹⁸⁶*Id.*

¹⁸⁷It is often suggested that the pro se prisoner should have an easier time. E.g., *The Jailed Pro Se Defendant*, *supra* note 136, at 306. See *Ross v. Moffitt*, 417 U.S. 600, 610-11 (1974). But cf. Blumberg, *Covert Contingencies in the Right to the Assistance of Counsel*, 20 VAND. L. REV. 581, 585 (1967).

¹⁸⁸E.g., *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932).

¹⁸⁹See *Johnson v. Avery*, 393 U.S. 483 (1969); *Cochran v. Kansas*, 316 U.S. 255 (1942); *Jacob & Sharma*, *supra* note 80, at 253; Note, *Right to Aid in Addition to Counsel for Indigent Criminal Defendants*, 47 MINN. L. REV. 1054, 1074-75 (1963); *The Jailed Pro Se Defendant*, *supra* note 145, at 306; Brief for Respondents at 43-44; *Bounds v. Smith*, 430 U.S. 817 (1977). But see *Larsen*, *supra* note 22, at 351, 360. *Contra*, *A Jailhouse Lawyer's View*, *supra* note 17, at 139-40; *Krause, A Lawyer Looks at Writ-Writing*, 56 CALIF. L. REV. 371, 374 (1968); *Zeigler & Hermann*, *supra* note 22, at 202 (1972); Note, *Trial Court and Prison Perspectives on the Collateral Post Conviction Relief Process in Florida*, 21 U. FLA. L. REV. 503, 508 (1969).

¹⁹⁰That convicted prisoners have the time to pursue, if not perfect, their claims is borne out by the number of habeas corpus and section 1938 actions filed. Almost 20% of the federal caseload is pro se; 95% of the pro se filings are by prisoners (both state and federal). *Zeigler & Hermann*, *supra* note 22, at 159-60.

forego the assistance of an attorney at trial—doubts about the competence,¹⁹¹ loyalty,¹⁹² or diligence¹⁹³ of appointed counsel, and the defendant's belief in his own ability to handle his case¹⁹⁴—apply with equal force to prisoners.

¹⁹¹As to their doubts about the competence of attorneys representing them, see *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942); *A Jailhouse Lawyer's View*, *supra* note 17, at 137-38; Larsen, *supra* note 22, at 346; Note, *The Representation of indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579, 603 (1963); *The Jailed Pro Se Defendant*, *supra* note 136, at 293-94 n.7. See ABA RESOURCE CENTER, *supra* note 22, at 423-24.

¹⁹²As to their doubts about attorney loyalty, see ABA RESOURCE CENTER, *supra* note 22, at 423-24; *A Jailhouse Lawyer's View*, *supra* note 17, at 137-38; Reeves, *supra* note 26, at 145; Note, *The Right to Defend Pro Se: Faretta v. California and Beyond*, 40 ALB. L. REV. 423, 424-25 (1976); Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579, 603 (1963); Note, *Legal Services for Prison Inmates*, 1967 WIS. L. REV. 514, 528; *The Jailed Pro Se Defendant*, *supra* note 136, at 293-94 n.7 (1976).

¹⁹³See Zeigler & Herman, *supra* note 22, at 213; Note, *Legal Services for Prison Inmates*, 1967 WIS. L. REV. 514, 525, 526; Note, *The Jailed Pro Se Defendant*, *supra* note 136, at 293-294 n.7. The lack of due diligence, at least for attorneys handling collateral attacks for prisoners, may relate to a perception that such petitions are frivolous. Pro se petitioners, in fact, are not always taken seriously by the courts. See Turner, *supra* note 15, at 503-04.

Part of the preception that prisoner claims are frivolous derives from appeals of convictions by indigent prisoners. See note 168 *supra*. The problems created by frivolous appeals and habeas corpus petitions are many. E.g. Flannery & Robbins, *The Misunderstood Pro Se Litigant: More than a Pawn in the Game*, 41 BROOKLYN L. REV. 769, 770 (1975); Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U. L. REV. 701, 702 (1970); Larsen, *supra* note 22, at 360; 56 CALIF. L. REV. 342, 342-43 (1968); Note, *Trial Court and Prison Perspectives on the Collateral Post Conviction Relief Process in Florida*, 21 U. FLA. L. REV. 503, 509-12 (1969). The difficulty the courts face in dealing with appeals and habeas petitions of indigents is, of course, how to structure the system to avoid the frivolous claims while assuring that the meritorious ones are heard. E.g. Note, *Withdrawal of Appointed Counsel From Frivolous Indigent Appeals*, 49 IND. L.J. 740, 740-41 (1974); *Inmate Legal Services*, *supra* note 22, at 514. Some courts have considered use of their contempt power for petitioners bringing frivolous claims. See Note, *Trial Court and Prison Perspectives on the Collateral Post Conviction Relief Process in Florida*, 21 U. FLA. L. REV. 503, 507 (1969). Cf. *Boddie v. Connecticut*, 401 U.S. 371, 381-82 (1971) (sanctions such as penalties for false pleading can be assessed against litigant with frivolous claim). Other jurisdictions require that indigent convicted persons, whether probationers or prisoners, repay prosecution costs if they are able. See, e.g., *Fuller v. Oregon*, 417 U.S. 40 (1974) (holding the Oregon repayment provision constitutional). This would be feasible if prisoners were paid a living wage. See note 98 *supra*. A living wage would also mean that a prisoner could not file habeas petitions in forma pauperis. This, presumably, would decrease the number of frivolous petitions filed. See, e.g., Herman, *Frivolous Criminal Appeals*, 47 N.Y.U. L. REV. 701, 701-07 (1972); Note, *Withdrawal of Appointed Counsel From Frivolous Indigent Appeals*, 49 IND. L.J. 740, 741-42 (1974); *Inmate Legal Services*, *supra* note 22, at 527 n.36.

¹⁹⁴*Faretta v. California*, 422 U.S. 806, 835 (1969). See *Bolick v. State*, 127 Ga. App. 542, 194 S.E.2d 302, 303 (1972). Note, *The Right to Defend Pro Se: Faretta v. California and Beyond*, 40 ALB. L. REV. 423, 425 (1976); *The Jailed Pro Se Defendant*, *supra* note 136, at 293-94 n.7 (1976). As do, of course, many of the reasons given why, at least as a policy matter, assistance of lawyers is preferred over self-representation. These include the pro se's poor educational background and consequent inability to articulate, his lack of proficiency in the law, and his subjectivity with respect to his own case. For information as to poor educational background, see note 134 *supra*. For comments on the subjectivity of the pro se litigant, see *A Jailhouse Lawyer's View*, *supra* note 17, at 139; Jacob & Sharma, *supra* note 80, at 519; Larsen, *supra* note 22, at 347; Zeigler & Hermann, *supra* note 22, at 181-82. Certainly courts and commentators in the past several years have found strong policy reasons for requiring, or encouraging, provision of attorneys in various proceedings. See notes 90 and 108 *supra*; ABA RESOURCE CENTER, *supra* note 22, at 834-87; Jacob & Sharma, *supra* note 80, at 521-23; Werner, *supra* note 26, at 268; *Prisoners' Rights*, *supra* note 22, at 290-91. See Bluth, *supra* note 17, at 59; Note, *Trial Court and Prison Perspectives on the Collateral Post Conviction Relief Process in*

More important than the similarities between the pro se defendant and the pro se prisoner is the difference in relative strain the two pro se's place on the societal interest in fairness and a just result. It can hardly be denied that the interest in a fair trial is an interest that society, in its respect for ordered liberty, must uphold.¹⁹⁵ Society may not deprive a defendant of a fair trial which affords him due process. It can be strongly argued, in turn, that a defendant may not deprive society of the responsibility—and privilege—to assure his fair trial. As Chief Justice Burger stated in his dissent to the *Faretta* result:

Nor is it accurate to suggest . . . that the quality of his representation at trial is a matter with which only the accused is legitimately concerned. . . . Although we have adopted an adversary system of criminal justice, . . . the prosecution is more than an ordinary litigant, and the trial judge is not simply an automaton who insures that technical rules are adhered to. Both are charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial. . . . That goal is ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel. The damage thus inflicted is not mitigated by the lame explanation that the defendant simply availed himself of the "freedom" "to go to jail under his own banner"¹⁹⁶

Florida, 21 U. FLA. L. REV. 503, 513 (1969). Nonetheless, the defendant electing self-representation may well do a good job and may even do a better job than appointed counsel. 422 U.S. at 834; See *Bolick v. State*, 127 Ga. App. 542, 194 S.E.2d 302, 303 (1972); Brief for Respondents at 43-44, *Bounds v. Smith*, 420 U.S. 817 (1977); *Bazono, Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 4 (1973); Note, *The Right to Defend Pro Se: Faretta v. California and Beyond*, 40 ALB. L. REV. 423, 426 (1976); *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579, 596 (1963); Note, *Adequate Appellate Review for Indigents: A Judicial Blend of Adequate Transcript and Effective Counsel*, 52 IOWA L. REV. 902, 920-27 (1967).

The reasons for proceeding pro se at trial or after conviction are not always similar. A defendant at trial might choose to proceed pro se to make a favorable impression on the jury without testifying and thus subjecting himself to cross-examination. *E.g.*, Note, *The Right to Defend Pro Se: Faretta v. California and Beyond*, 40 ALB. L. REV. 423, 425 (1976); *The Jailed Pro Se Defendant*, *supra* note 145, at 293-94 n.7. He might also choose self-representation as a political statement or in order to make such a statement. Note, *The Right To Defend Pro Se: Faretta v. California and Beyond*, 40 ALB. L. REV. 423, 427 (1976). The prisoner might prefer to proceed pro se as a way to keep busy. It has also been described as a way to put the prisoner's energies to productive use. *Johnson v. Avery*, 393 U.S. 483, 498 (1969) (Douglas, J., concurring). *Contra*, *Cardarelli & Finkelstein*, *supra* note 98, at 97. If there were full employment in the prisons then prisoners would have less free time to pursue these activities. Full employment, however, is not at present the situation in prisons. *E.g.*, Levy, Abram, & LaDow, Final Report on Vocational Preparation in U.S. Correctional Institutions, iii-iv (U.S. Dept. of Labor 1975).

¹⁹⁵422 U.S. at 839 (Burger, C.J., dissenting); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1194-96 (1970) [hereinafter cited as Grano].

¹⁹⁶422 U.S. at 839 (Burger, C.J., dissenting). The majority decision in *Faretta* has also been criticized on the ground that its discussion of the historical pro se right, while accurate, removes the right from its historical context, a context quite different from the rights afforded at, and the procedures of, the modern criminal trial. *Id.* at 850 (Blackmun, J., dissenting); Grano, *supra* note 195, at 1190-94; Note, *A Fool for A Client: The Supreme Court Rules on the Pro Se Right*, 37 U. PITT. L. REV. 403, 408 (1975). It has been pointed out that in the United States the pro se

These reasons, which weigh heavily against finding a pro se right at trial, have much less force once a defendant has been adjudicated guilty in a fair trial in which the degree of his culpability was fully and fairly litigated. This is, of course, the major reason why a state need not provide for appellate review of convictions.¹⁹⁷ Thus the societal interest in assuring justice is much less likely to be implicated in proceedings pursued by a pro se prisoner than in the trial at which a defendant represents himself.

It thus seems that the interests in fundamental fairness that led the *Faretta* Court to find a sixth amendment right in a defendant to proceed pro se should also require that a prisoner, as a fifth amendment right, be permitted the opportunity to refuse the attorney alternative thrust upon him by the state. And this, not surprisingly, is the historical stance in which is found the appellate pro se right even before *Faretta*: "[t]he right to represent oneself, even in post-adjudicative proceedings, has been recognized in court and stands as a fundamental constitutional right."¹⁹⁸

If the prisoner can refuse the assistance of counsel as a constitutional right, then, again, that right of refusal can only have meaning if he has the concomitant due process right to prepare to represent himself. Thus it appears that the *Bounds* due process right of access which allows the state to provide either law libraries or legal materials—at the state's choice—is a flawed constitutional theory. If the prisoner has a right of access then he has the right, if he so chooses, to represent himself. And that means access to law books. The choice afforded the states under the *Bounds* right of access, therefore, should be whether to provide law libraries only or both law libraries and legal assistance. Legal assistance, standing alone, cannot suffice.¹⁹⁹

There is one clear benefit to a system in which the pro se prisoner chooses, in the face of counsel ready to represent him, to represent himself. At present, courts feel compelled to lean toward the indigent prisoner in reading his petition and in construing his claim because the prisoner has no

right may have developed because of a lawyer shortage and not because of a deeply-held principle. Grano, *supra* note 195, at 1193; Note, *A Fool For A Client: The Supreme Court Rules on the Pro Se Right*, 37 U. PITT. L. REV. 403, 408 (1975).

¹⁹⁷See note 192 *supra*; United States v. MacCollom, 426 U.S. 317, 323 (1976); Chaffin v. Stynchcombe, 412 U.S. 17, 24 n.11 (1973); District of Columbia v. Clawans, 300 U.S. 617, 627 (1937); Note, *Adequate Appellate Review for Indigents: A Judicial Blend of Adequate Transcript and Effective Counsel*, 52 IOWA L. REV. 902, 904 (1967). Cf. Price v. Johnston, 334 U.S. 266, 285-86 (1948).

¹⁹⁸ABA RESOURCE CENTER, *supra* note 22, at 424 (emphasis added). See Johnson v. United States, 352 U.S. 565, 566 (1957) (per curiam); Price v. Johnston, 334 U.S. 266, 280, 285-86 (1948); Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942); Note, *The Right of An Accused to Proceed Without Counsel*, 49 MINN. L. REV. 113 (1965). Cf. 28 U.S.C. §§ 1654 (parties to "plead and manage their own causes personally").

¹⁹⁹See note 140 *supra*. This is true despite the fact that many commentators think provision of legal services is preferable to provision of law libraries. Werner, *supra* note 26, at 268; Ziegler & Hermann, *supra* note 22, at 173-76, 201-12; Note, *Legal Services for Prison Inmates*, 1967 Wis. L. REV. 514, 523-24. See United States v. Simpson, 436 F.2d 162, 167 (D.C. Cir. 1970).

other option available to him,²⁰⁰ but once the prisoner has counsel available to him and elects not to use counsel, a court would no longer have to treat a pro se prisoner's claims any differently than those filed by an attorney. It would thus be true, with perhaps more force than it is true of the pro se defendant, that the pro se prisoner would be held to the "same ground rules" required of a lawyer presenting a case.²⁰¹

BOUNDS LAW LIBRARY ALTERNATIVE: WHAT IS ADEQUATE?

The *Bounds* prisoner right of access then, appears flawed to the extent that it describes the state's obligation in the alternative and it may well be extended beyond its present parameters of habeas corpus and Section 1983 actions. But, considering the right as it is presently described by the *Bounds* Court, what precisely does the Court require of a state that chooses to provide law libraries to meet its right of access burden? What, in other words, constitutes an "adequate" law library?²⁰²

Although the *Bounds* holding speaks in terms of law libraries it is not completely clear whether the state must provide law libraries in prisons or whether it may meet its burden by assuring access to law books and legal materials stored in other libraries. Law libraries outside prisons are now providing law books and other services to prisoners.²⁰³ It is surely true as, indeed, the facts in *Bounds* itself indicate,²⁰⁴ that each state correctional facility, no matter how small, will not have to house a library.²⁰⁵ Does *Bounds*, then, require that a prisoner be able to be physically present in the law library or will it be sufficient if the books he needs are brought to him?

It is possible to devise a system, as is contemplated by the North Carolina plan in *Bounds*, in which prisoners are transported to a law library.²⁰⁶ Since the North Carolina plan was found adequate in *Bounds*, this procedure, at least, passes constitutional muster. It is also possible, of course, to transport

²⁰⁰The present appellate court approach in reviewing pro se appeals and habeas petitions is to "go out of their way to give fair consideration to those who are unrepresented." *Douglas v. California*, 372 U.S. 353, 366 (1963) (Harlan, J., dissenting). *Accord*, *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam); *Cochran v. Kansas*, 316 U.S. 255, 258 (1942).

²⁰¹422 at 808 n.2.

²⁰²*Bounds v. Smith*, 420 U.S. 817, 828 (1977).

²⁰³*Poe, A Spark of Hope for Prisoners*, 66 LAW LIB. J. 59, 60 (1973). The American Association of Law Librarians is on record as willing to assist in providing prisoners with law books and legal materials. *See Reeves, supra* note 26, at 131.

²⁰⁴North Carolina has seventy-seven correctional units; under *Bounds* law libraries will be set up in seven of these units with a smaller library set up in the central prison segregation unit. 420 U.S. at 819. The plan approved by the district court was affirmed by the Court of appeals except for that part which would have established at the women's facility a library not equal to those in the men's facilities. *Smith v. Bounds*, 538 F.2d 541, 545 (4th Cir. 1975). It was the plan as modified by the Court of Appeals that was affirmed by the Supreme Court. 420 U.S. at 819.

²⁰⁵*See UCA, supra* note 72, § 4-801 and Comment, at 317-21 *See ABA RESOURCE CENTER, supra* note 22, at 425-26.

²⁰⁶420 U.S. at 819.

law books to the prisoners.²⁰⁷ Would a plan that contemplated bringing the books to the prisoners likewise prove satisfactory under *Bounds*? Such a plan would seem to have some difficulties associated with it since, presumably, a prisoner, as indeed, a lawyer, must have access to the law library to determine what materials he needs. A system in which books are brought to a prisoner on request would seem to require that he know what he wants before he is able to acquire it; this, however, hardly seems adequate or, indeed, reasonable. It may, nonetheless, meet the *Bounds* test since the book list approved in *Bounds* contains no citators or digests.²⁰⁸ Thus, even the prisoner physically present at the library may have difficulty locating the materials he needs.

Further, there is not in *Bounds* any clear standard for determining whether access is "meaningful." The Court approaches the question in terms of the number of hours a given prisoner will be able to spend in the law library;²⁰⁹ it never addresses the question of the "quality" of the time afforded the prisoner. Yet even daily access to a library will be of little avail if each day is spent waiting to obtain a copy of a particular title. It would seem, then, that the relevant criterion in determining adequacy should be how likely it is that a prisoner will actually use books he needs and not merely how often he will be afforded access to the law library itself. And, in fact, in determining the meaningfulness of access most commentators focus on the number of copies of titles necessary to meet prisoner needs.²¹⁰ Estimates of the appropriate ratio of copies of titles to prisoners vary from one copy of each title for every 300 prisoners to one copy of each title for every 500 prisoners.²¹¹ The seven law libraries in *Bounds* must serve 13,000 prisoners;²¹² with one set of the requisite law books²¹³ kept at each library²¹⁴ the ratio of prisoner to copies of titles is one to 1857. Thus, the plan approved in *Bounds* appears woefully inadequate.

It was estimated by the state, moreover, that the *Bounds* plan would allow a maximum of 350 prisoners to use the law libraries weekly.²¹⁵ This

²⁰⁷A lending service or a law bookmobile could be maintained. See e.g., ABA RESOURCE CENTER, *supra* note 22, at 425-26. There are additional problems created by prisoners in, for example, prison hospitals or administrative segregation; they too are entitled to access. E.g., Kirby v. Blackledge, 530 F.2d 583, 586 (4th Cir. 1976); Adams v. Carlson, 488 F.2d 619, 634 (7th Cir. 1973); Johnson v. Anderson, 370 F. Supp. 1373, 1383 (D. Del. 1974) See ABA RESOURCE CENTER note 22, at 429-30; *The Jailed Pro Se Defendant*, *supra* note 136, at 299.

²⁰⁸See notes 222-23 *infra* and text accompanying.

²⁰⁹Even under this approach access hardly seems "meaningful. See notes 214-18 *infra* and text accompanying.

²¹⁰ABA RESOURCE CENTER, *supra* note 22, at 425. The appropriate ratio is not conducive to simple resolution. See Reeves, *supra* note 26, at 151-56.

²¹¹*Id.*

²¹²420 U.S. at 1492-93 & n.3.

²¹³ See notes 222-25 *infra* and text accompanying with respect to the sufficiency of the book list.

²¹⁴There is nothing in the *Bounds* opinion to require otherwise.

²¹⁵420 U.S. at 819.

figure is the result of the State's estimate that each of the seven facilities could handle ten prisoners daily.²¹⁶ The State further estimated that prisoners not facing court deadlines might wait three or four weeks for the opportunity to use a library.²¹⁷ Yet even a conservative opinion of law library use by prisoners estimates that 10 to 20 percent, or, in other words, 1300 to 2600 of the 13,000 prisoners in the North Carolina system, will use a law library on a "relatively consistent basis."²¹⁸ Again, then, the ability to serve 350 prisoners weekly seems to fall considerably short of what prisoner needs will probably be.

It is difficult, therefore, to understand how access can be "meaningful" when a prisoner can use a law library no more than once every three or four weeks²¹⁹ with no assurance that he will be able to use the books he wants when he gets there. Yet this is all that is provided by the plan found adequate in *Bounds*.

Further, *Bounds* includes no specified minimum number of hours that the law libraries will remain open. Nor does the Court recommend the optimum total weekly hours that the library should be open.²²⁰ This would appear to be a significant omission when coupled with the fact that the Court did not specify a copy to prisoner ratio for the titles provided. Particularly since there may be only one copy of a title available in each library it would have been useful to specify the hours daily that the library should remain open. The longer the library day, after all, the more opportunity a prisoner will have to use the books that he needs.

Another aspect of the state plan approved in *Bounds* that raises doubts as to what the Court meant by "meaningful" is the list of law books approved as adequate.²²¹ The list includes no state or federal decisions that are included in reporters prior to 1960.²²² Much more serious is the omission of Shepard's

²¹⁶ *Smith v. Bounds*, 538 F.2d 541, 543 n.1 (4th Cir. 1975). Presumably, then, the State plan did not contemplate weekend library use.

²¹⁷ 420 U.S. at 819. Under the plan prisoners will receive appointments for library use and will be given one full day in the library per appointment. *Id.*

²¹⁸ ABA RESOURCE CENTER, *supra* note 22, at 428. *Contra*, *Farrington v. State of North Carolina*, 391 F. Supp. 714, 717 (M.D.N.C. 1975) (no data on which opinion was based).

²¹⁹ See *In re Harrell*, 2 Cal. 3d 675, 470 P.2d 60, 652, 87 Cal. Rptr. 504 (1970), *cert. denied* 401 U.S. 914 (1971) (one visit weekly is sufficient); *Van Ermen v. Schmidt*, 343 F. Supp. 377, 378, 379 (W.D. Wis. 1972) (two hours weekly states prima facie case that access is abridged).

²²⁰ There is general agreement among commentators that the law library should be open as many hours as possible. ABA RESOURCE CENTER, *supra* note 22, at 429; AMERICAN CORRECTIONAL ASS'N MANUAL CORRECTIONAL STANDARDS STD. (3d ed. 1966). Suggestions vary as to the optimal number of hours. Reeves, *supra* note 26, at 151-56. Most prison law libraries are now open between thirty and forty hours weekly. See Werner, *supra* note 26, at 263. See, e.g., *Hatfield v. Bailleaux* 290 F.2d 632, 638 (9th Cir.), *cert. denied*, 368 U.S. 862 (1961) (Thirty hours weekly); *Stevenson v. Reed*, 391 F. Supp. 1375, 1384 (N.D. Miss. 1975), *aff'd* 530 F.2d 1207 (5th Cir. 1976) (thirty-seven and one-half hours weekly). More than forty percent of correctional law libraries are open more than forty hours weekly. See Werner, *supra* note 26, at 263.

²²¹ 420 U.S. at 819-20 n.4.

²²² *Id.* The 1960 cut-off for reporters is the cut-off used by the American Association of Law Libraries in its CHECKLIST ONE (minimum list of titles necessary to supply prison law library). See note 224 *infra*.

Citations²²³ and case digests. It would seem imperative, particularly for non-lawyers, that such locators of citations be provided.²²⁴ This need is especially acute because a prisoner may get to the library only once every three or four weeks. It is certainly unfortunate that much of his time there could be spent in an attempt merely to discover what books he needs. By contrast, the American Association of Law Libraries compilation of those titles, which, at a minimum, should be in a correctional law library, includes federal and state citators as well as the state's digest.²²⁵ The Federal Bureau of Prisons current list also includes federal citators as well as the Modern Federal Practice Digest.²²⁶

Finally, when focusing on what constitutes an adequate law library it is important to consider whether and what ancillary services are provided. At least in the prison context these services should include access to copying machines, typewriters (and typists), legal forms, and writing paper.²²⁷ The plan approved in *Bounds* did provide for such services²²⁸ and also contemplated training prisoners as research assistants and typists.²²⁹ Thus, at least in this respect the *Bounds* plan coincides with what prisoner needs appear to dictate.

The more complete the law library collection that is maintained and the more varied the services that are offered, the more costs that are involved. It would cost a state approximately \$5000 to establish one prison law library

²²³The *Bounds* majority called the absence of Shepard's citators a "questionable omission." 420 U.S. at 819-20 n.4. It nevertheless affirmed the plan.

²²⁴See Larsen, *supra* note 22, at 335.

²²⁵It also includes material not on the list approved in *Bounds*. AMERICAN ASSOCIATION OF LAW LIBRARIES SPECIAL COMMITTEE ON LAW LIBRARY SERVICES TO PRISONERS, CHECKLIST ONE: MINIMUM COLLECTION FOR PRISON LAW LIBRARIES, reprinted in ABA JOINT COMM., *supra* note 22, at 439-40. The Association, in CHECKLIST TWO, provides for an expanded prison law library collection. *Id.* at 441-43. The expanded list required that the reporters include volumes beginning with 1950 and recommends that complete sets of other materials be maintained.

²²⁶The Federal Bureau list is also much more extensive than the list provided in *Bounds*. Memorandum from Office of General Counsel, Federal Bureau of Prisons (June 1977) (updated list; earlier list found in Policy Statement 2001. 2B, May 8, 1972). See Werner, *supra* note 25, at 267-68. For other prison library law book lists, see, e.g., White v. Sullivan, 368 F. Supp. 292, 296-97 (S.D. Ala. 1973); Poe, *A Spark of Hope of Prisoners*, 66 LAW LIB. J. 59, 59 (1973).

²²⁷Many prison law libraries routinely provide such services. See e.g., Reeves, *supra* note 26, at 160-61; Werner, *supra*, note 26, at 268-69.

²²⁸420 U.S. at 819.

²²⁹*Id.* Training programs have been conducted, for example, in New York, Massachusetts, Ohio, Arkansas, Minnesota, New York City, and Washington D.C. ABA RESOURCE CENTER, *supra* note 27, at 427. Pamphlets have been prepared for prisoner use, and courses have been taught on legal subjects. Jacob & Sharma, *supra* note 80, at 589-90. West Publishing Company conducts such courses when setting up a correctional law library. Brief for Respondents at 48-49, *Bounds v. Smith*, 420 U.S. 817 (1977). The course may be a one-day program or run fifty-six hours; it is provided free or at no profit depending on the size of the law book purchase. Letter from Charles Kitzen, Executive Director, Special Projects, West Publishing Co., Inc., to J.R. Potuto (Aug. 25, 1977) (on file in Uniform Corrections Act Project Office, University of Nebraska Law College, Lincoln, Neb.). The courses include the mechanics of legal research and law library management. *Id.*

that included everything in the American Association of Law Libraries minimum book list; the expanded list would cost approximately \$7000.²³⁰ The state of New Jersey prepared its own minimum list and estimated the cost of supplying the books on it at \$9,760 for each library.²³¹ Other estimates run as high as \$13,800²³² and as low as \$1,000.²³³ These costs do not include costs to keep the library current²³⁴ or to pay staff to operate it.²³⁵ And, of course, the estimates relate to those law books thought necessary to pursue a habeas corpus or section 1983 action; it would cost more to establish a law library that would allow prisoners to pursue other fundamental rights. Yet these costs are insignificant when compared with total state expenditures²³⁶ and, in any case, a state may well be able to avoid even this negligible impact on its budget. First of all, there are sources available to help defray costs of setting up a correctional law library.²³⁷ Secondly, many states even before *Bounds* had already provided complete or substantially complete law libraries in their major facilities.²³⁸ Of course, even if a state avoids these start-up costs it may still incur building renovation costs in order to provide space in the

²³⁰See AMERICAN ASSOCIATION OF LAW LIBRARIES, CHECKLISTS ONE & TWO, reprinted in ABA JOINT COMM. *supra* note 22, at 439-43; *The Jailed Pro Se Defendant*, *supra* note 136, at 305.

²³¹Werner, *supra* note 26, at 267.

²³²*Id.* at 269.

²³³Brief for Respondents at 37, *Bounds v. Smith*, 420 U.S. 317 (1977). This is the estimate of the Connecticut Department of Corrections and contemplates purchase of a microfilm reader and microfilm materials.

²³⁴Costs to keep a law library current have been estimated at \$1800. Werner, *supra* note 26, at 269. The actual costs depends, of course, on the size of the basic collection and the number of copies of titles owned. A current collection is imperative. Reeves, *supra* note 26, at 143-44, 156-58. See, e.g., AMERICAN ASSOCIATION OF LAW LIBRARIES, CHECKLIST ONE, reprinted in ABA JOINT COMM., *supra* note 22, at 440 and CHECKLIST TWO, reprinted in ABA JOINT COMM., *supra* note 22, at 443; Larsen, *supra* note 22, at 353-54.

²³⁵Nor do they include replacement costs for lost or mutilated volumes. The book attrition and mutilation rate is a particular problem when the library is understaffed. E.g., Spector, *supra* note 17, at 368-69.

²³⁶These costs may loom more significant, however, if they are allocated to the overall budget of the department of corrections.

²³⁷See Reeves, *supra* note 26, at 166. The Law Enforcement Assistance Administration, for example, has assisted states to begin law libraries or legal services programs. See LEAA, A Compendium of Selected Criminal Justice Projects, III-201, IV-360 to IV-368 (1975); 42 U.S.C. §§ 3750-3750d (1970). See also Poe, *A Spark of Hope for Prisoners*, 66 LAW LIB. J. 59, 60 (1973).

²³⁸In at least fourteen states, as well as the District of Columbia and the federal system, both legal services and law libraries are already provided. See Brief for Respondents, Exhibit B, *Bounds v. Smith*, 420 U.S. 817 (1977). At least forty states presently maintain law libraries for confined persons. See *id.* E.g., ILL. ANN. STAT. ch. 38 § 1003-7-2(a) (Smith-Hurd 1973). In fifteen of these, the libraries provided are well beyond minimal requirements. See Brief for Respondents, Exhibit B, *Bounds v. Smith*, 420 U.S. 817 (1977); ABA RESOURCE CENTER, *supra* note 22, at 423. In several other states substantial access is provided: for example, law libraries are maintained in thirteen of sixteen Texas facilities, four of six Washington facilities, five of eight Pennsylvania facilities, eight of nine Illinois facilities. See Brief for Respondents, Exhibit B, *Bounds v. Smith*, 420 U.S. 817 (1977). Other states provide a complete collection in one facility, and, in the other facilities, basic materials with the availability of intercorrectional library loans. See *id.*

prison for the library; and it will still have to meet continuation costs to keep the collection current, pay staff, and meet other expenses. These costs do not appear very high, however, when balanced against the constitutional right of access and the positive results that such access should have on the prison population.

CONCLUSION

The *Bounds* right of access appears to be a right in flux. Its appropriate scope would have been one in which the states were obligated to expend funds to aid prisoners to petition for writ of habeas corpus and were otherwise required not to impede prisoner access to the courts. But the *Bounds* Court chose, instead, to include section 1983 actions within a state's obligation to expend funds. This *Bounds* right of prisoner access seems logically to require further expansion—to at least all fundamental rights and perhaps even to civil legal problems generally. It also appears that the right to an adequate law library, described in *Bounds* as a right only in the absence of adequate legal services, seems, on closer analysis, to *require* the establishment of law libraries. Finally, whatever the eventual scope of the right, the Court's acceptance of the library plan under consideration in *Bounds* leaves much doubt as to how meaningful this meaningful right of access will prove to be.

