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Prisoner's Rights - Failure to Provide Adequate Law Libraries Denies Inmates' Right of Access to the Courts

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E. Would a Nontendering Shareholder in the Target Corporation Have Standing to Sue Under Section 14(e)?

The legislative history and the nature of the remedy available under section 10(b) and rule 10b-5 indicate that the whole purpose behind section 14(e) was to protect this class of shareholders. As indicated, the purpose of the Williams Act Amendments was to protect shareholders who were faced with the decision of whether or not to tender their shares.[95] The shareholders who are faced with this decision and who tender their shares have standing under rule 10b-5 because they meet the purchaser/seller requirement. Only the nontendering shareholder was in need of protection, because only the nontendering shareholder lacked standing under rule 10b-5. The *Piper* Court discussed the possibility that Congress intended to give a private remedy to nontendering shareholders.[96] Despite the tentative, inconclusive manner in which the Court chose to treat this question (in a footnote they claim to express no view on the issue[97]), it is difficult to argue in light of the legislative history of the Williams Act and the standing requirements of rule 10b-5 that nontendering shareholders do not have a private cause of action to bring suit under section 14(e).[98]

V. CONCLUSION

The *Piper* decision is a break from the prior expansive trend in the application of the securities acts' antifraud provisions. As individual shareholders seldom have enough at stake to make a lengthy and complicated securities suit worthwhile, the decision will definitely limit enforcement of section 14(e). The impact of this case will be felt beyond the enforcement of section 14(e), since lower courts have already read this case as an indication that the securities regulations in general should be narrowly construed.[99]

PRISONERS' RIGHTS—FAILURE TO PROVIDE ADEQUATE LAW LIBRARIES DENIES INMATES' RIGHT OF ACCESS TO THE COURTS*

In *Bounds v. Smith*,[1] the Supreme Court held that the constitutional right of access to the courts requires that states aid inmates in filing meaningful legal papers by providing access to adequate law libraries or assistance from persons with legal training.[2] Emphasizing that a state cannot justify the denial of a constitutional

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[95] *See* text at notes 29-34 *supra*.

[96] 430 U.S. at 38-39. *See* text at note 74 *supra*.

[97] 430 U.S. at 39 n.25.

[98] One district court has already allowed nontendering shareholders standing to sue under § 14(e). Hurwitz v. R.B. Jones Corp., [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,261 (W.D. Mo. Aug. 30, 1977). *Cf.* Clayton v. Skelly Oil Co., [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,269 (S.D.N.Y. Dec. 30, 1977) (proxies).

[99] *See, e.g.*, Schy v. Federal Deposit Ins. Corp., [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,242 (E.D.N.Y. Oct. 27, 1977) (denying a private cause of action to investors under § 7 of the 1934 Act, 15 U.S.C. § 78g (1976)); Crane Co. v. American Standard, Inc., 439 F. Supp. 945 (S.D.N.Y. 1977) (denying a tender offeror standing to sue for damages under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1976)); Gunter v. Hutcheson, 433 F. Supp. 42, 45 (N.D. Ga. 1977) (denying a private cause of action under § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1976)).

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[1] 430 U.S. 817 (1977), *aff'g sub nom.* Smith v. Bounds, 538 F.2d 541 (4th Cir. 1975).

[2] *Id.* at 828.

right because of economic considerations alone,[3] the Court required states to "shoulder affirmative obligations"[4] to ensure that all prisoners have a "reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts."[5]

The *Bounds* case consolidated three separate actions under 42 U.S.C. § 1983 brought by prison inmates. The inmates alleged that they were denied access to the courts in violation of the fourteenth amendment by the state's failure to provide legal research facilities to aid in preparation of legal actions.[6] The district court held that the prison library was "severely inadequate"[7] and ordered the North Carolina Department of Corrections to devise an adequate assistance program.[8] On appeal by both parties, the circuit court affirmed the decision and the program.[9] The State then sought and was granted certiorari by the Supreme Court.

In a 6-3 decision, the *Bounds* Court reaffirmed the result of *Younger v. Gilmore*[10] and provided a line of reasoning to justify that two-paragraph per curiam opinion. In *Gilmore,* the Court had affirmed the lower court's holding that a California prison regulation excluding state and federal reporters and annotated codes from the prison library was an unconstitutional denial of the prisoners' right of access to the courts.[11] After *Gilmore,* some commentators contended that legal assistance programs for inmates had not been improved[12] and that prison libraries were still inadequate.[13] By underscoring the earlier decision, *Bounds* may increase significantly the availability and quality of legal libraries and assistance programs provided for inmates by state and federal prisons.

This Note will examine (1) the nature and legal foundation of the right of access to the courts endorsed by *Bounds,* (2) questions raised by the dissenting opinions concerning the scope and validity of the right, and (3) practical implications of the decision.

I. THE NATURE AND FOUNDATION OF THE RIGHT OF ACCESS

A. The Precedent

Dissenting opinions to *Bounds* charged the majority with a failure to specify the source of the right of access to the courts, asserting that the right of access "is created virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived."[14] Although the majority opinion does not tie the right of access to any specific constitutional provision, the cases relied on as precedent by the majority provide an obvious starting point for an analysis of the

[3] *Id.* at 825.
[4] *Id.* at 824.
[5] *Id.* at 825.
[6] *Id.* at 818.
[7] *Id.*
[8] The district court later approved the plan submitted by North Carolina. *See id.* at 820-21.
[9] The circuit court approved the North Carolina plan after slight revision to eliminate provisions that "denied women prisoners the same access rights as men to research facilities." *Id.* at 821, *citing* Smith v. Bounds, 538 F.2d 541, 545 (4th Cir. 1975).
[10] 404 U.S. 15 (1971).
[11] *Id.*
[12] Dickey & Remington, *Legal Assistance for Institutionalized Persons—An Overlooked Need,* 1976 S. ILL. U. L.J. 175; Reeves, *The Evolving Law of Prison Law Libraries,* 3 NEW ENG. J. PRISON L. 131, 135 (1976).
[13] Note, *The Jailed Pro Se Defendant and the Right to Prepare a Defense,* 86 YALE L.J. 292, 304 (1976).
[14] 430 U.S. at 840 (Rehnquist, J., dissenting).

right. An examination of this line of cases and the constitutional source for the protection afforded in each should suggest the source of the right of access recognized in *Bounds*. The cases will be dealt with in chronological order.

In 1941 *Ex parte Hull* struck down a prison regulation prohibiting prisoners from filing habeas corpus petitions unless the petitions were approved by a prison official as "properly drawn."[15] The Court held that prisoners retained a right of access to the courts after incarceration, and noted that "[w]hether a petition for writ of habeas corpus . . . is properly drawn and what allegations it must contain are questions for that court alone to determine."[16] The most obvious basis for the *Hull* holding was the suspension clause of article I, section 9 of the Constitution: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Some courts have read *Hull* and the suspension clause narrowly to apply only to cases involving a habeas petition.[17] Others have seen the case as precedent for a broader right of access to the courts[18] or for the proposition that prisoners have a first amendment right to petition the government for redress of grievances.[19] Although there is no mention of either the first amendment or a general right of access in *Hull,* that case provided a basis on which later courts built a broader right of access.[20]

In 1956 *Griffin v. Illinois*[21] presented the question whether a state that provides a right of appeal for criminal convictions must also provide indigents with free transcripts necessary for an appeal. The Court held in the affirmative, stating that the denial of free transcripts for indigents "is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law."[22] The Court based its decision on both the equal protection and due process clauses of the fourteenth amendment, but its analysis was founded solely on a equal protection rationale:

> In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial.[23]

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[15] 312 U.S. 546, 548-49 (1941).

[16] *Id.* at 549.

[17] Swaine v. Pressley, 430 U.S. 372 (1977); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Kirby v. Thomas, 336 F.2d 462 (6th Cir. 1964).

[18] *E.g.,* White v. Ragen, 324 U.S. 760 (1945).

[19] *E.g.,* Cruz v. Beto, 405 U.S. 319, 321 (1972). There is also ground for finding the locus of the right of access itself in the first amendment. *See* California Motor Transp. Co. v. Trucking Unltd., 404 U.S. 508 (1972); United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971); NAACP v. Button, 371 U.S. 415 (1963); Note, *A First Amendment Right of Access to the Courts for Indigents,* 82 YALE L.J. 1055 (1973). *Bounds,* however, made no mention of the first amendment. The cases relied on as precedent in *Bounds* are not explicitly based on the first amendment although Johnson v. Avery, 393 U.S. 483 (1969), was cited by the Supreme Court as precedent for a first amendment right to access in California Motor Transp. Co. v. Trucking Unltd., 404 U.S. at 510.

[20] Ross v. Moffit, 417 U.S. 600 (1974); Wolff v. McDonnell, 418 U.S. 539 (1974); Johnson v. Avery, 393 U.S. 483 (1969); Douglas v. California, 372 U.S. 352 (1962); Griffin v. Illinois, 351 U.S. 12 (1956). It is worthy of note that the *Hull* Court upheld the prisoner's right of access even while recognizing that the "considerations that prompted its [the regulation's] formulation are not without merit." 312 U.S. at 549. Thus the prisoner's right to petition overrode the legitimate state interest in avoiding waste of judicial resources.

[21] 351 U.S. 12 (1956).

[22] *Id.* at 19.

[23] *Id.* at 17-18.

Although states were "not required by the Federal Constitution to provide appellate courts or a right to appellate review at all,"[24] the Court held that if a state chose to provide the right it must do so even-handedly. Thus, refusing to provide an appellate review procedure would create no independent due process deprivation. The only due process violation in such a case is linked to the denial of equal protection.[25] Hence, *Griffin* depended on the equal protection clause alone to expand the *Hull* right to file habeas petitions into a more general right of access to "adequate and effective appellate review."[26]

The Court again applied an equal protection analysis in *Burns v. Ohio*[27] and *Smith v. Bennett*,[28] two subsequent right of access cases. *Burns*, decided in 1959, involved a challenge to a filing fee required for direct criminal appeals. The Supreme Court of Ohio had created the right of appeal from felony convictions (which was upheld by the court of appeals), but it had instructed its clerk to reject in forma pauperis appeals. The *Burns* Court held the filing fee invalid as it applied to indigents, and, in so doing, invoked equal protection analysis.[29] The state was under no duty to provide the second appeal opportunity. Having chosen to provide it, however, the state was obligated to do so without an unjustifiable differential impact.[30]

In 1961 the Court faced a similar requirement of a filing fee for habeas actions in *Smith v. Bennett*. The Supreme Court held the Iowa fee invalid, again basing its decision on an equal protection rationale. The Court summarized the "gist"[31] of the *Griffin*, *Burns*, and *Bennett* decisions, stating that laws that affect rich and poor differently without a rational basis for the distinction create a denial of equal protection of the laws: "There is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants."[32] The Court emphasized that the cost of ensuring access to the courts cannot be a reason for denying the right.

Douglas v. California[33] considered an appeal by thirteen indigent prisoners whose request for counsel was denied by the appeals court. In this 1963 case the Court held that "[w]here the merits of the one and only appeal an indigent has . . . are decided without benefit of counsel in a state criminal case, there has been a discrimination between the rich and the poor which violates the Fourteenth Amendment."[34] The Court pointed out that "lines can be and are drawn"[35] and the state can provide for differences so long as those differences do not amount to invidious discrimination or denial of due process.[36] Although the Court could have decided this case solely on an equal protection basis, it took the opportunity to explain that a state, by its line drawing, could violate the right of access on either equal protec-

[24] *Id.* at 18.
[25] That is, due process is denied to individuals within the unjustifiable classification.
[26] 351 U.S. at 20.
[27] 360 U.S. 252 (1959).
[28] 365 U.S. 708 (1961).
[29] 360 U.S. at 258.
[30] The Court cited *Griffin* for the principle that "once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." *Id.* at 257, *citing* 351 U.S. at 18, 22.
[31] 365 U.S. at 710.
[32] *Id.*, *quoting* Burns v. Ohio, 360 U.S. 252, 257-58 (1959).
[33] 372 U.S. 353 (1963).
[34] *Id.* at 353.
[35] *Id.* at 357.
[36] *Id.* at 356.

tion or due process grounds. This explanation suggests that some regulations curtailing the right of access could not be administered even on a nondiscriminatory basis, because such a curtailment would amount to a denial of due process. The due process right of access does not depend on the largess of the state for its viability, since it is constitutionally secured by the fourteenth amendment.

In 1969 the Court decided *Johnson v. Avery*,[37] the first case in the line of precedent cited in *Bounds* that dealt directly with the problem of how prisoners are to obtain legal information necessary to exercise the right of access. A Tennessee prison regulation, which prohibited prisoners from assisting one another in preparing legal papers, was challenged by a prisoner who had been disciplined for violating the regulation. The Court noted that since it is the practice of federal courts "to appoint counsel in post-conviction proceedings only after a petition for . . . relief passes initial judicial evaluation,"[38] the "initial burden"[39] for presenting a claim rests on the prisoner. Prisoners who could not afford counsel and who were illiterate or so poorly educated that they were unable to prepare a petition were totally barred from access to federal habeas corpus by the regulation. The *Avery* Court held that, absent "a reasonable alternative to assist illiterate or poorly educated inmates in preparing petitions for post-conviction relief, the State may not validly enforce a regulation which absolutely bars inmates from furnishing such assistance."[40] Although the *Bounds* majority stated that "[e]ssentially the same standards of access"[41] found in the earlier cases were applied in *Avery*, it is clear that *Avery* expanded the legal foundation of the right. Although *Avery* made no explicit reference to the due process or equal protection standards or even to the fourteenth amendment, the reasoning of the decision indicates a reliance on both constitutional mandates, as well as an emphasis on the fundamental nature of the right of access. The relief mandated in *Avery* was broader than necessary to cure the existing equal protection violation. Like *Griffin* and *Burns*, *Avery* involved a regulation that denied certain inmates access to the courts, based on a classification that had no rational relationship to guilt or innocence. The Court could have invalidated the Tennessee regulation by going no farther than the test of *Griffin*, for clearly the ability of a person to read has no rational relationship to guilt or innocence. The Court could have left the no-assistance provision intact and cured the equal protection defect simply by requiring an exception to the regulation allowing assistance for illiterate and poorly educated inmates. The relief mandated by the Court was broader: it invalidated the regulation for *all* inmates. It held that, absent some alternative assistance program, a state may not enforce a regulation that bars inmates from furnishing assistance to "other prisoners."[42] This analysis suggests that, rather than merely tacking on a reference to the due process clause, the Court actually relied on that provision to reach its decision.

[37] 393 U.S. 483 (1969).

[38] *Id.* at 487.

[39] *Id.* at 488.

[40] *Id.* at 483.

[41] 430 U.S. at 823.

[42] A possible alternative explanation for the Court's failure to isolate the illiterates as a group and extend the protection to them alone is that the Court may have thought that so many prisoners would fall into the category of those needing help that it would be unnecessary to distinguish them from the rest of the prison population. "In the case of all except those who are able to help themselves—usually a few old hands or exceptionally gifted prisoners—the prisoner is, in effect, denied access." 393 U.S. at 488.

The scope of the holding also supports an interpretation of the right of access as one of fundamental importance to "our constitutional scheme."[43] The traditional test for due process violations requires a "grievous loss" of a property or liberty interest.[44] Even after such a deprivation is established, the state need only show that its action is reasonably related to a valid state objective to defeat a due process claim.[45] In the context of prisoners' rights, the interests of the individual and the needs of the state are usually balanced.[46] The *Avery* Court acknowledged that the regulation at issue was within the ambit of state control and could be defeated only by important federal rights:

> Tennessee urges . . . that the contested regulation . . . is justified as a part of the State's disciplinary administration of the prisons. There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where *paramount* federal constitutional or statutory rights supervene. It is clear, however, that in instances where state regulations applicable to inmates . . . conflict with such rights, the regulations may be invalidated.[47]

Furthermore, the Court agreed with the state that the problem that the regulation was created to overcome was of legitimate concern: "It is indisputable that prison 'writ writers'. . . are sometimes a menace to prison discipline and that their petitions are often so unskillful as to be a burden on the courts which receive them."[48] Nevertheless, the Court cited the proposition in *Hull* that even regulations that are "'not without merit'"[49] cannot be upheld if they "'impair petitioner's right to apply . . . for a writ of habeas corpus.'"[50] The natural implication of this language is that in both *Hull* and *Avery* the Supreme Court deemed the right of prisoners to apply for habeas writs to be a paramount federal right.

Thus, *Avery* significantly expanded the prisoners' right of access to the courts in two ways: (1) It conclusively brought the right under the protection of the due process clause; and (2) it emphasized the fundamental nature of the right by indicating that the ordinary due process standard of legitimate state interest is not sufficient to curtail the right of access. This expansion suggested that the right of access is of such importance that the state may not choose to withhold it—even if it does so without discrimination and to serve a legitimate state purpose. Like the first amendment right of free speech, the right of access can be suspended only when a compelling state interest is at stake.

The next case in the series was *Younger v. Gilmore*,[51] a 1971 case that again upheld the right of access to the courts. A California prison regulation that excluded state and federal reporters and annotated codes from the prison library was challenged by inmates. The district court held that the regulation was a denial of the prisoners' right of access,[52] accepting the prisoners' contention that regulations that

[43] *Id.* at 485.
[44] Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).
[45] United States v. Carolene Prods., 304 U.S. 144, 152 (1937).
[46] Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970); Gilmore v. Lynch, 319 F. Supp. 105, 109 (N.D. Cal. 1970).
[47] 393 U.S. at 486 (emphasis added).
[48] *Id.* at 488.
[49] *Id., quoting* 312 U.S. at 549.
[50] 393 U.S. at 488, *quoting* 312 U.S. at 549.
[51] 404 U.S. 15 (1971) (per curiam).
[52] 319 F. Supp. 105, 111 (N.D. Cal. 1970).

deny "indigent prisoners and their jailhouse lawyers the legal expertise which is necessary" for meaningful access are invalid.[53] Although neither the Supreme Court nor the district court opinion specified the basis for the right of access, both cited *Avery* as precedent—the only precedent cited in the Supreme Court's per curiam decision. *Gilmore* expanded the concept of the right from that in *Avery,* since the district court not only invalidated the regulation but also charged California with the affirmative duty of "devising another system whereby indigent prisoners are given adequate means of obtaining the legal expertise necessary."[54] *Avery,* on the other hand, merely invalidated a prison regulation without specifying whether further action by the prison was necessary.

Ross v. Moffitt,[55] the next case relied on in *Bounds,* was decided in 1974. An indigent prisoner challenged a North Carolina court's denial of his request to be represented by counsel in a discretionary appeal after his appeal of right failed. The Court held that the state's refusal to appoint counsel in these circumstances was not an unconstitutional denial of the right of access to the courts. It pointed out that neither the equal protection nor the due process clause required appointed counsel for discretionary appeals to the state supreme court or to the United States Supreme Court when the state provided counsel on appeal of right.[56] At first blush, the *Moffitt* holding seems to limit the right of access to the courts. The *Bounds* district court cited *Moffitt* in its denial of the inmates' contention that the right of access required that North Carolina provide both a library and legal assistance.[57] It should be noted, however, that the facts of the two cases are very different. In *Moffitt* the issues of the discretionary appeal had been fully researched and briefed by court appointed counsel. If the prisoners in *Bounds* had received the benefit of counsel to prepare their briefs, the Court probably would have rejected their claim of need for legal assistance based on *Moffitt.* But in *Bounds* the district court found that respondents had received no legal assistance in researching or presenting their claims.[58]

The *Moffitt* Court did not assert that the right of access is actually narrower than represented in *Avery* or earlier cases. It recognized the equal protection and due process interests at stake.[59] Rather than altering the standard of access, the Court merely applied an equal protection and due process analysis to the facts of *Moffitt* and found that meaningful access had been provided. The Court stated that a state has not fulfilled the equal protection guarantee when the review offered is "meaningless ritual,"[60] but pointed out that, as a practical matter, the appellant bringing a discretionary appeal has had the benefit of legal assistance on the very issue to be presented.

> At that stage he [the appellant] will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting

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[53] *Id.* at 108.
[54] *Id.* at 112.
[55] 417 U.S. 600 (1974).
[56] *Id.* at 615-17.
[57] 430 U.S. at 820-21.
[58] Justice Rehnquist's assertion that *Bounds* is inconsistent with *Moffitt* will be considered in the discussion of the dissents. *See* text at notes 82-92 *infra.* The question at this point in the analysis is whether *Moffitt* contracts the scope of the right of access or alters the legal foundation recognized by earlier cases.
[59] 417 U.S. at 606-09.
[60] *Id.* at 612.

forth his claims of errors, and in many cases an opinion by the Court of Appeals disposing of his case.[61]

In 1974 *Wolff v. McDonnell*[62] extended the protection afforded habeas petitioners in *Avery* to prisoners bringing civil rights claims. The Court held that prisoners bringing such actions also have a right to some form of legal assistance to ensure that their access to the courts is meaningful.[63] *McDonnell* was based both on *Avery* and on the Court's judgment that civil rights and habeas actions are alike in that they both "serve to protect basic constitutional rights."[64]

Although the *Bounds* majority did not specify the locus of the right of access to the courts, it did cite a substantial line of cases upholding the right. The majority found historical recognition of the right in *Ex parte Hull,* and saw an expansion of the right in *Griffin* to ensure "adequate and effective appellate review."[65] Until *Avery,* the Court relied on the equal protection clause as the legal basis for the right. *Avery* expanded the legal principle of access by mandating relief that was broader than that required by an equal protection analysis and by emphasizing the fundamental nature of the right. The *Bounds* Court relied on *Avery* and *McDonnell* for application of the access standards to the issues of legal information and research facilities. In *Bounds,* the Court reached essentially the same result as in *Gilmore,* finally explaining the basis for its holding in the later case.

B. The Bounds *Decision: Expansion of the Right of Access*

The facts of *Bounds* are similar to those of *Gilmore.* In *Bounds,* three inmates of a North Carolina prison wished to do legal research related to habeas and civil rights claims. They charged that the prison library was inadequate and that no legal assistance was available. The district court found that there was "no indication of any assistance at the initial stage of preparation of writs and petitions,"[66] and held that the state's failure to provide either legal assistance or adequate library facilities was a violation of the equal protection clause.[67] At the district court level, reliance was placed on *Gilmore* and the equal protection clause. The Supreme Court, however, relied for its legal basis on the due process-*Avery* view that access to the courts is a fundamental right, as well as on the equal protection clause. The analysis of precedent relied on by the *Bounds* majorty reveals a cohesive legal foundation for the evolution of the right of access.[68]

The next inquiry is whether the *Bounds* decision significantly altered the existing state of the law. Did the Court, as Justice Stewart charged, make a "quantum jump"[69] from the principle of access as it stood in *McDonnell* and *Avery* to reach the result of *Gilmore* or to establish the rationale of *Bounds?* To assert that *Bounds* breaks no new ground because it merely reaffirms *Gilmore* on essentially the same

[61] *Id.* at 615.
[62] 418 U.S. 539 (1974).
[63] *Id.* at 579-80.
[64] *Id.* at 579.
[65] 430 U.S. at 822, *quoting* Griffin v. Illinois, 351 U.S. 12, 20 (1956).
[66] *Id.* at 818. The district court opinion was not reported.
[67] *See id.*
[68] It should be noted that *Bounds* does not stand for the proposition that prisoners have a constitutional right to do research in a law library. The constitutional right endorsed by *Bounds* is the right of access to the courts. The Court deemed library facilities or legal assistance necessary to provide meaningful access in this case; it did not recognize a separate right to do research.
[69] 430 U.S. at 836 (Stewart, J., dissenting).

facts would be to beg the question. Such an argument merely moves the focus of the question to the *Gilmore* decision and thus makes a conceptual analysis virtually impossible, since the rationale for *Gilmore* was not articulated until *Bounds*. The Court indicated that it would not use this sort of strategy to sidestep the issue of precedent. It stated that, while *Bounds* is consistent with *Gilmore*, the earlier case is not essential to the analysis or rationale of *Bounds*.[70] *Bounds* may be considered, then, as a new development in the law of access without any dependence on *Gilmore* for justification.

Although the *Bounds* Court asserted that it was applying the standard of earlier cases,[71] clearly it placed a greater duty on the state to ensure access than is found in the precedents. In *Avery*, a prison regulation was invalidated. It is unclear from the opinion, however, whether the state was required to do anything other than delete the no-assistance provision from the prison regulations. It could be argued, of course, that merely deleting the invalid provision would be insufficient if, in reality, inmates were not allowed to give assistance to one another. The *Avery* Court implied that a state cannot prohibit indirectly what it could not validly prohibit by direct provision.[72] Yet nothing in *Avery* specifically charged the prison or state with the responsibility of taking affirmative action to facilitate meetings and assistance between inmates and jailhouse lawyers. The *Avery* opinion did not require that prisoners be provided with a legal assistance program; it merely held that, in the absence of such a program, the state may not prohibit assistance.

Bounds, on the other hand, endorsed a plan that charged North Carolina with a definite affirmative duty to provide funds to establish and administer a legal assistance program. The *Bounds* majority noted that the question of an affirmative duty to provide legal information was presented by the facts of *Avery*, since "the petitioner originally requested law books."[73] *Bounds* did not attempt to distinguish *Avery*, although the Court noted that the availability of jailhouse lawyers was not "dispositive of respondents' claims."[74] Nor did the Court indicate why less comprehensive relief was mandated in the earlier case, other than to say that in *Avery* "we did not attempt to set forth the full breadth of the right of access."[75] This lack of explanation for extending the scope of protection due prisoners undermines the cohesiveness of the analysis. To some extent the Court repeated the *Gilmore* strategy of simply expanding the scope of the right without clarifying the legal basis for the benefit of courts in the future.

II. SCOPE AND VALIDITY OF THE RIGHT: THE DISSENTING VIEW

The dissenting justices raised several significant objections to the *Bounds* decison and the majority analysis. The objections can be summarized as follows: (1) The constitutional source of the right of access is not revealed; (2) there is no broad right to attack a conviction of a court of competent jurisdiction collaterally, and, therefore, no right to legal information for such an attack; (3) the only right to access deserving affirmative protection is the right to a "meaningful opportunity

[70] *Id.* at 828-29.
[71] *Id.* at 823.
[72] 393 U.S. at 487.
[73] 430 U.S. at 824.
[74] *Id.* at 825.
[75] *Id.* at 824.

to pursue a state created right of appeal," and, therefore, there is no affirmative duty to provide access in nonappeal actions; (4) absent a constitutional right or state-created right of appeal, the only duty owed indigent prisoners is a negative one—the duty not to obstruct their access to the court; and (5) libraries will not advance meaningful access for prisoners.

A. The Source of the Right

The first objection, that the source of the right of access is not specified, was the catalyst for the foregoing analysis of cases relied on by the majority. Although the Court did not point to any constitutional provision as the basis of the right, an analysis of precedent shows a reliance on the suspension clause and the fourteenth amendment equal protection and due process clauses. The cases relied on can be viewed as an evolution of the right or as a step by step revelation of the scope of the right, only fully acknowledged as an affirmative duty in *Bounds* and *Gilmore*. The precedent can, however, be interpreted as the complete statement of the state's duty of providing access to the courts to indigent prisoners. The dissenting opinions interpreted the precedent in the latter way, seeing each case as a full statement of the law of access at the time it was written.

The remaining objections to the majority opinion are dependent on this first objection that the right set forth in *Bounds* has no basis in the Constitution. If one accepts the majority's assertion that the right is constitutional, though never fully expressed until *Bounds*, then the other objections are not sufficient to defeat the majority analysis.

B. No Right to Collateral Attack

Chief Justice Burger's central objection to the *Bounds* decision is that, since there is no broad, federal constitutional right to attack a conviction from a court of competent jurisdiction collaterally, there can be no duty on the part of the state to provide legal information or legal assistance programs to inmates wishing to launch such collateral attacks. He claimed that the imposition on the states of this affirmative duty would be "understandable if the federal right in question were constitutional in nature."[76] The distinction between federal constitutional rights and federal statutory rights is significant, Chief Justice Burger maintained, because the Court can require states to expend funds to protect a federal right only if it is constitutional. If the right is statutory, "the duty of the State is merely negative; it may not act in such a manner as to interfere with the individual exercise of such federal rights."[77] This argument has persuasive force. How, one might ask, can the Court force a state to provide legal information to prisoners who have no right to bring an action based on that information?

The Chief Justice cited *Stone v. Powell*[78] for the proposition that there is no broad federal right to a collateral attack of a conviction. Implicit in *Stone* is the principle that there is no "blanket" right to attack a conviction from a court of competent jurisdiction collaterally. To conclude that the right to collateral attack is purely statutory in nature is, however, an oversimplification of the exposition of the right

[76] *Id.* at 834 (Burger, C.J., dissenting).
[77] *Id.* (Burger, C.J., dissenting).
[78] 428 U.S. 465 (1976), *cited in* 430 U.S. at 835 (Burger, C.J., dissenting).

found in *Stone*. The *Stone* Court did not hold that there is *never* a constitutional right to collateral attack; it merely applied traditional due process standards to determine whether such a right existed in the context of collateral review of evidentiary matters.

> The question presented is whether a federal court should consider, in ruling on a petition for habeas corpus relief filed by a state prisoner, a claim that evidence obtained by an unconstitutional search or seizure was introduced at his trial, *when he had previously been afforded an opportunity for full and fair litigation of his claim in the state courts.*[79]

Stone may thus be viewed as applying only to a certain category of collateral attacks—those arising after the due process standard of meaningful access has been fulfilled. The implication of *Stone,* then, is that a due process right to collateral attack does exist when due process standards have not been met.[80] Chief Justice Burger's objection draws attention to the failure of *Bounds* to specify which prisoners can validly claim that they need to use research facilities. At first blush, *Stone* appears to limit the right to library use to those with cognizable claims. It seems obvious that if a prisoner's claim need not be heard under the *Stone* test of previous full and fair litigation, the prisoner would have no right to research the claim. The problem with this argument is that a court's decision to entertain or to refuse to hear a claim will depend on the articulate presentation of that claim by the prisoner, which in turn will depend in part on the prisoner's knowledge of the law. The right of meaningful access demands that any prisoner be allowed to research the claim in order to make as effective a petition to the courts as possible, even though some of the claims will undoubtedly be deemed unworthy of court attention. Any determination of which prisoners may use the library based on the merits of their claims would create a pre-judicial screening of claims by prison administrators not unlike the regulation invalidated by *Hull.*[81]

C. Meaningful Opportunity to Appeal

Justice Rehnquist raised essentially the same negative-affirmative duty distinction propounded by Chief Justice Burger. Justice Rehnquist concluded that the state's only duty in circumstances such as those in *Bounds* is not to obstruct the prisoner's access to the courts. He contended that none of the cases presented by the majority required affirmative action on the part of the state and hence none of the cases could serve as precedent for the general proposition that states must affirmatively protect the prisoner's right of access. Rehnquist's objection to *Bounds* is based on his reading of the access cases as a full exposition of the right. He asserted that all the cases cited depend on one of two principles that recognize a right to physical access to the court: (1) "[I]ndigent convicts must be given a meaningful opportunity to pursue a state-created right to appeal";[82] and (2) after incarcerating

[79] 428 U.S. at 469 (emphasis added).

[80] *Id.*

[81] It should be noted here that Justice Powell wrote a concurring opinion for the purpose of pointing out that *Bounds* did not change the "kinds of claims that the Constitution requires state or federal courts to hear." 430 U.S. at 833 (Powell, J., concurring). The holding in no way affects the discretion of a court to entertain or refuse a collateral attack or a discretionary appeal. *Id.* It deals instead with the right of prisoners to meaningful access and the duty of the states to protect this right by providing legal information.

[82] *Id.* at 838 (Rehnquist, J., dissenting).

a prisoner, the state "may not further limit contacts which would otherwise be permitted simply because such contacts would aid the incarcerated prisoner in preparation of a petition seeking judicial relief."[83] Rehnquist's summation of precedent is a restatement of the interpretation stated in Part A above; the *Bounds* case clearly extended the protection of prisoners' right of access further than the earlier cases. On the other hand, the majority stated that the Court did not "set forth the full breadth of the right"[84] in the earlier cases.

Rehnquist, relying on *Moffitt,* found that a negative duty inhered in *Bounds* not because of a distinction between statutory and constitutional rights, but because the respondents in the case were not seeking a direct appeal of their convictions. "The prisoners here in question have all pursued all avenues of direct appeal available to them from their judgments of conviction . . . ."[85] But, as discussed in the analysis of *Moffitt,*[86] there are striking differences between the facts of *Moffitt* and *Bounds* that distinguish the cases on the issue of access. In *Moffitt,* all the briefs necessary for the discretionary appeal had been drawn up by counsel appointed for the earlier appeal of right. If this had been the case in *Bounds,* the Court might well have deemed the prisoners' right of access fully protected. In *Bounds,* however, the habeas issue had not been researched or briefed by counsel. The district court stated that there was "no indication of any assistance at the initial stage of preparation of writs and petitions."[87] Rehnquist read *Moffitt* to hold that only in the case of direct appeal does a defendant have a right to counsel. *Moffitt,* however, stands for the proposition that counsel is not required for discretionary appeals.[88] To conclude that these two statements are merely alternate phrasings of the same legal principle is to assume that all legal actions after conviction fall into one of the two categories of direct or discretionary appeals. A habeas action is not an appeal; it is a new civil action[89] charging that the petitioner is illegally confined.[90] This petition for post-conviction relief is available to raise issues that could not have been raised on appeal.[91] Prisoners filing habeas and civil rights actions, like the respondents in *Bounds,* frequently are seeking access to the courts for presentation of issues that have not been previously researched or presented. The *Bounds* Court noted that "[t]he need for new legal research or advice to make a meaningful initial presentation to a trial court in such a case is far greater than is required to file an adequate petition for discretionary review."[92]

D. Duty Not to Obstruct Access

The conclusion drawn by Justice Rehnquist and Chief Justice Burger is that the only duty owed to a prisoner by the state is a negative one—the duty not to obstruct access to the courts. Even accepting the distinctions made by each justice—of statutory versus constitutional rights and direct appeal versus other actions—there is

[83] *Id.* at 839 (Rehnquist, J., dissenting).
[84] *Id.* at 824.
[85] *Id.* at 839 (Rehnquist, J., dissenting).
[86] *See* text at notes 55-61 *supra.*
[87] 430 U.S. at 818.
[88] 417 U.S. at 615.
[89] *In re* Jewett, 69 Kan. 830, 77 P. 567 (1904).
[90] Preiser v. Rodriguez, 411 U.S. 475 (1972); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 201 (1830).
[91] POTTS, J., PRISONERS' SELF-HELP LITIGATION MANUAL 122 (1976).
[92] 430 U.S. at 828.

clear precedent for rejecting the negative duty concept as an artificial standard. The *Bounds* majority addressed the argument for a merely negative duty:

> Petitioners contend, however, that this constitutional duty merely obliges States to allow inmate "writ writers" to function. They argue that under *Johnson v. Avery*, . . . as long as inmate communications on legal problems are not restricted, there is no further obligation to expend state funds to implement affirmatively the right of access. This argument misreads the cases.[93]

Unfortunately, the majority does not elaborate on *how* the argument misreads the cases. The Court may be alluding to the principle found in *Griffin* that a state cannot prohibit indirectly what would be an unconstitutional limitation if done directly. In *Griffin*, the Court held that a regulation that effectively denied an appeal by indigents unable to obtain transcripts was as much a violation of equal protection as a rule directly prohibiting the filing of appeals by indigents.[94] It would seem to follow that, after *Avery*, prison officials could not effectively prohibit assistance between inmates by making no provision for such assistance. Since every movement, every facet, of a prisoner's day is controlled by the regulations and procedures of the institution, the only way a prison can meet the mandate of *Avery* is to take affirmative steps to allow scheduling of meetings between inmates for the purpose of giving legal assistance. Arranging and supervising such meetings necessarily involve some expenditures of state funds in the form of personnel provided to oversee these activities. While *Griffin* and *Douglas* are examples of federal courts requiring expenditures by states to ensure equal protection of state statutory rights, *Avery* is an example of the requirement that states make provisions to fulfill federal due process standards for access to the courts. Likewise, the "negative" duties in *Hull, Procunier v. Martinez*,[95] and *Wolff* not to prohibit access can as easily be seen as impositions of affirmative duties on the states. The state is charged with an affirmative duty to provide judicial review of petitions *(Hull)*, to arrange times and places for consultations between inmates *(Wolff)* or with law students *(Procunier)*, and to pay the extra cost of administering such programs.

E. Inability of Libraries to Assist Prisoner Access

The *Bounds* majority disagreed with Justice Stewart's judgment that meaningful access "can seldom be realistically advanced by the device of making law libraries available to prison inmates untutored in their use."[96] Yet neither the majority nor the dissenters presented a reasoned argument on this point. Each group merely asserted a conclusion based on experience. The question of whether prisoners can benefit from access to a law library does not, however, relate to the issue of whether the state owes an affirmative duty to provide meaningful access to the courts. It relates only to the type of assistance that will adequately fulfill this duty. Agreement

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[93] *Id.* at 823.
[94] 351 U.S. at 18.
[95] 416 U.S. 396 (1974).
[96] 430 U.S. at 836 (Stewart, J., dissenting). Stewart qualifies his judgment in this statement to apply to inmates untutored in the use of legal materials. It is clear, however, that he was not suggesting that the program should include instruction in using legal materials. His dissent is a vote against the general concept of providing legal materials and information to prisoners, rather than a vote for providing training in the use of legal materials. Stewart must be referring to the majority of the prison populace, despite the qualifying phrase "untutored in their use," since his criticism would be a patently insufficient attack on the majority opinion if he is merely declaring that *some* prisoners will not be benefited by the program.

with Justice Stewart's contention does not necessitate a conclusion that *Bounds* should be overruled. His objection merely argues for finding different methods for ensuring prisoner access. The question of the adequacy of the relief mandated by *Bounds* is the next topic for consideration.

III. IMPLICATIONS OF THE *Bounds* DECISION

A. Adequacy of Assistance Programs

1. Evaluation of Assistance Programs

Bounds does not answer the question of whether a state can refuse additional aid to the illiterate based on an assertion that its legal library program is adequate. Despite the Court's statement that "[a]ny plan . . . must be evaluated as a whole to ascertain its compliance with constitutional standards,"[97] traditional notions of due process argue for consideration of the adequacy of the program in relation to each individual.[98] A broad view of a program could not be used to judge that a program provided "meaningful access" to one who could not use it. *Bounds* made no provision for alternative assistance programs for illiterate or poorly educated inmates. If Justice Stewart is correct in his judgment that most prisoners are ill-equipped to benefit from legal research facilities, then *Bounds,* read in conjunction with cases that demand due process for the individual, would seem to require additional legal assistance for the illiterate or poorly educated inmate.

2. Adequacy of Materials

Although the *Bounds* Court approved the library list presented by North Carolina,[99] it did not indicate whether the same types of books must be present in all prison libraries or whether a less inclusive list would be deemed adequate in some circumstances. The Court noted the "questionable omission" from the North Carolina list of *Shepard's Citations,* local rules of court, and treatises.[100] The reporter systems provided in the plan began with the 1960 volumes. Would a set beginning with the 1965 volume be constitutionally adequate? Must the library provide a computer hook-up? What if a pocket part crucial to an inmate's case is lost from the library? The Court left these and many other questions concerning adequacy to be decided in future litigation. Likewise, it left unanswered questions concerning the legal significance of a judicial determination that a law library is inadequate. Will inmates who depended on such a library and lost their cases be given an additional day in court?

B. The Obstacle of Expense

The cost of adequate legal assistance programs may be the most important obstacle to full implementation of *Bounds.*

> As esteemed as the right to a prison law library may be, the expense of a full-fledged law library for prisoners will be a barrier to implementation of that right

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[97] *Id.* at 832.
[98] Wolff v. McDonnell, 418 U.S. 539, 579 (1974).
[99] 430 U.S. at 819-20 n.4.
[100] *Id.*

> unless and until technology can fathom some financially feasible way to assure access to legal materials to prisoners at budget prices.[101]

Although the Court dismissed the problem of funding by saying that "the cost of protecting a constitutional right cannot justify its total denial,"[102] it is clear that other worthwhile programs may be sacrificed to enable legislatures to provide funds for libraries. In its brief to the circuit court, North Carolina pointed out that its corrections system is composed of small, community-based units that allow "inmates to be housed close to their home community in programs designed for successful re-entry into society."[103] The State contended that the "cost of installation and maintenance of such [library] facilities" to benefit a small percentage of the prison population "would of necessity result in a restructuring of the community based correction system" that benefits many prisoners.[104]

A related question is whether legal services that cost the state very little (such as prisoner assistance projects provided by law schools) could be banned by prison administrators once a program is deemed adequate under the *Bounds* guidelines. If such a decision could be justified, many prisoners will receive less effective legal assistance as a result of *Bounds*.

A final fund-related question remaining after *Bounds* concerns priorities for allocating state funds. What is the relationship of the *Bounds* mandate to those decisions requiring adequate nutrition, clothing, heating, and sanitation for prisoners? If a state legislature fails to provide sufficient funds to meet all constitutional mandates in this and other areas, which needs should receive priority?

IV. CONCLUSION

In confirming the result of *Younger v. Gilmore* the Court did more than simply repeat its earlier decision. It added precedential force to that holding by providing a line of reasoning to justify the decision. As Justice Rehnquist noted, the case has an "unusual purpose of supplying as good a line of reasoning as is available"[105] to support *Gilmore*. The fact that this reasoning came six years after the original decision is certainly unusual, but does not in itself diminish the force of the holding.

The decision in *Bounds* is consistent with the trend of the last three decades of a gradual retreat from the "hands off" doctrine[106] and a corresponding movement toward recognition of the rights that prisoners retain after incarceration. The cases presented by the majority rely on the suspension clause, the equal protection clause, and the due process clause for the legal foundation of the right of access. The questions raised by the dissenters point out the lack of careful delineation of precedent and call attention to the fact that, even in *Bounds*, the constitutional locus of the right of access to the courts is not clearly identified. The Court's failure to clearly

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[101] Reeves, *supra* note 12, at 131-32.

[102] 430 U.S. at 825.

[103] Answer for Defendant at 18, Smith v. Bounds, 538 F.2d 541 (4th Cir. 1975).

[104] *Id.* North Carolina's plan called for libraries at seven prison facilities. Obviously the initial cost to the state will vary not only with the size of the prison system but also with the type of system. Equipping large, traditional facilities with libraries may thus be less costly than equipping the more progressive community-based facilities. If at some point the Court is persuaded that meaningful access requires one library per so many prisoners, large prisons would not be spared the cost of providing duplicate sets of materials.

[105] 430 U.S. at 837 (Rehnquist, J., dissenting).

[106] *See* Cardarelli & Finklestein, *Correctional Administrators Assess the Adequacy and Impact of Prison Legal Services Programs in the United States*, 65 J. CRIM. L.C. & P.S. 91, 91 (1974).

distinguish *Bounds* from *Avery* or to give reasons for enlarging the state's duty in *Bounds* is a significant omission that reduces the persuasive force of the majority decision.

The full implications of *Bounds* probably are not foreseeable at this time. As Chief Justice Burger suggested in *Bounds,* the "far-reaching implications . . . [may not have been] fully analyzed or their consequences adequately assessed."[107] Nevertheless, the right of state and federal prisoners to access to legal information in preparing legal papers stands on firmer ground after this decision.

THE POWER OF THE PROSECUTOR IN PLEA BARGAINING*

In *Bordenkircher v. Hayes,*[1] the United States Supreme Court considered the following question: Was the fourteenth amendment due process clause violated when a Kentucky state prosecutor carried out a threat made during plea negotiations to reindict the accused on more serious charges if he did not plead guilty to the original charge?[2] Answering the question in the negative, the Court stressed the nature of plea bargaining as a mutual negotiation between the State and the accused. Distinguishing the instant case from a situation in which the prosecutor brought additional charges without notice,[3] the Court held that the actions of the State in *Hayes* were within the scope of prosecutorial discretion.

This Note will first present a brief discussion of the development of judicial recognition of plea bargaining. The Note will then examine the facts of *Hayes* and the reasoning of the *Hayes* Court, comparing the majority's deference to prosecutorial discretion with the limitations sought by the dissenters. Finally, the *Hayes* holding will be compared with several major decisions that have applied due process analysis to protect defendants from vindictive actions by prosecutors and courts.

I. MAJOR SUPREME COURT DECISIONS RECOGNIZING PLEA BARGAINING

The Supreme Court recognized the practice of plea bargaining as early as 1927,[4] but it has been slow to examine the legal problems involved in the system.[5] In 1969 the Court finally focused its attention upon the plea bargaining process and required that defendant be addressed by the court on the record to insure the voluntariness of defendant's plea.[6] The next year the Court, examining plea bargaining in the *Brady* trilogy,[7] recognized the importance of adequate counsel, but established that a guilty plea cannot be withdrawn merely because counsel improperly assessed the strength of evidence against defendant.[8]

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[107] 430 U.S. at 834 (Burger, C.J., dissenting).

* Prepared by Martha J. Coffman-Gallagher.

[1] 98 S. Ct. 663 (1978).

[2] *Id.* at 665.

[3] *Id.* at 666. *See* text at notes 102-11 *infra.* In this case the prosecutor told Hayes during the plea bargaining that he would be reindicted if he did not plead guilty. *See* note 45 *infra.*

[4] Kercheval v. United States, 274 U.S. 220 (1927).

[5] *See* Von Moltke v. Gillies, 332 U.S. 708 (1948) (importance of counsel); Chambers v. Florida, 309 U.S. 227 (1940) (use of involuntary confession to coerce plea).

[6] Boykin v. Alabama, 395 U.S. 238 (1969); McCarthy v. United States, 394 U.S. 459 (1969).

[7] Parker v. North Carolina, 397 U.S. 790 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Brady v. United States, 397 U.S. 742 (1970).

[8] Parker v. North Carolina, 397 U.S. 790, 797 (1970); McMann v. Richardson, 397 U.S. 759, 770 (1970); Brady v. United States, 397 U.S. 742, 757 (1970).