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Does *Lewis v. Casey* Spell the End to Court-Ordered Improvement of Prison Law Libraries?*

Joseph L. Gerken**

The Supreme Court's decision in Lewis v. Casey raises the bar for advocates seeking court-ordered improvements in prison law libraries. Whether it dooms all such efforts to failure may well depend on the willingness of trial courts to take into account the realities of prisoners' pro se litigation.

¶1 In *Lewis v. Casey*, the Supreme Court held that prisoners do not have “an abstract, freestanding right to a law library.”¹ Hence, an inmate cannot support a federal claim simply by showing that a prison law library is “subpar in some theoretical sense.”² Rather, the inmate “must go one step further and demonstrate that the alleged shortcomings of the law library . . . hindered his efforts to pursue a legal claim.”³

¶2 As some commentators have noted, this “actual injury” requirement seems to create a “paradox” in that “the ability to litigate a denial of access claim is evidence that the plaintiff has no denial of access claim!”⁴

¶3 Does *Lewis v. Casey* spell the end of prisoners' efforts to obtain court-ordered improvements to their law libraries? Certainly the “actual injury” requirement makes it significantly harder for potential plaintiffs to sustain any challenge to the adequacy of law libraries. However, it may be possible to show actual injury, at least in the most egregious cases of denial of law library services. A key factor will be courts' willingness to take into account the realities of prison litigation. An underlying premise of the following discussion is that there is a significant relationship between the outcome of prisoners' access to court cases and the extent to which the deciding court acknowledges those realities. Decisions granting relief to plaintiffs almost invariably are supported by an analysis of the practical realities of prison litigation. Contrarily, decisions denying relief tend to disregard those realities.

¶4 In this regard, the *Lewis* decision represents a critical departure in the analytical approach to access to court cases. Prior Supreme Court decisions, notably

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1. 518 U.S. 343, 351 (1996).

2. *Id.*

3. *Id.*

4. *Walters v. Edgar*, 163 F.3d 430, 436 (7th Cir. 1998).

Bounds v. Smith,⁵ were premised on a sophisticated and somewhat sympathetic perspective of the real-life constraints facing prisoners seeking to pursue pro se litigation. In *Lewis*, however, such insights were markedly absent from the majority's analysis. While the core holdings of *Lewis* will undoubtedly have an impact on the outcome of subsequent access-to-court litigation, the critical factor in many such cases may well be whether the deciding court adopts the analytical approach of *Bounds* or *Lewis* in deciding whether plaintiffs suffered actual injury from the inadequacies of prison law libraries.

Avery and Bounds: Defining a Right of Access to Court

A prison inmate's right of access to the courts is the most fundamental right he or she holds. "All other rights of an inmate are illusory without it, being entirely dependent for their existence on the whim or caprice of the prison warden."⁶

¶5 Although courts have for years consistently acknowledged the fundamental nature of prisoners' right of access to court, the parameters of that right have not always been clearly delineated. Indeed, the Supreme Court has subjected the right of access to court to rather dramatic reinterpretation.

¶6 In a line of cases decided in the late 1960s and the 1970s, the Supreme Court held that prison inmates have a right to access to court. In *Johnson v. Avery* the Court held that prisoners' access to the courts "may not be denied or obstructed."⁷ Therefore, when a prison does not provide a "reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief," it may not "bar[] inmates from furnishing such assistance to other prisoners."⁸ In *Bounds v. Smith* the Court held that prison authorities have an "affirmative obligation[]" to assure prisoners "meaningful access to the courts."⁹ This affirmative obligation can be met by providing access to law libraries or access to "other forms of legal assistance."¹⁰

¶7 The Court's rationales in both *Avery* and *Bounds* are notable for the pragmatic approach taken with regard to the notion of access to court.

¶8 William Joe Johnson, the plaintiff in *Johnson v. Avery*, was transferred to a maximum security cell at the Tennessee State Penitentiary because he violated a prison rule that prohibited inmates from assisting each other with legal matters.¹¹ Johnson did not deny that he had helped another inmate to prepare a writ of habeas

5. 430 U.S. 817 (1977).

6. *DeMallory v. Cullen*, 855 F.2d 442, 446 (7th Cir. 1988) (quoting *Adams v. Carlson*, 488 F.2d 619, 630 (7th Cir.1973)).

7. 393 U.S. 483, 485 (1969).

8. *Id.* at 490.

9. *Bounds*, 430 U.S. at 824.

10. *Id.* at 825.

11. *Avery*, 393 U.S. at 484.

corpus challenging the other inmate's conviction. However, Johnson argued that punishing him for his efforts effectively denied the other inmate his right of access to court.¹² The Supreme Court agreed. It reasoned as follows:

There can be no doubt that Tennessee could not constitutionally adopt and enforce a rule forbidding illiterate or poorly educated prisoners to file habeas corpus petitions. Here, Tennessee has adopted a rule which, in the absence of any other source of assistance for such prisoners, effectively does just that.¹³

¶9 The Court noted that a prison

may impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and seeking of assistance . . . : for example, by limitations on the time and location of such activities. . . . But unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation such as that here at issue, barring inmates from furnishing such assistance to other prisoners.¹⁴

As this quotation suggests, the Supreme Court took a very pragmatic approach to the issue presented in *Avery*. Rather than simply announcing that inmates have an abstract right of access to court, the Court reasoned that this right is essentially meaningless if an inmate is illiterate or poorly educated, unless someone else assists the inmate.

¶10 *Avery* involved an inmate's right to submit a habeas corpus petition to the federal court. In *Wolff v. McDonnell*, the Supreme Court held that the right of access to court extends to inmates' civil rights actions under 42 U.S.C. § 1983.¹⁵ Once again, the Court took a pragmatic view of this right, noting:

[t]he recognition by this Court that prisoners have certain constitutional rights which can be protected by civil rights actions would be diluted if inmates, often "totally or functionally illiterate," were unable to articulate their complaints to the courts. Although there may be additional burdens on the [prison], if inmates may seek help from other inmates . . . this should not prove overwhelming.¹⁶

¶11 Neither *Avery* nor *Wolff* required that prisons take any affirmative steps to assure inmates' access to court. Both cases simply held that, if prison officials did not affirmatively assist inmates in obtaining access to court, the officials could not prevent inmates from assisting each other.

¶12 However, in *Bounds v. Smith* the 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.¹⁷

12. *Id.*

13. *Id.* at 487.

14. *Id.* at 490.

15. 418 U.S. 539, 579 (1974).

16. *Id.*

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

¶13 In rejecting prison officials' contention that they were under no affirmative obligation to provide assistance to inmates seeking to pursue legal claims, the Court once again took a very pragmatic view of the litigation process.

Although it is essentially true, as petitioners argue, that a habeas corpus petition or civil rights complaint need only set forth facts giving rise to the cause of action, it hardly follows that a law library or other legal assistance is not essential to frame such documents. It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available. Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and, if so, what facts are necessary to state a cause of action.

If a lawyer must perform such preliminary research, it is no less vital for a *pro se* prisoner. Indeed, despite the "less stringent standards" by which a *pro se* pleading is judged, it is often more important that a prisoner complaint set forth a nonfrivolous claim meeting all the procedural prerequisites, since the court may pass on the complaint's sufficiency before allowing filing *in forma pauperis* and may dismiss the case if it is deemed frivolous. Moreover, if the state files a response to a *pro se* pleading, it will undoubtedly contain seemingly authoritative citations. Without a library, an inmate will be unable to rebut the State's argument. It is not enough to answer that the court will evaluate the facts pleaded in light of the relevant law. Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation.¹⁸

¶14 The Supreme Court's analysis in this extended quotation is striking in its focus on the realities of prison litigation. Taken at face value, this analysis is not particularly controversial. Any practicing attorney would likely agree that it is necessary to be familiar with the procedural issues listed by the Court prior to filing an initial pleading, and certainly it is important to be aware of the substantive elements of the plaintiff's claims in order to adequately plead supporting factual allegations. If one accepts these truisms, then one is led ineluctably to the conclusion that the Court reaches in *Bounds*: a prisoner's right of access to court would be of little utility if the prisoner had no means of ascertaining the substantive and procedural law that bears on the claims that she¹⁹ seeks to bring. Although this analysis is quite realistic and its logic unimpeachable, subsequent Supreme Court decisions were to demonstrate that the reality-based approach utilized in *Bounds* was by no means preordained.

Between *Bounds* and *Lewis*

¶15 In the years following the *Bounds* decision, prisoners filed numerous lawsuits claiming a denial of access to court. In many of those cases the district court based its conclusions as to the adequacy of law library access on a careful analysis of the

18. *Id.* at 825–26 (citations omitted).

19. The gender of the third person singular pronoun will be alternated in this article between male and female where the person referred to is of indeterminate gender.

ways in which prisoners require law books in order to secure access to court. This analysis is particularly striking in a line of cases involving prisoners confined to segregated housing. In most states, a prison official has authority to confine a prisoner to a segregated cell because the prisoner committed a disciplinary infraction, to protect him from other prisoners, or to maintain security in the facility. The Supreme Court has consistently upheld states' authority to confine such prisoners in segregated housing, while defining procedural rights that apply in some instances.²⁰ Prisoners in segregation typically are confined to their cells for most of the day and are not permitted to congregate with other prisoners.²¹ Thus, prisoners in segregated housing typically are not allowed to go to the facility law library and must rely on a "runner" system to obtain law books or copies of requested cases or statutes.²²

¶16 In many of the cases following *Bounds* that involved segregation prisoners, the prison had required that the prisoners provide an exact citation to the case, statute, or other material requested. The Fourth Circuit, in an oft-quoted passage, described why an "exact cite" paging system, without more, was likely to result in a denial of access to court.

Simply providing a prisoner with books in his cell, if he requests them, gives the prisoner no meaningful chance to explore the legal remedies he might have. Legal research often requires browsing through various materials in search of inspiration; tentative theories may have to be abandoned in the course of research in the face of unfamiliar adverse precedent. New theories may occur as a result of a chance discovery of an obscure or forgotten case. Certainly a prisoner, unversed in the law and the methods of legal research, will need more time or more assistance than the trained lawyer in exploring his case. It is unrealistic to expect a prisoner to know in advance exactly what materials he needs to consult.²³

This rationale is striking in its focus on the practical realities of conducting legal research. A court unwilling to acknowledge such realities might have simply noted that segregation inmates have indirect access to law books and avoided an analysis of the quantity and quality of that access. By elaborating on the practical necessities

20. See *Sandin v. Connor*, 515 U.S. 472 (1995) (disciplinary segregation); *Hewitt v. Helms*, 459 U.S. 460 (1983) (administrative segregation).

21. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 7, pt. 300 (2003) (defining conditions of confinement in Special Housing Units in New York prisons).

22. See, e.g., *id.* § 304.7.

23. *Williams v. Leeke*, 484 F.2d 1339, 1339 (4th Cir. 1978). The above passage has been quoted or paraphrased in the following cases, *inter alia*. *Casey v. Lewis*, 43 F.3d 1261, 1267 (9th Cir. 1994), *rev'd*, 518 U.S. 343 (1996); *Peterkin v. Jeffes*, 855 F.2d 1021, 1039 n.22 (3d Cir. 1988); *Toussaint v. McCarthy*, 801 F.2d 1080, 1109–10 (9th Cir. 1986); *Glover v. Johnson*, 931 F. Supp. 1360, 1369 (E.D. Mich. 1996); *Walters v. Edgar*, 900 F. Supp. 197, 225 (N.D. Ill. 1995); *Kaiser v. County of Sacramento*, 780 F. Supp. 1309, 1316 (E.D. Cal. 1991); *Griffin v. Coughlin*, 743 F. Supp. 1006, 1023 (N.D.N.Y. 1990); *Watson v. Norris*, 729 F. Supp. 581, 585 (M.D. Tenn. 1989); *Tillery v. Owens*, 719 F. Supp. 1256, 1283 (W.D. Pa. 1989); *Reutcke v. Dahm*, 707 F. Supp. 1121, 1130 (D. Neb. 1988); *Walters v. Thompson*, 615 F. Supp. 330, 339 (N.D. Ill. 1985); *Martino v. Carey*, 563 F. Supp. 984, 1003–04 (D. Or. 1983); *Taifa v. Bayh*, 1995 WL 646300, at *17 (N.D. Ind. 1995); *Young v. Kelly*, 1989 WL 132023, at *2 (W.D.N.Y. 1989).

of legal research, as experienced by anyone faced with the prospect of submitting pleadings, motion papers, or a brief to a court, these courts highlighted the insufficiency of the “exact cite” paging system, as practiced in prison segregation units.

¶17 Of course, segregation inmates were not the only litigants asserting a denial of access to court. In numerous cases, the plaintiffs claimed that the holdings in their law libraries were inadequate.²⁴ Likewise, illiterate and non-English-speaking prisoners contended that they had no access to court, since they were unable to effectively utilize law books.²⁵

¶18 Then, in 1996, the Supreme Court decided *Lewis v. Casey*.²⁶ To understand the impact of *Lewis* on prisoners’ efforts to obtain improved law library services, it is useful to take a close look at the procedural history of the case, and the Supreme Court’s rationale for its central holdings.

Lewis v. Casey

¶19 *Casey v. Lewis* was a class action lawsuit brought by a class consisting of all Arizona state prisoners. Following a three-month bench trial,²⁷ the district court held that the plaintiffs had been denied access to court.²⁸ The court identified a number of systemic deficiencies related to the holdings and practices of the law libraries,²⁹ and specifically found prison practices deficient with regard to illiterate prisoners and prisoners in “lockdown.”³⁰

¶20 The district court held that the paging system utilized by lockdown prisoners to request law library materials was inadequate.³¹ The court noted that, “in many instances, prisoners in lockdown are denied law books unless they can provide an exact citation,” that lockdown prisoners “routinely experience long delays in receiving legal materials” even when they provide the exact citation, that pris-

24. See *Patrick v. Maynard*, 11 F.3d 991, 994–96 (10th Cir. 1993); *Johnson v. Moore*, 948 F.2d 517, 521 (9th Cir. 1991); *Lindquist v. Idaho Bd. of Corrections*, 776 F.2d 851, 856, 857–58 (9th Cir. 1985); *Canell v. Bradshaw*, 840 F. Supp. 1382, 1389 (D. Or. 1993); *Brown v. Smith*, 580 F. Supp. 1576, 1578 (M.D. Pa. 1984); *Canterino v. Wilson*, 546 F. Supp. 174, 203, 216 (W.D. Ky. 1982), *supplemented*, 562 F. Supp. 106, 109–11 (W.D. Ky. 1983); *Miller v. Evans*, 832 P.2d 786, 787–89 (Nev. 1992); *Jenson v. Satran*, 303 N.W.2d 568, 568–70 (N.D. 1981).

25. See *Cruz v. Hauck*, 627 F.2d 710, 721 (5th Cir. 1980); *United States ex rel. Para-Professional Law Clinic v. Kane*, 656 F. Supp. 1099, 1106 (E.D. Pa. 1987); *Canterino v. Wilson*, 562 F. Supp. 106, 110 (W.D. Ky. 1983); *Wade v. Kane*, 448 F. Supp. 678, 681 (E.D. Pa. 1978); *Knop v. Johnson*, 977 F.2d 996, 1005 (6th Cir. 1992); *Acevedo v. Fortunado*, 829 F. Supp. 886, 888 (D.N.J. 1993).

26. 518 U.S. 343 (1996).

27. *Id.* at 346.

28. *Casey v. Lewis*, 834 F. Supp. 1553, 1566 (D. Ariz. 1992).

29. The court found that holdings at some of the libraries were deficient, and found deficiencies with regard to staff training, photocopying policies, attorney-client telephone calls, and provision of supplies, such as pens, paper, and postage. *Id.* at 1560–65.

30. “Lockdown” is a type of segregated housing. Arizona prisoners are placed on “lockdown” status after having violated prison rules, for example, rules against fighting or disobedience of orders. Lockdown prisoners are maintained in their cells for most of the day and are not permitted to congregate with other inmates during meals, recreation, or on work assignments.

31. *Casey*, 834 F. Supp. at 1566.

oners often were permitted to obtain only one or two books at a time, and that legal assistants assigned to assist lockdown prisoners “are not sufficiently skilled to assist them.”³²

¶21 The district court also found that a significant number of Arizona prisoners were functionally illiterate, and concluded that these prisoners were unable to effectively research the law, and therefore that the prisons must provide them with assistance from properly trained legal assistants.³³

¶22 Although the district court’s opinion went into much detail with regard to deficiencies in prison policies, there was little discussion of specific instances in which these policies prevented prisoners from pursuing their claims. In fact, the court cited only two such instances, both involving illiterate inmates.³⁴ This omission was not necessarily due to the plaintiffs’ inability to identify prisoners who suffered actual harm. Rather, it appears that the question was not a focus of the trial.

¶23 Following its ruling on the merits of the plaintiffs’ claims, the court issued a detailed remedial order.³⁵ The defendants appealed. The Ninth Circuit held that “the district court did not abuse its discretion in ordering the relief set forth in its permanent injunction.”³⁶ The defendants then applied for and were granted certiorari.³⁷

¶24 The Supreme Court reversed the judgment and annulled the permanent injunction.³⁸ It held that the “success of [the plaintiffs’] systemic challenge” to the adequacy of the Arizona prison law libraries “was dependent on their ability to show widespread actual injury, and that the court’s failure to identify anything more than isolated instances of actual injury renders its finding of a systematic *Bounds* violation invalid.”³⁹ The Court reasoned that “*Bounds* did not create an abstract, freestanding right to a law library or legal assistance” and therefore, “an inmate cannot establish relevant actual injury simply by establishing that his prison’s law library or legal assistance program is subpar in some theoretical sense.”⁴⁰ Rather, “the inmate must . . . go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.”⁴¹

¶25 The Court’s use of the term “hindered” suggests an expansive view of the notion of actual injury. For example, it suggests that an inmate might show actual

32. *Id.* at 1557.

33. *Id.* at 1558.

34. *Id.*

35. The remedial order is included in an appendix to the Ninth Circuit’s decision on appeal. *Casey v. Lewis*, 43 F.3d 1261, 1272–83 (9th Cir. 1994).

36. *Id.* at 1270.

37. *Lewis v. Casey*, 514 U.S. 1126 (1995).

38. *Lewis v. Casey*, 518 U.S. 343, 346, 364 (1996).

39. *Id.* at 349.

40. *Id.* at 351.

41. *Id.*

injury if his argument in support of a particular claim were substantially weakened because of lack of access to relevant authorities. However, the *Lewis* majority explicitly rejected the notion that “the state must enable the prisoner . . . to *litigate effectively* once in court,”⁴² and the two examples of actual injury given in the opinion suggest a much more restrictive definition of that concept.

[A plaintiff] might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison’s legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.⁴³

In other words, the majority equated injury with having a claim dismissed, or being unable to even file a complaint. This is a far cry from being “hindered” in pursuing a claim.

¶26 The Court also held that “the injury requirement is not satisfied by just any type of frustrated legal claim.”⁴⁴ The right of access to court applies specifically to litigation in which “inmates . . . attack their sentences, directly or collaterally . . . [or] challenge the conditions of their confinement.”⁴⁵ Such a definition of actual injury seems inconsistent with the real life requirements of inmates’ access to court. For example, an inmate who has been denied any visitation with her children or who was threatened with termination of her parental rights would have a compelling need to gain access to court to contest those matters. Although not directly related to the inmate’s living conditions, the rights at stake are arguably of critical importance.

¶27 The *Lewis* majority held that the “actual injury” requirement impacts on the scope and propriety of injunctive relief that a district court may order. “The remedy must . . . be limited to the inadequacy that produced the injury in fact that the plaintiff has established.”⁴⁶ Consequently, even if plaintiffs demonstrate significant deficiencies in a prison’s law library, a district court has no power to remedy those deficiencies unless the plaintiffs show that identifiable individuals were harmed by them.⁴⁷ The plaintiffs in *Lewis* had identified only two instances of actual injury to inmates’ access to court, both involving illiterate inmates. The Supreme Court reasoned that these inmates would not have benefitted from an adequate law library since they could not read. Therefore, the actual injury to the illiterate inmates was insufficient to support the remedial order as it related to the adequacy of the prison law libraries.⁴⁸

42. *Id.* at 354.

43. *Id.* at 351.

44. *Id.* at 354.

45. *Id.* at 355.

46. *Id.* at 357 (citation omitted).

47. *Id.*

48. *Id.* at 359–60.

¶28 The *Lewis* majority and dissenters⁴⁹ disagreed on a critical issue related to the applicability of the actual injury requirement. Justice Souter, dissenting in part, opined that plaintiffs should not be required to show actual injury when they assert “a *Bounds* claim of complete and systematic denial of all means of court access.”⁵⁰ Justice Souter noted that the plaintiffs in *Lewis* did not allege that Arizona’s law library system was subject to any such systemic breakdown, and therefore, “I would go no further than to hold” that actual injury is required “in a case not involving substantial, systemic deprivation of access to court. . . .”⁵¹ In other words, if a prison has no law library, or if the system is so dysfunctional that inmates are left with virtually no access to legal information, the actual injury requirement might not apply.⁵²

¶29 The majority rejected this approach, holding that actual injury to identified inmates’ access to court must be shown even where the prison had no law library or legal assistance program.⁵³ The majority reasoned that “Justice Souter’s proposed exception is unlikely to be of much real-world significance” since “[w]here the situation is so extreme as to constitute ‘an *absolute* deprivation of access to *all* legal materials,’ finding a prisoner with a claim affected by this extremity will probably be easier than proving the extremity.”⁵⁴

¶30 One might certainly question the real-life validity of this presumption. In the first place, finding “a prisoner with a claim” in this context will be of minimal use to the plaintiffs, since *Lewis* requires that there be a showing of widespread actual injury in order to justify systemic relief. Thus, if plaintiffs were to show that a prison’s law library was an absolute shambles and to identify one inmate whose claim was dismissed because of the library’s inadequacy, this would fall short of the requirement for broad injunctive relief under *Lewis*.

¶31 Also, the majority’s presumption begs the question: how will potential plaintiffs be identified? Indeed, one suspects that inmates will be placed in a Catch-22 situation. On the one hand, there may be some inmates who have the persistence and wherewithal to pursue their claims despite the total inadequacy of the law library. In doing so, these inmates will have demonstrated that they were not actually injured, since they were able to gain access to court with their claims. On the other hand, there likely would be many inmates who are stymied by an inadequate law library and unable to pursue their claims. These inmates arguably

49. Justice Scalia wrote the majority opinion, which was joined by Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Thomas. Justice Souter wrote an opinion concurring in part, dissenting in part, and concurring in the judgment. This opinion was joined by Justices Ginsburg and Breyer. Justice Stevens wrote a dissenting opinion.

50. *Lewis*, 518 U.S. at 400 (Souter, J., concurring in part, dissenting in part, and concurring in the outcome).

51. *Id.* at 401.

52. *Id.* at 400–01.

53. *Id.* at 353 n.4.

54. *Id.* at 353–54 n.4.

suffer actual harm; however, they are effectively invisible, since they are not able to apprise the court of their claims. Thus, the Seventh Circuit, in *Walters v. Edgar*, noted “the paradox that ability to litigate a denial of access claim is evidence that the plaintiff has no denial of access claim!”⁵⁵

¶32 The majority’s blithe dismissal of Justice Souter’s concerns regarding systemic denial of legal resources reflects a dramatically different view of the realities of prison litigation than that expressed in either *Bounds* or *Avery*. This point of view is evident in dicta such as the following: “*Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims.”⁵⁶ The notion of inmates as “litigating engines” is absent from *Bounds* and *Avery*, and seems contrary to the general thrust of those opinions, which concern themselves mainly with the difficulties that pro se prisoner litigants face in gaining access to court.

¶33 One example of the *Lewis* majority’s attitude toward the realities of prison litigation is the following suggestion as to a presumably defensible approach that prison authorities might take to assure prisoners’ access to court.

One such experiment, for example, might replace libraries with some minimal access to legal advice and a system of court-provided forms such as those that contained the original complaints in two of the more significant inmate-initiated cases in recent years, *Sandin v. Conner* and *Hudson v. McMillian*—forms that asked the inmates to provide only the facts and not to attempt any legal analysis.⁵⁷

This example seems to suggest that inmates need only plead “the facts” and that they need not have any comprehension of the legal standard that will bear on those factual allegations.⁵⁸ It stands in stark contrast to the description, in *Bounds*, of procedural and substantive issues that a litigant would need to research prior to filing a federal complaint.⁵⁹

¶34 The majority’s citation of the *Sandin* and *Hudson* cases as examples of the viability of such an approach is misleading. Forms utilized by the (initially) pro se

55. 163 F.3d 430, 436 (7th Cir. 1998).

56. *Lewis*, 518 U.S. at 355. It is possible that the Court intended this dictum to be understood as hyperbole. Certainly the notion of inmates filing scores of shareholder derivative actions seems contrary to the realities of prisoner litigation. The present author, while staff attorney for a prisoners’ rights organization, interviewed hundreds of state inmates and reviewed thousands of inmate letters. The author also reviewed numerous pro se pleadings and motion papers while employed as a confidential law clerk in the United States District Court. None of those interviews, letters, pleadings, or motions involved a shareholder’s derivative action.

57. *Id.* at 352 (citations omitted).

58. The majority’s example includes a reference to prisoners having “minimal access to legal advice.” However, it does not elaborate on what that “minimal access” would entail. Of course, if inmates had access to legal professionals who could inform them of the standards and procedural requirements applicable to their cases, this would assure adequate access to court. Given the core holdings in *Lewis*, it is clear that this is not what the majority means when it refers to “minimal” access to legal advice in its example.

59. See *Bounds*, 430 U.S. at 825–26, quoted and discussed *supra* ¶¶ 13–14.

plaintiffs in *Sandin* and *Hudson* may have “asked” the plaintiffs “to provide only the facts.” However, it does not necessarily follow that the plaintiffs, in filling out the forms, did so without any reference to the applicable legal standards that likely would be applied to their claims. There is no indication that the plaintiff in either the *Sandin* or *Hudson* case was denied access to a functional law library.⁶⁰ Indeed, one can infer that the plaintiffs had access to the basic case law that bore on their claims, and framed their pleadings accordingly. For example, in challenging the disciplinary determination that led to his confinement in segregation, the plaintiff in *Sandin* asserted that he

was not given a summary of the facts leading to the charges, that he was not permitted to question the guard who charged him with the offense, [and] that he was not allowed to call witnesses to the hearing. . . .⁶¹

This recitation of alleged procedural deficiencies suggests that, at a minimum, the plaintiff was familiar with the Supreme Court’s decision in *Wolff v. McDonnell*, which defined the minimal due process requirements for prison disciplinary hearings.⁶² Thus, to suggest that all an inmate needs to do is to scribble a statement of “the facts” on a plain language form, when that inmate has no awareness of the legal criteria that will be used to judge whether the facts support a federal claim, is disingenuous.

¶35 The *Lewis* majority’s attitude toward the realities of prison litigation was also reflected in its discussion of “lockdown” inmates (i.e., those housed in segregation units). The district court, noting significant deficiencies in the system used to provide legal books and materials to lockdown prisoners, found that such prisoners had been denied access to court.⁶³ The Supreme Court reversed this ruling, finding that no lockdown prisoner had shown actual injury.⁶⁴ However, the majority went on to note, in dicta, that lockdown prisoners “present[] special disciplinary and security concerns”⁶⁵ which justify restricting such prisoners’ access to law library services.⁶⁶ As discussed later,⁶⁷ this “security” rationale is somewhat ambiguous and may well be the focus of future litigation involving segregation inmates’ access to law library materials.

¶36 While the majority opinion in *Lewis* is notable for its general disregard of the realities of prisoners’ pro se litigation, it did take such realities into account in its discussion of one segment of the prison population, namely, illiterate inmates.

60. See *Connor v. Sakai*, 994 F.2d 1408, amended and superceded by 15 F.3d 1463 (9th Cir. 1993), *rev’d sub nom. Sandin v. Connor*, 515 U.S. 472 (1995); *Hudson v. McMillian*, 929 F.2d 1014 (5th Cir. 1990), *rev’d*, 503 U.S. 1 (1992).

61. *Connor v. Sakai*, 15 F.3d at 1466.

62. 418 U.S. 539, 563–69 (1974).

63. *Casey v. Lewis*, 834 F. Supp. 1553, 1557 (D. Ariz. 1992).

64. *Lewis*, 518 U.S. at 358–60.

65. *Id.* at 361.

66. *Id.* at 362.

67. See discussion *infra* ¶¶ 65–71.

The *Lewis* majority rejected the state's contention that "all inmates, including the illiterate and non-English-speaking, have a right to nothing more than 'physical access to excellent libraries. . . .'"⁶⁸ The Court reasoned that a *Bounds* claim is established "[w]hen any inmate, even an illiterate or non-English-speaking inmate, shows that an actionable claim . . . has been lost or rejected . . . because th[e] capability of filing suit has not been provided. . . ."⁶⁹ Hence, even if a prison has an adequate law library, prison officials may be required to provide some other form of assistance, such as trained inmate law clerks.⁷⁰

¶37 Undoubtedly, the core holdings in *Lewis*, and particularly the actual injury requirement, present a significant impediment to inmates' efforts to obtain court-ordered improvements in prison law libraries. Of potentially greater concern is the significant shift of emphasis, from *Bounds* to *Lewis*, in the Supreme Court's analytical approach to the inmates' underlying claims.

Lower Court Cases after *Lewis*

¶38 As might be expected, application of the *Lewis* actual injury requirement has resulted in the dismissal of numerous access to court claims,⁷¹ although there have been occasional decisions in which plaintiffs were found to have met the actual injury requirement, or at least to have raised a triable issue of fact with respect to the requirement.⁷²

¶39 The actual injury requirement has proven to be most problematic when applied to litigation seeking systemic improvement in prison law library or advocacy programs. Many of these cases were initiated long before the Supreme Court decided *Lewis*. In some instances, a trial was held in which prison practices were scrutinized and the court issued an injunction ordering improvements in the prison law library or in advocacy services. Following *Lewis*, courts were often compelled to determine whether the plaintiffs had met the actual injury requirement.

68. *Lewis*, 518 U.S. at 356 (quoting Petitioners' Brief at 35).

69. *Id.* at 356.

70. *Id.*

71. *See, e.g.*, *Sowell v. Vose*, 941 F.2d 32, 35–36 (1st Cir. 1991) ("Sowell could and should have articulated its basis [for actual injury], stating how the 'legal property' of which he was deprived was relevant to or necessary for the state court appeal. . . ."); *Ruiz v. United States*, 160 F.3d 273, 274 (5th Cir. 1998) ("[N]o real prejudice resulted [from delay in providing Ruiz with the notice of dismissal], because Ruiz's appeal was ultimately frivolous."); *Akins v. United States*, 204 F.3d 1086, 1090 (11th Cir. 2000) ("The record does not support a finding of actual injury [because] Atkins fails to explain why the seven months prior to lockdown were inadequate to complete and file his motion."); *Tourscher v. McCullough*, 184 F.3d 236, 242 (3d Cir. 1999); *Hoard v. Reddy*, 175 F.3d 531, 533 (7th Cir. 1999); *Cody v. Weber*, 256 F.3d 764, 770 (8th Cir. 2001); *McBride v. Deer*, 240 F.3d 1287, 1290 (10th Cir. 2001).

72. *See, e.g.*, *Gentry v. Duckworth*, 65 F.3d 555, 559 (7th Cir. 1995) ("Prejudice to the right of access to the courts occurs whenever the actions of a prison official causes court doors to be actually shut on a complaint, regardless of whether the suit would ultimately have succeeded."); *Myers v. Hundley*, 101 F.3d 542, 545 (8th Cir. 1996) ("Myers specifically . . . stated that for lack of funds, he was forced to miss court deadlines and to dismiss cases. Such allegations raise material factual issues under [*Lewis v. Casey*].").

¶40 In two cases with similar procedural histories, the Sixth and Seventh Circuits addressed the actual injury issue. *Hadix v. Johnson*⁷³ involved litigation that began in 1982, after the Michigan Department of Corrections (MDOC) threatened to eliminate funding for Prisoners' Legal Services of Michigan.⁷⁴ In 1988, the district court found that plaintiffs' right of access to court had been denied and ordered that MDOC provide legal assistance to the prisoners.⁷⁵ On appeal,⁷⁶ the Sixth Circuit affirmed the district court's findings that plaintiffs had been denied access to court, although it held that the injunction was overly broad.⁷⁷

¶41 Following the Supreme Court's decision in *Lewis*, the defendants in *Hadix* argued that the plaintiffs had failed to show actual injury. The Sixth Circuit, in a second appeal decision, held "[i]t will be necessary for the district court to determine, first, whether any of the named plaintiffs are still incarcerated and active in the lawsuit and, second, whether they have suffered 'actual injury.'"⁷⁸ Given that the original named plaintiffs were designated as such in 1982, one suspects that there would be few, if any, of them in 1999 who were still: (a) incarcerated in an MDOC facility, (b) active in the case, and (c) capable of proving that seventeen years earlier they had suffered actual injury, as defined in *Lewis*. The Sixth Circuit further held that

[i]f actual injury can be demonstrated, the district court must determine whether the injury is widespread among the class of plaintiffs. If the record fails to establish widespread injury, the district court should dismiss the action as to all but the named plaintiffs who have established actual injury.⁷⁹

In other words, even if the plaintiffs were able to identify one or two named plaintiffs who met the actual injury requirement, the district court could not order any systemic relief unless it also found enough prisoners who were prevented from pursuing nonfrivolous claims to justify a finding of "widespread" actual injury.

¶42 *Walters v. Edgar*⁸⁰ also involved a long-running class action, initially filed in 1982. The plaintiff class included prisoners in segregation at Illinois prisons.⁸¹ After a trial on the plaintiffs' claims, the district court ruled, in 1995, that the plaintiffs' right of access to court had been infringed at three Illinois prisons.⁸² This holding was supported by detailed findings of fact regarding practices at each of the segregation units.⁸³

73. 182 F.3d 400 (6th Cir. 1999).

74. *Id.* at 401.

75. *Hadix v. Johnson*, 694 F. Supp. 259 (E.D. Mich. 1988).

76. In another access to court case involving different Michigan prisons, the district court also issued an injunction ordering officials to provide legal assistance. *Knop v. Johnson*, 667 F. Supp. 467 (W.D. Mich. 1987). The two cases were consolidated on appeal.

77. *Knop v. Johnson*, 977 F.2d 996 (6th Cir. 1992).

78. *Hadix*, 182 F.3d at 406.

79. *Id.*

80. 163 F.3d 430 (7th Cir. 1999).

81. *Walters v. Edgar*, 615 F. Supp. 330, 335 (N.D. Ill. 1985).

82. *Walters v. Edgar*, 900 F. Supp. 197, 200 (N.D. Ill. 1995).

83. *Id.* at 200-22.

¶43 Following the *Lewis* decision, the district court held that plaintiffs had not shown actual injury and therefore dismissed the case.⁸⁴ On appeal, the Seventh Circuit affirmed the dismissal, holding that neither of the named plaintiffs showed actual injury.⁸⁵ The appellate court also rejected the plaintiffs' contention that they should be permitted to substitute other members of the class as named plaintiffs, reasoning that "[the named] plaintiffs never had standing to bring this suit, and so federal jurisdiction never attached."⁸⁶

¶44 Both *Walters* and *Hadix* demonstrate the potentially devastating effect of requiring a showing of actual injury as a prerequisite to plaintiffs' claim. In both cases, a district court's injunction, ordering systemic improvements in a prison law library or advocacy program, was vacated because the plaintiffs were unable to show widespread actual injury. These and similar decisions raise the question whether litigation seeking significant improvement in prison law library services ever stands a chance of succeeding, post *Lewis*.

Interpreting the *Lewis* "Actual Injury" Requirement

¶45 *Lewis* undoubtedly represents a significant impediment to advocates seeking systemic improvements in prison law library services. Whether the decision represents the "end of the road" for such cases may depend on the analytical approach adopted by the deciding courts.

¶46 Clearly, plaintiffs' success in pursuing access to court claims will be determined largely by their ability to demonstrate actual injury. If the concept of actual injury is limited to the two examples cited in the *Lewis* decision—that a valid claim was dismissed or that a potential plaintiff was unable to even file a complaint in federal court—it will be virtually impossible to identify plaintiffs in sufficient numbers to support a claim for systemic relief, even where a prison's law library or advocacy services are abysmal. However, there may be a basis for a broader interpretation of the actual injury requirement, premised on Supreme Court decisions in cases challenging prison conditions. Also, an examination of the real-life constraints facing prisoners who seek to challenge their convictions or litigate with regard to prison conditions suggests ways in which the concept of actual injury may be interpreted more broadly.

Supreme Court Precedents

¶47 In other contexts the Supreme Court seems to have taken a more expansive view of actual injury than the one expressed in *Lewis*. Two such cases involved prisoners' claims that unsafe prison conditions violated the Eighth Amendment.

84. *Walters v. Edgar*, 973 F. Supp. 793, 804 (N.D. Ill. 1997).

85. *Walters*, 163 F.3d at 432.

86. *Id.* (citations omitted).

¶48 The plaintiff in *Helling v. McKinney*⁸⁷ claimed that he was being exposed to levels of environmental tobacco smoke (ETS) that threatened his health. The defendants argued that the plaintiff had no standing to assert an Eighth Amendment claim “unless [he] can prove that he is currently suffering serious medical problems caused by exposure to ETS.”⁸⁸ Defendants contended that the Eighth Amendment “does not protect against prison conditions that merely threaten to cause health problems in the future, no matter how grave and imminent the threat.”⁸⁹

¶49 The Supreme Court rejected the defendants’ argument, stating: “[w]e have great difficulty in agreeing that prison authorities . . . may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week, month or year.”⁹⁰ The Court reasoned that “[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them. . . . [A] remedy for unsafe conditions need not await a tragic event.”⁹¹ Since the plaintiff had introduced evidence suggesting that a significant percentage of the prison population was likely to suffer future harm from exposure to high levels of ETS, the Court concluded that it could not “rule at this juncture that it will be impossible . . . to prove an Eighth Amendment violation based on exposure to ETS,” and therefore, the defendants’ motion to dismiss was properly denied.⁹²

¶50 *Farmer v. Brennan* involved a preoperative transsexual inmate who had been housed in a male facility, and who claimed that she was in danger of being assaulted.⁹³ The Supreme Court rejected the argument that prison officials could not be held liable unless they were aware of a specific threat by an identified inmate against the plaintiff. The Court held that a credible threat that an inmate will be assaulted is sufficient to support an Eighth Amendment claim even if “the officials could not guess beforehand precisely who would attack whom.”⁹⁴ The Court also stressed that a prisoner alleging unsafe conditions need not “await a tragic event [such as an] actual assault before obtaining relief.”⁹⁵ Rather, the plaintiff need only show that prison officials “knowingly and unreasonably disregard[ed] an objectively intolerable risk of harm, and that they will continue to do so.”⁹⁶

¶51 If one were to pursue the reasoning of *Helling* and *Farmer* in the context of access to court, one might conclude that a prison official who steadfastly maintained a substandard law library which virtually guaranteed that some inmates would be

87. 509 U.S. 25 (1993).

88. *Id.* at 32.

89. *Id.* at 32–33.

90. *Id.* at 33.

91. *Id.*

92. *Id.* at 35.

93. 511 U.S. 825, 829–31 (1994).

94. *Id.* at 844.

95. *Farmer*, 511 U.S. at 845 (quoting *Helling*, 509 U.S. at 33–34).

96. *Id.* at 846.

prevented from pursuing their claims could be found liable. *Lewis* held that it is not enough to demonstrate that a law library is deficient “in some theoretical sense.”⁹⁷ However, a variation of the plaintiffs’ successful arguments in *Helling* and *Farmer* might meet the actual injury standard. For example, rather than simply arguing that the prison’s law library is inadequate, plaintiffs might seek to establish actual injury by showing: (a) that the prison’s law library is grossly deficient; (b) that specific, identified inmates at the facility have legal work that they need to complete in the foreseeable future; and (c) that many of these inmates likely will be prevented from completing their legal work because of the law library’s insufficiency. Such an approach would extend the notion of actual harm by demonstrating that a significant number of inmates will likely suffer actual injury, even though the identity of those particular inmates could not be ascertained at the time the access to court complaint was filed.

Real-Life Requirements of Prisoners’ Litigation

¶52 The examples of actual injury in *Lewis* focused on the impact of an inadequate law library on two specific moments in a prisoner’s pro se lawsuit—the point when the complaint is to be filed, and the point when a judge must decide whether to dismiss the complaint. If the relevant time frame is limited to those particular episodes, one might suspect that, at any given moment, there would be very few inmates subject to actual injury. However, realistically, a prisoner contemplating a federal lawsuit needs access to a law library over a much more extended period of time.

¶53 The following discussion describes three situations that prisoners typically confront when they seek to initiate litigation challenging their convictions or prison conditions. They are:

- A prisoner who must exhaust state court remedies as a prerequisite to filing a federal habeas petition
- A prisoner who contemplates filing a § 1983 complaint but fears that the complaint may count as a “strike” under the “three strikes” rule
- A prisoner in segregated housing

In each of these contexts, there are significant factors that may impact on the prisoner’s ability to obtain access to court. If the deciding court acknowledges these factors, plaintiffs stand a much better chance of establishing actual injury. Contrarily, if the court ignores these factors, it is unlikely that plaintiffs will be able to show “widespread” actual injury sufficient to support injunctive relief.

Exhaustion of State Court Remedies in Habeas Corpus Cases

¶54 A state prisoner employs the writ of habeas corpus to challenge the conviction under which she is incarcerated.⁹⁸ Federal habeas corpus relief is available only if

97. *Lewis*, 518 U.S. at 351.

98. 28 U.S.C. § 2254 (2000).

the prisoner first exhausts available state court remedies.⁹⁹ To adequately exhaust habeas claims, an inmate must be aware of a number of legal points, including the following:

- Habeas claims must be raised in state court.¹⁰⁰
- All habeas claims must be exhausted.¹⁰¹
- Generally, claims must be raised in the prisoner's direct appeal from the conviction.¹⁰²
- However, some claims are properly raised in a post-trial motion instead of in an appeal.¹⁰³
- A claim is not exhausted unless it is "fairly presented" in state court. This means that the "petitioner must have informed the state court of both the factual and the legal premises of the claim he asserts in federal court."¹⁰⁴
- Also, the petitioner "must have placed before the state court essentially the same legal doctrine he asserts in his federal petition."¹⁰⁵ Thus, if the claim, on appeal, is only framed as a matter of state law, it is not "fairly presented" for exhaustion purposes.¹⁰⁶
- In many states, a criminal defendant may raise his claim in an appeal to the intermediate state court,¹⁰⁷ and again in a motion for permission to appeal to the highest state court.¹⁰⁸ If a claim is raised in an intermediate appeal but is omitted in a motion for permission, it is unexhausted.¹⁰⁹
- Under some circumstances, failure to exhaust can be excused by the federal habeas court. For example, failure to exhaust may be excused if the petitioner shows cause for the omission of the claim and prejudice stemming from the claimed constitutional violation.¹¹⁰

It is evident from a recitation of the above principles that a prisoner contemplating a federal habeas petition needs access to legal information related to the exhaustion requirement, as well as to sources related to the claims to be raised in the state court appeal.

¶55 Criminal defendants are entitled to counsel under the Sixth Amendment in the first appeal as of right.¹¹¹ However, the Supreme Court has held that an appellate

99. *Id.* § 2254(b)(1)(c).

100. *Rose v. Lundy*, 455 U.S. 509, 515–16 (1982).

101. *Id.*

102. *See, e.g.*, N.Y. CRIM. PROC. LAW art. 450 (Consol. 1996).

103. *See, e.g., id.* art. 440.

104. *Daye v. Attorney General of New York*, 696 F.2d 186, 191 (2d Cir. 1982) (citation omitted).

105. *Id.* at 192 (citation omitted).

106. *Id.* at 191–92.

107. *See, e.g.*, N.Y. CRIM. PROC. LAW § 450.10 (Consol. 1996).

108. *See, e.g., id.* § 450.90 (Consol. Supp. 2003).

109. *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

110. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

111. *Anders v. California*, 386 U.S. 738, 741–42 (1967).

attorney is not required to raise every claim that the defendant wants to raise on appeal, and an attorney's omission of a claim from the appellate brief does not count as "cause" that would excuse the inmate from failure to exhaust the claim.¹¹² In practical terms, this means that a convicted defendant who wants to preserve claims that her attorney omitted from the appeal must file a pro se supplemental brief.¹¹³

¶56 Thus, in the context of the state appeal, it is imperative that a prisoner have access to legal information that may be required in order to identify and submit pro se claims in a supplemental appellate brief. It is equally important that the prisoner have access to the case law in which the exhaustion requirements are spelled out, since without this information, the prisoner would never even know of the necessity of raising the supplemental claims in the direct appeal.

¶57 Such an interpretation could prove to be a significant gloss on the meaning of actual injury as defined in *Lewis*. It would mean that a prisoner might have standing to challenge the inadequacy of a prison's law library even though he does not have any federal litigation pending. In essence, the prisoner would claim that he is being prospectively denied the opportunity to raise claims in a federal habeas petition, since he is being prevented from asserting the claims in his direct appeal. Such an interpretation considerably broadens the time frame during which inmates arguably are subject to actual injury.

Section 1983 Claims: The "Three Strikes" Provision

¶58 A pro se litigant who is without funds to pay court fees typically files a motion to proceed *in forma pauperis*. If the court grants that motion, the litigant is allowed to "commence[]" and "prosecut[e]" the lawsuit "without prepayment of fees or security therefore."¹¹⁴

¶59 As part of the Prison Litigation Reform Act of 1995, Congress passed a new provision known colloquially as the "three strikes" rule. That rule provides as follows:

In no event shall a prisoner bring a civil action . . . under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.¹¹⁵

Although this provision does not explicitly prohibit any prisoners from filing lawsuits, in practical terms, it will often have that effect, since very few prisoners can

112. *Jones v. Barnes*, 463 U.S. 745, 751–54 (1983).

113. Also, in some instances, the appellate attorney may submit a brief, termed an "*Anders* Brief," stating that there are no appealable issues. In those cases, the attorney can be relieved of the obligation of filing an appellate brief on the merits. *Anders*, 386 U.S. at 744–45.

114. 28 U.S.C. § 1915(a)(1) (2000).

115. *Id.* § 1915(g).

afford the filing fees and other costs associated with bringing a § 1983 action..

¶60 Courts have consistently upheld the facial constitutionality of the “three strikes” provision.¹¹⁶ The concern in the present context is not with the enforcement of the statute per se, but with its application against inmates who do not have any access to law library services or materials.

¶61 When an inmate has no means of conducting research with regard to a possible § 1983 claim, there is a significant risk that he will simply guess wrong and file a federal complaint in a situation where the claim is virtually certain to get dismissed. For example, assume that an inmate files a complaint with the following claim: “I lost my leg because of the doctor’s negligence.” That claim would be subject to *sua sponte* dismissal, since a physician’s negligence does not give rise to a constitutional claim for relief. Rather, the inmate must show that the physician demonstrated deliberate indifference to a serious medical need.¹¹⁷ Had he known of this standard he might have chosen not to file a federal lawsuit. Or, the inmate may have been able to plead facts that would support an Eighth Amendment deliberate indifference claim.¹¹⁸ Without access to the relevant standard, the inmate likely would end up with a “strike” assessed against him.

¶62 In the above hypothetical, the prisoner had a good faith grievance and needed to determine whether he could pursue this grievance in federal court. Access to law library materials would be essential to answering this question. It should be noted that the majority and dissenters in *Lewis v. Casey* debated whether a prisoner with a good faith grievance but no sustainable legal claim could allege actual injury. Justice Souter, writing for the dissenters, asserted that the standing requirement could be met if a prisoner has “some underlying claim or grievance for which he seeks judicial relief.”¹¹⁹ A prisoner’s standing to assert an access to court claim would not, under Justice Souter’s interpretation, stand or fall based on

116. See *Higgins v. Carpenter*, 258 F.3d 797, 799–800 (8th Cir. 2001); *Rodriguez v. Cook*, 169 F.3d 1176, 1178–82 (9th Cir. 1999); *Christianson v. Clark*, 147 F.3d 655, 658 (8th Cir. 1998); *Rivera v. Allin*, 144 F.3d 719, 723–28 (11th Cir. 1998); *Carson v. Johnson*, 113 F.3d 818, 821–22 (5th Cir. 1997).

117. *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976).

118. Conceivably, the district court might alert the pro se plaintiff to the *Estelle* standard and allow him to replead the claim; however, there is no requirement that a court do so. Indeed, the case load pressures to which most district courts are subject increase the likelihood that a prisoner’s pro se claim, which is insufficient on its face, would be subject to outright dismissal. For discussions of the implications of a high pro se case load on judicial administration of cases in federal courts, see Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 *FORDHAM URB. L.J.* 305 (2002); Lois Bloom, *Federal Courts, Magistrate Judges and the Pro Se Plaintiff*, 16 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 475 (2002); Edward M. Holt, Commentary, *How to Treat “Fools”*: *Exploring the Duties Owed to Pro Se Litigants in Civil Cases*, 25 *J. LEGAL PROF.* 167 (2001); Sandra J. Senn, *Stemming the Tide: Reduction in Federal Pro Se Prisoner Law Suits*, *S.C. LAW.*, Oct. 1997, at 24; Lurana S. Snow, *Prisoners in the Federal Courts*, 9 *ST. THOMAS L. REV.* 295 (1997). See also Judicial Conference of the United States, *Long Range Plan for the Federal Courts*, 166 *F.R.D.* 49, 123 (1995) (“pro se litigation places great stress on the resources of the federal courts. . .”).

119. *Lewis*, 518 U.S. at 399 (Souter, J., concurring in part and dissenting in part).

the validity of the claim that the prisoner sought to assert. However, the majority held that a prisoner could assert an access to court claim only if she “could demonstrate that a nonfrivolous legal claim had been frustrated or was being impeded.”¹²⁰

¶63 The majority’s interpretation does not necessarily invalidate the above analysis with regard to the “three strikes” rule. The debate in *Lewis* focused on an inmate’s purported right to *file* a lawsuit that is subject to dismissal. The “three strikes” analysis set forth herein focuses on inmates’ right to *choose not to file* a lawsuit that is doomed to be dismissed precisely because dismissal of that lawsuit may, in the future, prevent that prisoner from pursuing another otherwise valid claim. Treating such cases as instances of actual injury to the inmates’ access to court thus does not contravene the core holdings or the logic of the majority’s opinion in *Lewis*.

¶64 If a trial court were to adopt the above analysis, plaintiffs would stand a better chance of demonstrating widespread actual injury, since, at any given time, there would be two sets of prisoners who might claim actual injury from a denial of law library services: prisoners who have facially valid § 1983 claims, and those who have good faith grievances and need to research whether such grievances can be pursued in federal court, without running the risk of incurring a “strike.”

Prisoners in Segregation

¶65 A good deal of prison litigation over the years has been brought by prisoners in segregation. Such litigation typically involves either a challenge to the prison’s placement of the prisoner in segregation, or a challenge to living conditions on the unit.

¶66 A series of Supreme Court decisions defined due process procedures that must be followed when an inmate is placed in segregation or other restrictive housing.¹²¹ Although subsequent decisions restricted the applicability of due process to placement in segregation,¹²² a significant amount of federal court prison litigation involves procedural challenges to such placement.¹²³

¶67 Also, living conditions in segregation are often quite Spartan.¹²⁴ Segregation inmates typically are confined to their cells for most of the day and

120. *Id.* at 353 (footnotes omitted).

121. *See* *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Vitek v. Jones*, 445 U.S. 480 (1980); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Ponte v. Real*, 471 U.S. 491 (1985); *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445 (1985); *Sandin v. Connor*, 515 U.S. 472 (1995).

122. For example, *Hewitt v. Helms*, 459 U.S. at 473–76, held that a prisoner placed in administrative segregation is not entitled to the same procedural rights as a prisoner in disciplinary segregation. And *Sandin v. Connor*, 515 U.S. at 485–86, held that a short-term placement in segregation was not a sufficiently “dramatic departure” from typical prison conditions to trigger the due process clause.

123. *See, e.g.*, *Benjamin v. Fraser*, 264 F.3d 175, 188–90 (2d Cir. 2001); *Allah v. Seiverling*, 229 F.3d 220, 224–26 (3d Cir. 2000); *Love v. Sheahan*, 156 F. Supp. 2d 749, 755–57 (N.D. Ill. 2001); *Lee v. Coughlin*, 26 F. Supp. 2d 615, 629–37 (S.D.N.Y. 1998); *McClary v. Kelly*, 4 F. Supp. 2d 195, 197–213 (W.D.N.Y. 1998); *Malsh v. Garcia*, 971 F. Supp. 133, 139 (S.D.N.Y. 1997).

124. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 7, pts. 303–05 (2003) (defining basic living conditions in Special Housing Units (SHUs) of New York prisons).

are barred from any opportunity to interact with other prisoners.¹²⁵ Thus, it is not surprising that much litigation has involved Eighth Amendment challenges to conditions in segregation.¹²⁶ Also, as one commentator has noted, the percentage of inmates housed on segregation units has significantly increased in recent years.

While [segregated confinement] has a long history, in the past relatively few inmates were subjected to it. However, that has changed. The use of restrictive housing has increased to the point that now tens of thousands of inmates are confined in these units. According to some estimates as many as 7 to 10% of all inmates are currently confined in some form of punitive segregation or solitary confinement.¹²⁷

¶68 Given the sheer number of prisoners in segregation and the harsh conditions that they endure, it is reasonable to expect that such prisoners may have viable, nonfrivolous claims that would give them standing in an access to court case. Since segregation prisoners typically are prohibited from going to the facility law library,¹²⁸ they also are often in a position to challenge the prison's procedure for providing them access to law books and materials. Indeed, as discussed earlier, many of the post-*Bounds* access to court cases involved segregation inmates.¹²⁹

¶69 However, as previously indicated,¹³⁰ dicta in *Lewis v. Casey* suggest that segregation inmates face an additional hurdle in raising access to court claims, namely, prison authorities' assertion of security concerns. In *Lewis*, the majority held that "lockdown" prisoners had no standing to raise their claims, since none of them had shown actual injury.¹³¹ The *Lewis* majority went on to reason, in dicta, that "present[] special disciplinary and security concerns" justify restricting such prisoners' access to law library services.¹³²

¶70 Does the Supreme Court's analysis of the lockdown prisoner issue in *Lewis* mean that segregation inmates' access to court claims are doomed to fail? Will prison authorities inevitably argue that any failure to provide legal material to seg-

125. Thus, New York SHU prisoners are permitted out of their cells for one hour per day for exercise, *id.* § 304.3, and twice a week for five minutes for showers, *id.* § 305.5(a).

126. See *Hutto v. Finney*, 437 U.S. 678, 685–88 (1978); *Sostre v. McGinnis*, 442 F.2d 178, 182–87, 191–94 (2d Cir. 1971); *Wright v. McMann*, 387 F.2d 519, 521–26 (2d Cir. 1967); *Young v. Quinlan*, 960 F.2d 351, 363–65 (3d Cir. 1992); *Kirby v. Blackledge*, 530 F.2d 583, 586–87 (4th Cir. 1976); *Gates v. Collier*, 501 F.2d 1291, 1304–05 (5th Cir. 1974); *Walker v. Mintzes*, 771 F.2d 920, 924–32 (6th Cir. 1985); *Isby v. Clark*, 100 F.3d 502, 504–06 (7th Cir. 1996); *Divers v. Dept. of Corr.*, 921 F.2d 191, 193–94 (8th Cir. 1990); *Williams v. Adams*, 935 F.2d 960, 961–62 (8th Cir. 1991); *Hoptowit v. Ray*, 682 F.2d 1237, 1258–59 (9th Cir. 1982); *Keenan v. Hall*, 83 F.3d 1083, 1087–94 (9th Cir. 1996); *Mitchell v. Maynard*, 80 F.3d 1433, 1439–44 (10th Cir. 1996); *Chandler v. Baird*, 926 F.2d 1057, 1063–66 (11th Cir. 1991); *Madrid v. Gomez*, 889 F. Supp. 1146, 1227–44, 1260–79 (N.D. Cal. 1996).

127. 1 MICHAEL B. MUSHLIN, *RIGHTS OF PRISONERS* 86 (3d ed. 2002) (citing Craig Haney & Mona Lynch, *Regulating Prisons in the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 497 (1997)).

128. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 7, § 304.7 (2003).

129. See discussion *supra* ¶¶ 15–18.

130. See discussion *supra* at ¶ 35.

131. *Lewis*, 518 U.S. at 358–60.

132. *Id.* at 361–62.

regation inmates is justified by security concerns? Perhaps not. Certainly, there is a significant difference between providing prisoners with physical access to the prison's law library and providing legal materials to prisoners in their cells. Moving a prisoner from his cell to another location in the facility entails a significant risk of an altercation, and thus a prison official understandably may be concerned over security with regard to such a move. However, it is much harder to conceptualize a security justification for lengthy delays in bringing legal sources to a prisoner's cell, or for an outright refusal to provide a prisoner with such sources. The *Lewis* majority did not differentiate between these two methods of providing law library access to segregation inmates, merely noting the prison's generalized concern over security. If segregation prisoners seek improvement in the prison's "paging" system or other accommodations that do not require taking them out of their cells, then *Lewis* may not prove to be an insurmountable obstacle to such relief.

¶71 If a court is willing to acknowledge segregation prisoners's entitlement to access to court, plaintiffs would certainly stand a much better chance of demonstrating widespread actual injury sufficient to support a claim for systemic relief.

The Importance of the Court's Point of View

¶72 There is a common thread to the three examples described herein. In each instance, the viability of the plaintiffs' argument is premised on a court's willingness to take into account the realities of prison litigation.

¶73 For example, in the case of segregation prisoners, if the court simply defers to prison authorities' invocation of "security" as a rationale for limiting access to law library services, plaintiffs' efforts are doomed. However, if the court carefully examines the factual premises of the prison policy, it may reach the conclusion that there is no good faith security justification for denying segregation inmates access to law books.

¶74 Likewise, in the example of potential habeas petitioners, the relevant time frame for assessing the need for access to court will depend on whether the court acknowledges that a defendant who is prevented from raising claims in a criminal appeal will be effectively denied access to court in a subsequent federal habeas.

¶75 Also, a court will credit plaintiffs' assertion of the need for law library materials, to determine whether they have viable § 1983 claims, only if it first acknowledges that assessment of "strikes" under the "three strikes" provision has the likely effect of denying prisoners access to court.

¶76 It must be stressed that courts are not compelled to adopt the point of view described in these hypotheticals. Nothing in *Lewis* or *Bounds* requires that courts acknowledge the realities of prison litigation. On the other hand, nothing in *Lewis* or *Bounds* precludes courts from taking a realistic view of the ways that pro se litigants require law library materials in order to obtain access to court.

Conclusion

¶77 Undoubtedly, the Supreme Court's decision in *Lewis v. Casey* has made it more difficult for prisoners to assert their right of access to court. The actual injury requirement defined in *Lewis* will, in many instances, be a significant barrier to prisoners seeking improvement in prison law library services. However, the impact of the *Lewis* decision may not, in the long run, be as devastating as was foreseen at the time the decision was rendered.

¶78 The present article describes an approach to defining actual injury that may be more consistent with the realities of prisoners' pro se litigation. Such an approach will be of particular importance in a case involving a challenge to a prison's law library policies since in such a case the plaintiffs must demonstrate "widespread actual injury."¹³³

¶79 Underlying the present analysis of *Lewis* is examination of the real-life barriers that prisoners face when attempting to bring their claims before a court. It is clear that, in meeting the requirements defined in *Lewis*, plaintiffs will be constrained to define exactly how their access to court will be impeded if they are denied law library services. While that task may be difficult, it may not be impossible.

¶80 Nor should *Lewis* be taken as the "last word" on how courts ought to analyze access-to-court issues. *Bounds v. Smith* remains good law, and the mode of analysis in *Bounds* is arguably as valid as that in *Lewis*. In any case, it is evident that the future viability of access-to-court cases, and specifically those cases seeking systemic improvement of law library services, will depend in large measure on whether courts choose to adopt the reality-based approach of *Bounds* or the more circumscribed approach of *Lewis*.

¶81 Certainly, the importance to prisoners of the right of access to court has not been diminished. Indeed, now more than ever, access to court continues to be "the most fundamental right"¹³⁴ that a prisoner holds.

133. *Id.* at 349.

134. *DeMallory v. Cullen*, 855 F.2d 442, 446 (7th Cir. 1988).

