EXPLOITING PRISONERS: PRECEDENT, TECHNOLOGY, AND THE PROMISE OF ACCESS TO JUSICE

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ABSTRACT

This article examines the legal evolution of access to information for incarcerated litigants and the role that access to the internet, libraries, and "ownership" of the law plays in providing access to the courts under decades of precedent. It then discusses the Supreme Court's jurisprudence regarding the way technology has changed American behavior, including access to the internet, and how that significant shift in behavior is impacting incarcerated litigants. It concludes by offering a hopeful—and significantly fairer—approach to providing inmates access to the courts and, therefore, true access to justice, without exploiting them in the process.

TABLE OF CONTENTS

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INTRODUCTION

Fred, an inmate at a correctional institution in Florida, is entering the prison law library. Fred's family pays a monthly fee to ensure Fred has access to technology for both research and recreational technology use, and today is the day he is allowed to access the law library's computers. There, he will have an opportunity to research issues related to his private attorney's representation, whose services Fred believes were ineffective. He knows a little about the law—he's heard of Strickland v. Washington*—but he has less than a month to file his Motion for Post-Conviction Relief based on the bad advice he received from hired counsel during plea negotiations with the State. The prison law librarian informs Fred that, according to his account balance and the library's policies, he has 15 minutes to research. Fred clicks the icon to access the law library's online legal research*

> *platform. The internet churns slowly while Fred waits and watches his allotted research time tick by. Finally, and with three minutes remaining, Fred runs a cursory search: plea agreement. The internet starts churning again. Fred's research time is up.*

If you are only given fifteen minutes to research and, in that time, you are not given access to anything, have you truly performed legal research? Have you received access to the resources that are supposed to provide you with constitutionally required access to the courts, according to longstanding precedent? And does anyone care?

From defunding private prisons to defunding the police, criminal justice in the United States is standing on a precipice, poised for significant change that will inexorably alter the lives of those navigating the system.[1] What remains to be seen, of course, is whether that significant change will be to the benefit or detriment of those navigating the criminal justice system. Much of the attention has been focused on issues like police reform, ensuring that our country's detention centers are safe, and addressing prisoners' mental health crises. Yet, there is another issue standing squarely in the way of access to justice for America's convicted: access to information and, by extension, access to the courts.[2] In fact, the current unequal access to information in the United States and the way in

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[1] Where criminal justice reform is being discussed in the United States, those discussions have centered largely around things like the George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/house-bill/7120/all-actions (addressing a wide range of policies and issues relating to law enforcement accountability and police practices, and enhancing existing enforcement mechanisms to remedy violations by law enforcement). Furthermore, Oregon Measure 110 reduces penalties for mere possession of controlled substances. *See* Drug Addiction Treatment and Recovery Act, 2021 Or. Laws Ch. 591; *see also* Benzinga, *Oregon Becomes First U.S. State to Decriminalize Drug Possession*, CFO (Nov. 4, 2020), https://www.cfo.com/legal/2020/11/oregon-becomes-first-u-s-state-to-decriminalize-drug-possession. To decrease incarceration levels, President Biden has also ordered the Justice Department to end funding of private prisons. *See* Aamer Madhani, *Biden Orders Justice Dept. to End Use of Private Prisons*, AP NEWS (Jan. 26, 2021), https://apnews.com/article/joe-biden-race-and-ethnicity-prisons-coronavirus-pandemic-c8c246f00695f37ef2afb1dd3a5f115e; *see also* Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities, Exec. Order No. 14006, 86 Fed. Reg. 7483 (Jan. 26, 2021).

[2] JOHN HOWARD ASS'N, PRISONER ACCESS TO THE COURT AND ADEQUATE LAW LIBRARY: NINE RECOMMENDATIONS FOR SYSTEM IMPROVEMENT 4 (2019), https://static1.squarespace.com/static/5beab48285ede1f7e8102102/t/5db0b54c32a93274d095ff33/1571861839356/JHA+Special+Report+Access+to+Court+and+Adequate+Law+Library+2019.pdf.

which equal access to information can be changed on a dime threatens American society as a whole and criminal defendants in particular.[3] The unavailability of a neutral and open internet threatens equality and human welfare.[4] Nowhere is this threat more apparent than looking at the impact a lack of net neutrality could have on access to justice in the United States criminal justice system.[5] A truly neutral internet—one in which access cannot be blocked, slowed down, or censored—requires formal regulation by the federal government.[6]

The internet is central to the information-finding behaviors of a majority of Americans, and access to information is a central tenet of access to the courts (and access to justice).[7] But, for millions of Americans, meaningful access to the internet is not guaranteed; they turn to other sources—namely, libraries—to gather information.[8] Individuals navigating the criminal justice system who need access to information to weed their way through the system are chief among those who turn to external sources and seek help in accessing information.[9] But the volatility of net neutrality means

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[3] Former FCC Chairman, Tom Wheeler, defends the proposed rules allowing for Internet "fast lanes," as the rules will still allow for an "open pathway" that is "sufficiently robust." Sam Gustin, *FCC Chairman Tom Wheeler Pledges Open Internet in Face of Criticism*, TIME (Apr. 30, 2014, 9:43 AM), https://time.com/82409/wheeler-net-neutrality. Tim Wu, a Columbia University law professor who coined the term "net neutrality," described the proposed rules as a "net-discrimination rule" that would "threaten to make the Internet just like everything else in American society: unequal in a way that deeply threatens our long-term prosperity." Megan O'Neil, *Worried by FCC Plan, Net-Neutrality Advocates at Colleges Gauge Next Steps*, CHRON. OF HIGHER EDUC. (May 1, 2014), http://chronicle.com/article/Worried-by-FCC-Plan/146293.

[4] *See* Klint Finley, *Why Net Neutrality Matters Even in the Age of Oligopoly*, WIRED (June 22, 2017, 3:52 PM), https://www.wired.com/story/why-net-neutrality-matters-even-in-the-age-of-oligopoly.

[5] Ashley Krenelka Chase, *Neutralizing Access to Justice: Criminal Defendants' Access to Justice in a Net Neutrality Information World*, 84 MO. L. REV. 323, 343 (2019).

[6] *See generally* Babette E.L. Boliek, *Wireless Net Neutrality Regulation and the Problem with Pricing: An Empirical, Cautionary Tale*, 16 MICH. TELECOMM. & TECH. L. REV. 1, 7–8 (2009) (analyzing "the relative consumer benefits of [prior] state rate regulation and federal entry regulation" on the mobile telecommunications industry).

[7] *See* Bounds v. Smith, 430 U.S. 817 (1977), *overruled in part by* Lewis v. Casey, 518 U.S. 343 (1996); *see also* Lewis v. Casey, 518 U.S. 343 (1996).

[8] Lauren Kirchner, *Millions of Americans Depend on Libraries for Internet. Now They're Closed*, MARKUP (June 25, 2020, 10:00 AM), https://themarkup.org/coronavirus/2020/06/25/millions-of-americans-depend-on-libraries-for-internet-now-theyre-closed.

[9] *See generally* Adam Wisnieski, *Access Denied: The Digital Crisis in Prisons*, CRIME REP. (Aug. 6, 2018), https://thecrimereport.org/2018/08/06/access-denied-the-digital-crisis-in-prisons.

that access to information is not guaranteed.[10] Lack of access to a truly neutral internet severely limits the litigating capacity of criminal litigants, who are in turn exploited in order to have access to basic legal information that could provide them the ability to meaningfully attack their sentences.[11]

Part I of this Article examines the precedent that courts currently rely on in the United States when determining incarcerated litigants' access to the courts via their access to information. Next, it considers how those cases fail to examine the current realities of legal research and access to information. Part II discusses the significant issues that stand in the way of meaningful access to electronic resources—namely, a lack of regulated net neutrality and the inability of prison law libraries to provide equal and meaningful access to legal information due to the move to electronic resources. It also discusses a recent Supreme Court opinion detailing "ownership" of the law in the United States and the application of that standard to incarcerated litigants. Part III describes the Supreme Court Justices' current views on the application of precedent in light of constitutional issues and how the current precedent related to access to the courts via access to information should be overturned based on other precedent, which clearly states that rapidly changing technology has changed everything about the way Americans behave socially and economically. This new precedent, this Article argues, should apply to access to the courts and access to information, and it should require the Supreme Court to revisit its own limiting precedent about access to information. Finally, this Article examines the changes to legal research technology; how prisoners' gap in technological knowledge is coupled with the fallibility of access to information given the United States' current lack of net neutrality regulations;[12] the continuing exploitation of prisoners by private companies operating in prisons; and the need to reframe the narrative and use different precedent—namely, *South Dakota v. Wayfair*—to ensure that those navigating the criminal justice system have meaningful access to legal information.

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[10] *See generally* Jeffrey Cook et al., *Net Neutrality Repeal Sparks Praise and Disappointment: 'We Cannot Let This Happen'*, ABC NEWS (Dec. 14, 2017, 6:04 PM), https://abcnews.go.com/US/net-neutrality-repeal-sparks-praise-disappointment-happen/story?id=51798263.

[11] *See* Chase, *supra* note 5, at 344–45.

[12] *See* Chase, *supra* note 5 (providing a detailed description of net neutrality and access to justice).

I. THE PRECEDENT: *BOUNDS*, *CASEY*, AND THE FAILURE OF THE UNITED STATES SUPREME COURT

There is a significant need for far-reaching American criminal justice reform, a topic that has been discussed by popular media and non-profits and that has been prioritized by past and present Presidents of the United States with varying degrees of urgency and success.[13] The exploitation of prisoners—everything from outrageous commissary charges to unpaid work—is less of a priority for many who dare to address reforms.[14] The Biden administration and bipartisan legislators are attempting to remedy Trump-era rollbacks of access to justice initiatives, highlighting the need for equal access to legal resources to truly provide justice for all.[15]

The less public and less newsworthy side of criminal justice reform and access to justice lies within the walls of prison law libraries, where it is incredibly difficult for prisoners—especially indigent prisoners—to gain meaningful access to the courts.[16] An examination of prisoners' experience with legal research and technology in prison, particularly in light of decades-old precedent related to inmates' access to legal information, coupled with a massive digital divide for those in prison, illustrates the damage inflicted on these vulnerable populations.[17]

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[13] *Compare* Barack Obama, *The President's Role in Advancing Criminal Justice*, 130 HARV. L. REV. 811 (2017) (detailing former President Barack Obama's tenure and impact on criminal justice reform in the United States), *with* Malia Brink, *The Next Four Years: What Biden Should Prioritize on Policing and Criminal Justice Reform*, A.B.A. (Mar. 3, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-next-four-years/policing-and-criminal-justice-reform (analyzing President Biden's campaign promises regarding criminal justice reform and suggesting actions he could take to implement his promises).

[14] Jeanne Hirschberger, *'Imprisonment is Expensive' – Breaking Down the Costs and Impacts Globally*, PENAL REFORM INT'L BLOG (July 24, 2020), https://www.penalreform.org/blog/imprisonment-is-expensive-breaking-down-the-costs-and; Bernadette Rabuy & Peter Wagner, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), https://www.prisonpolicy.org/reports/money.html.

[15] Press Release, Congressman Jerry Nadler, Bipartisan Lawmakers Introduce Legislation to Restore DOJ's Office for Access to Justice (July 16, 2021), https://nadler.house.gov/news/documentsingle.aspx?DocumentID=394691; *see also* Memorandum on Restoring the Dep't of Justice's Access-to-Justice Function and Reinvigorating the White House Legal Aid Interagency Roundtable, 86 Fed. Reg. 27793 (May 21, 2021).

[16] *See* 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 (2006).

[17] *Id.*

A. The Intersection of Access to Justice and Libraries

The body of cases discussing access to information as an avenue to access the court system is not large, and two cases remain the polestars for discussing criminal defendants' access to information, the courts, and justice: *Bounds v. Smith*[18] and *Lewis v. Casey*.[19] Both *Bounds* and *Casey* discuss access to the American court system and the impact that libraries—specifically prison libraries—have on that access. While the opinions in both cases hinge on prisoners' ability to access legal information, neither case contemplates the significant shift in the cost and availability of legal resources, and subsequent cases continue to fail to acknowledge the new reality of legal research: meaningful access to the internet is essential to accessing legal resources.[20]

i. *Bounds*

Bounds v. Smith was the first Supreme Court case to address whether a failure to provide legal research facilities in prisons is akin to barring inmates' access to the courts in violation of their First and Fourteenth Amendment rights.[21] In making a determination that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law,"[22] the Supreme Court evaluated whether the need for legal research in new cases versus petitions for discretionary review had any impact on prisoners' ability to access the courts.[23] The Supreme Court established that it is "beyond doubt that prisoners have a constitutional right of access to the courts," regardless of the type of action being pursued by the prisoner.[24]

The Supreme Court went on to say that "access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with

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[18] 430 U.S. 817 (1977), *overruled in part by* Lewis v. Casey, 518 U.S. 343 (1996).

[19] 518 U.S. 343 (1996).

[20] Chase, *supra* note 5, at 359.

[21] *Bounds*, 430 U.S. at 817–18.

[22] *Id.* at 828.

[23] *Id.* at 827–28.

[24] *Id.* at 821–22.

adequate law libraries or adequate assistance from persons trained in the law."[25] In making its determination, the Court noted that an attorney would be deemed incompetent and ineffective if he filed an initial pleading without performing research and that research tasks are no less important for an incarcerated litigant representing himself pro se when navigating the criminal justice system.[26] The Supreme Court stated that economic factors may be considered when determining the methods used to provide the required access to prison law libraries or assistance from those trained in the law.[27] The decision in *Bounds* opened a door for thousands of cases in federal and state courts discussing the constitutional right to access the courts via use of legal information, but after the decision in *Lewis v. Casey* nearly twenty years later, the holding of *Bounds* became much more limited.[28]

ii. *Casey*

After *Bounds*, the Supreme Court noted in *Lewis v. Casey* that access to legal information is vital to prisoners, who frequently must represent themselves pro se.[29] The Supreme Court went on to limit the holding in *Bounds* by emphasizing that what was actually guaranteed was the right of access to the courts—not libraries.[30] In making that determination, the Court stated that incarcerated litigants cannot simply launch a theoretical argument that the prison's law library is inadequate to satisfy a broad claim of denial of access to the courts.[31] The Supreme Court found that prisoners are entitled only to "minimal access" to legal information and established strict standing requirements for prisoners suing about obstacles they encounter in the process of accessing legal information.[32]

In explaining its decision, the Supreme Court stated that "[t]o demand the conferral of . . . sophisticated legal capabilities

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[25] *Id.* at 828.

[26] *Id.* at 825–26.

[27] *Id.* at 825.

[28] Lewis v. Casey, 518 U.S. 343, 355 (1996) (limiting the holding of Bounds v. Smith, 430 U.S. 817 (1977) by determining that inmates are only allowed the litigation tools needed "in order to attack their sentences directly or collaterally").

[29] *Id.*

[30] *Id.* at 350.

[31] *Id.* at 356–57.

[32] *Id.* at 351–53.

upon a mostly uneducated . . . population is effectively to demand permanent provision of counsel, which [the Supreme Court] d[id] not believe the Constitution require[d]."[33] In *Casey*, rather than giving meaning to the right of access to the courts through access to information, the majority used a problem caused largely by the socioeconomic inequity of incarcerated individuals who would be impacted by their decision to justify denying court access.[34] In *Casey*, the Supreme Court rejected the caution issued in *Bounds* that "[t]he cost of protecting a constitutional right cannot justify its total denial."[35] The *Casey* decision further stated that:

> *Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need to attack their sentences, directly or collaterally, and to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.[36]

iii. Recent Decisions Regarding Access to Information/Courts

In the twenty-five years since *Casey* was decided, several cases challenging the precedent have made their way to the federal circuits, only to find the arguments of the incarcerated litigants dashed and dismissed.[37] Throughout the 1990s, litigants like

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[33] *Id.* at 354.

[34] *Id.*

[35] Bounds v. Smith, 430 U.S. 817, 825 (1977).

[36] *Casey*, 518 U.S. at 355.

[37] *See* McDonald v. Steward, 132 F.3d 225, 231 (5th Cir. 1998); Farver v. Vilches, 155 F.3d 978, 979–80 (8th Cir. 1998); Simmons v. United States, 974 F.3d 791, 797 (6th Cir. 2020).

Degrate,[38] Klinger,[39] and Jones[40] brought federal civil rights actions under 42 U.S.C. § 1983, alleging that deprivation of access to a law library—and therefore access to legal materials—violated their right of meaningful access to the courts. In each of these cases, not only did the circuit courts state that the inmates had as much access to law libraries as they needed but the courts also noted that, while these incarcerated litigants could have had *more* access to legal materials in the prison libraries, additional access would not have impacted the outcome of their cases and, as such, the lack of access did not violate their constitutional rights.[41]

There is no shortage of commentary discussing what prisoners should and should not be able to do, how they should behave, or what can be done to improve their lives during incarceration, while also ensuring they are appropriately punished.[42] The line between what convicted (and not-yet convicted) criminal litigants should and should not be able to do while in prison has been explored in many contexts.[43] In *Creative Prison Lawyering*, Feierman argued that, "[i]n the context of cuts in funding for educational programs for prisoners, *Casey* contribute[d] to the deepening gap between those with access to legal knowledge and those entirely dependent on others, further silencing prisoners who might otherwise attempt to participate in public discourse through litigation."[44]

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[38] Degrate v. Godwin, 84 F.3d 768, 769 (5th Cir. 1996) (holding that because the appellant refused assistance from court-appointed counsel, he had no right to access the law library for preparing his pro se defense).

[39] Klinger v. Dep't of Corr., 107 F.3d 609 (8th Cir. 1997) (holding that the prisoners did not establish they were denied meaningful access to the courts even though they did demonstrate a complete and systemic denial of access to the law library; thus, because they could not show that any actual injury arose from a failure to access the library, the court held that no constitutional rights were violated).

[40] Jones v. Greninger, 188 F.3d 322 (5th Cir. 1999) (limiting prisoners to five hours a week of time in a law library does not violate their constitutional right of access to the courts).

[41] *Degrate*, 84 F.3d at 769; *Klinger*, 107 F.3d at 617; *Jones*, 188 F.3d at 325.

[42] *See, e.g.*, Abdallah Fayyad, *Prisoners Should be Allowed to Vote While Serving*, BOS. GLOBE (July 23, 2020, 12:00 AM), https://www.bostonglobe.com/2020/07/23/opinion/yes-they-should-be-allowed-vote-while-serving (discussing whether inmates should or should not be allowed to vote); Bryan Nguyen, *Prisons: Reform or Punishment?*, MEDIUM (Mar. 27, 2017), https://medium.com/fhsaplang/prisons-reform-or-punishment-2ce135a108c7 (discussing prisoner reform versus prisoner punishment).

[43] *See* Jessica Feierman, *Creative Prison Lawyering: From Silence to Democracy*, 11 GEO. J. POVERTY L. & POL'Y 249, 252 (2004).

[44] *Id.* at 269 (discussing barriers to prisoners' speech and lack of access to the courts, as well as models for prison lawyering that empower prisoners to overcome issues with access to

This argument is particularly striking when considering the impact net neutrality and exploitation of prisoners through access to resources has on those in the criminal justice system. Internet deregulation, a lack of net neutrality, and the desire to profit on prisoners' need for access to legal information will not only impact the way incarcerated litigants use computers and the Internet to access legal information but it will also deepen the gap between self-represented litigants—who require access to legal information in libraries—and those who have been assigned public defenders or can afford to hire private attorneys.[45] Defendants who can afford private attorneys are unlikely to notice a change, other than slightly higher attorneys' fees,[46] and litigants with public defenders may find themselves being represented by attorneys who are less inclined to perform legal research to strengthen their cases because it will simply become too burdensome to do so.[47] But self-represented criminal litigants have the worst fate of all, as they may be left unable to access legal information online due to lack of time to access information, lack of computer skills needed to navigate online systems, slow internet access due to tiering or network throttling, and the prohibitive costs or lack of availability of meaningful resources due to the continued exploitation of prisoners.[48] In a world without a neutral internet or protections for incarcerated individuals, legal resources remain out of reach for criminal defendants.

II. THE PARAMETERS: NET NEUTRALITY, ACCESS TO JUSTICE, AND THE CURRENT FRAMEWORKS FOR INFORMATION ACCESS AND OWNERSHIP

Access to the internet is not a given. Millions of Americans do not have meaningful access to the internet and, for those that

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the courts, win legal victories, and enforce their rights in order to pursue long-term change for this underserved population and the prison communities in which they live).

[45] *See* Chase, *supra* note 5, at 343.

[46] *See* discussion *infra* Part III.B.1.b.

[47] *See* Chase, *supra* note 5, at 363–64.

[48] While there are many free legal research resources available today, such as Google Scholar and the Cornell Legal Information Institute, most are incomplete or lack the breadth of information that can be retrieved through traditional, paid legal research platforms. *See* Johnathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries*, 101 GEO. L. J. 1171, 1212, 1215 (2013).

do, the speed of that access is not guaranteed.[49] Net neutrality—the idea that access to information on the internet should be equal, accessible, and meaningful—has been kicked around in the public lexicon for years.[50] Similarly, access to justice and the barriers that stand between individuals and the court system in the United States are now a more widely-discussed issue, particularly in the legal field.[51] The intersection of these issues is, however, relatively new,[52] and the impact of a non-neutral internet on those navigating the criminal justice system is particularly problematic, as a lack of access to information at meaningful speeds is essentially a barrier to access to the criminal justice system itself.[53] The fallibility of access to legal materials, both due to issues related to internet access and issues with access to justice for those in the criminal justice system, demands that the Supreme Court revisit precedent and reevaluate whether access to the courts can truly be achieved when legal materials are not equally and meaningfully accessible to those navigating the system.

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[49] Tyler Sonnemaker, *The Number of Americans without Reliable Internet May Be Way Higher Than the Government's Estimate – and That Could Cause Major Problems in 2020*, BUS. INSIDER (Mar. 12, 2020, 3:00 PM), https://www.businessinsider.com/americans-lack-of-internet-access-likely-underestimated-by-government-2020-3 (detailing the ways in which the coronavirus accelerated the need for meaningful internet access for people around the United States); Sean Hollister, *In 2021, We Need to Fix America's Internet*, VERGE (Dec. 17, 2020, 8:15 AM), https://www.theverge.com/22177154/us-internet-speed-maps-competition-availability-fcc (discussing the differences between internet in the United States and Europe, including the difference in price and the availability of high speed access [which is not as readily available in the United States as it is throughout Europe]).

[50] Marguerite Reardon, *Net Neutrality: How We Got from There to Here*, CNET TECH (Feb. 24, 2015, 4:00 AM), https://www.cnet.com/tech/services-and-software/net-neutrality-from-there-to-here (providing a brief history of net neutrality in the United States); *A History of Net Neutrality in the United States*, MOZILLA FOUND., https://foundation.mozilla.org/en/campaigns/net-neutrality-timeline (last visited Oct. 14, 2021) (providing a history of internet access and net neutrality in the United States).

[51] Joe Kennedy & Rohan Pavuluri, *We Need a New Civil Right*, CNN OPINIONS (Aug. 8, 2021, 8:24 PM), https://www.cnn.com/2021/08/08/opinions/access-to-justice-gap-civil-rights-kennedy-pavuluri/index.html (arguing that access to information is a fundamental right); Maggie Jo Buchanan et al., *'Justice for All' Requires Access to Justice*, CTR. FOR AM. PROGRESS (Apr. 8, 2021, 9:00 AM), https://www.americanprogress.org/issues/courts/news/2021/04/08/497950/justice-requires-access-justice (discussing the Biden administration's call for racial equity and the revival of an Office for Access to Justice).

[52] *See* Chase, *supra* note 5, at 361.

[53] *Id.* at 362–63.

A. Net Neutrality's Role in Access to Information

Net neutrality has no simple definition and is often referred to as everything from absolute nondiscrimination[54] to limited discrimination without tiering based on quality of service.[55] In the United States, net neutrality has been discussed on the floor of Congress and at the Federal Communications Commission ("FCC"), as well as in federal courts.[56] Most recently, issues of internet access came to light as people around the globe faced the COVID-19 pandemic and found themselves working, attending school, and living completely in their homes.[57] Initially, a series of orders adopted by the FCC in the 1970s were all that was available to deal with telecommunications in the United States.[58]

Subsequently, the FCC was granted power to regulate interstate and international communications by radio, television, satellite, wire, and cable in all fifty states, the District of Columbia, and the U.S. territories.[59] The Communications Act of 1934 ("the 1934 Act") allows the FCC to regulate under two broad areas: Title I governs telecommunications services under the Commerce Clause, while Title II applies more stringent regulations to broadcast services, including radio and television.[60] Thirty-two years later,

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[54] *See* Tim Wu, *Network Neutrality, Broadband Discrimination,* 2 J. TELECOMM. & HIGH TECH. L. 141, 165 (2003) (discussing the concept of net neutrality as related to telecommunications policy and innovation).

[55] *See id.* at 154.

[56] Tony Romm & Brian Fung, *Net Neutrality Bill Sails through the House but Faces an Uncertain Political Future,* WASH. POST (Apr. 10, 2019), https://www.washingtonpost.com/technology/2019/04/10/net-neutrality-bill-sails-through-house-faces-an-uncertain-political-future; David Shepardson, *U.S. FCC Votes to Maintain 2017 Repeal of Net Neutrality Rules,* REUTERS (Oct. 27, 2020), https://www.reuters.com/article/us-usa-internet/u-s-fcc-votes-to-maintain-2017-repeal-of-net-neutrality-rules-idUSKBN27C2EO.

[57] Klint Finley, *The Covid-19 Pandemic Shows the Virtues of Net Neutrality*, WIRED (May 4, 2020, 8:00 AM), https://www.wired.com/story/covid-19-pandemic-shows-virtues-net-neutrality (discussing how a lack of net neutrality regulations in the United States was highlighted during the pandemic, when a crush of internet traffic slowed speeds as people tried to work and attend school from home); Chad Marlow, *Why Net Neutrality Can't Wait*, ACLU (July 9, 2021), https://www.aclu.org/news/free-speech/why-net-neutrality-cant-wait (calling on the Biden administration to prioritize naming an FCC Chair and formally revitalize net neutrality).

[58] JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 188 (2013).

[59] 47 U.S.C. § 151.

[60] Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151–646).

Congress passed the Telecommunications Act of 1996 ("the 1996 Act") in which it defined two classes of services, including "information services."[61] "Information services" offer the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing[] but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[62] Second, it defined "telecommunications services," which offer "telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[63]

In 2002, using the updated definitions from the 1996 Act, the FCC determined that provision of broadband internet and cable television services should be subjected to the less strict Title I standards of the 1934 Act.[64] In 2005, the United States Supreme Court upheld this ruling in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.[65] Later in 2005, the FCC extended the same *Brand X* regulatory relief to telephone company internet access services—for example, digital subscriber line ("DSL") services—in what became known as the Advanced Services Order.[66] The Advanced Services Order put telephone company internet access services under the ambit of telecommunications services subject to regulation under Title I.[67] The justification for doing so was simple, according to the FCC—telephone company internet services were purely transmission technologies.[68]

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[61] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended at 47 U.S.C. §§ 151–646).

[62] 47 U.S.C. § 153(24).

[63] *Id.* § 153(53).

[64] *In re* Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities, 17 FCC Rcd. 4798 (2002), *aff'd in part, vacated in part by* Brand X Internet Services v. FCC, 345 F.3d 1120 (9th Cir. 2003), *and rev'd and remanded sub nom*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Serv., 545 U.S. 967 (2005).

[65] 545 U.S. 967, 1002–03 (2005) (determining that the FCC was lawful and acted within its discretion in not defining cable broadband providers as "telecommunications services" under Chevron v. Nat. Res. Def. Council, 467 U.S. 837 (1984)).

[66] *See In re* Appropriate Framework for Broadband Access to the Internet, 20 FCC Rcd. 14,986 (2005).

[67] *See id.* at 14,987–88.

[68] *See id.*

By classifying both telephone internet access service and cable modem service as telecommunications services under Title I (instead of broadcast services under Title II), the FCC was allowed to apply less stringent regulations to both.[69] This classification also permitted the FCC to maintain its regulatory authority over these services under ancillary jurisdiction granted by Title I.[70] After the ruling in *Brand X* and the publication of the Advanced Services Order, the FCC adopted four principles "to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers . . . . [*Thus,*] *to encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*[:]

- . . . [C]onsumers are entitled to access the lawful internet content of their choice.
- . . . [C]onsumers are entitled to run applications and services of their choice (subject to the needs of law enforcement).
- . . . [C]onsumers are entitled to connect their choice of legal devices that do not harm the network.
- . . .[C]onsumers are entitled to competition among network providers, application and service providers, and content providers.[71]

While this statement of principles did not have the force of law,[72] it showed that the FCC, through the authority granted to it by Congress, considered itself a major stakeholder in the debate over net neutrality.

In 2010, the FCC published the Open Internet Order,[73] which contained three basic goals for the maintenance of net neutrality.[74] The first goal, transparency, indicated that internet service providers ("ISPs") should disclose to their users any and all relevant information about the policies that govern their networks.[75]

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[69] *See id.*

[70] *Id.* (alterations in original).

[71] *Id.*

[72] *Net Neutrality Overview,* 86 CONG. DIG. 39, 39–40 (2007).

[73] *In re* Preserving the Open Internet Broadband Industry Practices, 25 FCC Rcd. 17,905 (2010), *vacated and remanded by* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

[74] *Id.* at 17,906.

[75] *Id.*

Second, the FCC listed the goal of "no blocking."[76] Simply put, this goal requested that ISPs not block any content that can legally be put online. Finally, the FCC requested that ISPs not act in a "commercially unreasonable manner to harm the Internet, including favoring traffic from an affiliated entity."[77] The third goal is the one, which, arguably, most threatens daily use of the internet for non-commercial end users like attorneys, libraries, advocacy groups, and other individuals.[78]

It took four years but, in 2014, the D.C. Circuit struck down the FCC's Open Internet Order, rendering it almost entirely ineffective.[79] The court noted that it was well within the scope of broadband internet providers' technical abilities to "distinguish between and discriminate against certain types of [i]nternet traffic" and that these providers' "position in the market gives them the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers."[80] This decision, as well as the backlash that resulted, was broadly covered by the media in the United States and abroad, leading President Obama to call for the FCC to quickly pass formal regulations that would require an open and neutral internet.[81] FCC Chairman Tom Wheeler was quick to point out that the President's request was exactly what everyone else was requesting: "an open [i]nternet that doesn't affect your business."[82] A frustrated Wheeler went on to say that what the FCC needed to do was

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[76] *Id.*

[77] Tom Wheeler, *Setting the Record Straight on the FCC's Open Internet Rules*, FCC (Apr. 24, 2014, 11:15 AM), https://www.fcc.gov/news-events/blog/2014/04/24/setting-record-straight-fccs-open-internet-rules (explaining the process of drafting the Open Internet rules and the notice and comment period related to that rulemaking process).

[78] Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,745 (Apr. 13, 2015).

[79] Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014).

[80] *Id.* at 646. Edge providers are, in essence, what make the Internet functional for the general public; they "provide content, applications, or services" on the internet and "provide[] . . . device[s] used for accessing any content, application, or service over the [i]nternet." David Post, *Does the FCC Really Not Get It about the Internet?*, WASH. POST (Oct. 31, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/31/does-the-fcc-really-not-get-it-about-the-internet.

[81] *See* Brian Fung & Nancy Scola, *Obama's Call for an Open Internet Puts Him at Odds with Regulators*, WASH. POST (Nov. 11, 2014, 4:27 PM), http://www.washingtonpost.com/blogs/the-switch/wp/2014/11/11/the-fcc-weighs-breaking-with-obama-over-the-future-of-the-internet (describing the political difficulties in formal regulation of a neutral internet under President Obama).

[82] *Id.*

balance those interests, to "figure out . . . how to split the baby" between an open internet and one that does not impact businesses.[83]

In 2015, the FCC took an official, hardline stance in response to *Verizon v. FCC* by publishing a new set of open internet protections.[84] These "bright line rules," outlined by the FCC on its website, included:

> - **No Blocking:** broadband providers may not block access to legal content, applications, services, or non-harmful devices.
> - **No Throttling:** broadband providers may not impair or degrade lawful [i]nternet traffic on the basis of content, applications, services, or non-harmful devices.
> - **No Paid Prioritization:** broadband providers may not favor some lawful [i]nternet traffic over other lawful traffic in exchange for consideration [of any kind] – in other words, no "fast lanes." This rule also bans ISPs from prioritizing content and services of their affiliates.[85]

While the FCC seemed to have a clear vision for regulating the Internet, others began questioning these rules and demanding changes to Internet regulation.[86]

The FCC's clear and consistent desire to protect both consumers and edge users continued and, on April 13, 2015, it published its final rule: Protecting and Promoting the Open Internet ("PPOI").[87] In publishing this final rule, the FCC noted the immense power wielded by ISPs and their ability to do harm to any internet traffic they determined they did not like.[88] The FCC stated further that a "ban on throttling [was] necessary . . . to avoid gamesmanship designed to avoid the no-blocking rule by, for example,

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[83] *Id.*

[84] *See* Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,745 (Apr. 13, 2015).

[85] FCC, FACT SHEET: CHAIRMAN WHEELER PROPOSES NEW RULES FOR PROTECTING THE OPEN INTERNET 2 (2015), https://www.fcc.gov/document/chairman-wheeler-proposes-new-rules-protecting-open-internet.

[86] *See* Y. Peter Kang, *CenturyLink Sues FCC Over Net Neutrality*, LAW360 (Apr. 17, 2015, 6:01 PM), https://www.law360.com/articles/644864/centurylink-sues-fcc-over-net-neutrality.

[87] Protecting and Promoting the Open Internet, 80 Fed. Reg. at 19,745.

[88] *See id.*

rendering an application effectively, but not technically, unusable. [The PPOI] prohibit[ed] the degrading of [i]nternet traffic based on source, destination, or content."[89] In publishing the PPOI, the FCC won the hearts of net neutrality and infuriated ISPs.[90]

A mere four days after the PPOI was published in the Federal Register, a slew of new lawsuits were filed in the D.C. Circuit.[91] These cases, later consolidated, came to be known as *United States Telecom Ass'n v. FCC* and sought to rehash many of the same details discussed by the court in *Verizon* within the context of the PPOI.[92] Arguments in favor of the ISPs were largely economical, while briefs filed in favor of the respondents expressed a clear concern for free speech and ensuring that ISPs cannot "disadvantag[e] non-profit or public interest entities" through paid prioritization schemes.[93] On May 1, 2017, the D.C. Circuit denied the petitions and upheld the FCC's 2015 Open Internet Order and refused to involve itself in the then-ongoing debate over the PPOI,[94] confirming that the rules were lawful and within the FCC's statutory authority.

With a change in administration came a change to the FCC, and shortly after his 2016 victory, President Donald Trump appointed Chairman Ajit Pai to head the FCC.[95] Months into his tenure as Chair, Pai announced that the FCC would move forward with deregulating the internet and encourage ISPs to voluntarily adhere to net neutrality principles.[96] By reenacting a light touch framework for net neutrality, the FCC abdicated authority over ISPs and cleared the way for them to engage in behavior that would bar

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[89] *Id.* at 19,740.

[90] *See* Kang, *supra* note 86.

[91] *See, e.g.*, Petition for Review at 1, CenturyLink v. FCC, No. 15-1099 (D.C. Cir. Apr. 17, 2015).

[92] United States Telecom Ass'n v. FCC, 855 F.3d 381 (D.C. Cir. 2017).

[93] Amicus Brief for Am. Library Ass'n, Ass'n of Coll. & Research Libraries et al. in Support of Respondents at 3–4, 10, United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2015) (No. 15-1063), https://docs.fcc.gov/public/attachments/DOC-335408A1.pdf; *see also* Brief of Amici Curiae Elec. Frontier Found., ACLU et al. in Support of the Respondents, United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2015) (No. 15-1063), https://docs.fcc.gov/public/attachments/DOC-335407A1.pdf; Brief Amici Curiae of Comput. & Commc'ns Indus. Ass'n & Mozilla in Support of Respondents, United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2015) (No. 15-1063), https://docs.fcc.gov/public/attachments/DOC-335411A1.pdf.

[94] *See United States Telecom Ass'n*, 855 F.3d at 382.

[95] *See* Chase, *supra* note 5, at 338 n.89.

[96] *Id.* at 338 nn.90–93.

individual users from meaningful, open access to the internet.[97] Throughout his tenure at the FCC, Chairman Pai focused on the economic arguments for internet deregulation, stating:

> Money that could have expanded networks was now being siphoned off to pay lawyers and consultants to make sense of the new rules. Resources were spent developing plans to minimize the risk of enforcement actions. Some [members of the American Cable Association] even started setting money aside for litigation reserves. We're talking about time, money, and lawyers that your companies can't easily afford. On top of that, [members of the American Cable Association] faced the possibility of after-the-fact rate regulation that could reduce returns on investments and prevent you from raising further capital.[98]

Many others, including Congress, attempted to respond to Pai's assertions that internet deregulation would economically harm ISPs.[99] Surprising no one, every Trump-era congressional effort to formally adopt net neutrality legislation died either in committee or on the floor of Congress.[100]

Despite media attention related to net neutrality, the conversation around the potential harm of a deregulated internet seemed to focus on traditional consumers; very little attention was paid to access to justice and the role a neutral internet plays in providing legal information to millions of people in the justice gap.[101] Exceptions to the silence included Avvo and the American Association of Law Libraries, both of which highlighted the essential nature of net neutrality and the need for a neutral internet "to

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[97] *Id.* at 339 nn.94–95.

[98] FCC, REMARKS OF FCC CHAIRMAN AJIT PAI AT THE AMERICAN CABLE ASSOCIATION ANNUAL SUMMIT 3 (Mar. 21, 2018), https://docs.fcc.gov/public/attachments/DOC-349825A1.pdf.

[99] *See* Chase, *supra* note 5, at 333–34 nn.60-63 (describing how rolling back net neutrality affected consumers).

[100] *Id.* at 333 n.64.

[101] *See* Jason Tashea, *In the Battle for Net Neutrality, the A2J Community is Notably Quiet*, A.B.A. J. L. SCRIBBLER (Oct. 22, 2018, 6:00 AM), https://www.abajournal.com/lawscribbler/article/in_the_battle_for_net_neutrality_the_legal_community_is_notably_quiet (describing the U.S. Department of Justice's net neutrality lawsuit against California and the marked silence from legal aid providers, attorneys, and lawmakers about the impact net neutrality has on access to justice).

provide users with equitable access to up-to-date legal information," including users who may not be able to "pay the fees for preferred access. These users are . . . self-represented litigants" including, of course, criminal litigants.[102] In 2018, no one was sure how ISPs would exercise their freedom to block and throttle internet access, but issues with connectivity and equitable internet speeds quickly came into focus. With the election of President Biden in 2020 came a glimmer of hope for net neutrality to be regulated once again.[103] Ashley Boyd, vice president for advocacy and engagement at Mozilla, stated that the United States needs to focus again on net neutrality "and get it secured because of how fundamental it is."[104] The COVID-19 pandemic that continued to grip the United States after the inauguration highlighted the necessity of the internet for Americans who were still attending school, work, and play online.[105] The FCC, while without formal leadership or a strategic plan to ensure a neutral internet, has publicly prioritized broadband internet access, providing a glimmer of hope for a return to net neutrality. Unfortunately, the glimmer has yet to turn into a shining ray of hope. The FCC is politically deadlocked, and Congress is under immense pressure to deal with other pressing national issues arising; one hopes that advocates for net neutrality, including President Biden, will press the issue and sort the FCC's deadlock in the near future.[106]

B. The Role of Libraries in Providing Access to Information and Access to the Courts

Bounds and *Casey* discuss the need for those in the criminal justice system to have access to prison libraries,[107] but, in facilities where prisoners' access to legal information is treated less like a constitutional right and more like a money-making opportunity, that need is quickly drowned out by exploitation of this vulnerable

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[102] *Id.*

[103] *See* Tony Romm, *Pressure Builds on Biden, Democrats to Revive Net Neutrality Rules*, WASH. POST (Jan. 27, 2021), https://www.washingtonpost.com/technology/2021/01/27/net-neutrality-biden-fcc (describing optimism among democrats in reviving net neutrality after 2020 election).

[104] *Id.*

[105] *Id.*

[106] *Id.*; *see also* Promoting Competition in the American Economy, 86 Fed. Reg. 36,987 (July 9, 2021).

[107] Bounds v. Smith, 430 U.S. 817 (1977); *see also* Lewis v. Casey, 518 U.S. 343 (1996).

population.[108] In the fight for prisoners' true access to justice, the potential gap in access to information created by a lack of net neutrality is sure to be the most far-reaching. Most libraries with legal collections have moved away from print materials for cost-saving purposes; the cost of legal materials for libraries has increased by an average of 9.86% every year since 2009, while library budgets have largely remained flat or declined.[109]

Prison libraries—the primary focus of *Bounds* and *Casey*—do not ensure access to online resources, but a non-neutral internet all but ensures they will never be able to do so at any time.[110] The data surrounding prison libraries and acquisitions is deceptive.[111] "In institutions with limited prisoner access to libraries, prisoners with high literacy levels cannot advocate for themselves as well as they would have before, and prisoners with lower literacy levels cannot obtain as much help from jailhouse lawyers."[112] As far back as 2009, a lack of meaningful internet access was identified as a challenge to all kinds of prison programming.[113] Because "most convicts are poor and social deprivation is a primary correlate of criminal behavior, [should] it follow that the poor in prison should be connected to the internet?"[114] While access to the internet has changed for some prisoners, the access they are being granted today is not to legal materials, but to email, books, or other applications deemed

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[108] *See* Larry E. Sullivan, *The Least of Our Brethren: Library Services to Prisoners*, AM. LIB. 56, 58 (2000) ("This country, at least, [has] already turned away from the attempt to provide anything of substance for convicts."); *see also* Abel, *supra* note 48, at 1213–14 (discussing how in the transition to online prison library resources it is "dollars and cents" not meaningful prisoner access that drives decision making).

[109] *See* Narda Tafuri, *Prices of U.S. and Foreign Published Materials*, 62 LIBR. & BOOK TRADE ALMANAC 347, 352 (2017), https://alair.ala.org/bitstream/handle/11213/8099/LMPI%20Article%202017.pdf?sequence+1&isAllowed=y (averaging years 2010–17 on Table 2).

[110] *See generally* Chase, *supra* note 5, at 347–48 (discussing how internet deregulation may deepen the gap between those that rely on legal libraries and those who have assistance of counsel).

[111] *See id.* at 358.

[112] Jessica Feierman, *Creative Prison Lawyering: From Silence to Democracy*, 11 GEO. J. POVERTY L. & POL'Y 249, 268 (2004) (citing John Matosky, *Illiterate Inmates and the Right of Meaningful Access to the Courts*, 7 B.U. PUB. INT. L. J. 295, 307 (1998)).

[113] Carl Nink et al., *Expanding Distance Learning Access in Prisons: A Growing Need*, 71 CORRECTIONS TODAY 40, 42 (2009) (discussing methods for providing inmates without formal education access to distance learning opportunities using technology and other methods).

[114] Sullivan, *supra* note 108, at 58 (discussing possible approaches of providing internet access to prisoners in the digital age).

acceptable by both those running the prisons and the for-profit companies providing them with access.[115]

Access to the internet for performing legal research has never been perceived as a positive step towards providing inmates access to the courts via access to information, as guaranteed in *Bounds*.[116] Certainly, it is not a stretch to think limiting prisoner access to legal materials will continue as budget cuts to the Government Publishing Office and libraries around the country continue.[117] Nor is it a stretch to think that in order to access relevant legal information to proactively argue their cases, inmates would be better served by having access to the internet for the purposes of accessing legal information.

Thirty-nine states' departments of corrections—along with over a thousand jails—have access to Lexis for incarcerated litigants.[118] In other states, access to legal research in prisons is achieved through Westlaw, Conway Greene, or books, exclusively (though that number is small).[119] Nine states' prison libraries have begun providing inmates access to the Internet for the purposes of gathering legal information.[120] Nearly one million incarcerated litigants use Lexis for computer-assisted legal research.[121] Lexis claims

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[115] *See* Stephen Raher & Andrea Fenster, *A Tale of Two Technologies: Why "Digital" Doesn't Always Mean "Better" for Prison Law Libraries*, PRISON POL'Y INITIATIVE (Oct. 28, 2020), https://www.prisonpolicy.org/blog/2020/10/28/digital-law-libraries (comparing two different digital law library rollouts in prisons in Oregon and South Dakota); *see also* Stephen Raher, *The Wireless Prison: How Colorado's Tablet Computer Program Misses Opportunities and Monetizes the Poor*, PRISON POL'Y INITIATIVE (July 6, 2017), https://www.prisonpolicy.org/blog/2017/07/06/tablets (discussing limited and exploitive functionality of tablets being made available to prisoners in Colorado).

[116] *See generally* Abel, *supra* note 48, at 1211–14 (discussing the implications of computerization on the Law Library Doctrine).

[117] *See* Samantha Michaels, *Books Have the Power to Rehabilitate. But Prisons Are Blocking Access to Them*, MOTHER JONES (Feb. 2020), https://www.motherjones.com/crime-justice/2019/11/prison-libraries-book-bans-california-sacramento-reading-rehabilitation (discussing budget issues compounded by unsympathetic decision makers affecting access to prison library services).

[118] *See* Transcript of Deposition of Anders Ganten at 9, Brakeall v. Kaemingk, 18-CV-04056-LLP (D.S.D. Nov. 21, 2018), https://www.prisonpolicy.org/scans/lawlibraries/Ganten_Deposition_BrakeallvKaemingk.pdf (In his deposition, Ganten, the senior director of governmental corrections with LexisNexis, states that Lexis is "the market leader" in prison legal information services.).

[119] *See e.g.,* Wisnieski, *supra* note 9.

[120] This information was generated utilizing a series of documents and interviews, all of which are on file with the author and available upon request.

[121] *Id.*

to provide the same level of access to incarcerated litigants that they offer to law firms, but with less current access to secondary sources and external links disabled.[122]

Simply put, law library collections are moving online because of massive shifts in the industry that do not take criminal litigants' needs into account, and their access to justice hangs in the balance.[123]

C. Georgia v. Public.Resource.Org[124]

In the years between *Casey* and today, the Supreme Court addressed another issue related to access to information in *Georgia v. Public.Resource.Org*.[125] In determining that the state of Georgia violated the Copyright Act by copyrighting—and preventing access to—annotations that are published with Georgia's Official Code, the Supreme Court made it clear that "*no one can own the law*."[126] The Supreme Court offered a hypothetical citizen who would be affected by limited access to the fully annotated version of Georgia's Official Code:

> Imagine a Georgia citizen interested in learning his legal rights and duties. If he reads the economy-class version of the Georgia Code available online, he will see laws . . . criminalizing broad categories of consensual sexual conduct[] and exempting certain key evidence in criminal trials from standard evidentiary limitations—with no hint that important aspects of those laws have been held unconstitutional by the Georgia Supreme Court. Meanwhile, first-class readers with access to the annotations will be assured that these laws are, in crucial respects, unenforceable relics that the legislature has not bothered to narrow or repeal.[127]

This hypothetical citizen illustrates the reasoning behind the Court's decision: Copyrighting the Georgia Official Code stood

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[122] *Id.*

[123] *See generally* Chase, *supra* note 6, at 358–61.

[124] 140 S. Ct. 1498 (2020).

[125] *Id.*

[126] *Id.* at 1506–09 (emphasis added).

[127] *Id.* at 1512 (emphasis added) (internal citations omitted).

in the way of this citizen's access to information, which was unacceptable because no one owns the law. But this hypothetical citizen can, with a few small changes, also be used to illustrate the flaws in maintaining Bounds and Casey as precedent for prisoners' access to information, the courts, and justice:

> Imagine a Georgia [prisoner] interested in learning his legal rights and duties. If he reads the economy-class version of the Georgia Code available online [in the prison library], he will see laws . . . criminalizing broad categories of consensual sexual conduct[] and exempting certain key evidence in criminal trials from standard evidentiary limitations—with no hint that important aspects of those laws have been held unconstitutional by the Georgia Supreme Court. Meanwhile, [individuals who are not incarcerated] with access to the annotations will be assured that these laws are, in crucial respects, unenforceable relics that the legislature has not bothered to narrow or repeal.[128]

Denying the incarcerated criminal litigant access to the legal information he needs to adequately attack his case because it is behind a copyright and paywall would clearly violate the Copyright Act.[129] But impairing that same incarcerated criminal litigant's capacity to litigate his own case because access to current legal information is easily available online, and meaningful access to the internet in correctional facilities has not been deemed a meaningful approach to closing the justice gap, is "perfectly constitutional."[130]

The contrast between these two scenarios could not be more stark: In *Georgia v. Public.Resource.Org*, the Court was willing to cast precedent aside because the citizen at issue was not incarcerated and had access to the internet;[131] under *Lewis v. Casey*, a lack of access to information due to a lack of meaningful access to the internet by someone with an only cursory understanding of online

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[128] *Id.* (emphasis added) (internal citations omitted).

[129] *Id.*

[130] Lewis v. Casey, 518 U.S. 343, 355 (1996).

[131] *See* Georgia v. Public.Resource.Org, 140 S. Ct 1498, 1519–20 (2020) (Thomas, J. dissenting) (discussing the idea that many jurisdictions had relied on precedent to reach a conclusion contrary to that of the majority holding that annotations are copyrightable).

research to begin with—and the impairment of that criminal litigant's ability to argue his case—is perfectly constitutional.[132] Without guaranteed access to online information for criminal litigants coupled with digital literacy training, it does not *matter* who owns the law; prisoners will not have meaningful access to legal materials until the Supreme Court recognizes the fallibility of internet access due to a lack of net neutrality, and casts aside *Bounds* and *Casey* because the mere existence of internet access requires them to do so. Without guaranteed access to information, prisoners are being exploited, and their constitutional right of access to the courts is being violated.[133]

Despite the promise of the opinion in *Georgia v. Public.Resource.Org*, it is unlikely that courts will rely on anything other than *Bounds* and *Casey* when determining whether those navigating the criminal justice system have access to courts and, it follows, access to justice. Although no one can own the law, and because there are no guarantees that any Americans will have meaningful and equitable access to the internet because of regulated net neutrality (and, if net neutrality does again become a reality, its fallibility is easily demonstrated),[134] there are two options for moving forward: legislated net neutrality, which has failed time and again,[135] or a Supreme Court decision that acknowledges a lack of ownership of the law *and* the significant technological and sociological changes since *Bounds* and *Casey* were decided (in the 1970s and 1990s, respectively). In what can only be described as good news for those who fall in both the justice gap and the digital divide—namely, prisoners—the Supreme Court has declared that the proliferation of the

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[132] *Lewis*, 518 U.S. at 346–47, 355–57.

[133] *See* Chase, *supra* note 5, at 358–61 (discussing net neutrality issues and the state of online information in the context of prison libraries); *see also* Benjamin R. Dryden, *Technological Leaps and Bounds: Pro Se Prisoner Litigation in the Internet Age*, 10 U. PA. J. CONST. L. 819 (2008) (discussing the proposition that denying prisoners' access to the internet is a violation of fundamental connotational rights).

[134] *See generally Public.Resource.Org*, 140 S. Ct at 1521–22 (Thomas, J. dissenting) (discussing how the ruling will be difficult to administer and may push the cost of financing premium legal research services to those who can least afford to pay for it, such as individuals using electronic research services in the prison setting); Chase, *supra* note 6, at 340–43 (discussing the perilous present and uncertain future of internet deregulation and its implications for the world of electronic prison legal research).

[135] *See* Chase, *supra* note 5, at 343.

internet changes the game and requires a closer look at damaging precedent like *Bounds* and *Casey*.[136]

III. THE POTENTIAL: USING *SOUTH DAKOTA V. WAYFAIR* TO PROVIDE ACCESS TO JUSTICE IN THE CRIMINAL JUSTICE SYSTEM

Stare decisis, the idea that courts should stand by their previous decisions, is the basis for precedent in the United States.[137] Justice Breyer stated that overruling precedent always requires special justification beyond an argument that the Court simply got something wrong.[138] And, often, the Court's adherence to the principles of stare decisis is good; precedent makes courts more predictable.[139]

The Justices and their individual views on stare decisis are not, however, predictable.[140] Chief Justice Roberts and Justice Alito were quite outspoken about the importance of precedent and, in fact, both testified to the fundamental nature of stare decisis during their confirmation hearings.[141] After those hearings, however, their actions spoke "louder than their words to Congress," as both repeatedly abandoned stare decisis, even when fellow justices accused them of ignoring earlier decisions.[142] This alleged adherence to the principle of stare decisis while throwing it out the window when it suits individual justices is damaging to that predictability. Luckily, the world is not predictable, so a flexible view on stare decisis and a less rigid reliance on precedent is a good thing when the Court is faced with new issues.

Fortunately, the remainder of Supreme Court justices have adopted a flexible approach (though with varying degrees of

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[136] *See generally* David P. Fidler, *The Supreme Court Adapts Constitutional Law to Address Technological Change*, COUNCIL ON FOREIGN REL. (July 11, 2018, 11:05 AM), https://www.cfr.org/blog/supreme-court-adapts-constitutional-law-address-technological-change.

[137] Ramos v. Louisiana, 140 S. Ct. 1390, 1408 (2020) (Sotomayor, J., concurring).

[138] Franchise Tax Board v. Hyatt, 139 S. Ct. 1485, 1504–05 (2019) (Breyer, J., dissenting).

[139] *See* Geoffrey R. Stone, *Stone on Roberts, Alito, and Stare Decisis*, U. CHI. NEWS (Oct. 23, 2007), https://www.law.uchicago.edu/news/stone-roberts-alito-and-stare-decisis.

[140] *Id.*

[141] *Id.*

[142] *Id.*

conviction).[143] Justice Gorsuch authored an opinion in which he stated that there are precedential Supreme Court opinions that warrant the Court's deep respect, but the principle of stare decisis is not supposed to be an avenue for the Court to "methodically ignor[e] what everyone knows to be true."[144] In another case, Justice Gorsuch used his dissent to state that where "far-reaching systemic and structural changes make an 'earlier error all the more egregious and harmful,' stare decisis can lose its force."[145]

Justice Sotomayor also took aim at the issues with precedent, stating that "[w]hile overruling precedent must be rare, this Court should not shy away from correcting its errors where the right to avoid imprisonment pursuant to unconstitutional procedures hangs in the balance."[146] In noting that the majority opinion in a criminal case was irreconcilable with not one, but two strands of precedent, Justice Sotomayor noted:

> This case . . . threatens no broad upheaval of private economic rights. Particularly when compared to the interests of private parties who have structured their affairs in reliance on our decisions, the States' interests here in avoiding a modest number of retrials—emphasized at such length by the dissent—are much less weighty.[147]

In another opinion, Justice Kagan has noted that "[t]o reverse a decision, we demand a 'special justification,' over and above the belief 'that the precedent was wrongly decided.'"[148] Justice Kavanagh is in agreement, stating that special justifications for overruling a decision exist when a decision is "egregiously wrong, it has significant negative consequences, and overruling it would not unduly upset reliance interests."[149] Justice Thomas, too, has stated that when deciding whether or not to overturn precedent, the Court must look to "the quality of the decision's reasoning; its consistency

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[143] *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1404–05 (2020).

[144] *Id.* at 1405.

[145] Gamble v. United States, 139 S. Ct. 1960, 2008 (2019) (Gorsuch, J., dissenting).

[146] *Ramos*, 140 S. Ct. at 1410 (Sotomayor, J., concurring).

[147] *Id.* at 1409 (Sotomayor, J., concurring).

[148] Allen v. Cooper, 140 S. Ct. 994, 1003 (2020).

[149] *Ramos*, 140 S. Ct. at 1420 (Kavanaugh, J., concurring).

with related decisions; legal developments since the decision; and reliance on the decision."[150]

Justice Barrett's views of stare decisis and the impact strict adherence to precedent has on due process are, perhaps, the most directly related to the need to overturn *Bounds* and *Casey*.[151] Nearly two decades prior to her Supreme Court appointment, Justice Barrett detailed her view "that the preclusive effect of precedent raises due process concerns, and, on occasion, slides into unconstitutionality."[152] She noted that courts and commentators have "debated whether the force of a precedent should vary with its subject matter—whether it should be particularly weak in constitutional cases."[153] Stare decisis has a very real power to deprive litigants of hearings on the merits of their claims and, as Justice Barrett notes, where "liberty . . . is at stake—the Constitution guarantees litigants due process of law."[154] Incarcerated criminal litigants seeking to litigate the constitutionality of their access to the courts via access to legal information are likely to read *Bounds* and *Casey* and feel a sense of hopelessness; those cases clearly state that requiring access to legal information is akin to "permanent provision of counsel," which the Supreme Court has determined is not required by the Constitution.[155] The caution originally issued in *Bounds*, that "[t]he cost of protecting a constitutional right cannot justify its total denial,"[156] is even more salient today, when criminal litigants are virtually, if not actually, foreclosed from accessing legal information because of the electronic nature of the materials and the potential for lack of meaningful (if any) access because the United States has not found the time to prioritize a regulated neutral internet.

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[150] Franchise Tax Bd. v. Hyatt, 1398 S. Ct. 1485, 1499 (2019).

[151] *See generally* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011 (2003).

[152] *Id.* at 1012.

[153] *Id.* at 1029; *see also* Agostini v. Felton, 521 U.S. 203, 235 (1997).

[154] Barrett, *supra* note 151, at 1026.

[155] Lewis v. Casey, 518 U.S. 343, 354 (1996).

[156] Bounds v. Smith, 430 U.S. 817, 825 (1977).

A. Technology Changes Everything—Why Bounds *and* Casey *No Longer Guarantee the Constitutional Right of Access to the Courts*

Justice Barrett's argument that "stare decisis should be weaker in constitutional cases, because constitutional amendment—the only way around a constitutional decision if it is not overruled—can be accomplished only with great difficulty" is particularly important when discussing criminal litigants' constitutional right of access to the courts via access to information, as laid out in *Bounds*.[157] The Supreme Court certainly found it within its power to significantly limit the parameters of precedent when it used *Casey* to limit the application of *Bounds*, and in so doing it used paternalistic, racist, and classist assumptions that prisoners cannot understand legal information, so prison law libraries should not be obligated to provide it. Contemporary cases—cases completely unrelated to access to justice or criminal litigants—which, without the significant impact of technology likely would have followed precedent, give hope to criminal litigants who believe the changes in technology ought to give the Court pertinent reason to overturn *Casey*. In essence, the Supreme Court finally found a way to make one thing clear: the internet changes everything.

i. *Direct Marketing v. Brohl*[158]

The Supreme Court's first opportunity to use technology and equity to shift the tides of precedent came in 2015, with the decision in *Direct Marketing v. Brohl*.[159] In *Direct Marketing*, the Court evaluated whether the Tax Injunction Act barred federal court jurisdiction over a suit brought by non-tax payers seeking to enjoin certain requirements of a Colorado state tax law.[160] In determining the outcome of the case, the Court did not need to touch on the significant technological changes that occurred between *Bellas Hess*, *Quill*, and *Direct Marketing*; the Court simply relied on a more structural and text-based approach to finding that the requested relief would not "enjoin, suspend, or restrain the assessment, levy, or

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[157] Barrett, *supra* note 151, at 1029 n.71.

[158] 575 U.S. 1 (2015).

[159] *Id.*

[160] *Id.* at 4.

collection of any tax" and, as such, a federal district court could hear the case.[161]

In his concurring opinion, where he stated his "unqualified join and assent" for the majority opinion of the Court, Justice Kennedy took the time to carefully and specifically lay out why the reliance on stare decisis in cases where significant technological changes have impacted the core tenets of the case was an issue.[162] In his concurrence, Kennedy took the bold step of calling out a previous decision as not only wrong, but "inflicting extreme harm and unfairness" upon one of the parties in the case (and, in turn, the states themselves).[163]

ii. *South Dakota v. Wayfair, Inc.*[164]

In 2018, the United States Supreme Court directly addressed the "Internet revolution" in an opinion that, on its face, had nothing to do with the internet and had everything to do with commerce.[165] In *Wayfair*, the state of South Dakota taxed out-of-state sellers of "tangible personal property" with no physical presence in the state at the same rate that they taxed those sellers who do have a physical presence.[166] The law, passed by the legislature in opposition to Supreme Court precedent, was put in place because internet sales were increasingly affecting sales tax collections in the state.[167] That precedent, which stated that the dormant Commerce Clause prohibits states from taxing sellers without a physical presence in the state, was found to be incorrect and narrowly overturned by the Supreme Court.[168]

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[161] *Id.* at 7.

[162] *Id.* at 16–17 (Kennedy, J., concurring).

[163] *Id.* at 17. Notably, Kennedy takes the time to note that he, himself, relied solely on stare decisis when making his decision and did not consider a reevaluation based on other factors, namely the "dramatic technological and social changes that had taken place in the increasingly interconnected economy." *Id.* at 17.

[164] 138 S. Ct. 2080 (2018).

[165] *Id.* at 2084.

[166] *Id.* at 2092–93.

[167] *Id.* at 2088.

[168] *Id.*; *See generally* Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753 (1967) (holding that mail order resellers like the appellant were not required to collect sales tax unless the seller or reseller had some physical contact with the state); Quill Corp. v. North Dakota, 504 U.S. 298 (1992) (evaluating *Bellas Hess* to determine whether North Dakota's imposition of sales taxes upon Quill's merchandise violated the Due Process Clause or Commerce Clause. The Court noted that, while subsequent cases allowed for more flexibility

In deciding *Wayfair*, the Supreme Court not only directly discussed the changes in technology since the precedential cases were decided,[169] but explicitly stated that "[t]he Internet's prevalence and power have changed the dynamics of the national economy"[170] such that a "substantial nexus" to a state is the logical next step from physical presence, which the Court found to be outdated.[171] In coming to that conclusion, the Court stated that, previously, the

> Court did not have before it the . . . realities of the internet marketplace. In 1992, less than 2 percent of Americans had internet access . . . When it decided *Quill*, the Court could not have envisioned a world in which the world's largest retailer would be a remote seller.[172]

Notably, the Court highlighted that, in the year prior to its opinion, "e-commerce grew at four times the rate of traditional retail, and it shows no sign of any slower pace."[173] In fact, when the Supreme Court overturned the significant precedent discussed in *Quill* and *Bellas Hess*, they noted that it is important to focus on rules that are appropriate to the twenty-first century, not the nineteenth, and that the Commerce Clause was not written to "permit the Judiciary to create market distortions."[174] While the Supreme Court in *Wayfair* was fixated on the economic impact of following precedent—and those arguing for an unregulated internet make similar economic arguments—there are significant equity distortions that arise if the Supreme Court does not use the logic it used in deciding *Wayfair* to revisit *Bounds* and *Casey*. Just as "[t]he Internet's prevalence and power . . . changed the dynamics of the national

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than was initially allowable under *Bellas Hess*, the precedent should not be thrown out entirely. The Court held that there was no breach of the Due Process Clause because Quill had sufficient contact with the state of North Dakota and benefitted from the State's revenue, but the imposition of taxes *did* interfere with interstate commerce.).

[169] *Bellas Hess*, 386 U.S. 753 and *Quill*, 504 U.S. 298 were decided in the 1960s and 1990s, respectively.

[170] *Wayfair*, 138 S. Ct. at 2097.

[171] *Id.* at 2095.

[172] *Id.* at 2097 (internal citations omitted).

[173] *Id.*

[174] *Id.* at 2094.

economy" at the time of *Wayfair* so, too, has it changed access to legal information for attorneys and litigants alike.[175]

It is clear that the parameters of the decisions in *Bounds* and *Casey* are nothing like the decisions in *Wayfair* and *Direct Marketing*.[176] Similarly, the Supreme Court would likely refuse to hear a case about access to information and the constitutional right of access to the Courts if a litigant based his or her petition on *Wayfair* and *Direct Marketing*.[177] But the time has come for the Court to rethink *Bounds* and *Casey* and consider the recent societal and technological changes that impact access to the courts. After all, "individuals are the ones who stand to gain or lose the most when judges decide whether stare decisis matters."[178]

B. "Fairness dictates quite the opposite result."[179]

As mentioned above:

> Bounds does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and to challenge the conditions of their confinement. Impairment of any other litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.[180]

When the Supreme Court reversed itself in *South Dakota v. Wayfair*, the message was clear: the internet changed everything.[181] Given the significant changes in technology since *Bounds* and *Casey*

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[175] *Id.* at 2097.

[176] One envisions a reader singing "one of these things is not like the other." *Sesame Street* (Public Broadcasting Service 1969).

[177] *See generally Wayfair*, 138 S. Ct. at 2100; Direct Marketing Ass'n v. Brohl, 575 U.S. 1, 7 (2015) (noting that under the Tax Injunction Act, states have a right to collect, levy, and assess taxes via state law).

[178] Jesse D.H. Snyder, *Stare Decisis is for Pirates*, 73 OKLA. L. REV. 245, 247 (2021).

[179] *Wayfair*, 138 S. Ct. at 2096.

[180] Lewis v. Casey, 518 U.S. 343, 355 (1996).

[181] *Wayfair*, 138 S. Ct. at 2097 (noting that e-commerce grew at four times the rate of traditional retail in the year prior to the decision).

were decided, a similar reversal is warranted and fairness, truly, dictates a reversal of the damaging precedent that inmates could attack their sentences *without* meaningful access to legal resources.[182] The tools needed by prisoners "to attack their sentences, directly or collaterally" have moved online. [183] The "impairment of any *other* litigating capacity" the Court in *Casey* deemed "incidental (and perfectly constitutional)" has extended beyond what was imagined by the litigants in either *Bounds* or *Casey*, when they requested more robust law libraries in their correctional institutions.[184]

The Supreme Court needs to revisit *Bounds* and *Casey* not only because of the shift in access points for legal information but also to address the digital crisis in prisons and the fallibility of internet access to ensure that the importance of a neutral internet, free of tiering, throttling, and blocking, are made central to the argument that criminal litigants—especially those in prison—require a neutral internet to access necessary legal information and the courts. The way litigants, and citizens in general, access information has changed significantly since 1996, but the way prisoners access legal information has largely remained the same.[185] Where some change has been effectuated, prisoners are still being exploited and subject to outrageous fees associated with hard-to-use platforms, on the one hand, or completely inaccessible materials, on the other.[186] For criminal justice to be truly reformed, the Supreme Court must revisit *Bounds* and *Casey* with an understanding of the changes in technology, fallibility of access to online resources, and the further exploitation of prisoners if their constitutional rights to access legal information are not upheld under the internet-age standards set forth in *South Dakota v. Wayfair.*

i. Changes in Technology

a. Generally

It is impossible to deny that technology has changed since 1977, when *Bounds* was decided, or even 1996, when the Supreme

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[182] *Casey*, 518 U.S. at 355.

[183] *Id.*

[184] *Id.*

[185] *Id.* at 356–57.

[186] *See* Abel, *supra* note 48, at 1209–10.

Court issued its opinion in *Casey*.[187] In 1996, use of the internet had only begun to pick up speed; a startling twenty million American adults had access to the "Jurassic Web,"[188] which is the same number of people who subscribe to satellite radio today.[189] Only 22% of the United States' general public report going online from work, school, or home.[190] In 1995, only 21% of Americans had used the internet, but in 1996, that number increased to 73%.[191] In 1995, only 12% of people reported using the internet in the week prior to the survey;[192] in 1996, that number increased to 51%.[193] Only 77% of people who used the internet sent or received an email "at least once every few weeks."[194]

By contrast, in 2020, the FCC estimated that twenty-one million Americans (the same number that had access in 1996) were without access to high-speed internet.[195] In 2021, 93% of American adults report having used the internet.[196] And 77% of U.S. adults report having access to the internet at home.[197] The COVID-19

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[187] Bounds v. Smith, 430 U.S. 817, 825 (1977).

[188] Farhad Manjoo, *Jurassic Web: The Internet of 1996 is Almost Unrecognizable Compared with What We Have Today*, SLATE TECH. (Feb. 24, 2009, 5:33 PM), https://slate.com/technology/2009/02/the-unrecognizable-internet-of-1996.html (detailing the difference in the internet of 1996 and 2009).

[189] *Id.*

[190] *News Attracts Most Internet Users: Online Use*, PEW RSCH. CTR. (Dec. 16, 1996), https://www.pewresearch.org/politics/1996/12/16/online-use (finding slow but steady growth of people accessing the internet).

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.* This study was conducted to determine how many Americans were using the internet in 1996; it found that users during this time period primarily accessed the internet to view news sources. *Id.* It is important to remember, of course, that the number of people in the United States with *access* to the internet in 1996 may have been higher than the number of people actually *using* the internet in 1996. The same can be said today—while people may have access to the internet in 2021, it does not mean they are *using* the internet.

[195] Linda Poon, *There Are Far More Americans Without Broadband Access than Previously Thought*, BLOOMBERG CITYLAB (Feb. 19, 2020, 3:09 PM), https://www.bloomberg.com/news/articles/2020-02-19/where-the-u-s-underestimates-the-digital-divide (discussing the FCC's underestimations of people with access to the internet due to the high numbers of individuals in rural areas who are unable to get appropriate funding or resources to access the internet).

[196] *Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband.

[197] *Id.* (displaying charts and data about how Americans' internet use has changed over time).

pandemic that gripped the United States in early 2020 highlighted the necessity of the internet for Americans who were forced to attend school, work, and play online.[198] The FCC, while without formal leadership or a strategic plan to ensure a neutral internet, has publicly prioritized broadband internet access.[199] It launched a program entitled the "Emergency Broadband Benefit," which seeks to address the affordability of internet access for those Americans who cannot otherwise afford it.[200] In addition, the Commission has developed an "Emergency Connectivity Fund" to provide funding for schools and libraries to cover the "reasonable costs of laptop and tablet computers; Wi-Fi hotspots; modems; routers; and broadband connectivity purchases for off-campus use by students, school staff, and library patrons in need during the COVID-19 pandemic."[201]

The "digital divide" is so much more than providing access to the internet for children who need to do homework in the middle of a deadly pandemic, and efforts like these "are just the starting blocks of digital inclusion efforts," according to Amina Fazlullah, director of equity policy at Common Sense Media.[202] Digital equity requires not only internet access, but "IT support, digital literacy skills and technology training, accessible language availability for tech resources, [and] other forms of support."[203]

The differences between the internet access of 1996 and today are striking, but this discussion is largely centered around the changes to access of things like email, news websites, educational materials, or dancing baby videos.[204] None of these changes discuss the significant ways in which legal materials—and access to legal materials—have changed since *Bounds* and *Casey* were decided. While the change to email is obvious and the learning curve is not

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[198] *Homework Gap and Connectivity Divide*, FCC, https://www.fcc.gov/about-fcc/fcc-initiatives/homework-gap-and-connectivity-divide (last visited Oct. 16, 2021) (discussing the gap in internet access for students trying to navigate online school during the pandemic and the emergency broadband benefits put in place to assist them).

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] Natasha Piñon, *What Is the Digital Divide?*, MASHABLE (Mar. 9, 2021), https://mashable.com/article/what-is-the-digital-divide (discussing and defining the digital divide in America in light of the COVID-19 pandemic).

[203] *Id.*

[204] *See Dancing Baby*, WIKIPEDIA, https://en.wikipedia.org/wiki/Dancing_baby (last edited July 7, 2021) (just kidding, no one wants a dancing baby video now).

difficult, the learning curve in legal research is potentially insurmountable, particularly for those individuals, like criminal litigants, who lie at the intersection of the digital divide and the justice gap.

b. Legal Research

In April 1996, the American Bar Association ("ABA") Journal published an article titled "Internet: Who Needs It?"[205] The mere publication of an article by that title is unthinkable today, but in 1996—the year *Casey* was decided by the U.S. Supreme Court—law firms and attorneys were just beginning to grapple with how to truly utilize and embrace technology in their day-to-day lives. In fact, discussions around technology in 1996 centered mostly around computers, word processors, laser printers, and the use of CD-ROM based legal research systems.[206] Where access to the internet was discussed, modem speeds were recommended to be 14.4 kilobits per second or greater.[207] In 1997, scholars like Robin Widdison, Richard Susskind, and Lord Woolf were thinking about the legal profession, access to justice, and the future of the profession in light of rapidly advancing technology.[208] Widdison predicted that, between 1997 and today, "legal practice will change out of all recognition."[209] While law practice today is certainly as recognizable as it was in 1997, technological advances have made some parts of law

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[205] David Beckman & David Hirsch, *Internet: Who Needs It,* 82 A.B.A. J. 93 (1996) (arguing that everyone in a firm should have access to the internet, though the authors acknowledge that the cost of unlimited internet access may be high. Thus, they conclude that firms should put policies in place to ensure staff members cannot access "'hate' sites" or otherwise become distracted by easy access to the internet).

[206] *See* Steven G. Tyler, *Art of Technology in Today's Law Practice*, 29 MD. B.J. 11 (1996).

[207] *See* Jon Newberry, *Status Checks Plus Details on the March ABA Techshow*, 82 A.B.A. J. 68 (1996) (discussing how today's web access speeds are recommended to be between 3-8 megabits per second for "low-end users" and at least 25 megabits per second for higher-need internet users); *see also* Kristin Shaw & Onjeinika Brooks, *What Is a Good Internet Speed?*, U.S. NEWS (Dec. 14, 2020, 1:00 PM), https://www.usnews.com/360-reviews/internet-providers/what-is-a-good-internet-speed (illustrating the differences between "low-end" users in the 1990s and today, including that the "low-end" user of internet today can expect speeds at least 200 times faster than law firm users needed in 1996. This is a staggering difference in speeds and the ability to access materials from complex websites, like those in use by legal research providers.).

[208] *See* RICHARD SUSSKIND, THE FUTURE OF LAW (Oxford University Press 1996); Robin Widdison, *Electronic Law Practice: An Exercise in Legal Futurology,* 60 MOD. L. REV. 143 (1997); LORD WOOLF MR, ACCESS TO JUSTICE (London HMSO 1996).

[209] Widdison, *supra* note 209, at 143.

practice—most notably legal research—most accessible to those with proficiency using both computers and the internet.[210]

Between 1986 and 1996, a large-scale survey of the nation's 500 largest law firms was conducted to consider computer use of these firms' attorneys.[211] Results from this survey, coupled with results from the ABA Legal Technology Survey Report, provide a fascinating look at the shift in attorney research habits over the last three decades.[212] In 1992, four years prior to the opinion in *Casey*, 70% of attorneys reported having "workstations"[213] at their desks, but only 5% of attorneys reported having the internet available for legal research purposes.[214] By 1995, 88% of attorneys reported having a workstation located at their desk, and 77% of attorneys reported having access to the internet to perform legal research.[215]

In 2020, only 0.4% of attorneys reported *not* working primarily on a computer.[216] And while the latest data from the ABA doesn't

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[210] *See* Transcript of Deposition of Anders Ganten, *supra* note 118, at 6–7.

[211] Rosemary Shiels, *Technology Update: Attorneys' Use of Computers in the Nation's 500 Largest Law Firms*, 46 AM. U. L. REV. 537 (1996). Notably, when Shiels details how attorneys at these large law firms are using the internet to access legal information, she takes the time to describe Lexis, Westlaw, CompuServe, and Dow Jones. *Id.* Today, researchers would be hard-pressed to find an attorney who is not aware of at least two, if not all, of these pieces of technology. Shiels also notes that "the LEXIS-NEXIS databases currently contain more than 11,000 sources and provide over 953 million documents online." *Id.* at 538 n.1 (quoting *LEXIS-NEXIS Background*, LEXIS-NEXIS, http://www.lexis-nexis.com/Incc/about/background.html). Today, the Lexis suite contains dozens of products, from a legal research platform to analytics and data analysis products, to hosted litigation solutions. *Id.* at 537–39. Similarly, Shiels states that Westlaw contained over 9000 databases, and was introduced in 1975 as the only computer-assisted legal research service offering synopses, headnotes, and key numbers. *See West Publishing History*, WEST PUBLISHING, http://www.westlaw.com/htbin/htimage/about.conf?47,240 (on file with the author). Today, Thomson Reuters, the parent company of Westlaw, touts over 1500 products meant to streamline services for not only legal professionals, but corporate, tax, and accounting professionals, as well. *Products Page*, THOMSON REUTERS, https://www.thomsonreuters.com/en/products-services.html (last visited Oct. 23, 2021).

[212] Shiels, *supra* note 211, at 538.

[213] *Id.* at 539 (citing Greg R. Notess, *Telnet, the Forgotten Internet Tool*, ON THE NETS (July 17, 1996)).

[214] *Id.* at 538.

[215] *Id.* at 538–39.

[216] A.B.A., 2020 LEGAL TECHNOLOGY SURVEY REPORT, VOLUME III: LAW OFFICE TECHNOLOGY 12 (2020). In this survey, 48.9% of attorneys report using a desktop primarily for work; 38.6% report primarily using a docked laptop computer with one or more additional accessories; 8.8% report using a laptop on its own; 1.9% report using an all-in-one computer; 0.5% report using a tablet; and 0.9% of attorneys report using another form of technological device as their primary work station. *Id.*

detail how often attorneys access the internet to perform their work on any given day, 97.3% of attorneys report using the internet to "read information on news and current events relevant to [their] job[s]."[217] As attorneys have begun using the internet for research almost exclusively, publishers have shifted their legal content online.[218] LexisNexis, for instance, is ceasing to print Shepard's, and the United States Government Publishing Office routinely threatens to cease print publication of materials like the Federal Register.[219] The shift in attorneys' access to legal materials, from print to digital, is hardly problematic; after all, attorneys have resources available to help with training, including CLEs, vendor representatives, and law school courses that have trained them to research online. Incarcerated litigants' access to resources could not be more different.

ii. Criminal Litigants' Interactions with, and Access to, Technology

While the information about legal research practices of attorneys helps frame the significant shift in access to legal information, it is not at all illustrative of how these changes impact incarcerated criminal litigants. The digital crisis in prisons is real, and in cases where prisoners are given limited or no time with computers, there is no opportunity for incarcerated litigants to learn basic computer skills, let alone legal research.[220] Couple that with painfully slow internet speeds (due to throttling and tiering, which are a direct result of a lack of regulated net neutrality) and any time incarcerated litigants are permitted to spend performing digital research can be ground to a screeching halt.[221] Where prisoners are given access to technology, whether to perform research or simply to do things like listen to music or read for pleasure, they are constantly being exploited by for-profit companies who control their every

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[217] A.B.A., 2020 LEGAL TECHNOLOGY SURVEY REPORT, VOLUME I: ONLINE RESEARCH 52 (2020).

[218] *See* Transcript of Deposition of Anders Ganten, *supra* note 118, at 7.

[219] *Id.* at 6.

[220] *See* Wisnieski, *supra* note 9 (detailing the inability of prisoners to have meaningful access to electronic resources in prison and the lack of training in technology skills for those who do have access to electronic services).

[221] *See id.*

method of access.[222] In the words of Jane Newman, a previous director of LexisNexis's prison sales department, "it's not [Lexis's] problem that the prisoner – that the inmate is computer illiterate. [Lexis is] providing what the state is requiring, and it's up to the inmate to learn the system."[223] We should all be uncomfortable adopting Ms. Newman's cavalier attitude towards the constitutional rights of incarcerated litigants; to ensure true access to justice for criminal litigants, each of these three issues must be addressed.

a. Gap in Knowledge for Those Incarcerated

Those in the corrections field are quick to speak about the ways in which technology has helped and hindered their work.[224] Pointing to the industry's struggles to handle the technology itself, the National Institute of Corrections has compiled a list of resources discussing trends in corrections technology.[225] What these resources fail to address, however, is the massive digital moat surrounding those who live their lives behind bars. In 2016, the idea of a "digital moat" surrounding prisons was introduced to illustrate how technologically isolated incarcerated litigants are from those who are not in prison.[226] Unincarcerated people know how valuable internet access is, but most, if not all, states ban prisoners from "direct, unsupervised access to the internet" with some states going so far as to enact legislation to prevent them from doing so.[227] Internet access, alone, is a significant issue, but the ability to use *any* technology is a significant issue for incarcerated litigants.

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[222] *See* Abel, *supra* note 48, at 1176–78.

[223] *See* Transcript of Deposition of Anders Ganten, *supra* note 118, at 42; *see* Abel, *supra* note 48, at 1176–78 (detailing the rise of prison law libraries as a means for controlling inmate behavior in order to better understand how prison law libraries can plan for the future).

[224] *See generally Technology in Corrections*, NAT'L INST. OF CORR., https://www.nicic.gov/projects/technology-corrections (last visited Oct. 16, 2021) (landing page for resources related to technology in corrections, ranging from telehealth to drones, body cameras to biometrics).

[225] *Id.*

[226] Dan Tynan, *Online Behind Bars: If Internet Access Is a Human Right, Should Prisoners Have It?*, GUARDIAN (Oct. 3, 2016, 6:00 AM), https://www.theguardian.com/us-news/2016/oct/03/prison-internet-access-tablets-edovo-jpay.

[227] Stephen Raher, *You've Got Mail: The Promise of Cyber Communication in Prisons and the Need for Regulation*, PRISON POL'Y INITIATIVE (Jan. 21, 2016), https://www.prisonpolicy.org/messaging/report.html.

Educational attainment and household income are significant indicators of a person's likelihood to be offline. Some 14% of adults with a high school education or less do not use the internet, but that share falls as the level of educational attainment increases.[228] Adults living in households earning less than $30,000 a year are far more likely than those whose annual household income is $75,000 or more to report not using the internet (14% versus 1%).[229] And while the gap in a person's ability to use technology can easily be tied to their age, educational attainment, and socioeconomic status so, too, can it be tied to the amount of time they have spent involved in the criminal justice system and their lack of interaction with the "outside world."[230]Despite the digital moat and significant learning curve for prisoners seeking to use technology, prison officials are not keen to increase the technological skills of inmates.[231]

> [I]f prisons gave unfettered internet access to inmates . . . they wouldn't know how to secure it properly. Then all you need is one inmate to send an improper email or Facebook message to a victim. When that story makes the front pages, the prisons will use that data point to make sure no one ever gets connected again.[232]

But some prisons are trying to bridge the gap to assist criminal litigants while they are in prison, as well as decrease recidivism when they are released.[233] Inmates at prisons in North Dakota, South Carolina, New Mexico, Indiana, Maine, Alabama, Texas, and Oklahoma offer inmates some access to the internet via tablets.[234]

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[228] Sara Atske & Andrew Perrin, *7% of Americans Don't Use the Internet. Who Are They?*, PEW RSCH. CTR. (Apr. 2, 2021), https://www.pewresearch.org/fact-tank/2021/04/02/7-of-americans-dont-use-the-internet-who-are-they (describing the types of people who generally do not use the internet, including their educational attainment and socioeconomic status).

[229] *Id.*

[230] *See* Raher, *supra* note 227.

[231] *See* Abel, *supra* note 48, at 1213–14.

[232] Tynan, *supra* note 226 (quoting Brian Hill, CEO of Edovo) (discussing the campaigns to give prisoners more access to technology and the internet while incarcerated).

[233] *See* Alaa Elassar, *Inmates at Oklahoma Prisons Begin Receiving Computer Tablets*, CNN (June 13, 2021, 5:01 AM), https://www.cnn.com/2021/06/13/us/oklahoma-prison-inmates-computer-tablets/index.html; *see also* Raher & Fenster, *supra* note 115.

[234] *See* Steve Karimi, *Tablets for Inmates: Prisons in a Number of States Allow Those Behind Bars to Have Electronic Devices*, KARIMI L. BLOG (Oct 11, 2017),

But access to the internet on these tablets is neither unlimited nor does it guarantee access to legal information.[235] In fact, much of the access provided is explicitly not for access to legal materials, instead providing inmates access to music, entertainment, employment opportunities, and non-legal educational resources.[236]

And while limited access to online resources to aid in a decrease of recidivism is a good and noble cause, access to non-legal information is distinctly problematic for those who are trying to attack their sentences or their treatment while incarcerated.[237] The fallibility of access to technology—any technology—in prison is significant, due both to net neutrality concerns and the culture surrounding prisons and the way incarcerated litigants are treated in the United States.[238]

b. Fallibility of Access

Fallibility of internet access is an issue for all Americans, but the problems associated with internet access are particularly acute for those behind bars.[239] Because inmates' access to computers for any purpose is so limited—sometimes only minutes a day for those using the prison library or law library—it is susceptible to other limitations, as well.[240] If the prison goes on lockdown due to an internal incident, there is a blackout, or a pandemic rages within the prison's walls, access to the limited computers inmates are allowed to use can be cut off at a moment's notice, for indefinite periods of time.[241]

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https://www.karimilawoffice.com/tablets-for-inmates-prisons-in-a-number-of-states-allow-those-behind-bars-to-have-electronic-devices; *see also* Wanda Bertram & Mack Finkel, *More States Are Signing Harmful "Free Prison Tablet" Contracts*, PRISON POL'Y INITIATIVE (Mar. 7, 2019), https://www.prisonpolicy.org/blog/2019/03/07/free-tablets.

[235] *See* Bertram & Finkel, *supra* note 234.

[236] *See id.*; Elassar, *supra* note 233.

[237] *See* Abel, *supra* note 48, at 1187–89.

[238] *See generally id.*; *see also* Mirko Bagaric et al., *The Hardship that Is Internet Deprivation and What It Means for Sentencing: Development of the Internet Sanction and Connectivity for Prisoners*, 51 AKRON L. REV. 261, 282–85 (2017).

[239] *See* Abel, *supra* note 48, at 1214.

[240] *See* Tynan, *supra* note 226.

[241] Dale Chappell, *Are Prison Law Libraries Adequate?*, PRISON LEGAL NEWS (Apr. 1, 2020), https://www.prisonlegalnews.org/news/2020/apr/1/are-prison-law-libraries-adequate (detailing the resources available in prison law libraries and their adequacy to meet the needs of incarcerated litigants); *see also* Raher & Fenster, *supra* note 115 (discussing cost

Prison culture, generally, does not allow for much freedom for inmates to act or express themselves, sometimes for good reason. But states like South Carolina have made online expression an offense that can lead to years in solitary confinement.[242] It follows that in states where inmate internet access for legal materials is allowed, whether through the law library or through individual inmates' tablets, misuse of that valuable resource being viewed via a computer could also be leveraged as a sword just as easily, cutting off inmates' constitutional right of access to the courts under *Bounds* and *Casey*.[243]

In addition, internet speeds in prisons are problematic.[244] Modernizing prisons is not a priority, and discussions around improving prison facilities are largely driven by the ever-growing prison population and inmates' health and safety concerns, and not their need for more wireless or electrical infrastructure to support computers and wireless internet.[245] Instead of taking steps to improve infrastructure to potentially help America's mass incarceration problem[246] and provide more access to information via robust computer and wireless systems, America's prisons have chosen a path of further exploitation of inmates, this time through access to educational, technological, and research resources.

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cutting measures that led prison law libraries to license electronic resources and the pitfalls of relying on electronic materials).

[242] Dave Maass, *Hundreds of South Carolina Inmates Sent to Solitary Confinement Over Facebook*, ELEC. FRONTIER FOUND. (Feb. 12, 2015), https://www.eff.org/deeplinks/2015/02/hundreds-south-carolina-inmates-sent-solitary-confinement-over-facebook (describing instances where incarcerated individuals in South Carolina were sent to solitary confinement because of Facebook posts created by friends and family).

[243] *See* Chappell, *supra* note 241.

[244] *See* Transcript of Deposition of Anders Ganten, *supra* note 118, at 48.

[245] CHRIS MAI ET AL., VERA INST. FOR JUST., BROKEN GROUND: WHY AMERICA KEEPS BUILDING MORE JAILS AND WHAT IT CAN DO INSTEAD, (Nov. 2019), https://www.vera.org/downloads/publications/broken-ground-jail-construction.pdf.

[246] Eva Fedderly, *Can New Prison Design Help America's Mass Incarceration Problem?*, ARCHITECTURAL DIG. (Apr. 1, 2021), https://www.architecturaldigest.com/story/can-new-prison-design-help-americas-mass-incarceration-problem (discussing, through an architectural lens, how more humane prisons and jails can be used to reduce recidivism and rehabilitate incarcerated people).

c. Exploitation of Prisoners

Technology is slowly eking its way into the U.S. prison system but at an extremely high cost.[247] Between 2014 and 2016, major corporations including American Prison Data Systems, Edobo, and JPay began to distribute basic tablet computers to thousands of inmates.[248] These tablets, while basic, provide incarcerated individuals with educational and entertainment content which, they argue, can help reduce recidivism and improve behavior.[249] Some prisons, like those in Colorado, have implemented tablet programs that foreshadow "a potential new paradigm in corrections, shifting numerous communications, educational, and recreational functions to a for-profit contractor; and making incarcerated people and their families pay for services that are commonly funded by the state."[250]

It is no surprise that there is a high cost associated with this access, and the service received by the inmates would not be found acceptable by anyone who is not behind bars.[251] Companies like JPay have been accused of monetizing human contact and giving kickbacks to the U.S. government for financially exploiting the vulnerable prison population.[252]

Using technology to exploit prisoners is not new.[253] The use of Voice Over Internet Protocol ("VoIP") phone systems in prisons is pervasive, and the use of those phones is outrageously expensive.[254] The phone companies "bait prisons and jails into charging high phone rates in exchange for a share of the revenue," which sometimes results in phone calls from correctional institutions costing an average of a dollar per minute, or more.[255] And, as is nearly always the case in correctional institutions, there are costs

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[247] *See* Elassar, *supra* note 233; *see also* Tynan, *supra* note 226.

[248] Tynan, *supra* note 226.

[249] *Id.*

[250] Raher & Fenster, *supra* note 115 (discussing the exploitation of prisoners in Colorado via the tablet computer program).

[251] Tynan, *supra* note 226.

[252] *Id.*

[253] Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, PRISON POL'Y INITIATIVE (Feb. 2019), https://www.prisonpolicy.org/phones/state_of_phone_justice.html#consolidation (discussing the high cost of phone calls for people in America's prisons and jails).

[254] *Id.*

[255] *Id.*

associated with setting up the accounts that allow inmates to make phone calls at all.[256] The fees to open, fund, have, and close prison phone accounts account for almost 40% of what families spend on calls to their loved ones in prison.[257]

The FCC took care to cap the cost on out-of-state phone calls from prisons and jails, as well as capping fees that phone providers were charging to *further* exploit prisoners.[258] But, much like with net neutrality, these caps are subject to administrative whims,[259] and previous exploitation of prisoners via price-gouging could become a reality, again, at any point in time.

Prison telecommunications systems also present a promise for incarcerated litigants to communicate with friends and family via the internet.[260] This evolution has been slow, as demonstrated throughout this Article; providing prisoners with access to the internet has never been popular.[261] And the electronic communication options available to prisoners is not what the average person considers to be e-mail access: many providers offer one-way systems ("free-world" users can send messages but prisoners must respond by traditional mail); cost for each email sent or received; the use of proprietary software to access messages; character limits; and data retention policies.[262] And as with phone calls, there are a myriad of other fees associated with having access to a service that those on "the outside" consider basic.[263] Convenience fees are charged for setup (advance deposit required at setup, of course); there is a fee

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[256] *Id.*

[257] *Id.*; *see also* Drew Kukorowski et al., *Please Deposit All of Your Money: Kickbacks, Rates, and Hidden Fees in the Jail Phone Industry*, PRISON POL'Y INITIATIVE (May 8, 2013), https://www.prisonpolicy.org/phones/pleasedeposit.html#costoffees (detailing the hidden costs and fees associated with phone calls for those in prisons and jails in the United States).

[258] *Id.*; *see also Consumer Guide: Telephone Service for Incarcerated Individuals*, FCC, https://www.fcc.gov/sites/default/files/inmate_telephone_service.pdf (last reviewed Oct. 27, 2020) (discussing the rate caps for interstate calls from prisons and jails, as well as additional service charges that are allowable).

[259] *See generally* Andrea Fenster, *What Families Can Expect to Be Charged Under the New FCC Rules*, PRISON POL'Y INITIATIVE (June 10, 2021), https://www.prisonpolicy.org/blog/2021/06/10/new_fcc_rules (discussing the impact of the new FCC rules on administrative decisions to charge prisoners for calls).

[260] Tynan, *supra* note 226.

[261] Raher, *supra* note 227 (discussing types of communications available to inmates and the costs associated with each type of communication).

[262] *Id.*

[263] *Id.*

to deposit your money (and the fee increases as the deposit increases); and the fees are typically not mentioned in the service contracts.[264] The cost to communicate with an incarcerated loved one is extremely high.

Similarly, the cost for prisoners who do have access to legal information via online providers is high.[265] Michigan has a $1.3 million contract with LexisNexis, and South Dakota has a $54,000 annual contract with LexisNexis to provide access to legal information in the state prisons.[266] As a part of the contract with the state, LexisNexis recommends internet speeds and operating systems that are optimal for running their legal research platforms.[267] While the recommendations for browsers such as Internet Explorer, Edge, or Chrome are not surprising, the recommended speed that LexisNexis recommends is five megabytes per second (5 mbs), which is five times slower than internet access deemed "good for doing the basics with a little streaming."[268] If internet speeds of twenty-five megabyte per second is recommended for the average person to search the internet for things like a local takeout menu, how is one-fifth of that speed acceptable for incarcerated litigants to research their constitutional rights? Companies like LexisNexis, Westlaw, JPay, and Edobo are charging prisons—and by extension, prisoners—for access to technology that may as well not be accessible, at all.

IV. CONCLUSION

The way attorneys, judges, and litigants think about access to justice and access to courts has, justifiably, changed since the 1990s. For the majority of that group, their information-seeking and

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[264] *Id.*

[265] *See* Bertram & Finkel, *supra* note 234 (detailing the costs associated with prisoners using tablets to gain access to the internet); *see also* Elassar, *supra* note 233.

[266] *See* Notice of Contract, *Electronic Law Library for the Michigan Department of Corrections*, DEP'T OF TECH., MGMT., & BUDGET (May 4, 2020), https://www.michigan.gov/documents/dtmb/200000000691_688822_7.pdf (detailing the high costs and limitations put on contracting with legal research providers in contracts between the State of Michigan Department of Technology, Management, and Budget and RELX Inc).

[267] *Id.*

[268] *Id.*; *see also* John Dilley, *How Much Should I Be Paying for High-Speed Internet?*, HIGHSPEEDINTERNET.COM (June 18, 2021), https://www.highspeedinternet.com/resources/how-much-should-i-be-paying-for-high-speed-internet-resource.

research behaviors have changed dramatically as well. While the evolution of access to information has changed with the advent of the internet, the Supreme Court has been excruciatingly slow to change the ways in which prisoners are guaranteed access to the Courts.

But while the Supreme Court recognizes that the advent of the internet has changed the economic landscape of this country, and it reversed decades of precedent in determining the outcome of *Wayfair*, there has been no such desire to discuss—or even acknowledge—how the internet has changed the lives of millions of incarcerated Americans. Perhaps it is because their fundamental rights are not quite as important as the rights of states or corporations? Or because there is a profound discomfort in recognizing that internet access at meaningful speeds is a way to help those behind bars, both in terms of litigating their cases and helping them wade through the digital moat? Or perhaps big corporations simply have not found a way to further exploit prisoners by charging them exorbitant fees for the latest technology?

Bounds and *Casey* cannot stand as the foundational precedent upon which courts rely when determining whether prisoners have access to the courts. At a minimum, the arguments in *Wayfair* and *Georgia v. Public.Resource.Org* must be leveraged for the benefit of America's incarcerated litigants, many of whom do not have meaningful access to the internet for the purposes of performing legal research. The internet has changed everything, including legal research, and it is not enough to give an inmate like Fred fifteen minutes in front of a computer with internet speeds so slow that he cannot perform a search. We cannot deepen the digital moat and expect those who are unfamiliar with the internet to understand how to perform legal research online. We cannot provide and revoke prisoners' access to legal materials on a whim. We cannot allow further exploitation of our vulnerable inmate population so legal research providers, internet service providers, and other for-profit companies can make more money from inmates' constitutional rights. And so, the rallying cry continues: We must ensure meaningful access to legal information and the courts for incarcerated litigants; we must ensure access to justice.