After Reaching the Courthouse Door: Why Lack of Affirmative Assistance Post-Pleading Violates Prisoners' Access to Courts Right

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"Meaningful" access to the courts is a fundamental right under the Constitution's Due Process Clause. But for incarcerated persons, this access is severely limited. The Supreme Court has thus required states to provide prisoners with legal assistance for presenting complaints of civil rights violations and challenges to confinement. Because incarcerated individuals often represent themselves pro se, states often have fulfilled this constitutional duty by providing proper law libraries or legal assistance programs. However, the Supreme Court's decision in Lewis v. Casey *severely curtailed prisoners' right of access, disclaiming the notion that states must enable prisoners to "litigate effectively once in court." The decision has created a circuit split about the extent of a state's obligations to incarcerated persons after a complaint has survived the pleading stage. While some circuits have found the right of access to include "affirmative assistance" after the pleading stage, others have required that the state merely not engage in "active interference" with the plaintiff's case without mandating that the state facilitate access. This Note argues that lack of affirmative assistance directly violates prisoners' due process right to access the courts. Successful claims often depend on complying with legal technicalities that an incarcerated individual would not know about without affirmative assistance. Therefore, lack of affirmative assistance after the pleading stage causes meritorious lawsuits to fail. To rectify the disparity, this Note proposes reconciling* Lewis*' existing framework with the need to provide post-pleading stage assistance by introducing the "legal information vs. legal advice" distinction: states must be required to furnish*

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access to legal information after the pleading stage but are not required to provide legal advice. This dichotomy has already become commonplace in thirty-eight states that assist non-incarcerated pro se parties in civil actions, and should similarly apply to the prisoner litigation context.

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INTRODUCTION

"A prison inmate's right of access to the courts is the most fundamental right he or she holds. 'All other rights of an inmate are illusory without it . . .'"[1]

"[N]o one will ever find out."[2] Those were the last words Alan Brooks heard, struggling to breathe as a corrections officer choked him in the prison cell.[3] As Brooks fell to the floor, other officers began to stomp on his back and neck.[4] Brooks drifted in and out of consciousness, as guards placed him in leg shackles and slammed him against the cell wall.[5] All because Brooks took "too long" to end a phone call.[6]

The corrections officer was right. Far too often, "no one will ever find out" about the rampant violence that transpires behind bars.[7] While the officer's actions are a microcosm of the abuse that occurs in prisons every day, his words explain why this abuse has proliferated. Prison authorities' use of excessive force has become emblematic of the American carceral experience.[8] Moreover, accountability is virtually non-existent, partially due to the pervasive "culture of cover-ups" for officers' misconduct.[9] Prison

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

2. Brooks v. Kyler, 204 F.3d 102, 104 (3d Cir. 2000) (internal quotation marks omitted).

3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.*

7. *See, e.g*, Trenten Gibson, *Reasons for Increased Violence in Jails/Prisons*, FLA. DEP'T L. ENF'T, 1, 4 (2019) (finding that violence in prison and jails is widely underreported).

8. *See* Lauren-Brooke Eisen, *The Violence Against People Behind Bars That We Don't See*, TIME (Sept. 1, 2020), https://time.com/5884104/prison-violence-dont-see/ [https://perma.cc/2YFG-2PDF] (examining the use of excessive force that has become an "everyday occurrence" for incarcerated persons).

9. *See* Joseph Neff et al., *How a 'Blue Wall' Inside New York State Prisons Protects Abusive Guards*, MARSHALL PROJECT (May 22, 2023), https://www.themarshallproject.org/2023/05/22/new-york-prison-corrections-officer-abuse-cover-up [https://perma.cc/A4FX-AZ6S]. The culture of cover-ups is known as the "blue wall" and involves corrections officers conspiring with one another to lie to investigators following allegations of abuse. *See id.*; Lauren McGaughy, *'Culture of cover-up:' Warden Forced to Retire From Prison Where Whistleblower Says Teen Inmates Abused*, DALL. MORNING NEWS (Mar. 7, 2018), https://www.dallasnews.com/news/crime/2018/03/07/culture-of-cover-up-warden-forced-to-retire-from-prison-where-whistleblower-says-teen-inmates-abused/ [https://perma.cc/FS96-BM6T] (highlighting that prison staffers are discouraged from reporting incidents of officers' abuse toward incarcerated persons and will be found to be disloyal if they make such complaints). Moreover, many correctional officers wield an "us against them mentality" with respect to incarcerated people. Diana D'Abruzzo, *'I Can Kill You In Here*

systems' internal grievance systems are of no consolation, as prisoners'[10] challenges are often nothing more than a *fait accompli*: incarcerated individuals often must report their complaints to the very same guards who abused them.[11] In response, officers often will retaliate by filing false assault charges against those who complain and by sending them to solitary confinement.[12] In effect, this consistent reprisal blocks any system of liability, while fueling the cycle of intimidation and fear.[13] To the disillusionment of many, corrections officers seem "untouchable."[14] The question this system poses then becomes, "who will watch the watchers?"[15]

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and No One Would Know It', ARNOLD VENTURES (Aug. 23, 2020), https://www.arnoldventures.org/stories/i-can-kill-you-in-here-and-no-one-would-know-it [https://perma.cc/DZG4-52SX]. This no-accountability mentality has emboldened officers to threaten lives; one officer, for example, told an incarcerated person, "I can kill you in here and no one would know it." *Id.*

10. In the interest of brevity, the author has used the term "prisoner" because it has been found to be "considerably less fraught" than other dehumanizing terms commonly used to refer to incarcerated people (e.g., "felon," "offender," etc.). Akiba Solomon, *What Words We Use — and Avoid — When Covering People and Incarceration*, MARSHALL PROJECT (Apr. 12, 2021), https://www.themarshallproject.org/2021/04/12/what-words-we-use-and-avoid-when-covering-people-and-incarceration [https://perma.cc/5QP4-ZPWD]. The *Columbia Journal of Law Social Problems* generally recommends that authors use human-centered language (e.g., "incarcerated person," "incarcerated individual," etc.) when referring to people impacted by the criminal legal system, rather than terms that make a person's involvement with the system the defining feature of their identity (e.g., "convict," "inmate," etc.).

11. *See* Alysia Santo & Joseph Neff, *We Spent Two Years Investigating Abuse by Prison Guards in New York. Here Are Five Takeaways*, MARSHALL PROJECT (May 22, 2023), https://www.themarshallproject.org/2023/05/22/new-york-prison-corrections-officer-discipline-findings#:~:text=A%20culture%20of%20cover%2Dups,accusing%20prisoners%20of%20assaulting%20them [https://perma.cc/4KAP-CLCA] (finding that prison guards often conspire with one another to conceal violent assaults against incarcerated persons through lying to investigators, on official reports, and subsequently filing complaints accusing prisoners of assaulting them instead).

12. *Id.*

13. *See Disparate Advocates Tell Congress to Fix Law That Silences Prisoner Abuse*, ACLU (Nov. 8, 2007), https://www.aclu.org/press-releases/disparate-advocates-tell-congress-fix-law-silences-prisoner-abuse [https://perma.cc/6ZTJ-V9RX]; James E. Robertson, *"One of the Dirty Secrets of American Corrections": Retaliation, Surplus Power, and Whistleblowing Inmates*, 42 U. MICH. J.L. REFORM 611, 613 (2009) (finding that up to 70.1% of inmates who filed grievances suffered retaliation thereafter).

14. Maeve Bannister, *Ex-guard's Abuse and 'Open Secret' Among Prison Officers*, CANBERRA TIMES (Oct. 30, 2023), https://www.canberratimes.com.au/story/8405422/ex-guards-abuse-an-open-secret-among-prison-officers/ [https://perma.cc/AJ5F-TBH5]; *see also* Santo & Neff, *supra* note 11 (detailing how corrections officers' powerful unions protect them from disciplinary action).

15. David Isenberg, *Quis Custodiet Ipsos Custodes?* Cato Inst. (May 31, 2010) https://www.cato.org/publications/commentary/quis-custodiet-ipsos-custodes [https://perma.cc/CL5L-7RRV] (translating the famous Latin expression "Quis custodiet ipsos custodes?" to "Who will watch the watchers?").

For the few undeterred prisoners, such as Jojo Ejonga, their only hope for keeping guards, or "watchers," accountable lies with the judiciary: "It is crazy while y'all got me sick, torture me in [solitary confinement], I grieve y'all, then y'all want to write me up. This is intimidation and harassment, let the [grievance coordinator] know, *I will see her in court*."[16] As long as penal institutions do not have an adequate system of checks and balances in place, litigation is the only means prisoners have to hold corrections officers accountable. Their ability to pursue lawsuits, however, is inherently restricted by incarceration. Every aspect of an incarcerated person's life, "eating, sleeping, dressing, washing, working . . . are all done under the watchful eye of the State."[17] Filing a judicial claim is no different. Because incarcerated individuals must therefore depend on the state to file civil complaints, the Supreme Court has imposed upon the states certain duties to assure prisoners the right to present their grievances to the courts. Specifically, states must furnish prisoners with affirmative legal assistance for civil rights claims.[18]

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16. Christopher Blackwell, *The Prison Grievance System Is Broken and Unjust*, PROGRESSIVE MAG. (June 19, 2021) https://progressive.org/latest/prison-grievance-system-unjust-blackwell-210618/ [https://perma.cc/7JXQ-NL29] (emphasis added). Grievance coordinators will often block the filing of grievances: "they can say an issue is non-grievable, that the request needs a rewrite, that the grievance covers too many issues (regardless if they're correct), and, most recently, they can reject COVID-19-related grievances because the guidelines for prison sanitation are handed down from above." *Id.* Moreover, "grievance coordinators will often hand out infractions for "abusing" the program in order to intimidate prisoners from filing further complaints." *Id.*; *cf.* J. MICHAEL KEATING, JR. ET. AL., CTR. FOR CORRECTIONAL JUST., SEEN BUT NOT HEARD: A SURVEY OF GRIEVANCE MECHANISMS IN JUVENILE CORRECTIONAL INSTITUTIONS 4 (1976) (arguing that the time and resources required to pursue a case through the judicial system, in addition to the difficulty in enforcing court orders in "closed institutions," has bred incarcerated persons' disillusionment with the courts serving as "the primary vehicle for resolving [their] grievances").

17. Preiser v. Rodriguez, 411 U.S. 475, 492 (1973).

18. *See, e.g.*, Douglas v. California, 372 U.S. 353, 356 (1963) ("In the federal courts . . . an indigent must be afforded counsel on appeal whenever he challenges a certification that the appeal is not taken in good faith."); *see infra* Part I.A. It is worth noting the distinction between the fundamental constitutional right of access to courts and the Sixth Amendment's right to counsel for criminal defendants. For the purposes of this Note, the right to access the courts for prisoners centers primarily on civil rights claims, such as Section 1983 cases, inhumane conditions of confinement, and cruel and unusual punishment allegations. The Sixth Amendment guarantees criminal defendants an attorney at trial, and common law has extended that right to direct appeal. *See Douglas*, 372 U.S. at 356. Here, whether the right of access to courts includes access to legal resources is of lesser concern for two reasons. First, criminal defendants are entitled to the most effective form of defense—an attorney. Their access to legal materials is less pertinent because their attorney has access to legal materials, is much better versed in the law, and can produce a more compelling defense than the defendant could. When criminal

By properly enforcing this fundamental right at all stages of a prisoner's litigation, the judiciary can affect a shift in the status quo: someone will find out.

Despite the right existing as a vehicle to hold corrections officers accountable, its potential for change has been judicially stymied given confusion regarding the right's scope. In 1976, the Supreme Court's decision in *Bounds v. Smith* obligated states to institute a law library or legal assistance program such that a prisoner's access to the courts be "adequate, effective, and meaningful."[19] Twenty years later, however, the Court narrowed *Bounds*' rights-protective ruling in *Lewis v. Casey*.[20] It held that although incarcerated persons retain an access-to-courts right, the states are the final arbiters in determining *what type* of affirmative assistance is necessary.[21] Importantly, the Court asserted that states need not enable prisoners to "*litigate effectively* once in court."[22]

Prisons' reactions to *Lewis* were swift. Many began disbanding their law libraries and selling their legal materials on eBay.[23] Others "dumped hundreds of law books into the prison courtyard[,]" leaving the library shelves stripped bare.[24] Incarcerated persons filing lawsuits pro se have been left to navigate complex and unfamiliar legal terrain without adequate resources.[25] Even more daunting, their legal challenges are

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defendants represent themselves pro se, the extent of access to legal materials becomes much more relevant, but a court granting such a conferral of control is very rare. *See* Jona Goldschmidt & Don Stemen, *Patterns and Trends in Federal Pro Se Defense: An Exploratory Study*, 8 FED. CTS. L. REV. 81, 91–92 (2015) (finding that over a fifteen-year period, pro se criminal defendants represented 0.2% of all felony criminal cases). Second, most criminal defendants are not in prison when they are entitled to an attorney. Therefore, their access to legal materials is not inherently restricted due to incarceration, which this Note solely focuses on.

19. 430 U.S. 817, 822, 828 (1977).

20. 518 U.S. 343, 366–67 (1996).

21. *See id.*

22. *Id.*

23. *See* 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, 92 (2006) ("In Idaho, the department of corrections sold multiple law libraries for the price of one hundred dollars plus the cost of shipping over the eBay auction website.").

24. *Id.*

25. *See* Richard H. Frankel & Alistair E. Newbern, *Prisoners and Pleading*, 94 WASH. U.L. REV. 899, 902 (2017).

against the federal or state government, whose counsel "knows the lay of the land."[26]

Providing incarcerated persons access to legal resources becomes even more crucial when considering the rate at which corrections officers try to prevent prisoners from filing lawsuits entirely. William Cramer, for instance, is incarcerated at State Correctional Institution Dallas ("SCI Dallas").[27] In April 2022, he requested access to the law library to conduct legal research for a motion to reopen discovery in a pro se civil rights action.[28] His request was denied.[29] When Mr. Cramer inquired about the decision, prison officials threatened him:

> [The Program Review Committee] has decided that you'll never be allowed to use the law library because we know that you like to sue. . . . You brought this upon yourself with filing lawsuits. We here at SCI Dallas don't give a f*** [sic] about your so-called constitutional rights, so protest all you want. . . . Take it on the chin, Mr. Cramer, and go about your business before we make your life a living hell.[30]

Cramer's story was one of many illustrating the power asymmetries that undergird this system of redress. Of the 26,458 civil rights claims brought by prisoners in 2022, over 92% were filed pro se and 80% of pretrial decisions ruled in favor of the government-defendant.[31] Every so often, however, incarcerated plaintiffs beat the odds. They file a complaint alleging a civil rights violation, the government responds with a motion to dismiss, and the judge ultimately denies the government's motion, allowing the

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26. Frankel & Newbern, *supra* note 25, at 901. Procedural legal obstacles, in addition to adequate resources in prisons, have led Professor Michael Martin to deem pro se status as "lethal" to a prisoner's chance of success in a civil rights action. Michael W. Martin, *Foreword: Root Causes of the Pro Se Prisoner Litigation Crisis*, 80 FORDHAM L. REV. 1219, 1227 (2011).

27. *See* Cramer v. Bohinski, 2023 WL 2385133, at *1 (M.D. Pa. Mar. 6, 2023).

28. *See id.*

29. *See id.*

30. *Id.*

31. *See Federal Judicial Caseload Statistics*, tbl.C-2, U.S. COURTS (Mar. 31, 2022), https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2022/03/31 [https://perma.cc/S43G-K8H2]. There are separate categories for prisoner civil rights claims and prison conditions claims. *Id.* Both types of suits are § 1983 civil rights actions. *See* McCarthy v. Bronson, 500 U.S. 136, 140 (1991) (explaining that challenges to conditions of confinement may properly be brought as § 1983 suits). Their numerical values have been combined for clarity.

case to proceed. Most plaintiffs would feel relieved. But in some states, incarcerated persons have found that once their complaint has been deemed meritorious, they are no longer entitled to the affirmative assistance, such as access to a law library, that helped them file the complaint in the first place. In other jurisdictions, prisoners still retain the right to such assistance even after the court denies the government's motion to dismiss.

The circuit split between the Ninth Circuit and the Third and Seventh Circuits exemplifies this tension. The Ninth Circuit has found that the right to affirmative assistance stops after the pleading stage.[32] Reasoning that Supreme Court jurisprudence has largely focused on the ability of incarcerated persons to *file* their complaints, the Ninth Circuit has held that doing so is equivalent to the prisoner having "accessed" the courts entirely.[33] The Third and Seventh Circuits disagree: they have ruled that discontinuing affirmative assistance once the complaint is deemed meritorious would render the access-to-court right "illusory."[34] This Note focuses on an issue that has received little scholarly attention: the extent of a state's obligations to provide legal assistance to prisoners *after* the pleading stage.[35] For incarcerated persons, this right of access is the "foundation for every other right an inmate has[,]" necessitating state-sponsored legal resources post-pleading.[36] Cutting off access to courts would not ensure that

32. *See* Silva v. Di Vittorio, 658 F.3d 1090, 1102 (9th Cir. 2011).

33. *See id.*

34. *See* Rivera v. Monko, 37 F.4th 909, 913 (3d Cir. 2022); Marshall v. Knight, 445 F.3d 965, 969 (7th Cir. 2006).

35. *See Rivera v. Monko*, 2020 WL 3441430, at *7 (M.D. Pa. June 23, 2020), *aff'd,* 37 F.4th 909 (3d Cir. 2022) ("The question is whether at the time of the trial in *Rivera v. O'Haire,* it was clearly established that a prisoner had a right to assistance in the form of a law library or other legal assistance in presenting a claim at trial in a civil rights case. There has been surprisingly little written about that issue."). Most scholarship on this issue has instead focused on the ability of incarcerated people to present complaints to courts at all. *See, e.g.*, James M. Hill, *An Overview of Prisoners' Rights: Part I, Access to the Courts Under Section 1983,* 14 ST. MARY'S L.J. 957, 987–88 (1983) (arguing that the PLRA's exhaustion requirement as a precondition for filing a federal lawsuit stands in contradistinction to Supreme Court precedent); Charles Richard Walker et. al., *A Prisoner's Right of Access to the Courts*, 69 NW. J. CRIM. L. & CRIMINOLOGY 353, 355 (1978) (speculating that the access-to-courts right under *Bounds* only protects a prisoner's ability to file a lawsuit in federal court, but not state court); *cf.* Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 301, 303 (2022) (admonishing the construction of government-friendly doctrinal standards that persist throughout an incarcerated person's litigation).

36. MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 12:1 (5th ed. 2010); *see also* Jody L. Sturtz, *A Prisoner's Privilege to File In Forma Pauperis Proceedings: May It Be Numerically Restricted?*, 4 DETROIT C.L. MICH. ST. U.L. REV. 1349, 1353 (1995) ("The right to have access to the courts is viewed as the basis of all rights possessed by prisoners."); Wayne T. Westling

civil rights violations never occur—only that they never are remedied.[37] This Note will further explain that requiring states to provide "legal information" but not "legal advice" after the pleading stage is a tenable distinction consistent with *Lewis*' restrictions on the access-to-courts right. Part I describes the history and development of the access-to-courts right, an examination that is critical to determining its scope today. Part II examines the various circuits' conflicting interpretations of the right and critiques the Ninth Circuit's approach. Finally, Part III argues that the split should be resolved in favor of obligating states to provide access to "legal information" without "legal advice" beyond the pleading stage, explains how this dichotomy still fits within the *Lewis* framework, and addresses the effects of adopting such a distinction.

I. THE EVOLUTION OF THE ACCESS-TO-COURTS RIGHT FOR PRISONERS

Understanding the historical development of the right of access to courts helps to clarify its scope after the pleading stage. The Supreme Court has declared the right to be fundamental, despite never adequately explaining its origins.[38] In interpreting

& Patricia Rasmussen, *Prisoners' Access to the Courts: Legal Requirements and Practical Realities*, 16 LOY. U. CHI. L.J. 273, 273–74 (1985) (listing rights retained as rights of religion, speech, association, procedural due process, and freedom from discrimination and cruel and unusual punishment). One may argue that such a proposition also extends to non-incarcerated individuals. However, our legal system has been designed to encourage private citizens to resolve disputes without judicial interference. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 375–76 (1971) ("[O]ur society has been so structured that resort to the courts is not usually the only available, legitimate means of resolving private disputes. Indeed, private structuring of individual relationships and repair of their breach is largely encouraged in American life, subject only to the caveat that the formal judicial process, if resorted to, is paramount.").

37. *Cf.* Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 years of evidence for repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE, (Apr. 26, 2021) https://www.prisonpolicy.org/reports/PLRA_25.html [https://perma.cc/9SX5-QS3H] (describing obstacles of the Prison Litigation Reform Act that make it difficult for incarcerated people to bring, win, or settle civil rights cases).

38. *See, e.g.*, *Bounds*, 430 U.S. at 840 (Rehnquist, J., dissenting) ("[T]he 'fundamental constitutional right of access to the courts' which the Court announces today is created virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derive."); *id.* at 833 (Burger, C.J., dissenting) ("[T]he Court leaves us unenlightened as to the source of the 'right of access to the courts.'"); *see also* Lewis v. Casey, 518 U.S. 343, 366–67 (1996) (Thomas, J., concurring) (quoting Ross v. Moffitt, 417 U.S. 600, 608–609 (1974)) ("'[T]he precise rationale' for many of the 'access to the courts' cases on which Bounds relied had 'never been explicitly stated,' and that no Clause that had thus far been advanced 'by itself provides an entirely satisfactory basis for the result reached.'").

constitutional guarantees, the Court has required that they be rooted in the traditions and teachings of history.[39] This section serves to fill this conceptual gap in Supreme Court jurisprudence by describing the right's history and illuminating how its evolution extends the right's scope beyond the pleading stage.

A. HISTORY OF THE RIGHT

The right of access to the courts has roots that predate the founding of the United States, tracing back to the Magna Carta of 1215.[40] Clause 39 of the Magna Carta, in part, guaranteed the right to a fair and impartial trial in court decisions.[41] The right further applied equally to free and incarcerated persons.[42] Sir William Blackstone recognized that "absolute rights"[43] would be meaningless without enforcement:

> A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life,

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Even today, the source of the access-to-courts right remains unsettled. *See, e.g.*, Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741 (1983) (identifying the source of the access-to-courts right in the First Amendment Petition Clause); *infra* note 48 (finding the right in the Privileges and Immunities Clause); Pennsylvania v. Finley, 481 U.S. 551, 557 (1987) (applying the Fourteenth Amendment's Equal Protection Clause to enforce the right). However, most Supreme Court jurisprudence has found that the right to access the courts for incarcerated persons proceeds from the Due Process Clause, which will thus serve as the foundation of the right for this Note. *See, e.g.*, Hudson v. Palmer, 468 U.S. 517, 547 (1984) (Stevens, J., concurring in part and dissenting in part) ("We have also held that the Fourteenth Amendment entitles a prisoner to reasonable access to legal materials as a corollary of the constitutional right of access to the courts."); Murray v. Giarratano, 492 U.S. 1, 11 n.6 (1989) (plurality opinion); Jones v. Union Guano Co., 264 U.S. 171, 176 (1924); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 551 (1949).

39. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 122–23 (1989).

40. *See* Borough of Duryea v. Guarnieri, 564 U.S. 379, 395 (2011) (explaining that the right to petition for redress of grievances was derived from the Magna Carta); *but see* Petition for Writ of Certiorari at 26, Law. Comm. for 9/11 Inquiry, Inc. v. Garland, 143 S. Ct. 573 (2023), (No. 22-433) (noting that mass petitions regarding the "summoning and dissolution" of Parliament proliferated after the passage of the Petition of Right in 1628).

41. *See* MAGNA CARTA, cl. 39.

42. *See* MAGNA CARTA, cl. 40 ("To no one will we sell, to no one deny or delay right or justice.").

43. "Absolute rights"—an eighteenth-century concept in English legal history—are rights to (1) personal security, (2) personal liberty, and (3) private property. *See* James A. Bamberger, *Confirming the Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 SEATTLE J. FOR SOC. JUST. 383, 392 ("These rights have been recognized as either being natural in origin, intrinsic to the individual, or granted by society in exchange for the rights and benefits of society itself—including the right to protection of such rights.").

> liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein.[44]

State constitutions first established this right of access in the United States,[45] but the federal judiciary soon followed. In 1803, the Supreme Court recognized access to courts as the "very essence of civil liberty" in *Marbury v. Madison*.[46] Thereafter, the Court reaffirmed the right to judicial redress in a variety of cases, still without pinpointing any constitutional authority.[47] Certain early nineteenth century cases cited the Privileges and Immunities Clause,[48] while others found the right in the Due Process Clause.[49]

Prisoners, however, faced significant impediments to judicial relief during this progression. Courts refused to intervene into prisons' internal affairs for centuries, reasoning that a prisoner is a mere "slave of the State" who has "not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords him."[50] Known as the "hands-off" doctrine, this reasoning prevented prisoners from seeking judicial relief for even the most abominable prison conditions.[51] For example, a federal

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44. *See id.* at 392–93 (citing WILLIAM BLACKSTONE, COMMENTARIES *141 (continuing, "by any other subject . . . may take his remedy by the course of the law, and have justice and right for the injury done to him.").

45. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2818–19 (2015) (examining the 1776 Delaware Declaration of Rights and the first constitutions of Maryland, Massachusetts, and New Hampshire between 1776 to 1874 to find that they all provided for injured persons being afforded a remedy through the fair and impartial judicial system).

46. 5 U.S. 137, 163 (1803) (stating that it is "the right of every individual to claim the protection of the laws, whenever he receives an injury" and that "[o]ne of the first duties of government is to afford that protection").

47. *See* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 564 (1999).

48. *See id.* at 564–65 (citing Blake v. McClung, 172 U.S. 239, 252 (1898); Cole v. Cunningham, 133 U.S. 107, 113–14 (1890); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870)).

49. *See, e.g.*, Corfield v. Coryell, 6 F. Cas. 546, 551–552 (C.C.E.D. Pa. 1823) (including right of access to the courts as a "fundamental" right). *But see* Andrews, *supra* note 47, at 568 (identifying Boddie v. Connecticut, 401 U.S. 371, 375–76 (1971), as the first case to hold that due process requires "states to open their courts to plaintiffs").

50. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 139 (1977) (Marshall, J., dissenting) (quoting Ruffin v. Commonwealth, 62 Va. 790, 796 (1871)).

51. *See* Kenneth C. Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine*, 4 DETROIT COLL. L. REV. 795, 796–97 (1977). Professor Haas argues that the blatant judicial abstention practiced during the period was likely the result of societal hostility to prisoners as litigants. *Id.* at 797. Generally, justification for the hands-off doctrine can be traced to one of five rationales: (1) separation of powers; (2) lack of judicial expertise in prison administration; (3) fear that judicial intervention would

judge refused to intervene in a case where a coal stove presented a grave fire hazard in an area where prisoners were locked into overcrowded cells with no means of escape.[52] Although the judge characterized their conditions as a "fabulous obscenity," he felt "powerless to act because of the 'hands-off' doctrine."[53] In another illustrative case, the federal court dismissed a cognizable claim of racial discrimination because "the pull of the doctrine was so strong."[54] While the "hands off" doctrine responded to federalist concerns by leaving institutional decision-making to the states, those "most sensitive to the internal workings of the penal system," it also relegated likely constitutional violations to administrative oversight instead of judicial intervention.[55]

In 1941, the Court eventually departed from this philosophy in *Ex Parte Hull*, which precipitated the expansion of prisoner rights to access the courts.[56] There, a prisoner sought to file a habeas corpus claim.[57] The prison, however, required that all pro se legal documents be submitted for approval to the institutional welfare

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impair prison discipline; (4) fear of increased prisoner litigation; (5) principles of federalism and comity should preclude federal courts from hearing state prisoners' claims. SHANE BAUER, AMERICAN PRISON: A REPORTER'S UNDERCOVER JOURNEY INTO THE BUSINESS OF PUNISHMENT 66–67 (2018). However, Professor Haas has theorized that such disdain for incarcerated individuals among judges was influenced by the widespread belief that prisoners were not afforded the same constitutional protections as law-abiding citizens. *See* Haas, *supra*, at 797. In fact, this doctrine was "a near absolute jurisdictional bar to federal court review of alleged violations of prisoners' asserted constitutional rights." Ramos v. Lamm, 485 F. Supp. 122, 130 (D. Colo. 1979), *aff'd in part*, *set aside in part*, 639 F.2d 559 (10th Cir. 1980).

52. *See Ex parte* Pickens, 101 F. Supp. 285, 287 (D. Alaska 1951); *see also Ex parte* Ellis, 91 P. 81, 81 (Kan. 1907) (striking down a habeas petition from a prisoner in a jail described as "a dark, filthy, disease-breeding dungeon for its inmates, and a disgrace upon a prosperous and enlightened community").

53. MUSHLIN, *supra* note 36, § 1:3.

54. *Id.* (citing U.S. *ex rel.* Morris v. Radio Station WENR, 209 F.2d 105 (7th Cir. 1953) *overruled on other grounds by* Wartman v. Branch 7, 510 F.2d 130 (7th Cir. 1975)).

55. Hill, *supra* note 35, at 960.

56. 312 U.S. 546 (1941); Cruz v. Beto, 405 U.S. 319, 321 (1972) (per curiam) ("Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons', including prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, . . . [b]ut persons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes 'access of prisoners to the courts for the purpose of presenting their complaints.'") (internal citations omitted).

57. *See Hull*, 312 U.S. at 547. A federal petition for writ of habeas corpus challenges the validity of a state criminal conviction or sentence. *See Prisoner Self-Help Packet Habeas Corpus Petition Instructions*, U.S. COURTS (Oct. 24, 2011), https://www.id.uscourts.gov/Content_Fetcher/index.cfml/Habeas_Corpus_Instructions_865.pdf [https://perma.cc/3DBZ-3FJX]. In these actions, a federal court may perform a review of "pleadings, papers, transcripts, and evidence that were presented . . . in the state courts" regarding the conviction. *Id.*

office before being presented to a court and barred the filing of those claims that prison officials deemed improperly drawn.[58] The Court invalidated the regulation, reasoning that only the judiciary was sufficiently competent to determine whether petitions and other legal documents meet formal requirements.[59] *Hull* thereby ignited a decades-long line of case law about the scope of the access-to-courts right.[60]

Despite this decision, most courts remained reluctant to interfere with prison policies that restricted incarcerated persons from accessing the courts.[61] For instance, officials could refuse prisoners' requests to purchase law books, confiscate their legal documents, and censor or withhold prisoners' legal correspondence with their attorneys.[62] Even in situations where prisons were relatively accommodating to prisoners' right to access the courts, issues of ignorance, illiteracy, and poverty still "kept prisoners with arguably meritorious claims from filing their own complaints."[63]

Against this backdrop, the Court began expanding incarcerated persons' right to access the courts through landmark decisions over the next thirty-six years. Initially, the Court viewed this right in the context of appealing criminal convictions, with a focus on giving greater protections for indigent and illiterate prisoners.[64] In *Griffin v. Illinois*, the Supreme Court held that an Illinois law requiring indigent criminal defendants to pay a fee for trial transcripts, which were necessary for filing a state appeal, constituted a violation of the defendants' rights to equal protection and due process.[65] In particular, the Court found that this cost

58. *See Hull*, 312 U.S. at 548–49.

59. Hill, *supra* note 35, at 961–62.

60. *See, e.g.*, JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 87 (4th ed. 1991) ("The right of an inmate to exercise this basic constitutional right [of access] was established in the 1940 case of *Ex parte Hull*."); *see also* MUSHLIN, *supra* note 36, § 12:2 ("Fittingly, the first prisoner's rights issue addressed by the Supreme Court involv[ing] the right of access to courts . . . [was] *Ex parte Hull*.").

61. *See* BAUER, *supra* note 51, at 67.

62. *See id.*

63. *Id.*

64. *See* Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE DAME L. REV. 2107, 2118 (2009).

65. 351 U.S. 12 (1956). Note that individuals have a right to appellate review in individual proceedings, but that states are not required to provide any appellate review. *See* McKane v. Durston, 153 U.S. 684, 688–89 (1894). However, every state today does provide appellate review. *See* Quinn Yeargain, *Your State-by-State Guide to Every State Supreme Court*, BOLTS (Aug. 22, 2023), https://boltsmag.org/whats-on-the-ballot/state-supreme-courts [https://perma.cc/J529-AYD8].

would cause certain prisoners to be denied adequate review of their convictions by mere reason of their indigence.[66] The Court reasoned that because such appellate review is integral to the "correct adjudication of guilt or innocence," having such filing fees would result in "no equal justice where the kind of trial a man gets depends on the amount of money he has."[67] In turn, the Court required that states make accommodations for indigent prisoners, obligating prisons to find "other means of affording adequate and effective appellate review."[68]

In keeping with its trajectory of expanding the right of access for prisoners, the Court in *Johnson v. Avery* struck down a Tennessee regulation that categorically restricted jailhouse lawyers from assisting other incarcerated persons in preparing petitions for post-conviction relief.[69] "[T]here is no higher duty," according to the Court, than to maintain the writ of habeas corpus unimpaired in the constitutional scheme.[70] The Court reasoned that without the help of jailhouse lawyers, illiterate or poorly educated prisoners who were unlawfully incarcerated could never obtain their freedom.[71] The state, therefore, could not enforce a regulation that barred prisoners from seeking legal assistance from other incarcerated individuals, unless the state provided "some reasonable alternative" to assist them in preparing legal documents for post-conviction relief.[72]

Several years later, *Wolff v. McDonnell* explicitly extended the right of access beyond habeas corpus claims to Section 1983 actions.[73] Though the Court's reasoning in *Avery* had leaned

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66. *See Griffin*, 351 U.S. at 18–19.

67. *Id.* at 19.

68. *Id.* at 20. A few years later, the Court invalidated filing fees for indigent incarcerated people in habeas corpus petitions and discretionary state reviews in *Smith v. Bennett*, 365 U.S. 708, 709 (1961), and *Burns v. Ohio*, 360 U.S. 252, 258 (1959), respectively. Based on similar reasoning in *Griffin*, the Court held that such procedures would deny indigent prisoners equal protection of the laws. *See Bennett*, 365 U.S. at 709; *Burns*, 360 U.S. at 258.

69. 393 U.S. 483, 490 (1969).

70. *Id.* at 485 (internal quotation marks omitted).

71. *See id.*

72. *See id.* Nevertheless, the Court held that certain reasonable restrictions on incarcerated persons assisting others in writ-writing are constitutionally permissible due to the "acknowledged" tendency of abuse by prisoners of these beneficial programs. *Id.* at 490. Restraints on time and location of such assistance or imposition on punishment for those prisoners who demand consideration for their assistance exemplify forms of constitutionally permissible restraints. *See id.*

73. 418 U.S. 539, 579 (1974) ("[T]he Civil Rights Act of 1871 has [no] less importance in our constitutional scheme than does the Great Writ."). Indeed, the overlap between the

heavily on the constitutional significance of habeas corpus, *Wolff* explained that there was no line of demarcation between habeas petitions and civil rights actions, and that both protect equally important constitutional rights.[74] Here, the Court invalidated a Nebraska prison regulation that forbade prisoners from seeking assistance from *any* other person except the one designated jailhouse lawyer.[75] Once again applying a "reasonable alternative" standard, the state was required to provide alternative assistance if the prison imposed unreasonable restrictions on jailhouse lawyers.[76]

Avery's "reasonable alternative" standard, however, received new meaning in *Younger v. Gilmore*.[77] Previously, the "reasonable alternative" standard had only required states to provide affirmative legal assistance in light of a prison regulation that had impeded incarcerated persons' ability to access the courts, such as through restrictions on communications with jailhouse lawyers.[78] In *Gilmore*, however, the reasonable alternative inquiry asked

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actions was evident by recognized instances in previous case law where relief for the same constitutional rights could be sought under both forms of redress. *See id.*

74. *Id.* However, these rights "would be diluted if inmates . . . were unable to articulate their complaints to the courts." *Id.*

75. *See id.*

76. *See id.* at 580. The Court in *Wolff* measured the "adequacy of legal assistance under the reasonable-alternative standard of *Avery*." *Id.* at 580. *Avery* did not specifically delineate how reasonableness should be measured. However, the Court, in holding that Tennessee failed to meet this standard, found that the state did not provide "any regular system of assistance" to its prisoners. *Avery*, 393 U.S. at 489. It then proceeded to list alternative forms of assistance that other states had given prisoners (e.g. non-public defenders trained to assist incarcerated persons in filing habeas petitions, senior law students interviewing prisoners, local bar association members visiting prisoners to consult them on their cases) in order to demonstrate that viable alternatives existed at all. *See id.* The inquiry about reasonableness, in practice, has focused on the "adequacy" of legal assistance presented to incarcerated persons. According to *Avery* and its progeny, adequacy hinges upon the actual potential of prisoners to bring forward and defend their claims, not upon the state satisfying formulaic requirements that are unresponsive to the realistic needs of a pro se litigant. *See id.* at 488 (finding that the prison merely notarizing documents and sometimes allowing prisoners to view a list of attorneys in Nashville that they can write to in order to ask them to take their case were not reasonable alternatives). Similarly, in *Procunier v. Martinez*, the Court invalidated a regulation that restricted attorneys from using law students and legal paraprofessionals to assist prisoners, based on the same "reasonable-alternative" rationale in *Avery*. 416 U.S. 396, 419–21 (1974), *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401 (1989). As analogized to the topic of this Note, providing legal assistance after the pleading stage, but not before, cannot be considered "adequate." The average person, let alone the average prisoner, is not sufficiently informed in legal procedure to prepare for discovery and trial on their own.

77. 404 U.S. 15, 15 (1971) (per curiam).

78. *See, e.g.*, Johnson v. Avery, 393 U.S. 483, 490 (1969); Wolf v. McDonnell, 418 U.S. 539, 580 (1974).

about two forms of *affirmative* state assistance: "Does a state have an affirmative federal constitutional duty to furnish prison inmates with extensive law libraries or, alternatively, to provide inmates with professional or quasi-professional legal assistance?"[79] Further, the inquiry about a reasonable alternative included a novel component—whether prisoners had "meaningful access" to the courts.[80] By requiring states to "spend money where previously it had merely to stand neutral," the Court dramatically increased the scope of the access-to-courts right.[81] Notably, the district court had found that a prisoner's right to access the courts "encompasses all the means a . . . petitioner might require to get a fair hearing from the judiciary on all . . . grievances alleged by him," thereby implying that the right extends beyond the pleading stage.[82]

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79. Bounds v. Smith, 430 U.S. 817, 829 (1977) (citing *Gilmore*, 404 U.S. at 15); *see also* John Matosky, *Illiterate Inmates and the Right of Meaningful Access to the Courts*, 7 B.U. PUB. INT. L.J. 295, 297 (1998) (asserting that *Gilmore* was the first Supreme Court case mandating affirmative assistance by the state prisons). There has been controversy about whether the holding in *Gilmore* is limited to habeas corpus petitions, or whether it extends to civil rights lawsuits. *See* Karen B. Swenson, *John L. v. Betty Adams: Taking Bounds in the Right Direction for Incarcerated Juveniles*, 24 MEMPHIS ST. U.L. REV. 429, 439 n.66 (1994). This Note agrees that the holding extends to civil rights suits, given that *Gilmore v. Lynch* upheld the "challenge . . . concerning inmate access to law books, legal materials, and lay assistance in preparing prisoner writs and *complaints*." *See id.* (citing *Gilmore*, 319 F. Supp. at 107) (emphasis added).

80. *See Younger*, 404 U.S. at 15; *see also* Josephine R. Potuto, *The Right of Prisoner Access: Does Bounds Have Bounds?*, 53 IND. L. J. 207, 210 (1977) (emphasis added) (contrasting the previous admonition to states not to impede incarcerated persons' access to courts with a new state burden "to do more" by expending funds for law libraries or legal services).

81. Potuto, *supra* note 80, at 210. *Gilmore* was a departure from prior Supreme Court jurisprudence that had merely required that prisons do not unlawfully enact policies that would prevent prisoners from obtaining legal assistance that would facilitate their access to the courts. In other words, incarcerated persons were entitled "negative rights." Negative rights impose a "negative" duty on others—here, the duty not to interfere with a prisoner's activities in the access-to-courts realm, such as prohibitions on visits by legal paraprofessionals to assist prisoners, as in *Procunier*. *See* Manuel Velasquez et al., *Rights*, MARKKULA CTR. FOR APPLIED ETHICS, SANTA CLARA U. (Aug. 8, 2014), https://www.scu.edu/ethics/ethics-resources/ethical-decision-making/rights [https://perma.cc/2QXD-79V5]. In contrast, positive rights "claim for each person the positive assistance of others in fulfilling basic constituents of human well-being[.]" *Id. Gilmore* conferred onto incarcerated persons a positive right to access the courts by requiring the State to actively provide them legal resources. *But see* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 866 (1986) (suggesting that the Constitution does not confer any positive rights upon Americans, but instead is a charter of negative liberties protecting citizens from governmental oppression).

82. Gilmore v. Lynch, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971).

B. *BOUNDS V. SMITH*

The evolution of prisoner rights law from its inception only several decades earlier was an expeditious development.[83] *Gilmore*'s status as a summary affirmance, however, resulted in a "slew of irreconcilable . . . lower court decisions in the ensuing years" about the state's exact obligations to its prisoners.[84] As a result, the Supreme Court offered clarification in *Bounds v. Smith*,[85] which defined the right more broadly than ever before.

A "benchmark case," *Bounds* officially recognized that the constitutional right of access to the courts had been "established beyond doubt" and such access must be "adequate, effective, and meaningful."[86] The Court conferred upon states a *positive* legal obligation to "assist inmates in the preparation and filing of meaningful legal papers."[87] States could meet this requirement by either providing prisoners with adequate law libraries or a legal assistance program from persons trained in law.[88]

Petitioners, representing a North Carolina prison, argued that previous decisions did not "create a state duty to expend funds to actively assist prisoners."[89] According to *Avery* and *Wolff*, they argued, prison officials were only required not to "interfere[ ]" with incarcerated persons' right to access the courts. The Court

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83. *See supra* Part II.A.

84. Vladeck, *supra* note 64, at 2119–20; *see also id.* at n.81 (collecting cases about the precedential effect of a summary affirmance being limited to those issues necessary to sustain the judgment); Hill, *supra* note 35, at 965 ("The *Gilmore* Court's terse two-paragraph affirmation of the district court's holding in *Gilmore* did not include any reasoning process other than a cryptic cite to *Johnson*. This citation created conflict in the lower federal courts as to whether or not the Court's reference to *Johnson* mandated a federal right of access to law libraries to satisfy a prisoner's right of access to the courts.").

85. 430 U.S. 817, 817–18 (1977).

86. *Id.* at 821–22. The "beyond doubt" language is relevant for its implication in cases against government actors with qualified immunity. To sustain a claim against a government official, a party must show that the official violated a "clearly established" statutory or constitutional right. *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009) (internal quotation marks omitted).

87. *Bounds*, 430 U.S. at 828. In *Bounds*, North Carolina's one prison unit, out of about eighty, which had a "semblance" of a legal law library for 10,000 prisoners, did not meet this standard. *See id.*

88. *See id.* One scholar has remarked that *Bounds* "indirectly established at least minimum standards for adequate law libraries." Hill, *supra* note 35, at 968. The proposal included seven large libraries across North Carolina, and prisoners would be supplied with "transportation, housing, one full day in the library, legal forms, writing paper, and the use of typewriters and copying machines." *Id.* Additionally, the State proposed to include various legal resources in its law library, including but not limited to state statutes, the United States Code, and the Supreme Court Reporter. *See id.*

89. Brief for Petitioner at 6, Bounds v. Smith, 430 U.S. 817 (1977).

disagreed, noting that Petitioners had misread the cases.[90] In *Avery*, the Court had struck down a regulation that interfered with prisoners' ability to file their claims, "[b]ut in so holding, [the Court] did not attempt to set forth the full breadth of the right of access."[91] Similarly in *Wolff*, the prison already had an "adequate law library" in place, yet interference with incarcerated persons' abilities to solicit assistance from jailhouse lawyers still constituted a violation of the access-to-courts right.[92] These cases did not consider the question of what kind of assistance is required, and "neither is inconsistent with requiring additional measures to assure meaningful access to inmates able to present their own cases."[93] In other words, the Court stated that the absence of state interference alone is insufficient to determine whether prisons have fulfilled their constitutional obligation. Instead, prisons are required to *both* provide incarcerated persons with affirmative assistance and to abstain from undue interference.

As support, the Court referenced constitutionally-required assistance for prisoners to contest their convictions. For criminal appeals, prisons must provide indigent defendants with trial transcripts, pen and paper to draft legal documents with notarial services, and expensed stamps.[94] Affirmative assistance, the Court held, should similarly reach the filing of a prisoner's *civil* complaint.[95] Such "legal assistance" is "essential to frame such documents" because plaintiffs must be informed about both procedural requisites and substantive law to determine "whether

90. *See Bounds*, 430 U.S. at 823.
91. *Id.* at 824.
92. *See id.*
93. *Id.*
94. *See id.* at 824–25.
95. *See id.* at 828–29. Specifically, the Court provided a broad overview of the access-to-courts cases involving prisoners up to this point. The state has been required to expend funds to assist criminal defendants in trial and appeals. *See, e.g.*, Gideon v. Wainwright, 372 U. S. 335 (1963) (establishing the right-to-counsel for indigent criminal defendants); Argersinger v. Hamlin, 407 U.S. 25 (1972) (holding that the right-to-counsel extends to indigent criminal defendants accused of a misdemeanor that carries the possibility of a prison sentence); Burns v. Ohio, 360 U.S. 252, 257 (1959) (requiring prisons to pay filing and docket fees for indigent defendants); Griffin v. Illinois, 351 U.S. 12, 19–20 (1956) (mandating states to provide trial transcripts to prisoners unable to afford them). Prisons, moreover, cannot prevent incarcerated persons from assisting one another in preparing applications for post-conviction relief. *See, e.g.*, Johnson v. Avery, 393 U.S. 483, 489 (1969). This ban on unreasonable prohibitions on prisoners from assisting others was extended to civil claims in *Wolff v. McDonnell*, 418 U.S. 539, 577–80 (1974). *Younger v. Gilmore* explicitly found that States have an affirmative federal constitutional duty to furnish prisoners with legal assistance. 404 U.S. 15, 15 (1971).

a colorable claim exists, and if so, what facts are necessary to state a cause of action."[96] Therefore, resources for incarcerated persons to perform some preliminary research are vital for their right to access the courts.[97] After considering the various forms of assistance provided to incarcerated persons throughout the century, the Court determined that "[m]eaningful access to the courts is the touchstone" in defining the right.[98]

C. THE SUBSEQUENT RETREAT ON PRISONERS' RIGHT TO ACCESS THE COURTS

Bounds was partially responsible for prisoner litigation growing by 400% over the next eighteen years.[99] In turn, critics argued that incarcerated persons were "clogging the courts" with "frivolous" lawsuits and diminishing judicial resources for non-incarcerated persons.[100] Despite the inaccuracy of these arguments,[101] ensuing government action significantly hindered prisoners' ability to seek judicial relief for conditions threatening their health, safety, and fundamental rights.[102]

In 1995, Congress enacted the Prison Litigation Reform Act (PLRA), erecting several formidable barriers to justice for

96. *Bounds*, 430 U.S. at 825.
97. *See id*. at 825–26.
98. *Id.* at 823.
99. *See* Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 157 (2015). Judge Aldisert has called this increase the "litigious flood." Ruggero J. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 L. & SOC. ORD. 557, 566 (1973).
100. David Fathi, *No Equal Justice: The Prison Litigation Reform Act in the United States*, HUMAN RIGHTS WATCH 4, 9 (2009); *see also* 141 CONG. REC. S14408-01, S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole) ("Frivolous lawsuits filed by prisoners tie up the courts, waste valuable legal resources, and affect the quality of justice enjoyed by law-abiding citizens").
101. Although prisoner litigation has been notoriously framed as frivolous, a majority of civil rights claims "involve the identical types of grievances that prompted bloody and destructive prison uprisings during the 1970s: unsanitary and dilapidated prison facilities, lack of medical care, poor food quality, lack of treatment, and brutality." Roger Roots, *Of Prisoners and Plaintiffs' Lawyers: A Tale of Two Litigation Reform Efforts,* 38 WILLAMETTE L. REV. 210, 221–22 (2002); *see also* Fathi, *supra* note 100, at 9 (finding that prisoner lawsuits often involved allegations of physical abuse and other non-frivolous claims); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1692 (2003) (finding that prisoners were filing lawsuits at a similar rate to non-incarcerated persons).
102. *See* Fathi, *supra* note 100, at 9.

prisoners.[103] First, incarcerated individuals must exhaust their remedies with a prison's internal grievance system before filing a federal lawsuit.[104] If they fail to comply with all procedural rules or even miss a short deadline, their right "to sue may be lost forever."[105] Second, indigent prisoners must pay filing fees in monthly installments from their prison commissary accounts—these fees cannot be waived.[106] Incarcerated persons must depend on the facilities holding them to "cooperate administratively" by assessing the court's statutory fee to be paid.[107] Third, "each lawsuit an incarcerated person files that is dismissed for being frivolous, malicious, or not stating a proper claim is considered a 'strike.'"[108] After three strikes, prisoners cannot file another lawsuit *in forma pauperis*; instead, they must pay the entire filing fee up front.[109] Fourth, an incarcerated person cannot file a lawsuit for mental or emotional injury without accompanying physical injury.[110]

Only two months after legislative enactment of the PLRA, the Supreme Court issued a devastating decision for prisoners' right of access to the courts in *Lewis v. Casey*.[111] In *Lewis*, twenty-two prisoners filed a class action against the Arizona Department of Corrections (ADOC), claiming that ADOC's law libraries and legal assistance programs were inadequate, violating their fundamental

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103. *See* Prison Litigation Reform Act, 42 U.S.C. § 1997e; *see also* Woodford v. Ngo, 548 U.S. 81, 84 (2006) ("The PLRA contains a variety of provisions designed to bring this [prisoner] litigation under control.").

104. *See* 42 U.S.C. § 1997e(a). Incarcerated people must also pursue all available administrative appeals. *Id.* However, when prisoners have not received a response at the final appeal level or have not received grievance forms, they can file a lawsuit without reaching the exhaustion requirement. *See id.*; *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, ACLU 1–2 (2002), https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf [https://perma.cc/486M-JYG2].

105. *See* Fathi, *supra* note 100, at 2.

106. *See* 28 U.S.C. § 1915(b)(2).

107. *See Know Your Rights: The Prison Litigation Reform Act (PLRA)*, *supra* note 104, at 2. Indigent prisoners "pay an initial fee of 20% of the greater of the prisoner's average balance or the average deposits to the account for the preceding six months. After the initial payment, the prisoner is to pay monthly installments of 20% of the income credited to the account in the previous month until the fee has been paid." *Id.* Applying this formula in practice is complex, thus illustrating the importance of the prison's cooperation to inform prisoners of their remaining balance.

108. *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, *supra* note 104, at 3.

109. *See id.* There is, however, an exception for incarcerated people who are in imminent danger of serious physical injury. *See id.*

110. 42 U.S.C. § 1997e(e).

111. 518 U.S. 343 (1996).

right of access to the courts as defined in *Bounds*.[112] The district court agreed, finding there to be insufficient training for library staff, outdated legal materials, and unavailability of photocopying services.[113] The court likewise noted that "lockdown prisoners"—i.e., those who are segregated from the general prison population due to disciplinary or security reasons—were "routinely denied physical access to the law library."[114]

In response, the district court adopted a permanent injunction that mandated system-wide changes to the existing regulations on state-provided legal resources, hoping to "ensure that ADOC would 'provide meaningful access to the Courts for all present and future prisoners'. . . ."[115] The injunction:

> specified in minute detail the times that libraries were to be kept open, the number of hours of library use to which each inmate was entitled (10 per week), the minimal educational requirements for prison librarians (a library science degree, law degree, or paralegal degree), the content of a videotaped legal-research course for inmates (to be . . . funded by ADOC), and similar matters. . . . With respect to illiterate and non-English-speaking inmates, the injunction declared that they were entitled to "direct assistance" from lawyers, paralegals, or "a sufficient number of at least minimally trained prisoner Legal Assistants"; it enjoined ADOC that "[p]articular steps must be taken to locate and train bilingual prisoners to be Legal Assistants.[116]

The Supreme Court agreed with ADOC officials that the district court's "remedial order exceeded lawful authority."[117] Despite Respondents' claims, the Court found ADOC's existing legal resources to be adequate.[118] Moreover, the Court overruled one aspect of *Bounds*, holding that it had gone too far beyond precedent.[119] The Court's reasoning had several components.

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112. *See* Casey v. Lewis, 834 F. Supp. 1553, 1555–66 (D. Ariz. 1992), *rev'd* 518 U.S. 343 (1996).
113. *See id.*
114. *Id.* at 1556.
115. Lewis v. Casey, 518 U.S. 343, 347 (1996) (quoting the district court's injunctive order).
116. *Id.* at 347–48 (quoting the district court's injunctive order).
117. *Id.* at 346.
118. *Id.* at 360.
119. *See id.* at 354.

Foremost, the Court explained that *Bounds* did not create "an abstract, free standing right to a law library or legal assistance," and introduced a new standing requirement: for prisoners to prove an access-to-courts violation, they must prove "actual injury," such as demonstrating that the inadequate law library or legal assistance program hindered their efforts in pursuing a legal claim.[120]

The Court also held that states need only provide tools for incarcerated persons to challenge their sentences or conditions of confinement.[121] *Bounds* did not "guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims."[122] Third and finally, *Lewis* overruled those statements in *Bounds* suggesting that states must "enable the prisoner . . . to *litigate effectively* once in court."[123] By rejecting the idea that incarcerated persons needed to be able to "litigate effectively," the Court made clear that prisoners need not have access to resources that would enable them to counter the state's arguments convincingly and make compelling presentations to judges.

Importantly, the *Lewis* Court only disclaimed this one portion of *Bounds*. The rest of the opinion merely read *Bounds* narrowly, by granting states more discretion on how to fulfill their obligation to provide requisite legal assistance to incarcerated individuals.[124] Despite any suggestion that *Lewis* gutted the right to access, *Bounds* and *Lewis* remained in agreement that prisoners' access to courts must nevertheless be meaningful.[125]

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120. *Id.* at 351. For an argument on how the standing requirement can present a catch-22 for prisoners who must "go to court to prove that they are unable to go to court[,]" see Christopher E. Smith, *Prisoners' Rights and the Rehnquist Era*, 87 PRISON J. 457, 463 (2007); *see also* Walters v. Edgar, 163 F.3d 430, 436 (7th Cir. 1998) ("suggesting the paradox that ability to litigate a denial of access claim is evidence that the plaintiff has no denial of access claim").

121. *See Lewis*, 518 U.S. at 355.

122. *Id.*

123. *Id.* at 354. Although the Supreme Court has addressed other arguments since *Lewis* about the right of access to the courts, *Lewis* was the last case to fully discuss the right in relation to prisoners.

124. *See id.*

125. *See id.* at 346.

II. THE CIRCUIT SPLIT

For many lower courts, *Lewis* created more questions than answers. The Supreme Court failed to give sufficient guidance about the extent of affirmative assistance required throughout the course of an incarcerated person's lawsuit. In turn, circuit courts lacked consensus about the scope of the access-to-courts right after the pleading stage.[126] Namely, they disagreed on whether the states' obligations to ensure prisoners' access to courts include providing legal assistance after the complaint is filed. Only three appellate courts have ruled on the scope of the right since *Lewis*, creating a 2-1 circuit split. The Third and Seventh Circuits have held that the right of access to the courts after the pleading stage includes state-provided "affirmative assistance." In contrast, the Ninth Circuit has ruled that the right of access after the pleading stage only mandates prison officials to not "unduly interfere" with an incarcerated person's litigation, without a requirement to furnish any sort of assistance.

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126. Pre-*Lewis*, several other circuits ruled on the temporal scope of the access-to-courts right. The Tenth Circuit directly held that the right expires once the complaint has been filed. *See, e.g.*, Carper v. DeLand, 54 F.3d 613, 617 (10th Cir. 1995) (upholding a prison legal services plan that did not provide prisoners with assistance beyond the initial pleading stage) (cited favorably in Vreeland v. Schwartz, 613 F. App'x 679, 683 (10th Cir. 2015)); Bee v. Utah State Prison, 823 F.2d 397, 399 (10th Cir. 1987) (holding that if a prison provides adequate legal assistance in the preparation and filing of initial pleadings, it is not then constitutionally required to provide assistance beyond that point); Nordgren v. Milliken, 762 F.2d 851, 855 (10th Cir. 1985) (ruling that legal assistance is required only through the completion of the complaint for a federal habeas or civil rights action). The Sixth Circuit took a similar view. *See, e.g.*, Knop v. Johnson, 977 F.2d 996, 1007 (6th Cir. 1992) (ruling that if a court does not appoint counsel for a prisoner's claim, then the state "is not obligated to do anything more than assist inmates at the pleading stage."). On the other hand, many other circuits viewed the right more expansively. *See, e.g.*, Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985) ("*Bounds* explained that for access to be meaningful, post-filing needs, such as the research tools necessary to effectively rebut authorities cited by an adversary in responsive pleadings, should be met."); Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1212 (11th Cir. 1981) (en banc) (holding that the right to legal assistance reaches beyond the filing of a suit, and does not stop "precisely at the courthouse door as appellees would have it"; prisoner access to the courts is not meaningful if "it embraces no more than being permitted to file a paper that, without determination of whether it states a claim legally sufficient and within the court's jurisdiction, is subject to dismissal on grounds of convenience to court and litigants"). *But see* Kain v. Bradley, 959 F. Supp. 463, 467 n.10 (M.D. Tenn. 1997) (district court opinion recognizing the overruling of *Morrow*, *Knop*, and *Bonner* by *Lewis*). Further, the Fourth Circuit adopted the Seventh Circuit's reasoning that filing a complaint is not dispositive in dismissing an access to courts claim. *See* Fox v. N.C. Prison Legal Servs., 751 F. App'x 398, 400 (4th Cir. 2018) (per curiam); Pronin v. Johnson, 628 F. App'x 160, 162 (4th Cir. 2015).

A. THE RIGHT OF ACCESS TO THE COURTS INCLUDES AFFIRMATIVE ASSISTANCE AFTER PLEADINGS: THE THIRD AND SEVENTH CIRCUITS

In *Marshall v. Knight*, the Seventh Circuit held that the right to affirmative assistance for incarcerated persons does not stop once a complaint has been filed.[127] While incarcerated at Indiana's Miami Correctional Facility, Marshall challenged, pro se, the length of his confinement by claiming custodial "credit time" (time that serves to shorten the length of one's incarceration).[128] At an evidentiary hearing in 2003, the lower court ruled against him.[129] Marshall subsequently filed an access-to-courts claim, arguing that his lack of access to a law library caused his "ability to prepare, transmit, [and] research" ahead of the evidentiary hearing to be "non-existent," resulting in his loss of valid credit time.[130] The district court dismissed Marshall's complaint, interpreting *Lewis* to require only "that an inmate be given access to the courts to file a complaint or appeal," which Marshall had already done. Therefore, his "non-existent" ability to research his claims was of no import, because "state actors have no duty to assure that prisoners can litigate those claims effectively once they have been raised in court. The right to access . . . goes no further than access."[131]

The Seventh Circuit disagreed.[132] It explained that access-to-courts claims cannot be confined to instances where a prisoner was unable to file a claim or appeal. In *Lewis*, the Supreme Court described an access-to-courts violation where an incarcerated person successfully filed a complaint, but had it dismissed because of a failure "to satisfy some technical requirement which, because

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127. 445 F.3d 965, 969 (7th Cir. 2006).

128. *See id.* at 969.

129. *See* Rivera v. Monko, 37 F.4th 909, 921 (3d Cir. 2022). The *Rivera* court, in referencing *Marshall*, claimed that the proceeding was an evidentiary hearing. *See id.* According to Marshall's brief in this litigation, however, the proceeding in which he was denied credit time was a probation revocation hearing, thereby grouping such hearings into "courts" that prisoners constitutionally have access to. *See* Brief of Plaintiff-Appellant Kenneth A. Marshall at *3, Marshall v. Knight, 445 F.3d 965 (7th Cir. 2006) (No. 04–1062). Further, Marshall's efforts in filing for post-conviction relief due to inadequacies of counsel in his original conviction trial were also frustrated, but do not seem to be at issue in this case. *See id.* at *11.

130. *Marshall*, 445 F.3d at 967.

131. *Id.* at 969.

132. *See id.*

of deficiencies in the prison's legal assistance facilities, he could not have known [about]."[133] The Seventh Circuit therefore reasoned that although prisoners "successfully got into court" by filing a complaint, they may still have been denied their access-to-court right.[134] It further held that incarcerated persons establish a valid claim when they allege that their denial of access to legal materials "caused a potentially meritorious claim to fail."[135] The Seventh Circuit's finding that a prisoner's "simple ability to file a complaint is not dispositive"[136] in denying an access to courts claim further illustrates its rejection of a "bright-line" rule that would have severely curtailed prisoner claims at the pleading stage.[137]

By suggesting that the right to affirmative assistance should not be restricted to when a prisoner drafts a complaint, the Seventh Circuit implicitly suggested that such assistance extends to later stages of one's litigation. The Third Circuit explicitly endorsed this view in 2022. In 2015, Rivera, a prisoner at Fayette's State Correctional Institution in Pennsylvania, filed an excessive force claim, pro se, against several prison officers.[138] Despite his complaint surviving a motion to dismiss, Rivera eventually lost at trial.[139] Shortly after the jury verdict, he filed an access-to-courts claim, alleging that the repeated and complete denial of access to legal materials before and during his trial frustrated his ability to represent himself, and ultimately caused the loss of his meritorious suit.[140] He specifically claimed that the prison officials' consistent rejections of his requests for access to the Federal Rules of Evidence caused medical records attesting to his injuries—critical evidence to his case—to be excluded on hearsay grounds.[141]

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133. *Id.* (citing Lewis v. Casey, 518 U.S. 343, 351 (1996)).

134. *Id.*

135. *Marshall*, 445 F.3d at 969.

136. *Id.*

137. *See id*; *cf.* Harer v. Casey, 962 F.3d 299, 312 (7th Cir. 2020) (clarifying that for non-incarcerated persons, "an access-to-court claim" only covers interferences with a plaintiff's attempts to file a complaint, leaving out "post-filing conduct").

138. *See* Rivera v. Monko, 37 F.4th 909, 914 (3d Cir. 2022).

139. *See id.*

140. *See id.* at 913–15.

141. *See id.* at 913. When Rivera was temporarily transferred to a different prison for his civil rights trial, he asked for access to legal resources on three separate occasions. *See id.* His first request to the "mini" library was approved, but upon arrival, Rivera found no books and two inoperable computers. *See id.* Despite the prison officer's statement that he would work with the supervisor and law librarian to get the computers fixed, the officer never did so. *See id.* Rivera then asked to borrow paper copies of the rules, but was denied

The Third Circuit held that the state's failure to provide Rivera with access to the requested legal materials during trial constituted an access-to-courts violation. Aligning itself with the Seventh Circuit, the court explained it would be "ludicrous" for the right to stop once the litigant has reached the courthouse door.[142] Indeed, the court noted it would be an almost insurmountable challenge for a prisoner to litigate a claim pro se without access to legal materials, considering most attorneys could not do the same.[143] The Third Circuit further held that despite *Lewis*' restrictive holding, that decision did not free states from a duty to provide legal materials after the pleading stage because "[t]he right to meaningfully access the courts includes a right to 'the tools . . . need[ed] . . . in order to challenge the conditions of . . . confinement.'"[144] Reasoning that it would be perverse for the right to fade away once an incarcerated person has filed a petition or complaint, the circuit court explained that a "prisoner's need to access legal materials is just as great—if not greater—than when a prisoner initially filed a complaint."[145] Otherwise, the right is illusory.[146]

B. THE RIGHT OF ACCESS TO THE COURTS MERELY PREVENTS UNDUE INTERFERENCE AFTER PLEADINGS: THE NINTH CIRCUIT

The Ninth Circuit has taken a starkly different view. In *Silva v. Di Vittorio*, Silva, an incarcerated person at Washington State Penitentiary, alleged, pro se, that prison officials' conduct violated his access-to-courts right.[147] Prior to the lawsuit, Silva had filed civil rights suits against several prison officials.[148] He claimed that in retaliation, these officials "began transferring him within and among various prison facilities in Washington and Arizona."[149] He

twice because the "Law Librarian said no." *Id.* Rivera claimed that had he been able to access the Federal Rules of Evidence, he could have introduced the exhibits by presenting foundational testimony, a move that would have strengthened his case at trial. *See id.*

142. *Id.*

143. *See id.* at 915.

144. *Id.* at 918 (citing Lewis v. Casey, 518 U.S. 343, 355 (1996)).

145. *Id.* at 922–23.

146. *See id.* at 913.

147. *See* Silva v. Di Vittorio, 658 F.3d 1090, 1095 (9th Cir. 2011). If incarcerated persons want to file a complaint, they may have to request certain legal documents from their local district court, such as forms for a Section 1983 pro se action. *See id.* at 1096.

148. *See id.*

149. *Id.*

further claimed that the authorities "confiscat[ed] and destroy[ed] his legal documents and materials."[150] Silva argued the undue and deliberate interference hindered his ability to litigate his pending civil suits, and "hampered his ability to report the officials' misconduct and to bring any future cases."[151] Citing *Lewis*, the district court dismissed his claim, holding that the access-to-courts right "is only a right to bring petitions or complaints to the federal court and not a right to . . . litigate them effectively once filed with a court."[152] Because the officials' alleged conduct targeted Silva's ability to "effectively litigate his cases beyond the pleading stage[,]" their actions did not violate his right of access to the court.[153]

The Ninth Circuit reversed, reasoning that the prison officials' actions impermissibly interfered with Silva's claim.[154] However, the court's interpretation of the right was still restrained. The court began by creating a binary framework for the state's obligations in the access-to-courts context.[155] While prison authorities need not provide "affirmative assistance," they must not "actively interfere" with a plaintiff's lawsuit after the pleading stage.[156] In other words, the extent of the state's obligations depends on the stage of the litigation.[157] Citing the proposition in *Lewis* that states need not enable prisoners to "*litigate effectively* once in court,"[158] the Ninth Circuit held that the Constitution requires affirmative assistance only at the pleading stage.[159]

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150. *Id.*

151. *Id.*

152. Silva v. Olson, 2008 WL 607148 at *2 (D. Ariz. Feb. 29, 2008) (citing Lewis v. Casey, 518 U.S. 343, 354 (1996)). The district court further reiterated from *Lewis* that incarcerated persons do not have a right to discover grievances, but only are entitled the right to bring to court a grievance the prisoner already wanted to present. *Id.*

153. *Id.*

154. *See Di Vittorio*, 658 F.3d at 1103.

155. *See id.* at 1102. The Seventh Circuit, two years prior to deciding *Marshall v. Knight*, 445 F.3d 965 (7th Cir. 2006), adopted a similar "assistance" and "interference" distinction in *Snyder v. Nolen*, but limited it to litigating other civil actions besides challenges to conviction, sentence, and conditions of confinement. 380 F.3d 279, 290–91 (7th Cir. 2004).

156. *See Di Vittorio*, 658 F.3d at 1102.

157. *Id.*

158. *Id.* at 1097 (citing Lewis v. Casey, 518 U.S. 343, 354 (1996)).

159. *See id.* at 1102–03. *Di Vittorio* cited a pre-*Lewis* Ninth Circuit case, *Cornett v. Donovon*, 51 F.3d 894, 898 (9th Cir. 1995), for the proposition that prisons are not required to provide affirmative assistance after the pleading stage. *See Di Vittorio*, 658 F.3d at 1103. Additionally, *Di Vittorio* held that the pleading stage "does not encompass merely the complaint and the answer, but also includes the prisoner-plaintiff's 'reply to an answer,' his '"reply to a counterclaim' and his 'answer to a cross-claim' . . . Thus, the 'pleading stage'

In the Ninth Circuit, prison officials are obligated only to not unduly interfere with the prisoner's case after the pleading stage.[160] The right forbids officers from "erect[ing] barriers that impede the right of access of incarcerated persons."[161] In reaching its conclusion, the court used a variant of the *expressio unius* common law principle,[162] that the expression of one thing implies the exclusion of others: because the Supreme Court expressed that affirmative assistance is required up to the pleading stage, it therefore implied that such assistance is not mandated after that point.[163] However, this distinction left unanswered whether the right to access the courts still includes no undue interference after the pleading stage. Citing its own precedent, the court held that the right to litigate without undue interference exists throughout an incarcerated person's litigation efforts.[164] However, it failed to similarly require states to provide affirmative legal assistance after the pleading stage.

C. THE NINTH CIRCUIT'S NEEDLESSLY STRICT INTERPRETATION OF *LEWIS* RELIES ON AN ARBITRARY DISTINCTION

As summarized, circuit courts disagree about whether prisoners' right to access the courts includes affirmative assistance after the pleading stage, or merely a refrain from active interference. The Third and Seventh Circuits considered the limitations *Lewis* imposed, but also were cognizant of the fact that, pragmatically, prisoners must be able to have their claims adjudicated without their right to assistance being suddenly halted.[165] Otherwise, the potential for judicial relief becomes near

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encompasses the preparation of a complaint and the preparation of any filings necessary 'to rebut the State's arguments when a court determines that a rebuttal would be of assistance.'" *Id.* at 1102 n.9.

160. *See Di Vittorio*, 658 F.3d at 1102–03.

161. *Id.* (citing John L. v. Adams, 969 F.2d 228, 235 (6th Cir. 1992)).

162. For a discussion of the *expressio unius* principle, see ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 200 (2012).

163. *See Cornett*, 51 F.3d at 898 (summarizing portions of various cases that emphasized the importance of prisoners presenting complaints to the court, thus concluding that assistance need not extend beyond the pleading stage).

164. *See id.* (citing Vigliotto v. Terry, 873 F.2d 1201, 1202 (9th Cir. 1989); DeWitt v. Pail, 366 F.2d 682, 685 (9th Cir. 1966)).

165. *See supra* Part II.A; *see also* Joseph L. Gerken, *Does Lewis v. Casey Spell the End to Court-Ordered Improvement of Prison Law Libraries?*, 95 L. LIBR. J. 491, 491 (2003) (predicting that the status of state-sponsored legal assistance provided to prisoners post-

impossible. Compounding problems, "many prisoners already struggle with literacy and basic adult education, making the difficult task of single-handedly litigating a civil action even harder."[166]

The Ninth Circuit, on the other hand, misconstrued *Lewis*' deference to prison officials in how to assist incarcerated persons in accessing the courts after the pleading stage as an abdication of such a responsibility altogether.[167] By ignoring the futility of litigation without a meaningful opportunity for judicial relief, the Ninth Circuit relied on a reductive distinction that has prevented prisoners from vindicating their fundamental rights.[168] In particular, the court's logic is flawed in three fundamental ways.

First, the Ninth Circuit's reliance on the *expressio unius* canon was fallacious. Because Supreme Court access-to-courts cases discussed the extent of assistance only in the pre-filing stage, the circuit court wrongly assumed that such assistance is no longer required after the pleading stage. It failed to acknowledge, however, that the prisoners in each of the Supreme Court cases were unable to file *complaints*, thus explaining why the Court had limited its language to assisting prisoners at the outset.[169] In *Bounds*, for example, the prison at issue had given "no indication

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Lewis will depend on the individual trial courts' willingness to consider the practical realities of pro se litigation).

166. C. Dreams, *How the Prison Litigation Reform Act Blocks Justice for Prisoners*, THE APPEAL (May 8, 2023), https://theappeal.org/prison-litigation-reform-act-repeal-unjust [https://perma.cc/86UK-YEKM]; *see also* Gerken, *supra* note 165, at 492 (arguing that lower courts' willingness to consider the realities of prison litigation, such as the difficulty to craft arguments without proper legal resources, will be a key factor in whether they will find "actual injury" under *Lewis*).

167. *See Di Vittorio*, 658 F.3d at 1102.

168. Other appellate courts have, nevertheless, used a similar distinction in related cases. *See, e.g.*, John L. v. Adams, 969 F.2d 228, 235 (6th Cir. 1992); Cohen v. Longshore, 621 F.3d 1311, 1312 (10th Cir. 2010).

169. In *Wolff*, for example, the Supreme Court emphasized that the Fourteenth Amendment "has not been extended . . . to apply further than protecting the ability of an inmate to prepare a petition or complaint." Cornett v. Donovan, 51 F.3d 894, 898 (9th Cir. 1995) (citing Wolff v. McDonnell, 418 U.S. 539, 576 (1974)). However, the Court's snippet of precedent was in response to plaintiff's argument that the access-to-courts right protects inspection of mail from his attorney. *See Wolff*, 418 U.S. at 575–76. It was not meant to provide the scope of the access-to-courts right overall. The Ninth Circuit also looked at a statement in *Wolff* claiming that prisoners' rights would lose meaning if they "were unable to articulate their complaints to the courts." *Cornett*, 51 F.3d at 898 (citing *Wolff*, 418 U.S. at 579). However, that statement was in the context of discussing the potential dilution of certain constitutional rights of incarcerated persons if they had no recourse in the judicial system entirely. The Ninth Circuit also did not mention that the rest of the paragraph is devoted to jailhouse lawyers assisting prisoners more generally, not merely at the complaint stage. *See Wolff*, 418 U.S. at 579–580.

of assistance at the initial stage of preparations of writs and petitions."[170] In response, the Supreme Court found an access to courts violation because its "'main concern' was 'protecting the ability of an inmate to *prepare a petition or complaint*.'"[171] In finding that the right to affirmative assistance was not intended to extend beyond the pleading stage, the Ninth Circuit overlooked the fact-intensive analysis in *Bounds*.[172] Similarly, *Lewis* was concerned with prisoners' ability to *file* a complaint. Therefore, *Lewis*' and *Bounds*' failures to discuss states' obligations after the pleading stage did not mean that such an obligation did not exist. Simply put, the Court did not yet have an opportunity to affirm the right similarly applies at this phase.[173]

Second, *Bounds* acknowledged that the *expressio unius* canon cannot be utilized to describe the contours of the state's obligations to its prisoners. In its brief, the state argued that cases before *Bounds* held that prisons were required only to not unduly interfere with incarcerated persons' lawsuits.[174] The Supreme Court rejected the state's rationale, clarifying that such cases "did not . . . set forth the full breadth of the right of access."[175] The Court subsequently defined the right of access to require *both* a lack of undue interference, and state-sponsored affirmative

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170. Bounds v. Smith, 430 U.S. 817, 818 (1977).

171. *Id.* at 828 n.17 (emphasis added) (quoting *Wolff*, 418 U.S. at 576). *Bounds* emphasized that legal research or advice was necessary "to make a meaningful *initial presentation*" to a trial court. *Id.* at 828 (emphasis added).

172. *See Cornett*, 51 F.3d at 898 ("The Supreme Court has delineated the stages of litigation for which the right of access requires assistance and we are not free to expand the scope of the right beyond these limits.").

173. One commentator has concluded that the post-pleading statement in Lewis relieving states of the enabling incarcerated persons to "litigate effectively" was dictum, and not binding. *See* MUSHLIN, *supra* note 36, § 12:5. However, lower courts have often expressed being bound to follow Supreme Court dicta almost as firmly as the Court's outright holdings. *See, e.g.*, Bonidy v. United States Postal Service, 790 F.3d 1121, 1125 (10th Cir. 2015) ("[W]e are 'bound by Supreme Court dicta almost as firmly as by the Courts' outright holdings, particularly when the dicta is recent and not enfeebled by later statements.'"); F.E.B. Corp. v. United States, 818 F.3d 681, 690 (11th Cir. 2016) ("'[T]here is dicta . . . and then there is Supreme Court dicta.' We have consistently recognized that 'dicta from the Supreme Court is not something to be lightly cast aside,' but rather is of 'considerable persuasive value[.]'") (citations omitted); Hollis v. Lynch, 827 F.3d 436, 448 (5th Cir. 2016) ("[W]e are generally bound by Supreme Court dicta, especially when it is 'recent and detailed.'") (citations omitted). Further, over 900 cases have since cited *Lewis*' rule that states need not ensure prisoners become effective litigants once in court. The statement has thus had significant weight, despite it not being necessary to the holding. This Note therefore focuses on how a right to affirmative assistance on procedural matters fits within the confines of *Lewis*' limitations, dictum or not.

174. *See Bounds*, 430 U.S. at 823.

175. *Id.* at 824.

assistance. Similar to how *expressio unius* should not be used to determine *when* the right applies, it also should not be used for deciding *how* the right is defined. The Ninth Circuit, therefore, mistakenly viewed the right in light of a canon that the Supreme Court has disavowed in this sphere.

Third, the line between "affirmative assistance" and "active interference" is not as clear as the Ninth Circuit believes. It defined "active interference" as "erect[ing] barriers that impede the right of access of incarcerated persons" and had held it to be the only way that a state can infringe on an incarcerated person's access-to-courts right after the pleading stage.[176] The Ninth Circuit even admitted that *Lewis* "[did] not speak to a prisoner's right to litigate in the federal courts without unreasonable interference."[177] Further, in practice, it is all too easy for the state to classify its actions that may interfere with incarcerated persons' claims as "lack of assistance" in order to receive a favorable ruling. Consider a regulation that prohibits prisoners, whose claims have survived a motion to dismiss, from accessing the prison library. On the one hand, the regulation seems to constitute an attempt to interfere with an incarcerated person's ability to access the courts. The state, however, may argue that the regulation is merely not providing prisoners with assistance—in the form of legal materials—that they are not entitled to in the post-pleading stage. The distinction between the categories therefore is not only arbitrary, but can also be easily manipulated by the state.

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176. Silva v. Di Vittorio, 658 F.3d 1090, 1102–03 (9th Cir. 2011) (citing John L. v. Adams, 969 F.2d 228, 235 (6th Cir. 1992)). Although lower courts have not explicitly defined the components of "active interference," most agree that it "applie[s] only to intentional conduct, and not to something less than intentional conduct, such as recklessness or gross negligence." Williams v. Hazel, 2017 WL 4236968 at *9 (N.D. Cal. Sept. 25, 2017); *see also* Jackson v. Procunier, 789 F.2d 307, 311 (5th Cir. 1986) ("Any deliberate impediment to access, even a delay of access, may constitute a constitutional deprivation."); Galeas v. Inpold, 845 F. Supp. 2d 685, 688 (W.D.N.C. 2012) (holding that a plaintiff must plead alleged interference by prison officials to sustain an access-to-courts violation). Courts have observed such interference in a variety of situations. *See* Vigliotto v. Terry, 873 F.2d 1201, 1202 (9th Cir. 1989) ("[A] defendant is deprived of due process if prison authorities confiscate the transcript of his state court conviction before appeal."); Carter v. Hutto, 781 F.2d 1028, 1031 (4th Cir. 1986) (ruling that active interference would occur if prison officials destroyed an incarcerated person's legal materials because it would "infring[e] or render[] nugatory his constitutional right to access the courts"); *Jackson*, 789 F.2d at 311–12 (ruling that the intentional delay in mailing a prisoner's *in forma pauperis* filing could be a constitutional violation). In each of these cases, prison officials deliberately frustrated the prisoners' chances of succeeding in court by hindering their case.

177. *Di Vittorio*, 658 F.3d at 1103.

Bounds even explicitly dismissed categorization of a prison's obligations into "affirmative assistance" and "active interference" when it rejected the state's argument that previous cases only required lack of interference because such cases did not "set forth . . . the full breadth of access."[178] In addition to no undue interference, a prison must provide incarcerated persons with legal resources, or "affirmative assistance."[179] *Both* components are necessary to fulfill prisoners' right to access the courts. Lack of prison officials' undue interference is one requirement, not dispositive evidence that the state has fulfilled prisoners' constitutional rights.

III. THE RIGHT TO AFFIRMATIVE ASSISTANCE EXTENDS THROUGHOUT LITIGATION

A. THE FUTILITY OF LITIGATION WITHOUT POST-PLEADING AFFIRMATIVE ASSISTANCE

The central role of courts is "to provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm."[180] The judicial system is especially critical for incarcerated persons, who have no other recourse for the "abuse, neglect, and callous indifference that largely typify the administration of American prisons."[181] Not only is litigation an avenue for incarcerated

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

179. An access-to-courts violation can be found even when affirmative assistance is already being provided. In *Wolff v. McDonnell*, the Court found that despite prisoners having legal assistance through access to a law library, an unreasonable regulation on jailhouse lawyers nevertheless interfered with their filing ability. *See Bounds*, 430 U.S. at 824 (discussing *Wolff*). An access-to-courts violation existed, even though incarcerated persons had a "backdrop of availability of legal information." *See id.* The Court came to the same result in *Procunier v. Martinez*, 416 U.S. 396, 421(1974), when it invalidated a regulation interfering with prisoners' right of access to the courts, despite them being furnished with a law library and permitted assistance from jailhouse lawyers.

180. Lewis v. Casey, 518 U.S. 343, 349 (1996); *cf.* Marbury v. Madison, 5 U.S. 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals. . . .").

181. Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 302, 305 (2022); *see also* Ramona R. Rantala, *Sexual Victimization Reported by Adult Correctional Authorities, 2012–15*, U.S. DEP'T OF JUSTICE 1,7 (2018), https://bjs.ojp.gov/content/pub/pdf/svraca1215.pdf [https://perma.cc/LF3Q-4QK6] (finding over 14,300 allegations of sexual victimization by prisoners against prison staff); Alysia Santo et al., *Guards Brutally Beat Prisoners and Lied About It. They Weren't Fired.*, N.Y. TIMES (May 19, 2023), https://www.nytimes.com/2023/05/19/nyregion/ny-prison-guards-brutality-fired.html [https://perma.cc/YXU3-N4GN] (reporting The Marshal Project's finding that New York State prison officials have abused incarcerated persons through various methods, including withholding food and physical abuse that led to shattered teeth, broken bones, and

individuals to seek redress for dangerous conditions, but it also fosters accountability and security within penal institutions.[182] This is unachievable, however, if incarcerated persons are effectively deprived of any opportunity to obtain judicial relief in practice.

Take a prisoner who is given sufficient access to the law library and files a complaint pro se. The state then brings a motion to dismiss. After review, a judge denies the motion, allowing the case to proceed to discovery and trial.[183] With trial comes various procedural obstacles, including overcoming hearsay exceptions, admitting expert testimony, and parsing out permissible questions for cross-examination. These rules are beyond the information learned by the incarcerated person when filing the initial complaint. According to the Ninth Circuit, the state has fulfilled its constitutional duty by helping the prisoner "g[e]t into court"[184] at all.[185] Once the complaint has been deemed meritorious, however, the right to assistance evaporates. Incarcerated individuals must then navigate the complexities of the court system wholly uninformed of the hurdles ahead. In effect, they are on their own.

Pro se litigants face a multitude of challenges presenting their claims before a court. Their lack of legal knowledge regularly results in improper pleadings.[186] Courts, in an effort to apply an

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punctured lungs); Jannik Lindner, Must-Know Prison Violence Statistics, GITNUX, https://gitnux.org/prison-violence-statistics [https://perma.cc/QPP6-8BEN] (finding that 46.5% of male prisoners suffered physical violence perpetrated by staff or other incarcerated persons); Maya Miller, *One-third of California prisons provide 'inadequate' medical care, watchdog report says*, SACRAMENTO BEE (Nov. 8, 2023), https://www.sacbee.com/news/politics-government/the-state-worker/article281554588.html [https://perma.cc/3VLW-FMVD] ("A third of California's adult prisons provide an inadequate level of medical care to their inmate patients[.]").

182. *See* Fathi, *supra* note 100, at 8 (recounting interview with Jeanne Woodford, former San Quentin warden and California corrections director, who explained "if it wasn't for . . . litigation, I wouldn't be able to do my job as warden, and my job as a warden is to keep everyone safe").

183. *See Civil Litigation Process: The Basics*, NAT'L WOMEN'S LAW CTR. (Feb. 2021), https://nwlc.org/wp-content/uploads/2021/11/Civil-Litigation-Fact-Sheet.pdf [https://perma.cc/9EGB-W3RS]. Depending on the opposing parties, a motion for summary judgment may also be filed following discovery.

184. Marshall v. Knight, 445 F.3d 965, 969 (7th Cir. 2006).

185. *See* Silva v. Di Vittorio, 658 F.3d 1090, 1102 (9th Cir. 2011); Cornett v. Donovan, 51 F.3d 894, 898–900 (9th Cir. 1995); Marshall v. Knight, 445 F.3d 965, 969 (7th Cir. 2006).

186. *See* DONNA STIENSTRA ET AL., FED. JUDICIAL CTR., ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES vii (2011), https://www.govinfo.gov/content/pkg/GOVPUB-JU7-PURL-gpo73052/pdf/GOVPUB-JU7-PURL-gpo73052.pdf [https://perma.cc/4W99-9GYW] (finding pro se

egalitarian framework, must liberally construe these complaints.[187] Most courts, however, have not extended this forgiving standard beyond the pleading stage.[188] The importance of proper and elongated assistance, therefore, is heightened because the self-represented are often held to the same standards as actual attorneys—despite their lack of training in the "procedural and substantive intricacies of the law[.]"[189] Given that the judge has deemed the plaintiff's claim meritorious, and that the plaintiff is now facing a less forgiving standard from the court, adequate assistance after the pleading stage becomes crucial for fair adjudication.

Advocating for prisoners' access to these resources is not a controversial proposal. *Bounds* recognized that:

> [i]t would verge on incompetence for a lawyer to file an initial pleading without researching such issues such as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available. Most importantly of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action. If a lawyer

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litigants' lack of legal knowledge to be one of five major problems that chief judges regularly see).

187. *See* Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988) ("This court recognizes that it has a duty to ensure that pro se litigants do not lose their right to a hearing on the merits of their claim due to ignorance of technical procedural requirement."); Haines v. Kerner, 404 U.S. 519, 520 (1972) (noting that pro se complaints are to be held "to less stringent standards than formal pleadings drafted by lawyers"); Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Litigants*, 55 U. CHI. L. REV. 659, 660 (1988) ("A liberal construction of the pleadings enables a court to assess the nature of the interests at stake in the suit and to determine how much further procedural leniency, if any, is due in the particular case.").

188. *See* Bradlow, *supra* note 187, at 672 (clarifying that the rule to liberally construe pro se complaints as held in Haines v. Kerner, 404 U.S. 519, 520–21 (1972), is followed by strict compliance with procedure thereafter); Jessica Case, *Pro Se Litigants at the Summary Judgement Stage: Is Ignorance of the Law an Excuse?*, 90 KY. L.J. 701, 711–12 (2002) (asserting that a majority of circuits hold pro se litigants to the same procedural standards as represented parties for most stages of litigation following the initial filing of a complaint); *see also* STIENSTRA ET AL., *supra* note 186, at vii (listing problems with pro se litigants' responses to motions to dismiss or summary judgment as one of the primary ones chief judges find regularly in their practice).

189. Van Wormer & Nina Ingwer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983, 997 (2007).

> must perform such preliminary research, it is no less vital for a pro se prisoner.[190]

Even after decades of experience, most lawyers must still consult legal resources, such as the Federal Rules of Civil Procedure and the Federal Rules of Evidence.[191] It would be unrealistic to expect pro se prisoners to litigate an action successfully without access to the same.

Lewis affirmed *Bounds*' holding that states must "shoulder affirmative obligations to assure all prisoners meaningful access to the courts."[192] Requiring them to do so would frustrate, if not foreclose, any feasibility of obtaining legal relief, which *Lewis* has

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190. Bounds v. Smith, 430 U.S. 817, 825–26 (1977). *Lewis* disclaimed the requirement that states enable prisoners to perform legal research. *See* Lewis v. Casey, 518 U.S. 343, 360 (1996). It is important to note, however, that the Court had also reaffirmed *Bounds*' holding that states must shoulder some affirmative obligations if incarcerated persons are to have meaningful access to courts. *See id.* at 356. *Lewis* rejected Petitioners' claim that all prisoners are entitled an "excellent" law library in addition to aid from law clerks and legal assistance. *Id. Bounds* did not guarantee a particular methodology in which prisons are to fulfill their constitutional obligation. *See id.* Instead, it merely required that incarcerated persons have the capability to meaningfully present their grievances to a court. *See id.* Indeed, "it is that capability, rather than the capability of turning pages in a law library, that is the touchstone." *Id.* In analogizing to the requirement that lawyers must perform preliminary research to provide adequate representation, this author does not intend to overlook *Lewis*' significant rejection of such reasoning. Instead, the emphasis is merely on the illusory nature of the access-to-courts right when prisoners' access to affirmative assistance ceases at a point where trained attorneys, on the other hand, would need it. *Lewis*' paramount concern was reigning in judicial overreach in creating prison programs, which had become commonplace after *Bounds*. *See Lewis*, 518 U.S. at 364 (Thomas, J., concurring). Here, the Court took issue with the district court's sweepingly broad remedial decree on the Arizona Department of Corrections (ADOC), that "dictat[ed] in excruciatingly minute detail a program to assist inmates in the filing of lawsuits—right down to permissible noise levels in library reading rooms." *Id.* The "virtually unbridled equitable power that [the Court has] for too long sanctioned" resulted in *Lewis* giving prisons deference in how to ensure prisoners can access the courts. *Id.* at 386. This section does not advocate for a certain type of affirmative assistance to be provided to incarcerated persons, as it recognizes the "intrusive" nature of such a proposal. Instead, it argues that some kind of assistance that would give prisoners the opportunity to meet procedural requirements after the pleading stage is necessary. *See infra* Part III.B. Prison officials are arguably much closer to issues of reform and administration, which has led the Supreme Court to defer to their discretion in penal administration. This author's proposal still grants prison authorities discretion in how to achieve the listed objectives. Such an approach aligns with *Lewis*, which encouraged "'local experimentation' in various methods of assuring access to the courts." *Lewis*, 518 U.S. at 351. The Supreme Court envisioned that new experimental programs "would remain in place at least until some inmate could demonstrate that a nonfrivolous legal claim had been frustrated or was being impeded." *Id.* at 353.

191. *See* Rivera v. Monko, 37 F.4th 909, 915 (3d Cir. 2022) ("We know of very few lawyers who could litigate such an action without being able to refer to the Federal Rules of Civil Procedure and the Federal Rules of Evidence.").

192. *Bounds*, 430 U.S. at 824; *see also Lewis*, 518 U.S. at 356.

recognized would be a constitutional violation.[193] The right to access the courts promises the opportunity to be heard.[194] However, "the right to be heard has little value . . . to those who lack the knowledge to exercise their right in a meaningful . . . way."[195]

The *Lewis* court, unfortunately, did not decide what constitutes "meaningful" access.[196] One scholar has theorized that a 2011 case, *Turner v. Rogers*,[197] defined meaningful access as the ability "to identify the central issues in the case and present evidence and arguments regarding those issues."[198] On these grounds, prisoners' access to courts is meaningful only if they have knowledge of the law and legal process in order to make their arguments. By providing some kind of affirmative assistance that would help incarcerated individuals handle the procedural obstacles ahead, the states would at least be affording prisoners the opportunity for judicial relief. Litigants could engage in "adversary presentation" by presenting an argument, even if it is not the best one. Access to affirmative assistance post-pleading helps ensure that the courthouse door is not shut on incarcerated persons when it matters most.

193. *See* William B. Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 624–25 (1979) ("It is apparent that it is futile for prisoners to proceed pro se."); Raymond Y. Lin, *A Prisoner's Constitutional Right to Attorney Assistance*, 83 COLUM. L. REV. 1279, 1307 (1983) (arguing the futility of prisoners drafting proper pleadings for section 1983 suits without proper legal resources).

194. *See* United States v. Kras, 409 U.S. 434, 462 (1973) (Marshall, J., dissenting) (equating the "right of access to the courts" with "the opportunity to be heard when one claims a legal right").

195. Helen B. Kim, Note, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to Be Heard*, 96 YALE L.J. 1641, 1641 (1987).

196. *See* Joseph A. Schouten, *Not So Meaningful Anymore: Why a Law Library Is Required to Make a Prisoner's Access to the Courts Meaningful*, 45 WM. & MARY L. REV. 1195, 1196 (2004) ("[T]here is a dearth of material providing a detailed examination of the Court's interpretation of the right to meaningful access.").

197. 564 U.S. 431 (2011).

198. Laura K. Abel, *Turner v. Rogers and the Right of Meaningful Access to the Courts*, 90 DENV. U. L. REV. 805, 805 (2012).

B. THE "LEGAL INFORMATION" VS. "LEGAL ADVICE" DISTINCTION AND ITS RECONCILIATION WITH *LEWIS*

This Note proposes applying a dichotomy that would determine the requirements of state-sponsored assistance after the pleading stage, in light of *Lewis*.[199] However, it disavows the Ninth Circuit's distinction between interference and assistance, as explained in Part II. Instead, prisons must provide "legal information," but need not furnish "legal advice."[200] "Legal information" consists of "facts about the law and legal process[,]" whereas "legal advice" is "advice about the course of action [a litigant] should take to further his or her own best interests[,]" and is tailored to the litigant's particularized circumstances.[201] In other words, legal information educates: "What information does this litigant need in order to be able to decide what to do?" In contrast, legal advice counsels: "This is what the client should do."[202] Pro se advocate John M. Greacen proposed the distinction in 1995 as an approach for judicial staff to explain court procedure to pro se litigants in civil claims, without taking on an advocacy role that would violate clerks' mandated impartiality.[203] The distinction has since been adopted by the Federal Judicial Center, thirty-eight states, and the District of Columbia in policy guidance and court staff training curricula.[204] Its wide acceptance has further led to it becoming "the accepted standard of practice in both the federal and state court systems."[205] Extending this framework to prisoners' Section 1983 and *Bivens* actions is a rights-protective solution that many non-incarcerated pro se litigants already benefit from.

Categorization of affirmative assistance into these categories is reconcilable with *Lewis*' restrictive language regarding the scope

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199. *See* John M. Greacen, *Legal Information vs. Legal Advice: A 25 Year Retrospective*, 106 JUDICATURE 2, 49 (2022), https://judicature.duke.edu/wp-content/uploads/2022/09/GREACEN_Summer2022.pdf [https://perma.cc/AGX8-T7RB] (proposing the "legal information" and "legal advice" dichotomy as general parameters by which court clerks should frame their assistance to pro se litigants, while also respecting the court's ethical obligation of impartiality).

200. *Id.*

201. *Id.* at 53; *see* Tex. Off. Ct. Admin. et al., *Legal Information vs. Legal Advice*, TXCOURTS.GOV 1, 5 (2015), https://www.txcourts.gov/media/1220087/legalinformationvslegaladviceguidelines.pdf [https://perma.cc/W444-ZQJV] (defining legal advice as applying the law to "the individual person's specific factual circumstances" and by recommending to a litigant a specific course of action). *But see* Laureen Sudeall, *The Overreach of Limits on Legal Advice*, 131 YALE L. J. F. 637 (2022) (arguing that the current definitions of "legal advice" are "unnecessarily broad . . . [and] severely disadvantag[e] pro se litigants").

of the access-to-courts right. The Court relieved states of any obligation to enable prisoners to "*litigate effectively* once in court" because "[t]o demand the conferral of such sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population is effectively to demand the permanent provision of counsel, which [the Court does] not believe the Constitution requires."[206] With this language, the *Lewis* court equated "litigat[ing] effectively" to the permanent provision of counsel.[207] The only ways prisoners can "litigate effectively," as defined in *Lewis*, are through actually having counsel, or legal advice from the state that is so sophisticated and personally tailored that it is the functional equivalent of counsel.[208] Licensed attorneys are the

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202. *See id.*

203. *See id.* at 49.

204. *See id.* at 50. Two Canadian provinces—New Brunswick and Nova Scotia—have also adopted policies implementing the legal information/legal advice distinction. *See id.*

205. *See* Greacen, *supra* note 199, at 50 (citing Mary E. McClymont, *Nonlawyer Navigators in State Courts: An Emerging Consensus*, NAT'L CTR. FOR STATE CTS. 5, 5 (June 2019), https://www.ncsc.org/__data/assets/pdf_file/0024/53691/Justice-Lab-Navigator-Report-6.11.19.pdf [https://perma.cc/5VDG-BH2E]) (noting that all "legal navigator" programs—i.e., programs where non-lawyers assist self-represented litigants with their basic civil legal issues—in fifteen states "follow the legal information/legal advice distinction in defining the services that their staff and volunteers render"). This distinction is in various other areas of law as well, such as disclaimers in legal resources. *See, e.g.*, *Unnatural Will Definition & Legal Meaning*, THELAWDICTIONARY.ORG, https://thelawdictionary.org/unnatural-will/ [https://perma.cc/UTQ8-Q3E8] ("This article contains general legal information but does not constitute professional legal advice for your particular situation.").

206. Lewis v. Casey, 518 U.S. 343, 354 (1996).

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

208. *See id.*; *see also* Abel, *supra* note 198, at 810 ("[T]he Lewis Court's rejection of a broader reading of the right of meaningful access was based on a tautology: the only way to satisfy the broader right would be to provide counsel, and the Constitution does not require the appointment of counsel in civil cases."). In disclaiming the notion that states enable prisoners to litigate effectively, *Lewis* overruled the section of *Bounds* requiring that prisoners be able to conduct the same preliminary research that an attorney generally carries out before filing a complaint. *See* Bounds v. Smith, 430 U.S. 817, 825–26 (1977) (asserting that "[r]esearching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available . . . [to] determine whether a colorable claim exists" is necessary for attorneys). "Conducting comprehensive and appropriate legal research, however, requires significant training that most learn in law school," as Professor Priya Baskaran has noted. Priya Baskaran, *The Power of Critical Legal Research*, L. SCH. SURV. STUDENT ENGAGEMENT (Aug. 29, 2023), https://lssse.indiana.edu/blog/the-power-of-critical-legal-research [https://perma.cc/V6Y6-9ZSF]. Merely having access to resources themselves surely cannot allow an uninformed litigant to work with the same "sophisticated legal capabilities" as counsel. *Lewis*, 518 U.S. at 354. The Court held that enabling uneducated prisoners to conduct the same level of preliminary research that an attorney conducts would be allowing them to litigate effectively, but conferring such skills upon "a mostly uneducated and . . . largely illiterate population" is the same as requiring that they have counsel. *Id.* In other words, the Court

only parties that can provide legal advice.[209] Therefore, discharging states from providing prisoners with attorneys for their civil claims implies that they are not entitled legal advice. Not being required to furnish counsel, however, does not relieve states of providing affirmative assistance in the form of legal information once a prisoner's claim has survived a motion to dismiss.[210]

Access to legal information after the pleading stage would inform prisoners of the complex procedural hurdles, while still respecting the limits of *Lewis*, given that incarcerated individuals would retain full control over their case without legal advice. Further, both *Bounds* and *Lewis* predicted the high likelihood that meritorious lawsuits by pro se prisoners would fail without access

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found that the only way prisoners could work with the same sophistication of counsel is if they had counsel in the first place. *See id.*; *see also* Abel, *supra* note 198, at 812 ("The *Lewis* Court developed a narrow view of 'meaningful access' in the belief that truly meaningful access—enabling pro se litigants to litigate effectively—would require the appointment of counsel and be prohibitively expensive.").

209. *See* Janice Ruiz, *Legal Information vs. Legal Advice: What's the Difference?*, AM. JUD. SYS. (May 9, 2022), https://www.ajs.org/legal-information-vs-legal-advice/ [https://perma.cc/WFM4-NMVH] (clarifying that anyone may give legal information, but only licensed attorneys may provide legal advice). *But see* Deborah L. Rhode, *Access to Justice: Again, Still*, 73 FORDHAM L. REV. 1013, 1015 (2004) (criticizing the American Bar Association's broad prohibitions on the provision of legal advice by non-lawyer specialists who are nevertheless "generally at least as qualified as lawyers to provide assistance on routine matters where legal needs are the greatest"); Julian Lonbay, *Assessing the European Market for Legal Services: Developments in the Free Movement of Lawyers in the European Union*, 33 FORDHAM INT'L L.J. 1629, 1636 (2011) (discussing the efficacy of non-licensed legal advice providers); Herbert Kritzer, *Rethinking Barriers to Legal Practice*, 81 JUDICATURE 100, 100 (1997) (same).

210. *Bounds*—and even *Lewis*—suggested that legal assistance for incarcerated persons is necessary throughout all stages of litigation. *Bounds* found that merely allowing prisoners to draft a complaint is insufficient for fulfilling their access to courts rights. *See Bounds*, 430 U.S. at 826. Instead, they must be able to engage in "adversary presentation" since "even the most dedicated trial judges are bound to overlook meritorious complaints" without it. *Id.* Given that the PLRA now counts each dismissal of a "frivolous" lawsuit as a strike against prisoners—preventing them from filing a later lawsuit *in forma pauperis*—the stakes have intensified. *See Know Your Rights: The Prison Litigation Reform Act (PLRA), supra* note 104, at 3; Jonathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries*, 101 GEO. L.J. 1171, 1210 (2013) ("[B]ecause the PLRA penalizes inmates who file three 'frivolous' claims, it becomes even more important for inmates to know the law before they file."). *Lewis* also observed that filing a complaint is not dispositive evidence that a prison has fulfilled its constitutional obligations in providing proper assistance. *See* Lewis v. Casey, 518 U.S. 343, 351 (1996) ("[A prisoner] might show, for example, that a complaint he prepared was dismissed for failure to satisfy some *technical* requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known.") (emphasis added). Together, both cases suggested that meaningfulness of prisoners' access to courts may depend on the opportunity for relief, not on the mere ability to draft a complaint. *See id.*; *Bounds*, 430 U.S. at 826.

to these educational resources.[211] "Legal information," therefore, mitigates this concern by allowing incarcerated persons to defend their claims, to the fullest extent, *on their own terms*. Prisoners maintain ultimate control of the trajectory of their lawsuit without confluence of "legal advice." In effect, addition of "legal information" resources into prisons will facilitate two interests: (1) accountability for alleged abuse and inhumane treatment perpetuated by corrections officers, and (2) the opportunity for incarcerated persons to obtain judicial relief for constitutional violations. "Legal advice," on the other hand, need not be provided by the states.

1. *Legal Information*

"What does this person need to know to be able to decide what to do?"[212] Legal information consists of factual, objective "statements of what the law is."[213] It allows litigants to "draw their own conclusions as to the interpretation of the law" while also requiring them to apply the law to the circumstances of their own situation.[214] This Note proposes analogizing the permissible conduct of court clerks in assisting non-incarcerated pro se litigants to the type of state-required assistance in prisons after the pleading stage. State manuals provide helpful examples of ways court clerks can assist pro se litigants:

(i) Provide, describe, and explain court rules and practices, court procedures, administrative practices, statutes,

211. Various cases before *Bounds* and *Lewis* had also implicitly recognized this distinction. In *Procunier v. Martinez*, the Court struck down a regulation forbidding legal paraprofessionals and law students from accessing their clients in prison. 416 U.S. 396, 421–22 (1974). Indeed, the Court established that although the state itself need not provide legal advice to prisoners, it cannot interfere with such assistance when it is already provided by another party. *See id.* Similarly, in *Johnson v. Avery*, the Court invalidated a regulation that prevented jailhouse lawyers from assisting their fellow prisoners in their cases. 393 U.S. 483, 488–89 (1969). The State had attempted to deprive incarcerated persons of de facto legal advice, given that a jailhouse lawyer would particularize current law to their specific circumstances. *See id.* Again, the Court recognized that prisons cannot interfere with already-provided legal advice. *See id.*

212. Greacen, *supra* note 199, at 54.

213. *Legal Information v. Legal Advice: What is the difference?*, RIVERSIDE CNTY. L. LIBRARY, https://www.rclawlibrary.org/wp-content/uploads/Legal-Information-v.-legal-advice.pdf [https://perma.cc/KED4-7YY5].

214. *Id.*

ordinances, legal phrases or terms, and local rules, and explain generally how the court and judges function

(ii) Explain the meaning of terms and documents used in the court process

(iii) Answer questions concerning deadlines or due dates (without calculating due dates)

(iv) Provide general instructions on how to complete court forms

(v) Recite or provide a copy of applicable fees and costs to a litigant's case[215]

Providing legal information in practice may differ depending on the type of legal assistance program that the prison uses. In a law library, for example, the state may furnish access to the Federal Rules of Civil Procedure, Federal Rules of Evidence, and local rules of court.[216] Other resources could include treatises, practice guides, and hornbooks, such as Moore's *Federal Practice*[217] and Wright and Miller's *Federal Practice and Procedure*.[218] Facilitating access to court cases in the prison's jurisdiction would enable prisoners to conduct legal research, and could be an

215. *See How the Courts Work*, WISC. CT. SYS. (Mar. 1, 2022), https://www.wicourts.gov/services/public/selfhelp/procedures.htm [https://perma.cc/2JPL-L3QV]; Tex. Off. Ct. Admin. et al., *supra* note 201, at 5; *see also Serving the Self-Represented Litigant: A Guide By and For Massachusetts Court Staff*, MASS. JUD. INST. 1, 5 (2010), https://www.mass.gov/doc/serving-the-self-represented-litigant-a-guide-by-and-for-mass-court-staff/download [https://perma.cc/9E7F-84EQ]; *List of Some Things Court Personnel Can and Cannot Do*, MONTGOMERY CNTY., https://cms1files.revize.com/montgomerycountytx/PRO%20SE.pdf [https://perma.cc/U97R-VFFP].

216. Access to a law library would constitute insufficient access to courts for illiterate or non-English speaking prisoners if they are not offered alternative assistance. *See* Lewis v. Casey, 518 U.S. 343, 356 (1996); *see also* R. E. Ducey, *Survey of Prisoner Access to the Courts: Local Experimentation a' Bounds*, 9 N. ENG. J. CRIM. & CIV. CONF. 47, 80–82 (1983) (explaining that prisons must provide foreign-language resources for incarcerated non-English speakers). However, when such instances are rare, they do not warrant remedial system-wide relief. *See Lewis*, 518 U.S. at 359. The Court required that remedies of illiterate prisoners be tailored commensurate to the violations, instead of "going beyond their scope." *Id.* (quoting Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406, 417 (1977)). For a discussion of state-provided proposals that would fulfill the access-to-courts right for illiterate prisoners, see Matosky, *supra* note 79, at 299.

217. 6 DANIEL R. COQUILLETTE ET AL., MOORE'S FEDERAL PRACTICE § 26.40 (3d. 2018).

218. 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2552 (7th ed. 2023). In *Bounds*, the State proposed a list of materials for the law library to ensure meaningful access to the courts, which included resources on substantive law, case law, and statutes. *See* Bounds v. Smith, 430 U.S. 817, 819 n.4 (1977). This approach was lauded by *Lewis*. 518 U.S. at 362 ("*Bounds* was an exemplar of what should be done.").

alternative way to fulfill the right.[219] The state may even provide instructional court handbooks, informational brochures, and "how-to" packets.[220] In a legal assistance program, such measures may include reviewing paperwork for completion, "help[ing] [pro se litigants] fill out court forms, guid[ing] them in the appeals process, and answer[ing] procedural questions."[221] Regardless, the state should also provide the relevant forms that prisoners may need post-pleading in order to litigate their entire case. Further, these resources need extend only to those suits implicating the right of affirmative assistance, as delineated in *Lewis*, which are challenges to confinement and civil rights claims. Therefore, such assistance need not include, for example, state law about family law and tort disputes.[222]

Providing this assistance does not violate *Lewis*' overruling of the notion that prisoners must be able to "litigate effectively" once in court.[223] These resources are in no way tailored to the prisoner's specific circumstances. They would not be a functional substitute for an attorney, nor would they ensure the most compelling

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219. *Lewis* also held that "the Constitution does not require that prisoners (literate or illiterate) be able to conduct generalized research, but only that they be able to present their grievances to the courts—a more limited capability that can be produced by a much more limited degree of legal assistance." *Lewis*, 518 U.S. at 360. Lewis was largely concerned with enabling prisoners to conduct the research because merely giving someone access does not mean they know how to use a legal search engine, such as Westlaw, or *how* to conduct legal research. *See* Baskaran, *supra* note 208.

220. *See* Robert B. Yegge, *Divorce Litigants Without Lawyers*, 33 JUDGES J. 8, 13 (1994) (proposing a "facilitator program" where the facilitator helps litigants accomplish tasks without actually undertaking such tasks on the litigant's behalf).

221. *See* Meehan Rasch, *A New Public Interest Appellate Model: Public Counsel's Court-Based Self-Help Clinic and Pro Bono Triage for Indigent Pro Se Civil Litigants on Appeal*, 11 J. APP. PRAC. & PROCESS 461, 472 (2010). For arguments about creating simpler rules in order to create more equitable justice, see Tal Fortgang, *Writing Simpler Laws*, NAT'L AFFS. (2022), https://nationalaffairs.com/publications/detail/writing-simpler-laws [https://perma.cc/G7D2-UHM3].

222. *See Lewis*, 518 U.S. at 355.

223. Before *Lewis*, the Fourth Circuit acknowledged that requiring prisoners to "know in advance exactly what materials [they] need[ ] to consult" is unrealistic. *See* Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978). Indeed, legal research often involves "browsing through various materials in search of inspiration; tentative theories may have to be abandoned in the course of research in the face of unfamiliar precedent[;] [n]ew theories may occur as a result of a chance discovery of an obscure or forgotten case." *Id.* Because the onus is still on prisoners to create these legal theories or recognize cases that may call their arguments into question, legal research does not constitute legal advice. Indeed, the Fourth Circuit held that because prisoners are "unversed in the law and the methods of legal research[,]" they will need more time or assistance than the typical trained lawyer. *Id.* Therefore, circuit courts after *Bounds* also recognized that giving prisoners access to legal materials by itself does not enable them to "litigate effectively" due to their unfamiliarity with the legal system. *Id.*

presentation in court. Although providing legal information may seem like a modest proposal, unawareness about procedural requirements is one of the largest problems facing pro se litigants.[224]

The Supreme Court has endorsed using procedural safeguards to assist pro se litigants. *Turner v. Rogers* involved a defendant who was imprisoned after a civil contempt hearing for failure to comply with child support payments.[225] The Court held that indigent defendants are not entitled to counsel at such hearings in cases where the state has provided alternative procedural safeguards.[226] In so ruling, Justice Breyer emphasized the importance of procedural mechanisms that "can ensure the 'fundamental fairness' of the proceeding."[227] Because failure to follow procedural requirements can result in the dismissal of an incarcerated person's case, concerns about "fundamental fairness" are equally critical in prisoner litigation. States, therefore, must provide legal information to prisoners who are actively litigating a case.

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224. *See* STIENSTRA ET AL., *supra* note 186, at vii (surveying sixty-one chief judges of district courts and listing procedural issues that judges find in pro se cases before them, including problems with "pro se litigants' responses to motions to dismiss or for summary judgment . . . [and] pro se litigants' failure to understand the legal consequences of their actions or inactions (e.g., failure to plead statute of limitation, failure to respond to requests for admissions)"); s*ee also* Gigi Stone & Mary Harris, *'Jailhouse Lawyer' Lectures Harvard Law Students*, ABC NEWS (Dec. 17, 2006), https://abcnews.go.com/WNT/LegalCenter/story?id=2732920&page=1 [https://perma.cc/N8GG-YT8C] ("'Prisoners have an amazing amount of procedural obstacles to deal with,' [Jessica Feierman, former lawyer for ACLU's National Prison Project] says. 'Whether or not they get heard in court doesn't turn on the merits of their cases . . . it just doesn't matter if you have a good case or not.'").

225. *See* Turner v. Rogers, 564 U.S. 431, 436 (2011).

226. *See id.* at 448. At least one critic has argued that *Rogers* departed from *Lewis*' ruling that states need not enable prisoners to "*litigate effectively* once in court." *See* Abel, *supra* note 198, at 809 (quoting Lewis v. Casey, 518 U.S. 343, 354 (1996)). Specifically, Abel argues that such a deviation stems from Justice Breyer's suggestion that pro se litigants be able to "identify the critical issues in [a prisoner's] case and present relevant evidence regarding those issues." *Id.* at 808. However, lower courts have not applied *Rogers* to § 1983 actions, reasoning that its holding is limited to civil contempt hearings for child support. *See, e.g.*, Gordy v. Gordy, 2012 WL 3912790, at *1 (S.D. Ga. Aug. 21, 2012), *R. & R. adopted*, 2012 WL 3911880 (S.D. Ga. Sept. 6, 2012). Further, in contrast to *Lewis*' holding that applied to those *already* in prison, Rogers was not incarcerated at the time of his civil contempt hearing. *See Rogers*, 564 U.S. at 436–37. The Supreme Court has repeatedly held that the constitutional liberties retained by prisoners are still "limited in scope," and thus cannot be analogized to those freedoms of individuals in free society. *See, e.g.*, Shaw v. Murphy, 532 U.S. 223, 229 (2001).

227. *Rogers*, 564 U.S. at 448.

2. *Legal Advice*

Legal advice, in contrast, applies the current legal landscape to the particular circumstances an incarcerated person is facing.[228] It helps guide parties tactically on how to use the law to their advantage by issuing recommendations about a specific course of action that a litigant should take in a potential or existing proceeding.[229] Moreover, legal advice "[i]nterprets some aspect of the law, court rules, or court procedures," whereas legal information still allows for litigants to interpret the law for themselves.[230]

Court personnel are required to maintain the independent and impartial nature of the judicial system, qualities that "bring integrity to the court's work."[231] In turn, the requirement to serve as a neutral resource in providing "legal information," but not "legal advice," for all pro se litigants serves as a helpful benchmark for measuring how prisons can fulfill the same obligation. For example, court employees of California are permitted to provide legal information insofar as that information does not "cross the line" into becoming legal advice, as doing so would compromise the neutrality of the court.[232] Determining whether such a line has

228. *See Model Definition of the Practice of Law*, AM. BAR ASSN. (Sept. 18, 2002), https://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_definition [https://perma.cc/24E6-82H2] (including giving legal advice under the definition of the "practice of law," which is "the application of legal principles and judgement with regard to the circumstances or objectives of a person").

229. *See* Tex. Off. Ct. Admin., *supra* note 201, at 5; *see also* Greacen, *supra* note 199, at 52–53 (recommending that, when differentiating between legal information and legal advice, one begin by asking whether the clients are asking for advice about a course of action that they should take in order to further their best interests).

230. *See* Tex. Off. Ct. Admin., *supra* note 201, at 5; *see also Legal Information v. Legal Advice: What is the difference?*, *supra* note 213 ("Legal information allows a person to draw their own conclusions as to the interpretation of the law, allowing persons to decide how best to apply it in their case.").

231. *Code of Ethics for the Court Employees of California*, JUD. COUNCIL OF CAL. (Oct. 9, 2009) https://www.courts.ca.gov/documents/codethic-courtemp.pdf [https://perma.cc/N49F-T6G2]. How "court personnel" is defined depends on the jurisdiction of the court. In Arizona, for example, "court personnel" includes court clerks, law librarians, and probation officers. *See Court Help vs. Court Advice*, ARIZ. CT. HELP (Apr. 7, 2020) https://www.azcourthelp.org/faq/can-and-cannots [https://perma.cc/SYV6-927Z].

232. *Code of Ethics for the Court Employees of California*, *supra* note 231; *see also What the Court Clerk Can and Cannot Assist You With*, FRUITA, https://www.fruita.org/municipalcourt/page/what-court-clerk-can-and-cannot-assist-you#:~:text=We%20Can%20provide%20you%20with%20certain%20information%20from%20your%20case,complete%20the%20forms%20for%20you [https://perma.cc/9734-HNAH] ("[Court clerks c]an give you general information about court rules, terminology, procedures,

been crossed becomes a fact-intensive inquiry into whether the information supplied to the pro se litigant tends to favor one side of the case over another.[233] Similarly, legal resources furnished to incarcerated persons after the pleading stage must include objective information about the law, but need not directly benefit their case by providing tailored legal advice.[234] Using state manuals for permitted conduct by court clerks again serves as a helpful guide for evaluating the breadth of legal state-sponsored assistance required for prisons. Applying these rules for conduct in assisting non-incarcerated pro se litigants, one can clearly distinguish what types of assistance prisons need not provide.

Providing incarcerated persons with recommendations on how to present their case most effectively in court is, in essence, the exact kind of assistance that incarcerated persons are not entitled to post-*Lewis*. For example, prisoners would not be entitled resources that would answer:

(i) whether to file a certain pleading
(ii) which substantive arguments should be asserted in pleadings or at trial
(iii) what types and amount of damages to seek
(iv) which objections to raise regarding an opponent's pleading, which motions to file, and when and how to raise them
(v) whether to settle their claims prior to trial
(vi) whom to assert petitions or other pleadings against
(vii) what phrasing or content should be included in pleadings
(viii) which forms to file
(ix) whether to appeal a judge's decision
(x) which questions to ask witnesses or litigants
(xi) when or whether to request or oppose an adjournment

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and practices. [Court clerks c]annot advise you as to how the court rules and procedures will be applied to your case.").

233. *See id.*

234. In other words, incarcerated persons would not be able to circumvent learning the complexities of the legal system due to reliance on a party more familiar with them. Incarcerated persons effectively still have complete discretion over decisions in their lawsuit, but are permitted the assistance that would allow them to see these decisions come to fruition.

(xii) how to best present evidence in pleadings or at trial[235]

As illustrated, applying an analysis or interpretation of existing law to the specific facts of a prisoner's case would constitute legal advice, which can only be offered by licensed attorneys.[236] Interpreting the implications of a statute or legal decision regarding a client's current case would similarly be prohibited.[237]

3. *Ways to Differentiate Between Assistance*

Guiding parties on what to do is legal advice, whereas "showing them how to achieve it" is legal information.[238] Explaining complex judicial procedures would enhance prisoners' access to courts by making the judicial process more transparent and palatable. The moment where legal information becomes legal advice, however, may sometimes be difficult to pinpoint with certainty. The state can categorize the form of legal assistance by considering whether it is individualized for the incarcerated person. In other words, the inquiry should be whether the purpose of the assistance is to advocate for the prisoners, or whether it is to inform them of existing law or procedure. This Note proposes five categorical distinctions that the state can use to differentiate between the provision of legal information and legal advice, and provides examples of each.

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235. Tex. Off. Ct. Admin., *supra* note 201, at 6; *How the Courts Work*, *supra* note 215; *Help & Support for Delaware Courts*, DEL. CTS. JUD. BRANCH, https://courts.delaware.gov/Help/courtcando.aspx [https://perma.cc/6VMM-SX8Q].

236. Because incarcerated persons are not entitled attorneys for civil claims, they are similarly not entitled to such advice from an acting attorney as part of a legal program in the prison. *See Lewis*, 518 U.S. at 354; *see also* Westling, *supra* note 36, at 307–08 (recognizing that courts have no authority to require attorney representation for indigent prisoners in civil rights actions). Note, however, that a prison can fulfill its constitutional obligations through implementing such a program. *See* Bounds v. Smith, 430 U.S. 817, 828 (1977). Such a framework raises the possibility of using artificial intelligence in prisons to provide legal assistance. For a discussion on how such assistance can quickly transform into legal advice, see Eran Kahana, *Generative AI: Its Impact on AI Legal Advice and AI Computational Law Apps*, STAN. L. SCH. (Jan. 10, 2023), https://law.stanford.edu/2023/01/10/generative-ai-its-impact-on-ai-legal-advice-and-ai-computational-law-apps/ [https://perma.cc/59NQ-XP4C].

237. *See How the Courts Work*, *supra* note 215.

238. Harris Khan, *What's the Difference Between Legal Information and Legal Advice?*, WELP MAG. (Sept. 28, 2021), https://welpmagazine.com/whats-the-difference-between-legal-information-and-legal-advice/ [https://perma.cc/3QNN-F4C6].

First, there is the "explanation" versus "recommendation" distinction.[239] Legal explanations assist individuals "on how to accomplish various actions within the court system," and accordingly constitute legal information.[240] Legal explanations are "neutral" on their face, because they merely list existing law and assist prisoners in complying with the court's numerous technicalities.[241] Answers to questions that begin with "'who, 'what,' 'when,' 'where,' and 'how'" would likely constitute legal explanations because they provide factual information.[242] Recommendations, however, constitute legal advice because they are tailored to the prisoner's exact case.[243] For example, questions that include "should" or "whether" often signal an attempt by a pro se litigant to obtain a legal advantage.

(1) Explanation: Can I file a lawsuit that my cellmate already filed and lost?
(2) Recommendation: Should I file a lawsuit similar to the one my cellmate already filed and lost?

Second is the "legal terms" versus "legal interpretations" distinction.[244] Providing definitions of complex legal terms, known colloquially as legalese, increases one's familiarity with the law. Nevertheless, definitions are boilerplate language that do not depend on a party's case, and therefore constitute legal information. Legal interpretation, on the other hand, focuses on resolving the normative meaning attached to a text, and is often used to advocate for a certain position.[245] In turn, legal interpretation would serve as legal advice because it directly dictates how a plaintiff would plead a case.

(1) Legal terms: What is a Section 1983 claim?

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239. Tex. Off. Ct. Admin., *supra* note 201, at 8.
240. *See id.*
241. *See* Greacen, *supra* note 199, at 53.
242. *Id.*
243. *See id.*
244. *But see In re* Kaitangian, 218 B.R. 102, 111 (Bankr. S.D. Cal. 1998) (noting that defining legal terms of art constitutes legal advice).
245. *See* AHARON BARAK, PURPOSIVE INTERPRETATION IN Law 3 (2005). There has been a copious amount of scholarship devoted to various theories of legal interpretation. *See, e.g.*, Richard H. Fallon, Jr., *The Meaning of Legal 'Meaning' and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1235 (2015).

(2) Legal interpretation: A doctor works as an independent contractor for the state prison. Can I assert a Section 1983 claim against him?

Third is the "procedural" versus "substantive" differences in filling out court forms.[246] Incarcerated persons must have access to resources that would answer their procedural questions. The Supreme Court has repeatedly echoed its fears that prisoners' meritorious lawsuits would be thrown out for not following procedural prerequisites.[247] As mentioned, however, incarcerated persons would not be entitled to assistance that would help them "litigate effectively." They would not be entitled to substantive assistance that would answer what are the case's most salient points, which wording would be the most compelling to include in a form, or how to align the forms with their legal strategy. Such substantive assistance would direct incarcerated persons on how to present their case, and thus be synonymous with legal advice.

(1) Procedural: Does a continuance motion need to be notarized?
(2) Substantive: What arguments should I assert in this continuance motion?

Fourth is the "options" vs. "opinions" distinction.[248] Incarcerated persons must know all the various procedural options available to them.[249] Opinions, by contrast, inform a litigant of the most prudent option to pursue, how to best raise an issue, or how

246. *See* Tex. Off. Ct. Admin., *supra* note 201, at 8 (advising against issuing "procedural recommendations" to litigants that would "indicate a direct advantage or disadvantage of a particular procedure," which would substantively advance their case).

247. *See* Bounds v. Smith, 430 U.S. 817, 826 (1977) ("[I]t is often more important that a prisoner complaint set forth a nonfrivolous claim meeting all procedural prerequisites, since the court may pass on the complaint's sufficiency before allowing filing in forma pauperis and may dismiss the case if it is deemed frivolous."); Lewis v. Casey, 518 U.S. 343, 351 (1996) ("[A prisoner] might show . . . that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known.").

248. *See* Tex. Off. Ct. Admin., *supra* note 201, at 14.

249. Informing court users of all available options is of paramount importance. Otherwise, a pro se litigant can indirectly be influenced by being aware of only some options due to the limitation in choices. *See Serving the Self-Represented Litigant: A Guide By and For Massachusetts Court Staff*, *supra* note 215, at 4.

likely the prospects are of winning one's case.[250] Legal advice likely involves an attorney presenting the options to the client, and subsequently issuing an opinion. Legal information, however, allows incarcerated persons to create their own opinions.

(1) Options: How can I exclude my prior criminal record from the jury?
(2) Opinions: What is the best way to exclude my prior criminal record from the jury?

The last categorical distinction states should use is considering who performs the legal research. A prisoner must be permitted access to legal research resources. Merely having access to such resources does not confer upon prisoners the ability to litigate with the same sophistication as counsel, and states are not required to train them to do so. Incarcerated persons are not entitled to a third party performing legal research for them, because it could be compiled in a way such that it is tailored to the prisoner's pending lawsuit, potentially constituting quasi-legal advice.[251] Greacen has also proposed the "website rule."[252] Material found on an official court website—or hyperlinked from a court website—"has presumably been vetted to ensure its accuracy and currency."[253] Therefore, providing an incarcerated person with legal information that would otherwise be found on a court website meets the confines of *Lewis*.

A critic may argue that creating such a system may confuse prison officials as to what is required by them, and, in turn, lead to personal liability. But prison officials are entitled to qualified

250. Greacen, *supra* note 196, at 53. When there is only one legal remedy or option available to the litigant, however, court staff are instructed to give the court user that information. *See Serving the Self-Represented Litigant: A Guide By and For Massachusetts Court Staff*, *supra* note 215, at 4.

251. The North Dakota Legal Self Help Center provides pro se litigants with "starting points" for legal research into their issues. *See What the Legal Self Help Center Can & Can't Do For You*, STATE OF N.D. CTS., https://www.ndcourts.gov/legal-self-help/about-us [https://perma.cc/U5U7-EZ8U]. However, many other judicial offices have not followed this approach. *See, e.g.*, *Rule 1402: Providing Assistance to the Public*, KAN. CTS. 1, 2 (July 8, 2019), https://www.kscourts.org/KSCourts/media/KsCourts/Rules/Rule-1402.pdf?ext=.pdf [https://perma.cc/KGA2-PEFJ] (prohibiting court staff from performing legal research for any member of the public).

252. Greacen, *supra* note 199, at 53.

253. *Id.*

immunity.[254] Holding them accountable for a constitutional violation requires that the right violated be "clearly established."[255] Case law would eventually define the gray areas regarding what type of assistance is sufficient to fulfill states' obligations for prisoners' access-to-courts right. In the meantime, prison officials would not be penalized for not having the correct assistance because it would not yet be "clearly established" at the time.[256] Such litigation will also further illuminate the necessity of such access and will put the states on notice going forward.[257]

C. EFFECTS OF ADOPTING THE "LEGAL INFORMATION" VERSUS "LEGAL ADVICE" DISTINCTION

1. *Courts Would Litigate More Meritorious Claims at Little Additional Cost*

Prisoner litigation has been viewed by some as a frivolous and burdensome strain on the federal courts,[258] and thus many judges give these claims minimal consideration.[259] For an incarcerated person, filing a claim then becomes a competitive endeavor, as each

254. *See Qualified Immunity*, NAT'L CONF. ST. LEGISLATURES (Jan. 12, 2021), https://www.ncsl.org/civil-and-criminal-justice/qualified-immunity [https://perma.cc/M47G-HWPU].

255. *See id.*

256. In *Rivera v. Monko*, evidence of a circuit split contributed to the Third Circuit finding that the extent of the State's obligations after the pleading stage was not "clearly established." 37 F.4th 909, 922 (3d Cir. 2022). The court did not impose liability. *See id.* at 923.

257. Applying the distinction to Rivera's case, the Third Circuit would have come to the same conclusion that he was entitled to further legal assistance ahead of trial. However, the proposed categorization framework would provide the appropriate limits to the assistance that incarcerated persons may have access to. In his previous litigation in which he was denied adequate access to the courts, Rivera, acting pro se, alleged excessive force claims against certain officers. *See id.* at 925 (Phipps, J., concurring). Ahead of trial, he independently crafted a legal strategy, which included admitting medical records attesting to his sustained injuries. *See id.* at 913 (majority opinion). Indeed, he was not furnished with legal advice encouraging him to submit such evidence. However, he was not given the proper legal information to admit those records per the prison's denial of his request for the Federal Rules of Evidence. *See id.* Due to his lack of knowledge of the "legal information" relevant to hearsay rules, he lost a potentially meritorious claim. *See id.* Yet at no point did Mr. Rivera contest his inability to consult with another party on the most effective legal strategy. In other words, Rivera did not ask for "legal advice." Doing so would enable him to "litigate effectively," which the Supreme Court has equated to providing counsel.

258. *See* Frankel & Newbern, *supra* note 25, at 902.

259. *See* Schlanger, *supra* note 101, at 1589 (prisoner civil rights claims on average receive "under an hour of judge time, from filing to disposition").

claim vies with the others for the judge's attention.[260] Justice Robert Jackson wrote that it "must prejudice the occasional meritorious application to be buried in a flood of worthless ones" and "[h]e who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."[261] Because many judges believe meritorious claims are often lost in the haystack—and may be prone to overlook them—it is even more important to allow the claims that do survive the government's 12(b)(6) motion a chance to succeed. With prisons providing incarcerated persons the necessary tools to challenge their confinement through legal information, the courts can more fully and fairly hear the prisoners' arguments. The greater likelihood of success could further encourage judges to thoughtfully consider prisoner claims, since they would likely see more pro se prisoner claims successfully litigated, instead of dismissing them based on stereotypes.

One may argue that managing a court's limited resources should be of utmost importance when evaluating a proposal that results in increased costs. Enlarging the right's scope, however, would not significantly increase financial costs on the state, given how few prisoner complaints pass the pleading stage. Various safeguards, such as the PLRA, have caused a steep decline in the number of prisoner complaints being filed at all.[262] Professor Margo Schlanger estimates that federal lawsuits against prisons by prisoners "has fallen by sixty per cent in the twenty years since the P.L.R.A.'s passage."[263] Moreover, very few prisoner complaints

260. *See* Frankel & Newbern, *supra* note 25, at 902.

261. *Id.* at 903 (quoting Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring)).

262. For reference, the year before the PLRA was passed, the number of total lawsuits filed regarding civil rights decreased from 23.1 to 15.0 per 1000 incarcerated persons. *See* Margo Schlanger, *Data Update*, INCARCERATION AND L., tbl.A, https://incarcerationlaw.com/resources/data-update/#TableA [https://perma.cc/5G8N-BXWX]. The lowest figure in recent decades was in 2007, when the number fell to 9.6 lawsuits per 1000. *See id.* To this day, the number of lawsuits filed has not nearly reached pre-PLRA levels. *See id.* Further, the heightened pleading standard established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) has resulted in statistically significant rises in the court dismissals of cases brought by pro se plaintiffs. *See* William Hubbard, *The Empirical Effects of Twombly and Iqbal*, 14 J. EMPIRICAL LEGAL STUD. 474, 500 (2016).

263. Rachel Poser, *Why It's Nearly Impossible for Prisoners to Sue Prisons*, NEW YORKER (May 30, 2016) https://www.newyorker.com/news/news-desk/why-its-nearly-impossible-for-prisoners-to-sue-prisons [https://perma.cc/GS3P-LJXC]; *see also* Fathi, *supra* note 99, at 3 ("The effect of the PLRA on prisoners' access to the courts was swift. Between 1995 and 1997, federal civil rights filings by prisoners fell 33 percent, despite the fact that the number of incarcerated persons had grown by 10 percent in the same period.").

even survive the government's motion to dismiss. Of all Section 1983 civil rights lawsuits filed in 2021, a great majority ended in pre-trial decisions for the government.[264] Further, only 0.5% of these suits even reached trial.[265]

The significant tilt of decisions in favor of the government highlights the significance of the proposal. The likely rise in the 0.5% of lawsuits reaching trial should be a welcome development, because it would provide prisoners with an opportunity to seek relief for their injuries. Additionally, given that 80% of cases are dismissed, the extension of affirmative assistance will affect only a fraction of the claims filed. In turn, furnishing such assistance would come at a *de minimis* expense. Regardless, the Supreme Court has recognized that "cost . . . cannot justify a State's failure to provide individuals with a meaningful right of access to the courts."[266]

2. *Federalism Concerns Raised by the Proposed Framework*

Principles of federalism and separation of powers require deference to state decisions about the appropriate administration of its prisons, and the extent to which incarcerated persons are entitled to legal assistance. The Supreme Court has recognized the states' significant interest in regulating its penal institutions, especially in how to handle common grievances by prisoners.[267] Prisons have the requisite "expertise, comprehensive planning, and commitment of resources, all of which are peculiarly within the province of the legislative and executive branches[,]" making

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264. *See* Schlanger, *supra* note 262, tbl.D. Pre-trial decisions include dismissals and summary judgements. *See id.* at 20. The clear imbalance raises the questions as to why so few incarcerated persons are able to seek actual judicial relief, and whether the lack of assistance after the pleading stage has pressured voluntary dismissals from prisoners, or the decision to settle.

265. *See id.* at 7, tbl.D.

266. *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 533 (2004); Taylor v. Sterrett, 532 F.2d 462, 473 n.16 (5th Cir. 1976) (expressing skepticism that cost to public should carry "substantial weight when a burden on the fundamental right of access to the courts is involved").

267. *See* Preiser v. Rodriguez, 411 U.S. 475, 491–92 (1973) ("It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons . . . [f]or state prisoners, eating, sleeping, dressing, washing, working, and playing are all done under the watchful eye of the State[.]"); *id.* ("[Penal regulations are] most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances.").

them better-equipped to manage the continual issues arising in penal administration.[268] Embracing the dichotomy between "legal information" and "legal advice" inherently contradicts these considerations by mandating states to allocate funds towards a specific goal—namely, ensuring prisoners' meaningful access to the courts. Consequently, the Court typically grants substantial autonomy to prison authorities in governing state penal systems, known as "*Turner* deference."[269] In *Turner v. Safley*, the Supreme Court held that a prison regulation that impinges on prisoners' constitutional rights is valid so long as it is "reasonably related to legitimate penological interests."[270] It proposed a four-part inquiry to inform this analysis:

(1) whether there is a "valid, rational connection" between the regulation and the governmental interest offered to justify it;
(2) whether incarcerated persons have "alternative means for exercising the right";
(3) the impact that an accommodation will have on corrections officers, other incarcerated persons, and "on the allocation of prison resources more generally"; and

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268. *See Procunier*, 416 U.S. at 404–05 ("[P]roblems of prisons in America are complex and intractable, and . . . are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. . . . [C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.").

269. *See, e.g.*, *id.* at 405 ("[W]here state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities."); Torcasio v. Murray, 57 F.3d 1340, 1346 (4th Cir. 1995) ("[P]rinciples of comity and federalism apply with special force in the context of correctional facilities."); Lewis v. Casey, 518 U.S. 343, 385 (1996) (Thomas, J., concurring) ("Principles of federalism and separation of powers impose stringent limitations on the equitable power of federal courts. When these principles are accorded their proper respect, Article III cannot be understood to authorize the Federal Judiciary to take control of core state institutions like prisons, schools, and hospitals, and assume responsibility for making the difficult policy judgments that state officials are both constitutionally entitled and uniquely qualified to make."). *But cf.* Ford v. Uniroyal Pension Plan, 154 F.3d 613, 616–17 (1998) (reaffirming that federal courts should not intrude into traditional domains of states without authorization from Congress); Evan Bianchi & David Shapiro, *Locked Up, Shut Up: Why Speech in Prison Matters*, 92 ST. JOHN L. REV. 1, 5 (arguing that *Turner* deference deprives incarcerated persons of expressive power, "thereby distorting public discourse").

270. Turner v. Safley, 482 U.S. 78, 89–91 (1987); Christopher E. Smith, *Justice Sandra Day O'Connor and Corrections Law*, 32 HAMLINE L. REV. 477, 493 (2009) (describing the *Turner v. Safley* test as "the most important and widely used legal standard for evaluating prisoners' rights claims").

(4) "the absence of ready alternatives."[271]

In *Lewis*, the Court read *Turner*'s deferential standard *in pari materia* with *Bounds*.[272] Instead of conducting the four-part analysis, the Court holistically analyzed the lack of deference given to the prison's existing regulations by ordering an exhaustive and meticulous remedy.[273] The prison's restrictions on the access of "lockdown prisoners" to law libraries were justified on three grounds. First, the state housed "the most dangerous and violent prisoners in the Arizona prison system[,]" which was a sufficient safety interest to make their delays in receiving legal materials or assistance legitimate.[274] Second, the Court found the district court's injunction to be "inordinately—indeed, wildly—intrusive."[275] How specific the proposed regulations were was at odds with the notion that the court should not be "enmeshed in the minutiae of prison operations."[276] The Court's final determination that the district court order was excessive was the fact that it was created through a process "that failed to give adequate consideration to the views of prison authorities."[277] Unlike *Bounds* where the state itself responded with a proposal to fulfill its access-to-courts right obligations, the district court in *Lewis* relied on a third party, a law professor, instead of prison officials, to devise a remedial plan.[278] "As *Bounds* was an exemplar of what should be done, [*Lewis*] is a model of what should not."[279] *Lewis*' primary concern revolved around granting prison authorities considerable latitude in implementing solutions to novel penitentiary issues due to their greater familiarity with those issues, relative to the judiciary.

Restrictions on accessing affirmative assistance after the pleading stage do not pass muster under *Turner* deference. First, there is no rational connection between total deprivation of access to legal information and any legitimate government interest. In *Turner* and its progeny, the interests alleged by the government

271. *Turner*, 482 U.S. at 89–90.
272. *See* Lewis v. Casey, 518 U.S. 343, 361 (1996).
273. *See id.* at 361.
274. *See id.* at 361–62.
275. *Id.* at 362.
276. *Id.* (internal citations omitted).
277. *Id.*
278. *See id.* at 363.
279. *Id.*

have primarily concerned prison security[280] and the rehabilitation of incarcerated persons.[281] Neither would be apt here. Relatedly, the Court in *Procunier v. Martinez*, evaluating the validity of a prison regulation prohibiting the use of law students and legal paraprofessionals in interviewing clients, found that such an absolute ban could not be reasonable.[282] The order was not limited to "prospective interviewers who posed some colorable threat to security or to those inmates thought to be especially dangerous."[283] Per *Turner*, the connection for a prison policy cannot be "so remote as to render the regulation arbitrary or irrational."[284] In *Procunier*, however, the enforcement of the regulation created an "arbitrary distinction" between the types of persons allowed to assist incarcerated persons.[285] The standard for arbitrariness similarly applies to providing legal information after the pleading stage. Such assistance is already being provided prior to the filing of a complaint. Extending this assistance until after the claim has survived a motion to dismiss cannot be rationally connected to a security interest that suddenly arises after the pleading stage but not before.

Second, incarcerated persons would not have alternative means of exercising their right of access to the courts. An absolute ban on access to legal information—and only the requirement that prison officials do not actively interfere with an incarcerated person's litigation efforts—are not adequate measures for accessing the courts because the lack of resources available to the pro se plaintiff

280. *See Turner*, 482 U.S. at 91; *see, e.g.*, Johnson v. Avery, 393 U.S. 483, 486 (1969); Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 330 (2012) (sustaining a prison regulation on invasive search procedures for new incarcerated persons due to potential of admitting concealed weapons or other contraband); Overton v. Bazzetta, 539 U. S. 126, 133–34 (2003) (quoting *Turner*, 482 U.S. at 91–92) (upholding restrictions on visitation rights of prisoners meeting with former incarcerated persons since "communication with other felons is a potential spur to criminal behavior); Thornburgh v. Abbott, 490 U. S. 401, 416–17 (1989) (allowing for a regulation that prohibited certain publications among prisons that were reasonably expected to present a security threat).

281. *See Turner*, 482 U.S. at 97; *see, e.g.*, Beard v. Banks 548 U.S. 521, 530 (2006) (finding that restrictions to prisoners accessing newspapers, magazines, and photographs to have a rational connection to providing "increased incentives for better prison behavior"); *Overton*, 539 U. S. at 134 (upholding restrictions on the visitation rights of prisoners who have two substance-abuse violations, justified by deterring drug and alcohol use in prisons).

282. *See* Procunier v. Martinez, 416 U.S. 396, 420–21 (1974) (ruling that the district court did not err in deeming the absolute ban unreasonable).

283. *Id.*

284. *Turner*, 482 U.S. at 89–90.

285. *Procunier*, 416 U.S. at 421 ("Appellants' enforcement of the regulation in question also created an arbitrary distinction between law students employed by practicing attorneys and those associated with law school programs providing legal assistance to prisoners.").

would inevitably cause many meritorious suits to fail.[286] Third, as this Note has explained, the expense of providing such increased legal assistance would come at a *de minimis* expense to the State, and that cost cannot be used as a justification for not providing meaningful access to the courts regardless. Fourth, *Turner* held that "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable but is an 'exaggerated response' to prison concerns."[287] Supplying incarcerated persons with some sort of access to legal information after the pleading stage is, in essence, the epitome of an easy alternative that would not invoke the prison concerns typically part of a *Turner* analysis. The overarching and broad remedial order in *Lewis* that included "excruciatingly minute detail" was struck down because it did not provide prison officials adequate deference.[288]

This Note does not propose encumbering prisons with requiring a specific type of affirmative assistance after the pleading stage, but instead extending the assistance that is already being provided prior to filing of a complaint. Although prisoners retain "rights such as freedom of religion and freedom of speech to a lesser extent[,]" they keep the right of access to the courts to a "significant degree[.]"[289] Therefore, restricting incarcerated persons from accessing legal information after the pleading stage does not survive *Turner* deference.

3. *Utility of Affirmative Assistance Post-Pleading Stage*

Finally, some have argued that certain types of legal assistance, such as law libraries, may be futile tools in actually providing incarcerated persons access to the courts due to the inability of many to effectively utilize them.[290] As a result, they may argue

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286. *See supra* Part III.A.

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

288. Lewis v. Casey, 518 U.S. 343, 364 (1996) (Thomas, J., concurring).

289. Lorijean Golichowski Dei, *The New Standard of Review for Prisoners' Rights: A "*Turner*" for the Worse?* Turner v. Safley, 33 VILL. L. REV. 393, 403 n.41 (citing J. GOBERT & N. COHEN, RIGHTS OF PRISONERS § 1.04 at 13 (1981)).

290. *See* Bounds v. Smith, 430 U.S. 817, 836 (1977) (Stewart, J., dissenting) ("In the vast majority of cases, access to a law library will, I am convinced, simply result in the filing of pleadings heavily larded with irrelevant legalisms possessing the veneer but lacking the substance of professional competence."); *see also* Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299, 310 n.75 (2006) (explaining that the average reading level for many state prisoners is below sixth-grade level, and for many, their language skills are below fourth-grade level).

that extension of legal information beyond the pleading stage would have minimal impact. *Lewis*, however, explained that a prisoner is "actually injured" when he is deprived of "an arguable (though not yet established) claim . . . because it deprives him of something of value—arguable claims are settled, bought, and sold."[291] Therefore, even if the prisoner's claim may have not definitively won at a later stage in the litigation, he still sustained an injury by never having been given the opportunity to win. Opposing parties understand that prisoners will be unassisted after the pleading stage, and thus the prisoners have no leverage to settle their claims. In other words, an incarcerated person without post-pleading assistance is almost certain to lose a meritorious suit, is less likely to receive a favorable settlement offer, and thus has sustained actual injury for which they should be compensated. These prisoners' claims cannot be "settled, bought, and sold," when they will inevitably leave the plaintiff holding no value.[292]

CONCLUSION

"[S]uffering of the convicted is carefully arranged to take place somewhere out of sight."[293] Drawing the judicial system's attention to perpetuated injustices against incarcerated persons will help end this concealment by cultivating an accountability that has been missing for centuries. However, the judicial system's attention is inconsequential if it is unable to give victims of civil rights violations relief for their sufferings—an almost inevitable result if they are to be deprived of post-pleading assistance. Otherwise, corrections officers are at great liberty to dehumanize prisoners, as there would be no repercussions for their behavior.

Civil litigation, in theory, provides a fair and neutral forum to resolve disputes, and ensures litigants equal access to justice.[294] Denying prisoners access to legal information puts them at a significant disadvantage against the state and undermines the

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291. *See* Lewis v. Casey, 518 U.S. 343, 352 n.3 (1996).

292. *Id.*

293. ROBERT A. FERGUSON, INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT 13 (2014).

294. *See, e.g., Objective 3.4: Expand Equal Access to Justice*, U.S. DEP'T OF JUST., https://www.justice.gov/doj/doj-strategic-plan/objective-34-expand-equal-access-justice [https://perma.cc/UWG2-74B5] (suggesting various mechanisms to increase justice system accessibility through grassroots efforts).

judicial system's supposed impartiality. In turn, pursuing litigation would become a futile endeavor for incarcerated persons. Indeed, "prisoners who do not complain are often the truly lost souls who have surrendered and cannot be restored."[295]

There exist several hurdles that prevent incarcerated persons from filing suit for legitimate grievances. They must learn the law from the limited resources in prison—and learn it well enough to represent themselves in court proceedings.[296] Further, the PLRA strictly disciplines prisoners who may unknowingly file "frivolous" suits. Nevertheless, incarcerated persons—after independently maneuvering through these procedural obstacles and filing a complaint found meritorious by a judge—are often *still* deprived of legal assistance, which renders the right of access to courts illusory.

Abandoning the distinction between "assistance" and "interference" and instead requiring states provide "legal information" is a rights-protective solution that is still compatible with the *Lewis* holding. *Lewis*, just as *Bounds* before it, reiterated that "meaningful access to the courts is the touchstone" in defining the right.[297] This right cannot be "meaningful," however, if it helps incarcerated individuals reach the courthouse door, but halts them once they get there.[298] "The right of access to courts is perhaps the most basic of the rights possessed by inmates; certainly it is the foundation for every other right an inmate has."[299] To deprive prisoners of this access would be to strip them of their rights entirely.

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295. Warren E. Burger, *Post Conviction Remedies: Eliminating Federal-State Friction*, 61 J. CRIM. L. CRIMINOLOGY 148, 150 (1970).

296. *See* O'Bryant, *supra* note 290, at 300 ("I had to engage in two extremely difficult tasks: I had to teach myself the law, and I had to represent myself. I had to perform these tasks using only the limited resources available to me inside the prison walls and while trying to adjust to prison life, overcome mental health issues, such as severe depression, and fight a drug addiction.").

297. Lewis v. Casey, 518 U.S. 343, 351 (1996) (quoting Bounds v. Smith, 430 U.S. 817, 823 (1977)).

298. *See* MUSHLIN, *supra* note 36, § 12:1.

299. *Id.*