

**TECHNOLOGICAL LEAPS AND BOUNDS:
PRO SE PRISONER LITIGATION IN THE INTERNET AGE**

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I. INTRODUCTION

The premise of this Comment is a tired platitude: that today information is, and in the future will only increasingly be, exchanged primarily on the Internet. From this boring and uncontroversial assumption, this Comment argues that the unenumerated constitutional right of access to courts entails that prisons provide *pro se* prisoner litigants with Internet access to help them with legal research.

Establishing such a right need not lead to inmates surfing the web all day, trading pornography, and e-mailing death threats to the Attorney General. Simple, inexpensive, and practically foolproof technology exists¹ that can limit a computer's Internet access to only pre-approved law-related websites. Reasonable, or even draconian, restrictions could still be put in place to suit security needs.

Nor need this right put an unfunded mandate on state justice systems to subscribe to million dollar research systems.² Quality legal research resources are available today online for free—and they can only be expected to get better with time. These resources include private services like Findlaw.com and Wikipedia, as well as government websites that states already pay for anyway.

States would have to pay for computers, Internet access, filters, and maintenance—all of which are generally falling in price every year. But over the long run, states would eventually *save* money, because the Supreme Court's 1977 decision in *Bounds v. Smith*³ already

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1 See *infra* Part II.E.

2 A 2006 survey calculated that private law firms paid, on average, \$999,825 for LexisNexis and \$1,494,588 for Westlaw in 2005. These figures were up from \$856,731 and \$1,241,337, respectively, in 2004. Alan Cohen, *Law Librarians Look Beyond Books*, AM. LAWYER, July 11, 2006, at 65.

3 430 U.S. 817 (1977); see *infra* Part II.C.

obligates them to provide *pro se* inmates with access to paper law libraries that require regular, expensive updates.⁴

As a matter of political philosophy, moreover, this right is compelling. Our nation is constitutionally committed to fundamental fairness in its criminal justice system, and extending Internet access to inmates for this purpose would advance that promise tremendously. Fairness, of course, is a noble end in itself; in consequentialist terms, the more just our criminal justice system appears to the public, the more we can expect the citizenry to follow its commands.⁵ But perhaps most valuably, encouraging criminals to do legal research on the Internet appeals to the seemingly forgotten rehabilitative philosophy of criminal punishment in that it presents a golden opportunity for imparting computer literacy skills⁶ and the civilizing effects of legal understanding⁷ on those members of our society most in need of both. Although the Bureau of Justice Statistics reports that 68% of state prison inmates have never received a high school diploma⁸ and authoritative studies have demonstrated that prison education programs reduce recidivism,⁹ the latest data show that the national percentage of inmates participating in education courses is falling.¹⁰

4 The Court's subsequent decision in *Lewis v. Casey*, 518 U.S. 343 (1996), which effectively reduced the scope of the States' obligations to furnish prison law libraries, saved Washington State \$1.2 million per year and Arizona \$650,000. See *infra* Part II.C. Accord Cohen, *supra* note 2, at 65 (interviewing law firm librarian who "discovered that it was more cost-effective to buy a new copy of American Jurisprudence II every other year, getting the new-subscriber discount, than to pay for annual updates").

5 See generally Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

6 See, e.g., James L. Esposito, Comment, *Virtual Freedom—Physical Confinement: An Analysis of Prisoner Use of the Internet*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 39, 64–65 (2000) (describing North Carolina and Minnesota programs that have used the Internet in prisons for rehabilitation); see also *infra* Part II.C.

7 The *Bounds* Court cited a 1974 survey of prison officials that found "over 80% felt legal services provide a safety valve for inmate grievances, reduce inmate power structures and tensions from unresolved legal problems, and contribute to rehabilitation by providing a positive experience with the legal system." *Bounds*, 430 U.S. at 829–30 n.18.

8 CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, EDUCATION AND CORRECTIONAL POPULATIONS I (2003), <http://www.ojp.usdoj.gov/bjs/abstract/ecp.pdf>.

9 See, e.g., MILES D. HARER, PRISON EDUCATION PARTICIPATION AND RECIDIVISM: A TEST OF THE NORMALIZATION HYPOTHESIS 16 (1995), http://www.bop.gov/news/research_projects/published_reports/recidivism/orepredprg.pdf ("[There is] substantial evidence that prison education program participation reduces the likelihood of recidivating irrespective of post-release employment. [The author] interpret[s] this result as support for the normalization hypothesis, which posits that many policies, operations, and programs found in modern prisons reduce prisonization and nurture prosocial norms supporting rule/law abiding behavior. . . . Additional analysis suggests that the monetary savings

In the real world, however, the democratic process denies prisoners access to the free law-related websites available online. Few states even allow inmates to use *DVD-based* legal research tools¹¹ let alone surf the web. Congress seems unlikely to step in to aid prisoners, either. In 1998, a bill was introduced that would have banned all federal, and many state, inmates from using the Internet at all.¹² More recently, a sitting House Majority Leader voiced contempt for web-based legal research in general, even that done at the Supreme Court.¹³

In short, the prospects of achieving this reform through legislation appear dim. The Supreme Court, however, has consistently found the Constitution to guarantee a right to meaningful access to courts, even (in fact, especially) for prisoners.¹⁴ Therefore, in an age in which dockets can be accessed and fruitful legal research can be done, for free, on any Internet-connected computer, advocacy for an extension of that right to include a guarantee of the freedom to access online legal resources might prove more productive than idly waiting for legislatures to come around.

from reduced recidivism, due to prison education program participation, are substantial.”).

- 10 See HARLOW, *supra* note 8, at 1 (“[T]he percentage of State prison inmates who reported taking education courses while confined fell from 57% in 1991 to 52% in 1997 . . .”).
- 11 These states include Louisiana, Wisconsin, Georgia, California, Steve Seidenberg, *Replacing Lawyers with DVDs*, 3 A.B.A. J. E-REPORT 1, Jan. 9, 2004, and Pennsylvania, Letter from James C. Young, inmate, to author (Oct. 15, 2007) (on file with author) (discussing life as a prison lawyer: “[W]e have updated and current material either in book form or via computer. We have an intranet, if you will. A closed loop system which accesses a server. Premise 4.0 is used for legal research and Dunlap Hanna for forms.”). *But see* Clark v. Johnson, 181 F. App’x. 606, 607 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 1133 (2007) (finding that CD-ROMs with federal court opinions had been removed from the Wisconsin Resource Center law library and that this “appears likely to invite serious constitutional claims in the future”).
- 12 See Stop Trafficking of Pornography in Prisons Act (STOPP ACT) of 1998, H.R. 3729, 105th Cong. § 2 (1998) (“Notwithstanding any other provision of law, no agency, officer, or employee of the United States shall implement, or provide any financial assistance to, any Federal program or Federal activity in which a Federal prisoner is allowed access to any interactive computer service without the supervision of an official of the Government.”).
- 13 JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 198 (2007) (“Every year, one or two justices testified before Congress in support of the Court’s annual budget request, and Kennedy often took on the assignment. In his testimony . . . he mentioned in passing that he used the Internet for legal research. This prompted Tom DeLay, the[n] House majority leader, to tell an interviewer from Fox News Radio, ‘We’ve got Justice Kennedy . . . [who] said in session that he does his own research on the Internet. That is just incredibly outrageous.’”).
- 14 See *Bounds v. Smith*, 430 U.S. 817, 828 (“[T]he prisoner petitions here are the first line of defense against constitutional violations.”).

One challenge to this approach is that even Justice Stevens—the sitting Justice most receptive to extending prisoner rights¹⁵—has expressly noted in dictum that “a prisoner would lose on the merits if he alleged that the deprivation of that right [of effective access to the courts] occurred because the State, for example, did not provide him with access to on-line computer databases”¹⁶ However, that footnote is now more than a decade old, and as this Comment argues, the subsequent Internet Revolution represents such a paradigm shift in the way we access information that it now requires the states and the federal government to do now precisely what Justice Stevens said they were not required to do in 1996.

The greatest challenge to this Comment is not Stevens’s *Lewis* dictum, however, but rather the aversion of today’s conservative Justices to the methods of constitutional interpretation that gave rise to the non-textual right of meaningful access to courts in the first place.¹⁷ Rather than attempting to make sense of the jurisprudence in any detail, it suffices to quote Justice Souter’s most recent try: “Decisions of this Court have grounded the right of access to courts in the Article IV Privileges and Immunities Clause,¹⁸ the First Amendment Petition

- 15 See generally Jeffrey Rosen, *The Dissenter*, N.Y. TIMES, Sept. 23, 2007, § 6 (Magazine) (connecting Stevens’s sympathy for criminal defendants to his experience at age fourteen of seeing his father, uncle, and grandfather wrongfully indicted for embezzlement, leading to his uncle’s suicide and the “unjust,” later overturned, conviction of his father). See also *People v. Stevens*, 193 N.E. 154 (Ill. 1934) (casting doubt on the evidence and reversing the conviction against the future Justice’s father).
- 16 *Lewis v. Casey*, 518 U.S. 343, 408 n.5 (1996) (Stevens, J., dissenting).
- 17 Compare *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) (“We observe first that the Court’s decisions concerning access to judicial processes . . . reflect both equal protection and due process concerns. . . . [D]ue process and equal protection principles converge. The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs. The due process concern homes in on the essential fairness of the state-ordered proceedings anterior to adverse state action. A precise rationale has not been composed, because cases of this order cannot be resolved by resort to easy slogans or pigeonhole analysis.” (citations and quotation marks omitted)), with *Lewis*, 518 U.S. at 367 (Thomas, J., concurring) (“We have described the right articulated in *Bounds* as a ‘consequence’ of due process, as an ‘aspect’ of equal protection, or as an ‘equal protection guarantee.’ In no instance, however, have we engaged in rigorous constitutional analysis of the basis for the asserted right.” (citations omitted)). *But cf. id.* at 381 (“In the end, I agree that the Constitution affords prisoners what can be termed a right of access to the courts. That right, rooted in the Due Process Clause and the principle articulated in *Ex parte Hull*, is a right not to be arbitrarily prevented from lodging a claimed violation of a federal right in a federal court.”).
- 18 *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (citing *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907); *Blake v. McClung*, 172 U.S. 239, 249 (1898); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873)).

Clause,¹⁹ the Fifth Amendment Due Process Clause,²⁰ and the Fourteenth Amendment Equal Protection²¹ and Due Process Clauses.”²² Because conservative concerns about such nebulous constitutional interpretation are valid and likely to grow in influence in the future, this Comment strives wherever possible to address the arguments of Justices Scalia and Thomas on their own terms.

Thus, Part III of this Comment ultimately attempts to root the *pro se* prisoner’s right to legal research more firmly in the text of the Constitution, in the hope that a greater appreciation for the correctness of *Bounds* will help carry the right forward into the third millennium.

First, a short history of legal research inside and outside of prisons is due. Part II shows that the venerable tradition of legal research in this country is deeply rooted in the traditions of our Nation. It then describes the rise and fall of the right to legal research in prisons. It ends with a word on the technological revolution that has swept the planet since the Court’s most recent decision.

II. HISTORY

A. *Legal Research in the Early Republic*

The origins of modern-day legal research date to the earliest days of the Republic. Ephraim Kirby published the first reporter from any jurisdiction, a collection of decisions from the State of Connecticut, in 1789, just one year after the Constitution was ratified.²³ Alexander Dallas published the second, covering Pennsylvania law, in 1790.²⁴ The second volume of Dallas’s reporter also featured cases from the freshly constituted Supreme Court of the United States, which was meeting in Philadelphia at the time; the decisions of the Supreme Court have been formally recorded for posterity and public use since. The Supreme Court’s second reporter, William Cranch, envisioned his labors as an essential check on the discretion of undemocratically

19 *Id.* (citing *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972)).

20 *Id.* (citing *Murray v. Giarratano*, 492 U.S. 1, 11 n.6 (1989) (plurality opinion); *Walters v. Nat’l Ass’n. of Radiation Survivors*, 473 U.S. 305, 335 (1985)).

21 *Id.* (citing *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987)).

22 *Id.* (emphasis omitted) (citing *Wolff v. McDonnell*, 418 U.S. 539, 576 (1974); *Boddie v. Connecticut*, 401 U.S. 371, 380–81 (1971)).

23 LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 242 (3d ed. 2005).

24 *Id.* Significantly, this latter reporter, *Reports of Cases Ruled and Adjudged in the Courts of Pennsylvania, Before and Since the Revolution*, covered cases as far back as 1754.

appointed judges. “Whatever tends to render the laws certain,” he opined, “equally tends to limit that discretion; and perhaps nothing conduces more to that object than the publication of reports.”²⁵ By 1800, reporters were published for Vermont and Virginia. New York, Massachusetts, and New Jersey had their first reporters by 1810.²⁶ Rhode Island, the last state to see its decisions reported, held out until 1847.²⁷

It is significant for the purposes of this Comment that the early Republic also abounded in legal self-help texts designed for laymen. “*Every Man His Own Lawyer!*,” an ideal the utilitarian philosopher Jeremy Bentham exhorted in an open letter to the American people,²⁸ soon became, in the words of one historian, a “ubiquitous title”²⁹ for simple law texts in plain English. One book so entitled, published in New York in 1768 and in Philadelphia in 1769,³⁰ even predates the Constitution. The most popular self-help book published before the turn of the nineteenth century, John G. Wells’s *Every Man His Own Lawyer and Business Form Book*, was advertised to laymen as a “complete guide in all matters of law and business negotiations for every State of the Union. With legal forms for drawing the necessary papers, and full instructions for proceeding, without legal assistance, in suits and business transactions of every description.”³¹

25 *Id.*

26 *Id.* at 242–43. The reporter for decisions of the Supreme Court of New York, published in 1804, was given “official” status. *Id.* at 243.

27 *Id.* at 243. Rhode Island only extended the franchise to non-property-holding white males in 1843. See generally Rhode Island History (updated by Elmer Cornwell), <http://www.rilin.state.ri.us/RhodeIslandHistory/chapt4.html>.

28 Jeremy Bentham, *Letter from Jeremy Bentham, an Englishman, to the Citizens of the Several American United States*, in ‘LEGISLATOR OF THE WORLD’: WRITINGS ON CODIFICATION, LAW, AND EDUCATION 113, 137 (Philip Schofield & Jonathan Harris eds., 1998) (“Why every man his own lawyer?—I. Because no man’s interest is as dear to his lawyer as it is to himself. 2. It is not every man that can afford to pay a lawyer. 3. No man, how rich so ever, can have a lawyer always at his elbow.”).

29 FRIEDMAN, *supra* note 23, at 246.

30 This was legal lexicographer Giles Jacob’s *Every Man His Own Lawyer; or A Summary of the Laws of England in a New and Instructive Method*. Gary L. McDowell, *The Politics of Meaning: Law Dictionaries and the Liberal Tradition of Interpretation*, 44 AM. J. LEGAL HIST. 257, 273 n.109 (2000).

31 Julee C. Fischer, Note, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121, 126 (2000).

B. *The Dawn of Electronic Legal Research*

Perhaps surprisingly, electronic legal research already has a rich tradition in its own right, dating to 1959.³² In that year the first such endeavor, known as the Horthy Project, was started by Professor John F. Horthy of the University of Pittsburgh Law School to facilitate his compilation of a "Hospital Law Manual."³³ Comprised of punch cards and computer tape, by 1961, Horthy's work allowed users to search the full text of the Pennsylvania Code by keyword.³⁴ The Horthy Project began a commercial venture, Aspen Systems Corporation, the first service to allow lawyers to efficiently³⁵ search statutory codes.³⁶

Inspired by the Horthy Project, the Ohio State Bar began experimenting with computerized legal research systems in 1966, and by 1971 had put online not only the entire Ohio Code but also, for the first time, the decisions of courts.³⁷ Originally launched as Ohio Bar Automated Research ("OBAR"), the project was renamed "Lexis" in 1973.³⁸

In 1975 the West Publishing Company, publisher of the *National Reporter System* and the nation's leading reporting service since the 1870s,³⁹ launched Westlaw, a competing⁴⁰ searchable database of decisions.⁴¹ By 1982,⁴² both Lexis and Westlaw were providing users with

32 Olufunmilayo B. Arewa, *Open Access in a Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market*, 10 LEWIS & CLARK L. REV. 797, 818 (2006).

33 *Id.*

34 *Id.* at 818 n.133.

35 The searches still took hours to complete, but were quite rightly hailed as the breakthrough they were. *Id.* at 822 n.162.

36 *Id.* at 818.

37 *Id.* at 818-19.

38 *Id.*

39 West's dominance over the market was such that the page numbers used in its *National Reporter System* became the industry standard, and when Lexis began incorporating West's "star pagination" into the text of its opinions in 1985, West asserted a copyright in the numbers and successfully obtained an injunction. *West Publ'g Co. v. Mead Data Ctr., Inc.*, 799 F.2d 1219 (8th Cir. 1986). In 1998, a lawsuit by the proprietors of the CD-ROM research program "Authority from Matthew Bender" reversed this precedent. *Matthew Bender & Co., Inc. v. West Publ'g Co.*, 158 F.3d 693 (2d Cir. 1998).

40 Arewa, an applied economist, describes their present-day market position as a "competitive duopoly," Arewa, *supra* note 32, at 820, and notes their collective nickname "Wexis," *id.* at 821.

41 Bernard J. Hibbits, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615, 657 (1996).

42 Which is to say, before the author of this Comment was born.

searchable access to cases, statutes, legislative materials, administrative materials, and law review articles.⁴³

C. *Legal Research in Prisons*

American prisons have long featured modest libraries, dating back to 1790 when the Philadelphia Prison Society donated books to the criminals at the Walnut Street Jail.⁴⁴ In the 1870s, a survey of thirty-three state prisons counted 50,663 books among them.⁴⁵ In the 1960s, however, a broad rehabilitation-minded movement by “activist librarians”⁴⁶ began to expand prison library services to include law books, novels, and academic curricula. In 1971, Congress passed the Law Enforcement Administration Act, which granted states money for prison law libraries and other literature.⁴⁷ There are accounts of prisoners using stolen novels for currency.⁴⁸

The American Library Association’s 1992 publication of *Library Standards for Adult Correctional Institutions* left no room for ambiguity, acknowledging “the inmates’ right to read and their right to free access to information,” noting also that “[s]ervices shall encompass the same variety of material, formats, and programs as available in the outside community.”⁴⁹

1. *Bounds v. Smith*

The watershed moment for *lawbooks* in prisons came in 1977, when the Supreme Court decided *Bounds v. Smith*.⁵⁰ Three inmates of North Carolina prisons separately sued the Department of Corrections for Eighth Amendment violations, and all asserted that their constitutional right to access courts entitled them to “legal research

⁴³ Arewa, *supra* note 32, at 822.

⁴⁴ Evan R. Seamone, *Fahrenheit 451 on Cell Block D: A Bar Examination to Safeguard America’s Jailhouse Lawyers from the Post-Lewis Blaze Consuming Their Law Libraries*, 24 YALE L. & POL’Y REV. 91, 98 (2006).

⁴⁵ Larry E. Sullivan, *The Least of Our Brethren: Library Service to Prisoners*, AM. LIBR., May 2000, at 56, 57.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 58. Moreover, “[i]n 1995, the International Federation of Library Associations and Institutions (IFLA) issued its revised ‘Guidelines for Library Services for Prisoners,’ which stated that ‘prisoners are as entitled as other citizens to have access to information and therefore to proper library facilities.’” *Id.*

⁵⁰ 430 U.S. 817 (1977).

facilities.”⁵¹ On the premise that “‘meaningful access’ to the courts is the touchstone”⁵² of the inquiry, Justice Marshall’s opinion for the Court concluded without much hesitation, “If a lawyer must perform such preliminary research, it is no less vital for a *pro se* prisoner.”⁵³ States, therefore, were deemed constitutionally burdened with the duty of facilitating prisoner litigation: either through the provision of law libraries or “some degree of professional or quasi-professional legal assistance to prisoners.”⁵⁴ The Court advised states that “a legal access program need not include any particular element we have discussed, and we encourage local experimentation.”⁵⁵

2. Lewis v. Casey

In 1996, *Lewis v. Casey*⁵⁶ repudiated this sentiment and substantially modified the effective scope of *Bounds*. Twenty-two inmates of Arizona prisons filed a class action asserting that the State was not fulfilling its duty to facilitate prisoners’ access to legal research. The District Court ruled for the plaintiffs and issued a “microscopically detailed order [that left] no stone unturned. It cover[ed] everything from training in legal research to the ratio of typewriters to prisoners in each facility.”⁵⁷

Writing for the Court, Justice Scalia’s opinion reversed this judgment on the ground that the plaintiffs lacked standing to bring the claim at all. Emphasizing that “our decision here . . . does not foreclose alternative means to achieve” the provision of meaningful access to courts, Scalia reasoned thus:

Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, 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. That would be the precise analog of the healthy inmate claiming constitutional violation because of the inadequacy of the prison infirmary. Insofar as the right vindicated by *Bounds* is concerned, “*meaningful access to the courts is the touchstone*,” and the inmate therefore must go one step further and demonstrate that the

51 *Id.* at 818.

52 *Id.* at 823 (quoting *Ross v. Moffitt*, 417 U.S. 600, 611, 612, 615 (1974)).

53 *Id.* at 825–26.

54 *Id.* at 831.

55 *Id.* at 832.

56 518 U.S. 343 (1996); *see infra* note 186.

57 *Id.* at 390 (Thomas, J., concurring).

alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.⁵⁸

In other words, the Court ruled that the Constitution only guarantees prisoners a right to do legal research at state expense for the purposes of pursuing *some other*, non-frivolous claim.

Justice Stevens, the sole dissenter from the judgment, grasped the implications of this decision immediately. "At first glance, the novel approach adopted by the Court today suggests that only those prisoners who have been refused the opportunity to file claims later found to have arguable merit should be able to challenge" their starvation of information.⁵⁹ Even assuming that a prisoner eventually managed to discover that his rights had been violated, winning on the merits would require, in the words of another learned commentator, "showing that he or she would have won in court if only better law library facilities had been available."⁶⁰

Thus, the plight of inmates is even bleaker than Justice Stevens anticipated. Only those prisoners who have been refused the opportunity to raise arguable claims, *and* who (despite not having lawbooks) learn that they have been denied this opportunity, *and* who (despite not having lawbooks) can articulate how their denial of lawbooks caused them prejudice, can challenge their convictions. In short, an inmate can only vindicate his right to legal research in courts if he shows that being denied it causes him actual prejudice in a case.

But the Court did not stop there. Oddly, considering that "at the very outset of analysis, the Court concluded that it was without the constitutional authority to begin to address the issues raised,"⁶¹ the majority nonetheless proceeded to restrict the precedential weight of *Bounds* in lengthy dicta. Justice Scalia concluded that insofar as *Bounds* promises inmates the right to state assistance "to *discover* grievances, and to *litigate effectively* once in court,"⁶² it can no longer be considered good law. Justice Thomas added a twenty-nine page

58 *Id.* at 351 (emphasis added) (citation omitted).

59 *Id.* at 409 (Stevens, J., dissenting). The occasional lower court also shows sympathy for such litigants. *See, e.g., Lilly v. Jess*, 189 F. App'x. 542, 544 (7th Cir. 2006) ("We appreciate that without good access to a law library (for that matter, without a legal education) a prisoner may never *know* which suits have been lost (or not filed) because of deficient access to legal materials. That obstacle is built into *Lewis*, however . . .").

60 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 886 (2d ed. 2002).

61 David Steinberger, Note, *Lewis v. Casey: Tightening the Boundaries of Prisoner Access to the Courts?*, 18 PACE L. REV. 377, 417 (1998).

62 *Lewis*, 518 U.S. at 354.

concurrency detailing his aversion to *Bounds*, which went so far as to disdain “the last half century”⁶³ of liberal jurisprudence.

3. Impact

In the wake of *Lewis*, states eager to test the new waters rushed to curtail their prison legal research services. Hot off of its victorious appeal, Arizona closed all but one of the thirty-five prison law libraries it previously maintained,⁶⁴ which were costing the State a combined \$650,000 a year.⁶⁵ The State of Washington managed to shave \$1.2 million off the state budget from the reductions it made in its prison law libraries.⁶⁶ The Idaho Department of Corrections auctioned off several of its collections on eBay for \$100 and cost of shipping.⁶⁷ Iowa simply dumped the contents of its libraries into the prison courtyard to rot.⁶⁸

By and large, the gambles have paid off. The vast majority of prisoners' claims for denial of access to legal research are eliminated for lack of standing. One inmate in Oklahoma was found to lack standing to claim the right for simply wanting to see opinions from circuits other than the Tenth.⁶⁹ Another, denied access to pre-1950 Supreme Court opinions, was then denied standing because “he does not allege how” this deprivation hurt him.⁷⁰ The Third Circuit even denied standing to an inmate transferred to a special facility to await a post-conviction relief hearing, who on arrival had all of his legal files confiscated.⁷¹ These cases do nothing but beg the question: *Without the*

63 *Id.* at 365 (Thomas, J., concurring).

64 Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1633 n.268 (2003).

65 Jill Schachner Chanen, *Banned in the Bighouse*, A.B.A. J., Mar. 1998, at 26. Moreover, Arizona purged most of the texts at the remaining library. “Gone are the federal, state and regional case law reporters, the legal encyclopedias and the federal and state annotated statutes. The 16 law books that remain on the shelves include non-annotated Arizona statutes, state and district court rules, portions of the *U.S. Code*, court forms, and a few self-help manuals.” *Id.*

66 Schlanger, *supra* note 64, at 1633 n.268.

67 Seamone, *supra* note 44, at 91.

68 *Id.*

69 Fisher v. Mullin, 213 F. App'x. 698, 703 (10th Cir. 2007).

70 Hairston v. Nash, No. 06-5219, 2007 WL 2390432, at *1 (3d Cir. Aug. 23, 2007).

71 Gordon v. Morton, 131 F. App'x. 797 (3d Cir. 2005). Then-Judge Samuel Alito was on the panel that found the appellant lacked standing. See also Garland v. Horton, 129 F. App'x. 733 (3d Cir. 2005) (finding petitioner lacked standing where he was kept in restrictive housing for two months and only returned to the section of the prison with the law library one week before his filing deadline).

documents, how are the inmates supposed to know how their contents could have helped their cases?

However, not every case goes against the *pro se* prisoner. States must still provide *some* prisoners with lawbooks. *Lewis* itself makes clear that standing exists where an inmate shows

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.⁷²

Lower courts have found other situations that create standing to sue. One was found when prison officials seized and destroyed all of an inmate's legal files, and he alleged—but did not specify—prejudice to an ongoing civil rights action.⁷³ Another is an “exact cite” system, one that only provides prisoners with cases they request by the specific citation.⁷⁴ In one especially egregious exact cite case, an inmate “allege[d] conditions of confinement that would make the filing of a lawsuit practically impossible even for a trained attorney[.] . . . no physical access to the law library, no access to cases twenty pages or longer, access to cases only by citation”⁷⁵ The prisoner missed a filing deadline as a result. The Ninth Circuit not only found him to have standing to sue, but also remedied his injury by equitably tolling the statute of limitations.⁷⁶

Additionally, courts have found that the right of access to courts extends to require prisons to provide “*some means of preparing legal documents, including a means of binding them where required,*”⁷⁷ and to furnish prisoners with “[t]he right to Xerox.”⁷⁸

⁷² *Lewis v. Casey*, 518 U.S. 341, 351 (1996).

⁷³ *See Montana v. Hargett*, 151 F. App'x. 633, 636 (10th Cir. 2005) (“[T]he right prohibits prison officials from affirmatively hindering a prisoner's efforts to construct a nonfrivolous appeal or claim, including the improper destruction of a prisoner's legal materials.” (citing *Green v. Johnson*, 977 F.2d 1383, 1389–90 (10th Cir. 1992))).

⁷⁴ *See, e.g., Trujillo v. Williams*, 465 F.3d 1210, 1226 (10th Cir. 2006) (citing *Clayton v. Tansy*, 26 F.3d 980, 982 (10th Cir. 1993)); *Skelton v. Bruce*, No. 06-3045, 2007 WL 1469652, at *4–*5 (D. Kans. May 21, 2007). *But see Baca v. Mondragon*, No. 96-2027, 1996 WL 330290, at *2 (10th Cir. June 6, 1996).

⁷⁵ *Jones v. Blanas*, 393 F.3d 918, 929 (9th Cir. 2004).

⁷⁶ *Id.* at 936.

⁷⁷ *Phillips v. Hust*, 477 F.3d 1070, 1077 (9th Cir. 2007) (emphasis added).

⁷⁸ *Muhammad v. Collins*, 241 F. App'x. 498, 499 (10th Cir. 2007) (dictum) (quoting *Jones v. Franzen*, 697 F.2d 801, 803 (7th Cir. 1983)). Note that the Tenth Circuit quotes a Seventh Circuit case, illustrating the possibility that the petitioner in *Fisher v. Mullin*, 213 F. App'x. 698 (10th Cir. 2007), was in fact prejudiced by the denial of his request for other circuit's caselaw. *See supra* note 69 and accompanying text.

Only three prisoners have ever brought claims for a right to do legal research on the Internet,⁷⁹ and all three have ultimately been denied. In direct conflict with *Lewis*, two of these were denied for failure to meet what could fairly be described as a technical requirement. The first of these cases claimed the right under state discovery rules rather than under *Bounds* or *Lewis*.⁸⁰ The other was a much more novel case: originally incarcerated in the District of Columbia, the petitioner was attacked in prison and was moved for his own protection to a facility in California. He sued the District for failure to protect him, but the California facility lacked legal materials for D.C. A California state court ordered the prison to provide him access to Findlaw.com. On appeal, however, the court reversed the order because the petitioner had never specifically pleaded a request for Internet access.⁸¹

The third case might strike the reader as much more pernicious. Standley, an inmate, claimed a denial of his due process rights at his parole hearing, and a judge denied the claim. In his report, the judge cited cases that were only available through LexisNexis or Westlaw. The inmate sued for simply the right to view these cases, but his request was refused. Without elaborating, the denying court found unconvincingly that “the cases cited for *major* tenets of law are reported in volumes *presumably* available to Standley. Therefore, to the extent that some peripheral cases were not available to him, Standley has not been *unduly* prejudiced.”⁸²

Meanwhile, states have not opted to provide Internet access voluntarily as an alternative. Only a few states offer any electronic legal research at all, but do so using DVD-based software rather than an Internet connection.⁸³ North Carolina stands out as the one state to use the Internet in prisons successfully—as a teaching tool for prisoners, offering them web-based college coursework in a program in con-

79 Based on Westlaw “All Federal” and “All States” searches for: “bounds v. smith’ /p internet” and “lewis v. casey’ /p internet,” as of January 2008.

80 *Tuvalu v. Woodford*, No. CIV S-04-1724, 2006 WL 3201096, at *4 (E.D. Cal. Nov. 2, 2006). The court added, “Plaintiff has [not] cited and the court has not found any case suggesting that an inmate’s right of access to the courts includes the right of access to the internet for research.” *Id.* Note that all three of these cases considering the claim are unpublished. Moreover, the lower court opinion of *In re Ashford*, No. D048210, 2007 WL 106180 (Cal. Ct. App. Jan. 17, 2007, as modified Feb. 6, 2007), is not even available on Westlaw.

81 *In re Ashford*, 2007 WL 106180.

82 *Standley v. Dennison*, No. 9:05-CV-1033, 2007 WL 2406909, at *2 (N.D.N.Y. Aug. 21, 2007) (emphasis added).

83 See *supra* note 11.

junction with the University of North Carolina.⁸⁴ Minnesota briefly experimented with providing Internet-connected computers to inmates as part of an award-winning inmate telemarketing program,⁸⁵ but was forced to end the program after one of its participants—in the midst of a twenty-three year sentence for child molestation—was discovered to have downloaded 280 images of child pornography.⁸⁶ Indeed, this embarrassment sparked the introduction of the Stop Trafficking of Pornography in Prison (STOPP) Act of 1998, which would have barred federal inmates from accessing the Internet without permission and obligated the Attorney General to oversee state provision of Internet in prisons.⁸⁷

D. Legal Research in the Internet Age

Justice Stevens summarized his *Lewis* dissent in a footnote: “Although a prisoner would lose on the merits if he alleged that the deprivation of that right [of meaningful access to courts] occurred because the State, for example, did not provide him with access to on-line computer databases, he would also certainly have ‘standing’ to make his claim.”⁸⁸ Since 1996, however, our country and the rest of the world have witnessed an unprecedented revolution in the way humanity accesses information. Today, 71% of American adults use the Internet, and 47% have broadband connections in their homes.⁸⁹ In all, 68% of American households are connected to the Internet in some form or another.⁹⁰ All of these homes can access the entire Internet in all its uncensored glory.

84 Esposito, *supra* note 6, at 64.

85 *Id.*

86 See *Child Protection and Sexual Predator Punishment Act of 1998 and Related Proposals: Hearing Before the Subcomm. on Crime*, 105th Cong. 25 (1998) [hereinafter *Child Protection Hearing*] (statement of Hon. Deborah Pryce, Rep. in Congress from the State of Ohio, available at http://commdocs.house.gov/committees/judiciary/hju58761.000/hju58761_0.HTM (“Due to excellent law enforcement, the Federal authorities caught the prisoner with a computer disk containing 280 pictures of juveniles engaged in sexually explicit conduct.”); Esposito, *supra* note 6, at 53 (noting that the prisoner was found guilty of violating 18 U.S.C. § 2252(a)(4)(B) for possessing child pornography).

87 *Child Protection Hearing*, *supra* note 86; Esposito, *supra* note 6, at 52–53.

88 *Lewis v. Casey*, 518 U.S. 343, 408 n.5 (1996) (Stevens, J., dissenting).

89 Eric Benderoff, *High-Speed Internet Hits Home: African-Americans' Usage Is Up Sharply Since '05*, *Study Says*, CHI. TRIB., July 6, 2007, § 3, at 1. Twenty percent of Americans have a wireless network in their homes. *Trends & Innovations*, INVESTOR'S BUS. DAILY, Feb. 27, 2007, at A02.

90 William E. Kennard, *Spreading the Broadband Revolution*, N.Y. TIMES, Oct. 21, 2006, at A13.

Most significantly, when Stevens penned this dictum in 1996, only 28% of U.S. public libraries provided visitors with computers featuring free access to the Internet.⁹¹ In 2005 that figure reached 99%.⁹² Hence, for all practical purposes, every person in this country now enjoys the liberty to surf the Internet as he pleases—with the conspicuous exception of prisoners.

Even more dramatic has been the proliferation of free legal research websites. When *Lewis* came down, there were basically two such sources, and both were dismissible as efforts of academics. The Supreme Court began posting opinions online for public access in 1990, having been persuaded to do so by faculty of Case Western Reserve School of Law; and in 1992, Cornell Law School launched the Legal Information Institute, a website that allowed users freely to search its collection of cases and statutes.⁹³

Although universities continue to play a vital and innovative role in the increasing digitization of the Internet,⁹⁴ the most significant developments in free legal research databases have quite eagerly been provided by the courts and legislatures themselves. Thirty-nine states operate government top-level domain websites (mostly “.gov” or “.us”) that allow users to search the statute books by keyword, and several of these offer advanced search functions.⁹⁵ Another twenty states have opted to contract this service out to private publishers, or at least to link government websites to already-existing websites that provide searchable statutes. *Only one state*—North Dakota—has posted nothing online to provide their citizens with the ability to search

91 Steve Lohr, *Libraries Wired, and Reborn*, N.Y. TIMES, Apr. 22, 2004, at G1.

92 Gretchen Ruethling, *Almost All Libraries in U.S. Offer Free Access*, N.Y. TIMES, June 24, 2005, at A14. Meanwhile, visits to public libraries have more than doubled nationally, most likely as a consequence of this Internet accessibility. *Id.* The Bill and Melinda Gates Foundation has provided generous technology grants to libraries serving poor counties. Lohr, *supra* note 91.

93 Carol A. Parker, *Institutional Repositories and the Principle of Open Access: Changing the Way We Think about Legal Scholarship*, 37 N.M. L. REV. 1, 3–4 (2007).

94 *See, e.g., id.* at 9 (explaining that seven new Legal Information Institutes modeled after the Cornell program now serve the English-speaking world, and describing Berkeley Electronic Press' Legal Repository (“bepress”), a new service provided by the University of California, which makes forthcoming legal research—such as Parker’s article—freely accessible and searchable); *see also* Washington and Lee University’s Law Library Journal Finder, <http://lawlib.wlu.edu/resolver.aspx>.

95 These figures are based on the author’s own Google searches for each state name, plus “statutes.”

the statute books by keyword, although even it offers its statutes on a government website⁹⁶ in browse-only form.

Although United States Supreme Court opinions have been on-line since 1990, well before the *Lewis* opinion, since 2003 the Internet has allowed users to listen to audio recordings of oral arguments before the Court dating back to 1955 via the website Oyez.org, a private venture supported in large part by the National Science Foundation.⁹⁷ This site provides visitors a unique perspective on not only legal issues, but also—of particular importance to *pro se* plaintiffs—the mastery of oral advocacy.

Meanwhile, state supreme and appellate courts have typically picked arbitrary dates and provided decisions from those dates forward.⁹⁸ Delaware even provides digital opinions from its trial courts.⁹⁹ These court websites are increasingly adding search capabilities to their databases,¹⁰⁰ a trend that is only bound to accelerate as the costs of doing so decline.

The Federal Courts—in addition to operating websites to rival the States¹⁰¹—also administer the Internet-based Public Access to Court Electronic Records (PACER) system, which “provides access to the case summary, the docket entries, and in many jurisdictions copies of documents filed in federal cases.”¹⁰² Although PACER charges users \$0.08 for each page generated, the Judicial Conference of the United States approved a measure in 2001 not to charge users until they ac-

96 N.D. CENT. CODE (2007), available at <http://www.legis.nd.gov/information/statutes/cent-code.html>.

97 Oyez, Supreme Court Case Summaries, Oral Arguments & Multimedia, <http://www.oyez.org/> (last visited Mar. 3, 2008).

98 David Whelan, *Opinions Online: An Increasing Number of Courts Are Offering Web Access*, L. TECH. NEWS, July 2006, at 8. “Some courts, such as Connecticut and Delaware, have opinions from 2000 on. Others go back further—Alaska to the 1960s or California to the 1850s. . . . In Ohio, Supreme Court opinions are available since 1992; Court of Appeals start anywhere from 1999 to 2001, depending on the jurisdiction.” *Id.*

99 *Id.*

100 *Id.* “Tennessee uses dtSearch Corp.’s dtSearch. . . . Hawaii and Ohio both use the Google Search tool. North Dakota,” one of the two states that does not allow visitors to search its statutes by keyword, “uses Microsoft’s Index Server, which many websites use as a free search tool packaged with their Microsoft Windows server.” *Id.*

101 The Tenth Circuit Court provides opinions dating back to 1997. All the other courts of appeals store opinions at least back to 1995. See Timothy L. Coggins, *Legal, Factual and Other Internet Sites for Attorneys and Others*, 12 RICH. J.L. & TECH. 17, 23–25 (2005) (listing and commenting on hundreds of law-related websites).

102 Public Access to Court Electronic Records Frequently Asked Questions, <http://pacer.psc.uscourts.gov/faq.html> (last visited Mar. 8, 2008). See generally Kimberly Koscielniak, *Litigation Searching*, 83 MICH. B.J. 44 (May, 2004) (describing functionality of PACER).

crue a \$10 charge in a calendar year, and courts are explicitly permitted “for good cause, [to] exempt persons or classes of persons from the electronic public access fees, in order to avoid unreasonable burdens and to promote public access to such information.”¹⁰³ PACER thus not only offers users (such as, potentially, *pro se* prisoner litigants) the control and convenience of overseeing one’s own docket, but also a revolutionary new breakthrough in legal research: the ability to view ready-made briefs (so called “e-briefs”).¹⁰⁴

Perhaps the most consequential change since *Lewis* has been the appearance of free law-related “portals.”¹⁰⁵ Of these, practitioners rate most highly¹⁰⁶ Findlaw.com,¹⁰⁷ a subsidiary of West Publishing and winner of the 2007 “Webby” for Best Law Website.¹⁰⁸ Findlaw.com allows free searches of the constitutions, codes, and opinions of the federal government and every state. From its main page it offers links to various practice areas—such as civil rights and criminal law—with relevant links a click away. Similar portal sites include LexisNexis’s competitor service LexisONE¹⁰⁹ and Nolo,¹¹⁰ the latter of which generates revenue from advertising (mostly for lawyers) rather than through channeling users to “pay as you go” Shepardizing (or KeyCiting) services like the other two.¹¹¹ Even Wikipedia contains enough

103 *Id.*

104 See Michael Whiteman, *Appellate Court Briefs on the Web: Electronic Dynamos or Legal Quagmire?*, 97 LAW LIBR. J. 467 (2005); see also *id.* at 471 (quoting Peter Davis, former President of the American Academy of Lawyers: “E-briefs are absolutely essential for appellate work. . . . I have no doubt this is the wave of the future.”).

105 “A portal is a Web site that collects and organizes other Web sites.” Thomas Keefe, *Internet Legal Portals*, 94 ILL. B.J. 264 (2006).

106 According to a recent survey by the ABA Legal Technology Resource Center. *Id.*

107 FindLaw.com, <http://www.findlaw.com/> (last visited Mar. 29, 2008). It maintains a special section on criminal justice. Findlaw Criminal Law Center, http://criminal.findlaw.com/crimes/criminal_rights/ (last visited Mar. 29, 2008).

108 Press Release, Findlaw.com, Thomson FindLaw Wins Three Honors at 2007 Webby Awards (May 24, 2007), <http://company.findlaw.com/pr/2007/052407.2007webby.html> (last visited Apr. 10, 2008) (burying two “Official Honoree Awards” in the fourth paragraph). It also won the 2000 Webby for Politics and Law. Winda Benedetti, *Four Seattle Sites Named Among the Best on the Web*, May 15, 2000, SEATTLE POST-INTELLIGENCER, at C2. *But cf.* Jack Shafer, *What? You’ve Not Been Honored by the Webbys?*, SLATE, Apr. 9, 2008, <http://www.slate.com/id/2188581/> (last visited Apr. 17, 2008) (“Entering your Web site in the Webby Awards is a little like buying a box of Cracker Jack—everybody wins a prize.”).

109 Geared to solo and small firm attorneys. LexisONE, <http://www.lexisone.com> (last visited Mar. 29, 2008).

110 Nolo, <http://www.nolo.com> (last visited Mar. 29, 2008).

111 Keefe, *supra* note 105.

information about laws that imagining it saving an inmate's freedom or even life is not too farfetched.¹¹²

Law-related blogs (or, as they are unfortunately nicknamed, "blawgs") presently number in the thousands,¹¹³ and can only be expected to continue to grow in quantity, quality, and import. Momentously, the Supreme Court cited a document posted on law professor Douglas Berman's "Sentencing Law & Policy" blawg¹¹⁴ in a 2005 footnote.¹¹⁵ More recently, a Ninth Circuit dissent joined by five judges quoted an entire block of text from "The Volokh Conspiracy."¹¹⁶ Additionally, legal "wikis"—collaborative Internet encyclopedias, the content of which are produced entirely by users¹¹⁷—have begun to crop up addressed to topics both general¹¹⁸ and specific.¹¹⁹

These trends are irreversible, and we are merely witnessing the infancy of free legal research on the Internet. It is hardly an overstatement to predict that an age of regular judicial citation to Internet resources—whether to documents filed through PACER, or to blawgs and legal wikis—is just around the corner. Indeed, it is only slightly premature to declare that a comprehensive, definitive legal wiki is at

112 See, e.g., Antiterrorism and Effective Death Penalty Act of 1996, http://en.wikipedia.org/wiki/Antiterrorism_and_Effective_Death_Penalty_Act_of_1996 (last visited Mar. 25, 2008); Habeas corpus, http://en.wikipedia.org/wiki/Habeas_corpus (last visited Mar. 25, 2008).

113 See, e.g., Michael J. Tonsing, *The State of the Legal Blawgosphere*, FED. LAW., Oct. 2006, at 14.

114 Sentencing Law & Policy, http://sentencing.typepad.com/sentencing_law_and_policy (last visited Apr. 11, 2008).

115 U.S. v. Booker, 543 U.S. 220, 277 n.4 (2005) (Stevens, J., with Souter, J., Scalia, J., dissenting in part) (citing Memorandum from Christopher A. Wray, Assistant Att'y Gen., U.S. Dep't. of Justice, Criminal Div., to all Federal Prosecutors, Guidance Regarding the Application of *Blakely v. Washington* to Pending Cases, at 8, available at http://sentencing.typepad.com/sentencing_law_and_policy/files/chris_wray_doj_memo.pdf).

116 Harper v. Poway Unified Sch. Dist., 455 F.3d 1052, 1055 (9th Cir. 2006) (O'Scannlain, J., dissenting in part) (citing Memorandum from Christopher A. Wray, Assistant Att'y Gen., U.S. Dep't. of Justice, Criminal Div., to all Federal Prosecutors, Guidance Regarding the Application of *Blakely v. Washington* to Pending Cases, at 8, available at http://sentencing.typepad.com/sentencing_law_and_policy/files/chris_wray_doj_memo.pdf).

117 See generally Wiki, <http://en.wikipedia.org/wiki/Wiki> (last visited Mar. 25, 2008) ("A wiki is software that allows users to easily create, edit, and link pages together."). The concept of the "wiki" (the term comes from the Hawaiian word for "fast") dates back to 1994, but only came into public consciousness at the turn of the millennium when the Nupedia Internet encyclopedia project was relaunched as Wikipedia. <http://en.wikipedia.org/wiki/Wikipedia> (last visited Mar. 25, 2008).

118 See, e.g., Wex, http://www.law.cornell.edu/wex/index.php/Main_Page (last visited Mar. 25, 2008) (providing a wiki legal dictionary hosted by Cornell's Legal Information Institute); Legal Wikia, http://legal.wikia.com/wiki/Main_Page (last visited Mar. 25, 2008).

119 See, e.g., Michigan Family Law Wiki, <http://lawpedia.jot.com/WikiHome> (last visited Mar. 25, 2008).

this point an inevitability; the better question is whether this day is a hundred years away or a hundred hours.

E. Security

Naturally, the proposition of extending Internet access to prisoners raises myriad security concerns. It would be outside the scope of this Comment—and probably outside the scope of a federal court’s jurisdiction—to dictate to states precisely how best to allay these concerns. Indeed, it is desirable to encourage states to experiment with how best to provide inmates with Internet access. This Part seeks simply to show that several manageable solutions are readily available.

The most basic solution is “white-list filtering,” whereby network users can only access those law-related sites that the administrator has already pre-approved.¹²⁰ This solution is technically uncomplicated and has the virtue of ensuring that inmates only view pre-approved material; it does, however, require the intensive upfront labor of identifying appropriate law-related websites before putting the system online.

The alternative is “black-list filtering” (used by most public libraries), which is essentially software programmed to block access to certain categories of content (usually pornography, but just as easily all non-legal sites).¹²¹ “Black-list filtering” requires less effort to set up, but risks filtering out too much desirable content and too little undesirable content.¹²² The problem, in other words, is that “black-list” filtering leads to overbroad Internet censorship, thus denying prisoners access to potentially useful legal resources.¹²³ Under *Turner v. Safely*, however, this overbreadth is constitutionally tolerable as “reasonably related to legitimate penological interests,”¹²⁴ as long as the filtering software still provides meaningful access to a minimal handful of suitable law-related websites. Additionally, states would presumably be free to monitor—or in extreme cases, to deny—Internet access to so-

120 E-mail from Frederick Benenson, Creative Commons Cultural Fellow, to author (Nov. 1, 2006, 18:28 EST) (on file with author); see also RICHARD A. SPINELLO, REGULATING CYBERSPACE: THE POLICIES AND TECHNOLOGIES OF CONTROL, 55–59, 116–21 (2002) (discussing the technology, ethics, and constitutionality of black-list filtering).

121 *Id.*

122 *Id.*

123 See, e.g., Sites Blocked by Internet Filtering Programs: Edelman Expert Report for Multnomah County Public Library et al. vs. United States of America, et al., available at <http://cyber.law.harvard.edu/people/edelman/mul-v-us/> (last visited Apr. 17, 2008).

124 482 U.S. 78, 89 (1987).

phisticated prisoners convicted or reasonably suspected of computer “hacking” or related offenses.¹²⁵

To summarize, our nation has a rich history of disseminating legal materials for the benefit of the populace. Since the mid-1990s, however, society has turned a corner in how it accesses information—legal and otherwise—and there is no turning back. It is in this light that the right of prisoners to use these rich and free resources must be contemplated; Part III presents the constitutional arguments needed to make it so.

III. CONSTITUTIONAL ANALYSIS

The underlying animus of Justices Scalia and Thomas towards the *Bounds* right is that it has no clear basis in the Constitution. It troubles them when the Court creates unfounded mandates for states to treat prisoners “fairly” without clear textual authority to do so. More to the point, they think the Constitution actually requires them to abstain from such interference. The modern history of prisoners’ rights, they believe,

rest[s] on the unstated (and erroneous) presumption that the Constitution contains an implicit definition of incarceration. Because the Constitution contains no such definition, States are free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations—*provided only that those deprivations are consistent with the Eighth Amendment.*¹²⁶

The purpose of this Part is to reestablish the place of the *pro se* prisoner’s right of meaningful access to courts in the text of the Constitution. Justice Souter’s latest attempt identified the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses.¹²⁷ With all apologies to the Justice, this Comment addresses these in reverse, and begins with one he did not name: the aforementioned Eighth Amendment.

125 It is worth noting that in the context of meaningful access to law libraries cases, courts seem far more concerned that prisoners are too illiterate to benefit from the facilities, than that they are so literate as to pose a security risk.

126 *Beard v. Banks*, 126 S. Ct. 2572, 2582–83 (2006) (Thomas, J., with Scalia, J., concurring) (quotation marks omitted) (quoting *Overton v. Bazzetta*, 539 U.S. 126, 139 (2003) (Thomas, J., with Scalia, J., concurring)).

127 *Christoper v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (Souter, J.) (citations omitted).

A. *The Eighth Amendment*

This argument need but take a few words. By any reasonable definition, it is cruel and unusual for the law to deprive prisoners of the law.

Justices have differed, of course, on their definitions of “cruel” and “unusual.”¹²⁸ But it is perhaps Justice Scalia’s originalist definition—which takes the meaning of the words among the legal community of the Framing Generation—that does the *most* to show the unconstitutionality of a punishment unconstrained by law.

In the legal world of the time, and in the context of restricting punishment determined by the Crown (or the Crown’s judges), “illegall” and “unusuall” were identical for practical purposes. Not all punishments were specified by statute; many were determined by the common law. . . . A requirement that punishment not be “unusuall”—that is, not contrary to “usage” (Lat. “usus”) or “precedent”—was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition.¹²⁹

In short, Justice Scalia more than any other is committed to the view that the Eighth Amendment rests on a concept of punishment as inherently *legal*. It is plain that such a system logically requires a meaningful right of a prisoner to vindicate his legal rights; otherwise the concept would be self-defeating. The Court should remain within the *Bounds* of common-law tradition, indeed.

B. *The Equal Protection Clause*

The relevant principle of equal protection is that the state may not deny justice to the indigent. At least in the pre-conviction context, this principle was settled in *Gideon v. Wainwright*:

That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed

128 *Compare* Harmelin v. Michigan, 501 U.S. 957, 994–95 (1991) (Scalia, J.) (“Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation’s history.”), *with* Furman v. Georgia, 408 U.S. 238, 266 (1972) (Brennan, J., concurring) (“The Clause . . . guards against the abuse of power; . . . the prohibition of the Clause is not confined to such penalties and punishment as were inflicted by the Stuarts.” (quotation marks and alterations omitted)).

129 *Harmelin*, 501 U.S. at 974 (quoting Declaration of Rights, 1689, 2 W. & M., 2 (Eng.)).

fundamental and essential to fair trials in some countries, but it is in ours.¹³⁰

By analogy, our society has now (or very soon will have) irreversibly reached the point where a litigant's right to get legal information online is valued as a necessity, and not a luxury. To put it differently, any defendant out on bail would be expected to look up some information about the charges against him on the Internet. Hence, a straightforward interpretation of the principles of *Gideon* should require states to give defendants who are not out on bail access as well.

In the context of discretionary appeals, habeas petitions, civil rights actions, and any other category of potential prisoner litigation, by contrast, indigent prisoners lose the right to state-appointed counsel, on the theory that justice has already been done for them.¹³¹ Hence, after *Bounds* and *Lewis*, their only reliable¹³² means by which to vindicate legal rights is self-education with whatever resources the State sees fit to provide them.

In Justice Thomas's view, the reason for the distinction in treatment is that "the Equal Protection Clause does not impose on the States an 'affirmative duty to lift the handicaps flowing from differences in economic circumstances.'"¹³³ The notion is that defendants

¹³⁰ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

¹³¹ *Ross v. Moffitt*, 417 U.S. 600, 610–11 (1974) ("[I]t is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt.").

¹³² For lack of a better alternative, convicts are free to seek the assistance of fellow inmates on legal projects. *Johnson v. Avery*, 393 U.S. 483 (1969), *abrogated by Shaw v. Murphy*, 532 U.S. 223, 231 n.3 (2001) (imposing standing requirement). However competent some writ writers might be, at the very least, there is no way for an indigent prisoner to know, a priori, whether any particular writ writer is reliable. Hence, their assistance ought to be considered too unreliable to render the Prison Litigation Reform Act "three strikes" provision constitutional. See *infra* Part III.D. Then-Justice Rehnquist quoted at some length the problem of

a few unscrupulous manipulators who are interested only in acquiring from other prisoners money, cigarettes, or merchandise purchased in the inmate canteen. Once they have a "client's" interest aroused and determine his ability to pay, they must keep him on the "hook." This is commonly done by deliberately misstating the facts of his case so that it appears, at least on the surface, that the inmate is entitled to relief.

Cruz v. Beto, 405 U.S. 319, 327 n.7 (1972) (Rehnquist, J., dissenting) (quoting Charles Larsen, *A Prisoner Looks at Writ-Writing*, 56 CAL. L. REV. 343, 348–49 (1968)). For a practical answer to this problem, see Seamone, *supra* note 44 (proposing a modified bar examination for "jailhouse lawyers" to ensure their competence).

¹³³ *Lewis v. Casey*, 518 U.S. 343, 375 n.5 (1996) (Thomas, J., concurring) (quoting *Douglas v. California*, 372 U.S. 353, 362 (1963) (Harlan, J., with Stewart, J., dissenting)). The quota-

are entitled to counsel only because the government seeks to impose the affirmative burden of a jail sentence on them. Justice Thomas believes that once people have been validly deprived of their freedom, those who are unable to afford outside counsel have no right to expect the state to provide them the tools to try to get out of jail.

However, societal circumstances have changed since *Lewis*: in 1996, the act of incarceration did not usually deprive convicts of the liberty to go to an Internet-connected public library; and now in 99% of cases it does.¹³⁴ By virtue of the affirmative act of imprisoning individuals, the question is not, as Justice Thomas would construe it, whether the state has “an affirmative duty to lift the handicap[,],” but rather whether the state may legitimately impose such an affirmative handicap as the denial of vital information as a consequence of imprisonment.

Justice Blackmun’s response to the rape of a transsexual inmate left in the general male population of a maximum-security facility is salient:

It is society’s responsibility to protect the life and health of its prisoners. “[W]hen a sheriff or a marshall [sic] takes a man from the courthouse in a prison van and transports him to confinement for two or three or ten years, *this is our act*. We have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not.”¹³⁵

tion continues, “[t]o so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society.” *Id.* Accord *Griffin v. Illinois*, 351 U.S. 12, 35 (1956) (Harlan, J., dissenting) (“[N]o economic burden attendant upon the exercise of a privilege bears equally upon all, and in other circumstances the resulting differentiation is not treated as an invidious classification by the State, even though discrimination against ‘indigents’ by name would be unconstitutional. Thus, while the exclusion of ‘indigents’ from a free state university would deny them equal protection, requiring the payment of tuition fees surely would not, despite the resulting exclusion of those who could not afford to pay the fees. And if imposing a condition of payment is not the equivalent of a classification by the State in one case, I fail to see why it should be so regarded in another. Thus if requiring defendants in felony cases to pay for a transcript constitutes a discriminatory denial to indigents of the right of appeal available to others, why is it not a similar denial in misdemeanor cases or, for that matter, civil cases?”).

134 See *supra* Part II.D.

135 *Farmer v. Brennan*, 511 U.S. 825, 854 (1994) (Blackmun, J., concurring) (quoting Address by The Chief Justice, 25 REC. OF THE ASSN. OF THE BAR OF THE CITY OF N.Y. 14, 17 (Supp. Mar. 1970.); cf. *Estelle v. Gamble*, 429 U.S. 97, 116 n.13 (1976) (Stevens, J., dissenting) (“If a State elects to impose imprisonment as a punishment for crime, I believe it has an obligation to provide the persons in its custody with a health care system which meets minimal standards of adequacy. . . . For denial of medical care is surely not part of the punishment which civilized nations may impose for crime.”).

Conservative Justices have embraced this position (albeit in the due process context),¹³⁶ and in the words of one appellate court, “the state-created danger doctrine has become a staple of our constitutional law.”¹³⁷

It is well established that the State cannot *affirmatively* obstruct prisoners from filing court papers, regardless of the substance of the underlying lawsuit.¹³⁸ Justice Stevens, for one, has indicated that he would extend this logic to give ample protections to the rights of incarcerated indigents to research legal claims.

[B]ecause prisoners are uniquely subject to the control of the State, and because unconstitutional restrictions on the right of access to the courts—whether through nearly absolute bars like that in *Hull* or through inadequate legal resources—frustrate the ability of prisoners to identify, articulate, and present to courts injuries flowing from that control, I believe that *any prisoner who claims to be impeded by such barriers* has alleged constitutionally sufficient injury in fact.¹³⁹

To bring this argument into the new millennium, the state’s act of jailing individuals removes them from a society in which any citizen

136 See, e.g., *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989) (Rehnquist, C.J., with White, J., Stevens, J., O’Connor, J., Scalia, J., & Kennedy, J.) (“The affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. In the substantive due process analysis, it is the State’s affirmative act of restraining the individual’s freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the ‘deprivation of liberty’ triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.” (citation omitted)).

137 *Bennett v. City of Phila.*, 499 F.3d 281, 287 (3d Cir. 2007); see also *id.* (“[T]o establish a claim based on the state-created danger doctrine, a plaintiff must satisfy the following elements: (1) the harm caused was foreseeable and fairly direct; (2) a state actor acted with a degree of culpability that shocks the conscience; (3) some relationship existed between the state and the plaintiff that renders plaintiff a foreseeable victim; and (4) ‘a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.’” (quoting *Bright v. Westmoreland County*, 443 F.3d 276, 281 (3d Cir. 2006))).

138 See *Ex parte Hull*, 312 U.S. 546, 549 (1941) (rejecting prison regulation requiring submission of legal documents to prison official for approval before they could be filed in court); see also *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974) (“There is no iron curtain drawn between the Constitution and the prisons of this country.”); cf. *Bounds v. Smith*, 430 U.S. 817, 839–40 (1977) (Rehnquist, J., dissenting) (“But if a prisoner incarcerated pursuant to a final judgment of conviction is not prevented from physical access to the federal courts in order that he may file therein petitions for relief which Congress has authorized those courts to grant, he has been accorded the only constitutional right of access to the courts that our cases have articulated in a reasoned way.” (citing *Ex parte Hull*, 312 U.S. at 549)).

139 *Lewis v. Casey*, 518 U.S. 343, 409 (1996) (Stevens, J., dissenting) (emphasis added).

may freely sit down at any public library computer and teach himself how to defend his rights. It moreover removes them from a world where, for no cost, the citizen can manage his docket or monitor those of cases relevant to his.¹⁴⁰ The act of imprisonment today affirmatively handicaps the indigent convict from any access to these resources, and because non-indigent convicts are still guaranteed the right to pay somebody to use these potentially critical resources for them,¹⁴¹ the result is invidious discrimination against the poor. The Equal Protection Clause cannot accept this result.

C. *The Due Process Clauses*

The constitutional text most likely to give inmates the right to use the Internet for legal research and docket management regardless of economic status is found in the Due Process Clauses of the Fifth and Fourteenth Amendment. These Clauses not only provide a universally accepted ground for a right of access to courts,¹⁴² but also are traditionally far more flexible and accommodative of social changes. Indeed, “[t]he concept of due process is, ‘perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society.’”¹⁴³ The challenge, then, is to show that *today* (or someday soon), society has reached (or will reach) the point where it deems the individual’s interest in accessing web-based legal resources to outweigh any government interest in denying him that data.

The first step to get there is determining which due process standard governs the analysis. There are two candidates: the long-prevailing *Mathews v. Eldridge*¹⁴⁴ three-factor balancing test, or the seemingly spartan test for criminal prosecutions laid down one year

140 See *supra* Part II.D.

141 See, e.g., *Clement v. Cal. Dep’t. of Corr.*, 364 F.3d 1148 (9th Cir. 2004) (striking down prison regulation forbidding inmates from receiving print-outs of websites in the mail).

142 See, e.g., *Lewis*, 518 U.S. at 381 (Thomas, J., concurring) (acknowledging a limited right of prisoners to access courts rooted in due process).

143 *Medina v. California*, 505 U.S. 437, 454 (1992) (O’Connor, J., concurring) (quoting *Griffin v. Illinois*, 351 U.S. 12, 20–21 (1956) (Frankfurter, J., concurring)); see also *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) (“[D]ue process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring))).

144 424 U.S. 319 (1976).

later in *Patterson v. New York*,¹⁴⁵ which has of late come back into vogue.¹⁴⁶

At the very least, *Patterson* governs the procedural due process rights of *pro se* defendants in criminal prosecutions, and might thus give rise to a right to Internet access for these defendants.¹⁴⁷ *Patterson* has only been applied in the pre-conviction context, but its overarching logic, “that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States,”¹⁴⁸ naturally extends to the appellate context too. Hence, this Part argues that both tests *should* lead to the conclusion that due process guarantees the objects of criminal justice—pre-conviction or post-conviction—the freedom to do legal research online, although presently the right only goes to convicts.

1. *Patterson and the Rights of Defendants and Direct Appellants*

Patterson only overturns criminal procedures that are found offensive to custom. At first glance, this seems to guarantee shamefully threadbare constitutional protection to criminal defendants and to defer unimaginably to state legislatures:

Among other things, it is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.¹⁴⁹

However, because our society traditionally values the rights of criminal defendants so absolutely, this standard should be thought of as providing as rich a tradition of purely procedural safeguards as any society has ever had.

The narrow holding of *Patterson* is that states may assign the burden of proof on affirmative defenses to defendants, and so in this technically procedural regard the case narrows defendants’ rights. But before coming to its conclusion, the Court found special signifi-

¹⁴⁵ 432 U.S. 197 (1977).

¹⁴⁶ In *Medina*, 505 U.S. 437, the Court ruled that a statute placing the burden of proving the defense of incompetency to stand trial was not violative of due process. A majority of the Court applied the *Patterson* test, two concurring Justices applied *Mathews*, and two dissented on the grounds that neither test applied.

¹⁴⁷ Special note to any *pro se* defendant reading this Comment: your time would be infinitely better spent getting a lawyer.

¹⁴⁸ *Patterson*, 432 U.S. at 201, *quoted in Medina*, 505 U.S. at 445.

¹⁴⁹ *Id.* at 201–02 (internal quotation marks omitted).

cance in the fact that criminal defendants at common law bore the burden of proving all affirmative defenses, implying that this carved out a particular exception to the rule to presume in defendants' favor.¹⁵⁰ The Court even inserted a proviso into this exception to the rule of protecting defendants, deeming the burden of proof to be appropriately placed on defendants only when doing so serves the overarching interests of knowledge and justice at little or no opportunity cost to the defendant.¹⁵¹

The key to prevailing over the *Patterson* due process standard is not to identify a relevant common law practice from which the state is deviating, but rather to identify a relevant "principle of justice" that the state obstructs at the expense of those it accuses of crime.

Hence, *Patterson* can quite appropriately be used *on a defendant's behalf* in the pre-conviction stage to argue that defendants in jail awaiting trial are entitled to Internet access behind bars. Doing so would advance the same social interests in justice and knowledge that the Court pointed to in *Patterson*.¹⁵² Moreover, it is easy to see the infinite number of ways that providing this access could inform a defendant's exercise of "those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so."¹⁵³ The critical step is arguing that denying defendants this access "offends" one of these principles of justice,¹⁵⁴ and two characteristics of modern America make this so.

150 *Id.* (citing WILLIAM BLACKSTONE, 4 COMMENTARIES *201; MICHAEL FOSTER, CROWN LAW 255 (1762)).

151 *Id.* at 203 n.9 ("The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough *to make it just* for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon *a balancing of convenience or of the opportunities for knowledge* the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." (emphasis added) (quoting *Morrison v. California*, 291 U.S. 82, 88–89 (1934)); *see also Medina*, 505 U.S. at 460 (Blackmun, J., dissenting).

152 *Patterson*, 432 U.S. at 203 n.9

153 *Riggins v. Nevada*, 504 U.S. 127, 139–40 (1992) (Kennedy, J., concurring) (citing *Drope v. Missouri*, 420 U.S. 162, 171–72 (1975)). Defendants could use the Internet to read up on the law to better collaborate with their attorneys in making these decisions, or to help track down otherwise unreachable witnesses. Perhaps even more critically, defendants could also use the Internet to obtain independent information about the qualifications of their attorneys—to get a better idea of the extent to which they will need to (literally) take the law into their own hands.

154 *Patterson*, 432 U.S. at 202.

First, the Internet is now society's preeminent self-educational resource;¹⁵⁵ second, public defenders are chronically overworked and underfunded.¹⁵⁶ In combination, these circumstances mean that a minimally computer-literate, indigent defendant stands to improve vastly the effectiveness of his state-appointed counsel at a relatively small cost to the state.

Courts, however, have tended not to see it this way.¹⁵⁷ Although both defendants and convicts are entitled to "a certain minimum standard of 'assistance'"¹⁵⁸ in their legal pursuits, the Circuit Courts of Appeal have not extended *Bounds* to the rights of defendants. This conclusion has not, however, been unanimous.¹⁵⁹

The same analysis would apply in the post-conviction context, at least insofar as the convict enjoys a state-law privilege¹⁶⁰ to appeal his conviction. In this arena, due process guarantees indigent convicts the same rights accorded to them as to defendants under *Gideon*.

[A] State can, consistently with the Fourteenth Amendment, provide for differences [in criminal appellate procedure] so long as the result does not amount to a denial of due process or an 'invidious discrimination.' Absolute equality is not required; lines can be and are drawn and we often sustain them. But where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.¹⁶¹

By precisely the same reasoning, courts would likely deny a direct appellant's claim for legal research, but this result is wrong. In this age in which online information is becoming as much a necessity as an

155 See *supra* Part II.D.

156 See, e.g., Stephen B. Bright, *Glimpses at a Dream Yet To Be Realized*, CHAMPION, Mar. 1998, at 12.

157 See *Bounds v. Smith*, 430 U.S. 817, 828 (1977); *Bourdon v. Loughren*, 386 F.3d 88, 93-94 (2d Cir. 2004) (citing *United States v. Smith*, 907 F.2d, 42, 45 (6th Cir. 1990)); *Peterkin v. Jeffes*, 855 F.2d 1021, 1042 (3d Cir. 1988); *Howland v. Kilquist*, 833 F.2d 639, 643 (7th Cir. 1987); *Love v. Summit County*, 776 F.2d 908, 914 (10th Cir. 1985); *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981); *United States v. Chatman*, 584 F.2d 1358, 1360 (4th Cir. 1978).

158 *Bourdon*, 386 F.3d at 96.

159 *Id.* at 100 (Oakes, S.C.J. concurring) ("While a defendant does not necessarily have a constitutional right to hybrid representation, I do not believe that the state may constitutionally bar a defendant represented by ineffective counsel from meaningfully accessing the court *in propria persona* in order to preserve his right to an effective defense at such a critical stage of the proceedings.").

160 *McKane v. Durston*, 153 U.S. 684, 687 (1894) ("An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal.").

161 *Douglas v. California*, 372 U.S. 353, 356-57 (1963) (citations omitted); *accord* *Evitts v. Lucney*, 469 U.S. 387 (1985).

attorney,¹⁶² *Patterson* properly demands that prisoners be provided such access at least insofar as their first appeal is heard. The issue is not one of “[a]bsolute equality,” but rather of not doing offense to the very principles of justice “by which the quality of our civilization may be judged.”¹⁶³

2. Mathews, Turner, and the Rights of Convicts

As was explained above,¹⁶⁴ the protections of *Patterson* do not extend beyond the first appeal as of right. At this point, the state is considered free to do to convicts whatever it wishes, unless prohibited from doing so elsewhere in the Constitution. The initial due process inquiry, then, is whether a state may legitimately deny convicts the right to meaningfully enforce whatever rights they retain. The test laid down in *Turner v. Safley*¹⁶⁵ controls: “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”¹⁶⁶

A threshold question, then, is whether denying prisoners due process rights could be “a legitimate penological interest,” the answer to which is most clearly no. “The touchstone of due process is protection of the individual against arbitrary action of government,”¹⁶⁷ and it is a central constitutional premise that arbitrary justice is never a legitimate governmental aim. *Turner* itself requires that penological interests must be “legitimate and neutral,”¹⁶⁸ and not even the most conservative Justices seem to suggest that altogether denying due process rights could be constitutionally proper.¹⁶⁹ Rather, all seem to

162 See *supra* Part III.B.

163 *Douglas*, 372 U.S. at 357 n.2 (quoting *Coppedge v. United States*, 369 U.S. 438, 449 (1962)).

164 See *supra* Part III.B.

165 482 U.S. 78 (1987) (O’Connor, J.).

166 *Id.* at 89. Justice Thomas cited the *Turner* standard approvingly in *Lewis v. Casey*, 518 U.S. 343, 387 n.9 (1996) (Thomas, J., concurring). The dissenting Justices in *Turner* were concerned by how deferentially trial courts would interpret the “reasonable relation” standard. *Turner*, 482 U.S. at 100–01 (Stevens, J., with Brennan, Marshall, and Blackmun, JJ., dissenting) (“[T]here is a logical connection between prison discipline and the use of bullwhips on prisoners.”).

167 *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Dicta in *Wolff* make the additional point that in some cases, denying prisoners “procedures of a free society to the maximum possible extent” actually comes at the expense of the state’s penological interest in rehabilitation. *Id.* at 563.

168 *Turner*, 482 U.S. at 90.

169 See *Overton v. Bazzetta*, 539 U.S. 126, 141–42 (2003) (Thomas, J., with Scalia, J., concurring) (listing as examples of legitimate penological interests “[r]estrictions that are rationally connected to the running of a prison, that are designed to avoid adverse impacts

agree that prisoners retain due process rights, "subject to restrictions imposed by the nature of the regime to which they have been lawfully committed,"¹⁷⁰ and the purpose of *Mathews* is to balance the interests appropriately.

i. *Mathews v. Eldridge*

The next question becomes whether due process entails giving convicts the right to legal research online. *Mathews* controls.¹⁷¹ The breakthrough of *Mathews* is the insight that in the myriad administrative and judicial situations that give rise to procedures to which individuals are due, courts always need to keep three factors in mind:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁷²

Its application in the prison context is straightforward. The first factor, the private interest of the prisoner in the outcome of the liti-

on guards, inmates, or prison resources, that cannot be replaced by 'ready alternatives,' and that leave inmates with alternative means of accomplishing what the restrictions prohibit . . ."). Note that these Justices would fundamentally alter the *Turner* analysis as traditionally understood: "Rather than asking in the abstract whether a certain right 'survives' incarceration, the Court should ask whether a particular prisoner's lawful sentence took away a right enjoyed by free persons." *Id.* at 139 (citing Justice Kennedy's opinion for the Court); see also *Beard v. Banks*, 126 S. Ct. 2572, 2582 (2006) (Thomas, J., with Scalia, J., concurring) (reaffirming commitment to their *Overton* concurrence). But it is highly illuminating that in both *Overton* and *Beard*, Justices Thomas and Scalia approved challenges to prison regulations that carved out special allowances so not to encroach on the right of access to courts. See *Beard*, 126 S. Ct. at 1576 (upholding regulation denying newspapers but allowing religious and legal materials); *Overton*, 539 U.S. at 126 (upholding regulation denying visitation by children but allowing visitation by lawyers and clergy). Thomas and Scalia did not suggest in their concurrences that such allowances were unnecessary. Ironically, it was Justice Stevens who argued that the allowance in *Beard* was dangerous, but he did so concluding that the regulations were futile and should be overturned. See *Beard*, 126 S. Ct. at 2586–87 (Stevens, J., dissenting) ("In light of the quantity of materials that [Long Term Segregation Unit] inmates are entitled to have in their cell, it does not follow, as a matter of logic, that preventing inmates from possessing a single copy of a secular, nonlegal newsletter, or magazine will have any measurable effect on the likelihood that inmates will start fires, hide contraband, or engage in other dangerous actions.").

170 *Wolff*, 418 U.S. at 556.

171 See *Wilkinson v. Austin*, 545 U.S. 209, 211 (2005) (Kennedy, J.) (applying *Mathews* to decide procedural due process rights of Ohio inmates challenging placement in state supermax facility).

172 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

gation, clearly weighs towards providing him Internet access. Doing so stands potentially to allow the wrongfully imprisoned to liberate themselves through informed habeas petitioning; hence, for purposes of *Mathews*, inmates are acutely and uniquely interested in being provided Internet access. Additionally, a prisoner has at least the same personal interest in defending against a parental rights revocation, private action against his estate, or any other litigation that might arise during a prison sentence¹⁷³ as anyone else in society would have, and this fact weighs in favor of ensuring prisoners at least the same access to legal websites as all citizens enjoy.

The second *Mathews* factor, the risk of error,¹⁷⁴ weighs heavily in favor of providing prisoners with the means to muster an at least intelligent defense. Not only does starving prisoners of legal knowledge increase the likelihood of injustices going uncorrected, but as will be explained,¹⁷⁵ it also increases the likelihood of prisoner-litigants having the doors to federal courts shut to them in accordance with the “three strikes” provision of the Prison Litigation Reform Act. Thus, the first two *Mathews* criteria both demand substantial due process protection for prisoners; and if these were the only two relevant criteria, the balance of interests might obligate states to subscribe to sophisticated databases and provide quality counsel in any action that implicates the rights of a prisoner.

The balance *Mathews* strikes, however, rests also on a third factor: the government’s important interests in economy, criminal justice, and maintaining the prison environment. Certainly, the state would incur substantial expenses outfitting prisons with even rudimentary Internet access—not only the start-up costs of the hardware and filtering, but also maintenance and operating costs.

The question becomes how to balance these countervailing demands. “The due process clause is not susceptible of reduction to a mathematical formula,”¹⁷⁶ but *Turner v. Safley*¹⁷⁷ gives courts some very helpful guidelines for determining the reasonableness of a restriction’s relation to a legitimate penological interest.

173 See *infra* Part III.C.3, *Life, Liberty, and Property Interests*.

174 *Mathews* expounds this concept: “the fairness and reliability of the existing . . . procedures, and the probable value, if any, of additional procedural safeguards.” 424 U.S. at 343.

175 See *infra* Part III.D.

176 *Gibbs v. Burke*, 337 U.S. 773, 781 (1949) (Reed, J.).

177 482 U.S. 78 (1987).

ii. *Turner v. Safley*

Turner proffers four factors for courts to look at to determine the reasonableness of prison regulations. Quite rightly, the first three defer tremendously to the “informed discretion of corrections officials”¹⁷⁸ and would (probably) weigh against requiring Internet access in prisons *as long as the prisons already* provide adequate law libraries or legal assistance programs.

[First,] a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational. . . .

A second factor . . . is whether there are alternative means of exercising the right that remain open to prison inmates. Where other avenues remain available for the exercise of the asserted right, courts should be particularly conscious of the measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.

A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally. . . .¹⁷⁹

Because the state’s interest in economy is directly served by not providing computers and Internet, the first factor is satisfied. In the long term, of course, digital law libraries will be more economical than paper, but a court will be bound to defer to a state’s stated short-term economic needs.¹⁸⁰

As long as there are minimally decent alternative means for prisoners to do legal research, the second factor is met. It is important to note, however, that this factor cuts deeply against those prisons that have curtailed their provision of legal services after *Lewis*,¹⁸¹ in the absence of alternative mechanisms to give meaning to inmates’s due process rights, *this factor would considerably strengthen a claim* for Internet access in jail.

178 *Id.* at 90.

179 *Id.* at 89–90 (internal quotes and citations omitted).

180 *See generally* Alden v. Maine, 527 U.S. 706, 751 (1999) (Kennedy, J.) (“Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process. While the judgment creditor of a State may have a legitimate claim for compensation, other important needs and worthwhile ends compete for access to the public fisc. . . . If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.”).

181 *See supra* Part II.C.

The third factor, later called the “ripple effect”¹⁸² on the prison environment, again evokes the state’s interest in prison economy: any expenditure of funds for computers and Internet access will necessarily divert money that could be used elsewhere. The ramifications of the program on prison security also weigh in the state’s interest here. Although filters can be designed that make it impossible to visit non-approved sites, and perhaps special rules could be made for cybercriminals, a court should hesitate to discount the risk of an inmate hacking the filter for nefarious purposes. On the other hand, there are reasons to think that computerizing law libraries would produce a safer prison environment: five computers can be kept in five isolated rooms, whereas prison libraries are generally open to multiple users at a time, and have been the site of several high-profile acts of prison violence.¹⁸³

The essential connection to be drawn here is that these three *Turner* reasonableness factors govern how courts should weigh the third *Mathews* due process factor. The state’s interests in economy and discipline cannot trump the prisoner’s interest in due process absolutely—only insofar as *Turner* deems the balance reasonable. *Turner*’s fourth reasonableness factor, on the other hand, works very much in the prisoner-litigant’s favor, and seemingly necessitates that prisons currently lacking good law libraries be ordered to go digital.

Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation. By the same token, *the existence of obvious, easy alternatives* may be evidence that the regulation is not reasonable, but is an “exaggerated response” to prison concerns. This is not a “least restrictive alternative” test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint. *But if an inmate claimant can point to*

182 *Turner*, 482 U.S. at 90.

183 James Earl Ray, the assassin of Dr. Martin Luther King, Jr., was stabbed twenty-two times and beaten by members of a Black Muslim group while reading lawbooks in the library at Brushy Mountain State Penitentiary in 1981. *See Suspects Named in Ray Stabbing*, BOSTON GLOBE, June 5, 1981. In 1982, Ronald Simmat, an inmate who contributed a weekly column to a Connecticut newspaper, was assaulted after upsetting a fellow inmate for typing too loudly in the library. Samuel G. Freedman, *An Inmate Columnist Fights To Halt Transfer*, N.Y. TIMES, Mar. 16, 1982, at B1. In 1997, members of the Aryan Brotherhood in California slipped a bullet under the prison library door to one another for use in retaliation against an inmate who had assaulted Mafia boss John Gotti, who was paying the Aryan Brotherhood for protection. *Inmate Tells of Gotti Revenge*, NEWSDAY, Apr. 15, 2006, at A13. The same year, rioting inmates set fire to the library of a Virginia prison—another danger that would be obviated by replacing paper resources with digital. *Inmate Is Indicted in Warden’s Stabbing*, DAILY PRESS (Va.), Jan. 17, 1997, at C4. *See also Chavez v. Perry*, 142 F. App’x 325 (10th Cir. 2005) (denying Eighth Amendment claim for failure to provide security for a protective custody inmate after two assaults at prison law library).

*an alternative that fully accommodates the prisoner's rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.*¹⁸⁴

This final factor implicitly reads into the Constitution a requirement that prisons employ new rights-protecting technologies as they become cheap and readily available. When the Court decided *Turner* in 1987, little could it have anticipated the oncoming digital revolution. Far less could it have anticipated the precipitous decline in the startup costs of computers, nor the proliferation of quality legal research websites available to all for free. Rather, when the Court laid down this factor, it had in mind "obvious, easy alternatives" to a Missouri regulation flatly prohibiting inmate marriages without the permission of the prison superintendent that would pose less of a burden on individuals without compromising any security interests.¹⁸⁵

Nevertheless, the conclusion that today this factor requires prisons to facilitate online legal research by inmates is inescapable. The digital revolution represents the greatest achievement in the proliferation of information in human history—it has not only expanded the information readily available to individuals to a truly infinite degree, but it has overtaken society at a historically unparalleled rate. When *Lewis* came down more than a decade ago, it might well have been true that *Bounds* posed a tremendous burden on state resources that in many cases could not be justified; indeed, the District Court's handling of *Lewis* exemplified the enormity—verging on lunacy—of this burden.¹⁸⁶ But in the time since then, society has witnessed an unprecedented technological paradigm shift that now enables states not only to provide prisoners with a boundless reserve of laws and cases, but to do so for a tiny fraction of the price of even the most rudimentary paper law libraries.

184 *Turner*, 482 U.S. at 90–91 (emphasis added) (citations omitted).

185 *Id.* at 98 (pointing to federal regulation that considers "marriage by inmates in federal prison generally permitted, but not if warden finds that it presents a threat to security or order of institution, or to public safety").

186

The microscopically detailed order leaves no stone unturned. It covers everything from training in legal research to the ratio of typewriters to prisoners in each facility. It dictates the hours of operation for all prison libraries statewide, without regard to inmate use, staffing, or cost. . . . The order tells [Arizona Department of Corrections] the types of forms it must use to take and respond to prisoner requests for materials. It requires all librarians to have an advanced degree in library science, law, or paralegal studies. . . . The order goes so far as to dictate permissible noise levels in law library reading rooms and requires the State to "take all necessary steps, and correct any structural or accounting problems."

Lewis v. Casey, 518 U.S. 343, 390 (1996) (Thomas, J., concurring).

The due process analysis, therefore, has irreversibly changed. To the individual inmate, Internet legal resources represent a uniquely superior tool for the defense of private interests, while to the state, they represent a uniquely cost-efficient mechanism for honoring its obligations to prisoners. Filtered Internet access represents the ultimate “obvious, easy alternative[.]” to paper law libraries, and because it can “fully accommodate[.] the prisoner’s rights at *de minimis* cost” to the state in comparison to paper, it is no longer constitutionally excusable to deny it.

iii. Taking It One Step Further

One last due process argument remains: that the Internet is not an acceptable “alternative” to paper law libraries, but is rather so comprehensive and simple to navigate that it is now the constitutionally minimal baseline that states must provide. The first and second *Mathews* factors—“the private interest . . . and the probable value . . . of additional or substitute procedural safeguards”—pull in this direction, but the ultimate analysis turns on *Turner*. Two of the *Turner* reasonableness factors present arguments that potentially lead to this conclusion. The second factor examines whether “other avenues”¹⁸⁷ are left open to prisoners to vindicate their rights, and the fourth asks “if an inmate claimant can point to an alternative that *fully* accommodates the prisoner’s rights at *de minimis* cost to valid penological interests”¹⁸⁸

The needed step is to show that existing prison law libraries are constitutionally inadequate and that only Internet resources can “fully” fill the void. As more and more courts begin citing “blawgs”¹⁸⁹ and other sources only available online,¹⁹⁰ this will be an easier and easier argument to make.

In the meantime, this conclusion can stand on two other grounds. First is the undeniable fact that the Internet is *easier to use* than paper sources. Nearly three-quarters of adults in this country now use the

187 *Turner*, 482 U.S. at 90.

188 *Id.* at 91 (first emphasis added).

189 For more on Legal Research in the Internet Age, see *supra* Part II.D.

190 *See, e.g., Standley v. Dennison*, No. 9:05-CV-1033, 2007 WL 2406909 at *2 (N.D.N.Y. Aug. 21, 2007) (denying an inmate’s claim of due process violations for lack of Internet access even though cases cited in parole hearing judge’s opinion were available only through LexisNexis and Westlaw).

Internet,¹⁹¹ and it is a safe bet that practically all of them would be more comfortable using it than old-fashioned reporters. The Court has repeatedly considered arguments “that inmates are ‘ill-equipped to use’ ‘the tools of the trade of the legal profession,’”¹⁹² but the same can hardly be said about their ability to click the “Criminal Law” links on the home page of most law-related portals or to use the elementary search functions of state statutory and decisional law databases. Such technology is just too good to deny people.

The second possible ground is that the relevant legal knowledge available to prisoners online dwarfs that which can feasibly be made available in prison libraries. *Bounds* was satisfied with North Carolina providing inmates copies of the North Carolina General Statutes, North Carolina Reports (dating back less than two decades), North Carolina Court of Appeals Reports, five volumes of the United States Code, three Federal Court reporters (dating back less than two decades), and eight various other books. The Internet, by contrast, provides thousands of resources, the entire *United States Code*, and the statutes and court decisions of every jurisdiction. Not only might situations arise where these additional resources would be directly valuable (for example, when a state initiates custody termination proceedings against a resident temporarily imprisoned in a different state), but they might also prove to be just as valuable indirectly (for analogizing, or as persuasive authority).¹⁹³

In short, there are ample grounds for rooting a right to Internet access in due process. The only obstacle is the *Lewis* standing requirement. But the grand irony of *Lewis* is that its elaborate and unnecessary repudiation of specific language in *Bounds* actually makes it easy for a crafty litigant to allege actual prejudice to the pursuit of a fundamental right.

191 Benderoff, *supra* note 89, § 3, at 1 (putting figure at 71%); *Wired World*, SEATTLE POST-INTELLIGENCER, Apr. 29, 2006, at E1 (73%).

192 *Bounds v. Smith*, 430 U.S. 817, 826 (1977). See also *Lewis v. Casey*, 518 U.S. 343, 355 (1996) (approving ruling of *Bounds* trial court “that the cost of N.C. Digest and Modern Federal Practice Digest will surpass the usefulness of these research aids.”).

193 It is significant that one of the primary effects of the proliferation of state judicial reporters in the United States, see *supra* Part II.A. on Legal Research in the Early Republic, was encouraging the exchange of ideas between jurisdictions. FRIEDMAN, *supra* note 23, at 243–44.

3. *Life, Liberty, and Property Interests*

In addition to imposing a high threshold for showing standing to sue under *Bounds*, Justice Scalia also felt compelled to limit the precedent's scope. In what was technically dicta,¹⁹⁴ he wrote:

It must be acknowledged that several statements in *Bounds* went beyond the right of access recognized in the earlier cases on which it relied, which was a right to bring to court a grievance that the inmate wished to present. . . . These statements appear to suggest that the State must enable the prisoner to *discover* grievances, and to *litigate effectively* once in court. . . . To demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand permanent provision of counsel, which we do not believe the Constitution requires.¹⁹⁵

"Finally," the Court had to add, "we must observe that the injury requirement is not satisfied by just any type of frustrated legal claim."¹⁹⁶ It turns out that "[n]early all" of the precedents that led up to *Bounds* were only direct appeals or habeas petitions.¹⁹⁷ Only in one case, *Wolff v. McDonnell*,¹⁹⁸ did the Court "extend[] this universe of relevant claims [and then] only slightly, to 'civil rights actions'—i.e., actions under 42 U.S.C. § 1983 to vindicate 'basic constitutional rights.'"¹⁹⁹

The Court decided that the right of access to courts went no further than these precedents. To the extent *Bounds* had suggested otherwise and forced prisons to facilitate claims other than appeals, habeas corpus, or constitutional rights, it was overruled.

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. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional)²⁰⁰ consequences of conviction and incarceration.

194 Steinberger, *supra* note 61, at 417.

195 *Lewis*, 518 U.S. at 354 (citing *Ex parte Hull*, 312 U.S. 546, 547–48 (1941); *Griffin v. Illinois*, 351 U.S. 12, 13–16 (1956); *Johnson v. Avery*, 393 U.S. 483, 489 (1969)).

196 *Id.*

197 *Id.* The direct appeals it cited were: *Douglas v. California*, 372 U.S. 353, 354 (1963); *Burns v. Ohio*, 360 U.S. 252, 253, 258 (1959); *Griffin v. Illinois*, 351 U.S. at 13, 18; *Cochran v. Kansas*, 316 U.S. 255, 256 (1942). The habeas petitions were: *Johnson*, 393 U.S. at 489; *Smith v. Bennett*, 365 U.S. 708, 709–10 (1961); *Ex parte Hull*, 312 U.S. at 547–48.

198 418 U.S. 539 (1974).

199 *Lewis*, 518 U.S. at 354.

200 *Id.* at 355.

Justice Souter specifically dissented from the dictum on the ground that it was not presented by the case before the Court.²⁰¹ But there are more fundamental problems with the Court's intimation than that. For one, it does not necessarily follow from the *Wolff* decision. Second, there are consequences of the *arguably unconstitutional* variety that flow from it.²⁰²

What the Court did not recognize was that by curtailing the rights of prisoners to access information that could assist in vindicating these *arguably fundamental* rights, it actually gave more *pro se* prisoners standing to defeat the actual holding of *Lewis*.

i. *Wolff v. McDonnell* and "Fundamental Constitutional Rights"

In *Lewis*, the Court explains its limitation on the scope of *Bounds* by pointing to its 1974 decision in *Wolff v. McDonnell*.²⁰³ Whereas earlier decisions had only guaranteed prisoners the right to minimally assisted habeas corpus petitions,²⁰⁴ *Wolff* extended their entitlement to assistance with civil rights actions.²⁰⁵ From this, *Lewis* concludes that the Constitution only ensures prisoners the meaningful right to litigate state appeals, habeas petitions, and § 1983 actions. *Wolff's* own reasoning, however, would quite clearly preclude such a simplification:

[W]hile it is true that only in habeas actions may relief be granted which will shorten the term of confinement, it is more pertinent that both actions serve to protect basic constitutional rights. The right of access to the courts . . . 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.²⁰⁶

201 *Id.* at 403–04 (Souter, J., with Ginsburg, Breyer, JJ., concurring in part, dissenting in part).

202 *Compare* *Marshall v. Knight*, 445 F.3d 965, 969 (7th Cir. 2006) (finding sufficient allegations of injury from claim that “non-existent” access to law library caused prisoner “to lose custodial credit time that would have shortened his incarceration”), *with* *Shane v. Fauver*, 209 F. App'x. 87 (3d Cir. 2006) (denying redress to a prisoner who could link shortcomings in his prison law library to actual injury in a parole board hearing).

203 418 U.S. 539 (1974).

204 *Johnson v. Avery*, 393 U.S. 483, 490 (1969) (“[U]nless 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 in issue, barring inmates from furnishing such assistance to other prisoners.”).

205 *Wolff*, 418 U.S. at 579–80.

206 *Id.* at 579 (citation omitted).

Now, strictly speaking, it would be logically consistent with this language to extend prisoners' right of access to comprehend the very gamut of "shareholder derivative actions to slip-and-fall claims"²⁰⁷ that *Lewis* sarcastically rejected. Nothing in *Wolff* precludes the possibility of further broadening the rights of prisoners under the Due Process Clause in a later case, and the language in *Lewis* claiming as much cannot be justified. More to the point, however, *Wolff* gives prisoners the right of assisted access to courts whenever "violations of fundamental constitutional rights" are at stake—and habeas petitions and § 1983 actions are hardly the only such situations.

Because the Constitution always stands potentially to give prisoners at least arguable new rights,²⁰⁸ a commonsensical argument is to be had that, a priori, it is impossible to know what case or statute will prove essential to a prisoner's case. Theoretically, any single precedent may prove relevant to the correct interpretation of the Constitution. But it is unnecessary to make such a stretch, for as Justices Thomas and Scalia recently made clear, *state law* often voluntarily preserves the rights of prisoners to certain fundamental interests;²⁰⁹ wherever this is the case, the principles in *Wolff* dictate that by doing so the state preserves its right to assistance in protecting these interests.

In other words, the post-*Lewis* decay of prison law libraries has ironically given standing to even more convicts to vindicate those rights that the state chooses not to strip them of. *Perhaps* when *Lewis* was decided, a state could reasonably have decided that while it

207 *Lewis v. Casey*, 518 U.S. 343, 355 (1996).

208 *Wolff* expressly leaves room for liberal arguments for expanding prisoners' property rights. 418 U.S. at 557–58. Family rights are also a promising avenue. See *Turner v. Safley*, 482 U.S. 78, 96 (1987) (finding "a constitutionally protected marital relationship in the prison context"); cf. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 32–33 (1981) (concluding that indigent prisoner's due process rights were not violated by refusal to appoint attorney in child custody termination hearing, but only after finding that convict had chosen without cause not to contest the termination proceeding and that "the presence of counsel for Ms. Lassiter could not have made a determinative difference"). *Contra* *Loden v. Hayes*, 208 F. App'x. 356 (5th Cir. 2006) (denying a *Bounds* claim for a paralegal's assistance in an inmate's divorce); *Woods v. Purington*, 117 F. App'x. 616 (9th Cir. 2004) (action for brother's wrongful death). Of course, a court should always avoid ruling on an undecided constitutional question unless squarely presented by the case. See generally Gilbert Lee, Comment, *How Many Avoidance Canons Are There After Clark v. Martinez?*, 10 U. PA. J. CONST. L. 193 (2008).

209 *Overton v. Bazzetta*, 539 U.S. 126, 140 (2003) (Thomas, J., with Scalia, J., concurring) ("Whether a sentence encompasses the extinction of a constitutional right enjoyed by free persons turns on state law, for it is a State's prerogative to determine how it will punish violations of its law, and this Court awards great deference to such determinations.").

would not directly deny convicts certain liberty or property interests, in the interest of economy it would deny them the resources to defend them meaningfully. Today, however, the state does not necessarily have to make such a decision; indeed, today, the state necessarily has *not* to make it, because the Internet renders the dilemma between economy and due process false. The digital revolution has left the state the most “obvious, easy alternative[]”²¹⁰ to traditional libraries conceivable, one that is far easier to use, effectively comprehensive, and free.

ii. Standing to Claim a Fundamental Right

“Fundamental” is a purposely vague word. A clever litigant could make a host of non-frivolous arguments that certain state law rights are “fundamental.” This Part suggests a promising avenue for argument.

A state-created liberty interest in avoiding harsh prison conditions, which every prisoner has standing to claim, is fundamental. The Eighth Amendment prohibits states from inflicting “cruel and unusual punishments,”²¹¹ but states are of course free to restrict their brutality further through voluntary legislation. Some of these laws vest prisoners with “liberty” interests—an ironic concept the Supreme Court elucidated in 2005 with *Wilkinson v. Austin*.²¹²

When a prisoner challenges his confinement for violating a state-created liberty interest in less restrictive conditions, “the touchstone of the inquiry . . . is not the language of regulations regarding those conditions but the nature of those conditions themselves ‘in relation to the ordinary incidents of prison life.’”²¹³ In other words, states give prisoners liberty interests in avoiding restrictions that “impose an atypical and significant hardship within the correctional context,”²¹⁴ and it should be obvious that this interest is fundamental in any meaningful sense of the word.

The question *Wilkinson* begs with respect to *Lewis v. Casey*, however, is how a prisoner can hope to challenge conditions that are “atypical” without having access to information on what prison conditions are “typical.” There are two distinct components of this claim.

210 *Turner v. Safley*, 482 U.S. 78, 90 (1987).

211 U.S. CONST. amend. VIII. See generally Symposium, *Cruel and Unusual Punishment: Litigating Under the Eighth Amendment*, 11 U. PA. J. CONST. L. (forthcoming 2009).

212 *Wilkinson v. Austin*, 545 U.S. 209 (2005) (Kennedy, J.).

213 *Id.* at 223 (quoting *Sandin v. Conner*, 515 U.S. 472 (1995)).

214 *Id.* at 224.

A *pro se* prisoner has standing to obtain the *Wilkinson* opinion as well as cases that challenge local prison conditions. This could be done on the Internet, through DVDs, or with traditional lawbooks, provided that they have been updated since 2005. But a prisoner should also have standing to do substantive (in other words, not strictly *legal*) research on typical prison conditions, and the most effective and least expensive way to accommodate this would clearly be through the Internet.

Thus, upon a simple allegation that denial of Internet access is impeding an inmate's naked claim that his conditions "impose an atypical and significant hardship" on him, he can show standing to defeat *Lewis*. With a little more thought, surely countless more claims of "fundamental" rights could be at least non-frivolously conceived²¹⁵—which by a proper reading of the caselaw is enough to create standing.

D. First Amendment Petition Clause²¹⁶

In addition to the Equal Protection and Due Process Clauses, the Bill of Rights is read to contain one more provision protecting the right of access to courts: the First Amendment. Its phrasing even suggests that the right was presupposed²¹⁷ in the main body of the Constitution: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."²¹⁸ This right comprehends not only the freedom to lobby Congress and the Executive, but also the right of access to courts.²¹⁹

²¹⁵ See cases cited *supra* note 202.

²¹⁶ The scope of this Comment is the right of access to courts, lodged in the Petition Clause, but it is well worth noting that banning Internet access in prisons also implicates First Amendment Speech and Press Clauses. In *Clement v. Cal. Dep't of Corr.*, 364 F.3d 1148 (9th Cir. 2004), a prison regulation that banned inmates from receiving printouts of websites in the mail was found to violate the First Amendment rights of the prisoners. The Court found that the Department of Correction's regulation failed to meet the first *Turner* reasonableness factor "because it did not articulate a rational or logical connection between its policy" and its putative concern that web pages could have coded messages inserted in them by the mailer. *Id.* at 1152. And if the day comes that prisoners are granted filtered Internet access, there are even grounds for arguing that the speech rights of the Internet Service Providers themselves are violated by this filtration. See Randolph J. May, *Infringing Free Speech in the Broadband Age: Net Neutrality Mandates*, ENGAGE, Oct. 2006, at 178.

²¹⁷ An idea elaborated on in Part III.E, *Article IV Privileges and Immunities Clause, infra*.

²¹⁸ U.S. CONST. amend. I (emphasis added).

²¹⁹ See *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("Certainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition.").

Like other First Amendment rights, however, this right is not absolute. “Just as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition.”²²⁰ Hence, the Prison Litigation Reform Act of 1995 (enacted before *Lewis v. Casey* was decided) created a facially legitimate²²¹ “three strikes” provision that closes the doors of federal courthouses to prisoners who file three “frivolous” civil rights actions.²²²

Since the passage of the PLRA and the decision in *Lewis*, however, the Court decided *BE & K Construction*,²²³ where it found a First Amendment violation in the application of the National Labor Relations Act to order a corporation to stop pursuing unmeritorious, but arguable, lawsuits against labor unions. Justice O’Connor’s reasoning—which was joined by every conservative member of the Court as then comprised—is worth quoting at length:

First, even though all the lawsuits in this class are unsuccessful, the class nevertheless includes a substantial proportion of all suits involving genuine grievances because *the genuineness of a grievance does not turn on whether it succeeds*. Indeed, this is reflected by our prior cases which have protected petitioning whenever it is genuine, not simply when it triumphs.²²⁴ Nor does the text of the First Amendment speak in terms of successful petitioning—it speaks simply of “the right of the people . . . to petition the Government for a redress of grievances.”

220 *Bill Johnson’s Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (citations omitted).

221 *See, e.g.*, *Johnson v. Daley*, 339 F.3d 582, 591–93 (7th Cir. 2003) (en banc) (Easterbrook, J.) (explaining why the PLRA survives equal protection and due process rationality review). For more on the PLRA’s fate in light of the equal protection and due process review, see also *Jackson v. State Bd. of Pardons & Paroles*, 331 F.3d 790 (11th Cir. 2003), *Walker v. Bain*, 257 F.3d 660 (6th Cir. 2001), *Fouk v. Charrier*, 262 F.3d 687 (8th Cir. 2001), *Boivin v. Black*, 225 F.3d 36 (1st Cir. 2000), *Hadix v. Johnson*, 230 F.3d 840 (6th Cir. 2000), *Madrid v. Gomez*, 190 F.3d 990 (9th Cir. 1999), and *Collins v. Algarin*, 1998 WL 10234 (E.D. Pa. 1998), *aff’d by an equally divided court sub nom Collins v. Montgomery City Bd. of Prison Inspectors*, 176 F.3d 679, 686 (3d Cir. 1999) (en banc), all of which were cited in *Johnson*, 339 F.3d at 583.

222 28 U.S.C. § 1915(g) (2000) (“In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding 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.”).

223 *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002) (O’Connor, J., with Rehnquist, C.J., Scalia, J., Kennedy, J., Thomas, J.).

224 *Id.* at 532 (citing *Prof’l Real Estate Investors v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 58–61 (1993) (“[P]rotecting suits from antitrust liability whenever they are objectively or subjectively genuine.”); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965) (shielding from antitrust immunity any “concerted effort to influence public officials”)).

Second, even unsuccessful but reasonably based suits advance some First Amendment interests. Like successful suits, unsuccessful suits allow the “public airing of disputed facts,” and raise matters of public concern. *They also promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around.* Moreover, the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force.²²⁵

If the First Amendment protects the right of access to courts in the contexts of labor and antitrust disputes, then there is no principled reason to refuse it to *pro se* prisoners who have been systematically denied the tools to articulate a sufficient legal complaint. If anything, there is reason to think that the more information about the legal system and civil rights that prisoners have access to, the better we all will be, for *Bounds* made clear that

[a]s this Court has “constantly emphasized,” habeas corpus and civil rights actions are of “fundamental importance . . . in our constitutional scheme” because they directly protect our most valued rights. . . . [T]he prisoner petitions here are the first line of defense against constitutional violations. The need for new legal research or advice to make a meaningful initial presentation to a trial court in such a case is far greater than is required to file an adequate petition for discretionary review.²²⁶

There are two arguments here. The first looks to the policy underlying the First Amendment in concluding that society will be served by encouraging its prisoners to have every resource available to vindicate their rights, because doing so will lead to a more open marketplace of legal ideas and, possibly, to a trickle-up in progressive jurisprudence. This is most properly an argument to bring to Congress and to state legislatures, but it is significant that the most conservative justices appeared to be paying it credence in *BE & K*.

²²⁵ *Id.* at 532 (emphasis added) (citations omitted). Even though Justice O’Connor decided the case on narrow statutory textual grounds, it is particularly significant that Justice Scalia’s concurring opinion, joined by Justice Thomas, added that, “in a future appropriate case, we will construe the [NLRA] in the same way we have already construed the Sherman Act: to prohibit only lawsuits that are *both* objectively baseless *and* subjectively intended to abuse process.” *Id.* at 537 (Scalia, J., with Thomas, J., concurring).

²²⁶ *Bounds v. Smith*, 430 U.S. 817, 827–28 (1977) (emphasis added); *see also id.* at 826 n.14 (“A source of current legal information would be particularly important so that prisoners could learn whether they have claims at all, as where new court decisions might apply retroactively to invalidate convictions.”). *Lewis*, however, expressly disavowed this footnote. *Lewis v. Casey*, 518 U.S. 343, 354 (1996). Of course, for a *non-prisoner* to claim standing to sue from the fact that prisoners are denied Internet access, as the *Bounds* dicta suggests is conceivable, would require not only showing actual harm but also the further uphill battle of causally linking this alleged injury to the prisoner’s deprivation of Internet access. Such a plaintiff would have to show, in other words, not only that being denied the Internet impeded some particular convict’s pursuit of a substantial legal claim, but that the resulting gap in jurisprudence negatively affected his own pursuit of a right.

The second argument is that the First Amendment rights of some prisoners are actually being violated (or, at least, unconstitutionally chilled) by the combined effect of *Lewis* and the Prison Litigation Reform Act. Every time a prisoner's subjectively genuine grievance is dismissed as frivolous, or is discouraged from being filed for fear of being branded frivolous, he suffers the actual harm of having a "strike" against his right of access to courts.²²⁷ By definition, there is a gray area between "frivolous" and "unmeritorious, but arguable in good faith." Because *Lewis* denies prisoners the "abstract, freestanding right to a law library or legal assistance,"²²⁸ an inevitable consequence is that individual convicts lose the meaningful ability to know the difference, and face the Hobson's choice of risking a PLRA strike²²⁹ or letting the violation pass. Whenever this happens, the First Amendment is violated—which in and of itself suffices to give the deprived prisoner standing to sue under *Bounds*.

The tragedy of *Lewis*, of course, is that prisons can use it to deprive this prisoner of any knowledge that he even has standing. There is no easy way around this, but when the case arises where a prisoner risks the strike on his record to challenge this violation of his First Amendment rights, he will have a real chance to turn *Lewis* on its head. In such a case, a conservative court might be more likely to find the PLRA "three strikes" provision unconstitutionally vague²³⁰ or void as applied than to order the installation of Internet connections in prisons. Perhaps in that case, Congress could finally be persuaded that Internet in prisons can fairly be used to reduce the overall burden that *pro se* prisoner litigation places on the federal courts.

227 Joseph L. Gerken, *Does Lewis v. Casey Spell the End to Court-Ordered Improvement of Prison Law Libraries?*, 95 LAW LIBR. J. 491, 508–11 (2003).

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

229 See, e.g., *Sanders v. Klinger*, 100 F. App'x. 957 (5th Cir. 2004) (counting second strike for a frivolous *Bounds* claim).

230 See, e.g., *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.").

E. Article IV Privileges and Immunities Clause

Compelling arguments have long been made²³¹ that the right of access to courts is implicit in the very concept of ordered liberty.²³² As Justice Moody, for example, explained, “[t]he right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.”²³³ As such, it would follow that the right is one of the inalienable freedoms of citizens implied in the Privileges and Immunities Clause of Article IV, and is presupposed (and, hence, not specifically enumerated) in the Bill of Rights.

Courts have spoken of *pro se* prisoners’ right to legal research in such flowery terms.²³⁴ A right to state-supplied Internet access in prison, however, was obviously not contemplated in the ratification of Article IV of the Constitution, and it would require a truly profound generational ignorance to argue that any such entitlement is inherent in the concept of ordered liberty. At most, the Privileges and Immunities Clause can be used to compel the few states that voluntarily offer DVD-based research to ensure that non-resident inmates are provided these resources to the same degree as residents.²³⁵

Instead, the Privileges and Immunities Clause can most compellingly be used to argue morally against the temptation to reduce one class of citizens’ access to courts with further decisions like *Lewis*. All one needs to do is point to the Court’s infamous *Dred Scott* decision, which in no small part was responsible for the Civil War,²³⁶ and was ul-

231 See, e.g., *BE & K Constr. Co. v. NRLB*, 536 U.S. 516, 524–25 (2002) (“[T]he right is implied by ‘[t]he very idea of a government, republican in form.’” (quoting *United States v. Cruikshank*, 92 U.S. 542 (1876))); *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 403 (1856) (discussing the right of a citizen of the United States to sue in court).

232 The constitutional standard Justice Cardozo first articulated in *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

233 *Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907).

234 *Lehn v. Holmes*, 364 F.3d 862, 865–66 (7th Cir. 2004) (“Without this right, all other rights a prisoner may possess are illusory.” (quoting *Corgain v. Miller*, 708 F.2d 1241, 1247 (7th Cir. 1983)).

235 Cf. *Supreme Ct. of N.H. v. Piper*, 470 U.S. 274, 281 (1985) (“We believe that the legal profession has a noncommercial role and duty that reinforce the view that the practice of law falls within the ambit of the Privileges and Immunities Clause.”). See generally *Chambers*, 207 U.S. at 149 (“Different States may have different policies, and the same State may have different policies at different times. But any policy the State may choose to adopt must operate in the same way on its own citizens and those of other States.”).

236 See, e.g., Abraham Lincoln, “House Divided” Speech (June 16, 1858), in MICHAEL F. HOLT, *THE FATE OF THEIR COUNTRY: POLITICIANS, SLAVERY EXTENSION, AND THE COMING OF THE CIVIL WAR* 146–47 (2004) (“Either the *opponents* of slavery, will arrest the further spread of it, and place it where the public mind shall rest in the belief that it is in the

timately was overruled by Amendment. Chief Justice Taney's now universally rejected reasoning seems easily applicable to the plight of convicts today, starved of legal knowledge in the wake of *Lewis* and punished for bringing unsophisticated claims under the Prison Litigation Reform Act. Deciding whether the descendants of African slaves are "constituent member[s] of this sovereignty,"²³⁷ his answer was unapologetic.

We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them. It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws.²³⁸

Hence, the Court concluded, the dominant race of citizens validly denied the subjugated race the privileges and immunities of citizenship in framing the Constitution—for purposes of the issue in *Dred Scott*, the right to access to courts. In light of the Nation's prompt, righteous, and spectacularly bloody rejection of this logic, it would hardly be "judicial activism" to approve the modernization of another subjugated class's foundational privilege and immunity.

IV. CONCLUSION

Since *Lewis* came down, our Nation has turned a digital corner. There is no going back: the Internet is easier to navigate, less expensive to use, and more comprehensive and timely than any paper library could ever be. The paradigm shift has made us all more productive contributors to society and has opened our society up in ways that were still hard to imagine in 1996. The relative superiority of the

course of ultimate extinction; or its *advocates* will push it forward, till it shall become alike lawful in *all* the States, *old* as well as *new*—*North* as well as *South*. . . . Let anyone who doubts, carefully contemplate that now almost complete legal combination—piece of *machinery* so to speak—compounded of the Nebraska doctrine, and the *Dred Scott* decision."); William H. Seward, "Irrepressible Conflict" Speech (Oct. 25, 1858), *in id.* at 154 ("Under the protection of the Judiciary, [the slaveholding class] will, on the principle of the *Dred Scott* case, carry Slavery into all the Territories of the United States now existing, and hereafter to be organized.").

²³⁷ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404 (1856).

²³⁸ *Id.* at 404–05.

Internet over traditional media is only going to grow more acute with time, and it no longer stretches the imagination to envision a legal world where paper resources are gone the way of the abacus. The Internet Revolution has only left one segment of our society behind: prisoners, who ironically are those who have the most to gain from the knowledge freely available thereon.

The Constitution, mercifully, gives us the tools to level the playing field. Although all three cases to raise the argument have failed, the Eighth Amendment, Equal Protection, Due Process, the First Amendment, and the Article IV Privileges and Immunities Clause all point in the same direction: towards opening the portals of legal research to those we lock behind bars. In so doing, we can save public money, provide an extra layer of procedural fairness to the criminal justice system, and give inmates the opportunity to rehabilitate themselves through computer literacy and the betterment that inherently flows when one learns law. In not so doing, we squander resources, make a mockery of justice, and abandon hope for the class of society most in need of our guidance and benevolence.