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Philip W. Collier
University of Kentucky

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The Impact of Bounds v. Smith on City and County Jail Facilities

INTRODUCTION

In Bounds v. Smith, the United States Supreme Court held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." The Court established a tenuous balance between the constitutional rights of indigent prisoners and the affirmative duty placed upon the states to protect the exercise of those rights. The breadth of the Bounds decision, however, raised legitimate doubts as to its constitutional scope.

Recently, in Williams v. Leeke, the Fourth Circuit Court of Appeals held that local jails incarcerating misdemeanants for terms of up to twelve months have an affirmative duty to provide inmates with access to adequate law libraries or adequate legal assistance. Williams proposes answers to two important questions regarding the reach of Bounds' constitutional mandate: (1) whether the affirmative duty set forth in Bounds applies to local jails as well as state correctional facilities; and, if so, (2) what criteria should be used for ascertaining whether jails comply with the Bounds requirement.

The purpose of this comment is to test the propriety of constitutionally requiring local jails to provide inmates with adequate law libraries or comparable legal assistance, beginning with a brief exposition of Williams. Subsequent to an examination of the constitutional bases of the right of access to the courts, the natural parameters of the Bounds decision will be considered. Finally, the unique position of local jails in

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2 Id. at 828. Bounds was the first full Supreme Court opinion which expressly imposed affirmative obligations upon the states to insure that indigent prisoners have meaningful access to the courts. Six years earlier, in Younger v. Gilmore, 404 U.S. 15 (1971), the Court affirmed per curiam a district court decision requiring California to provide indigent inmates with access to adequate law libraries.
3 584 F.2d 1336 (4th Cir. 1978).
4 Id. at 1340.
the corrections system will be discussed, concluding with a search for satisfactory criteria to fashion a workable constitutional standard for the protection of jail inmates' right of access to the courts.

I. Williams v. Leeke

In *Williams v. Leeke*, the courts of appeals from adverse judgments dismissing their complaints in various district courts. Each of the prisoners claimed to have been denied his respective constitutional right of access to the courts as provided in *Bounds v. Smith*. With Chief Judge Haynsworth writing for the majority, the court affirmed the dismissal of three of the prisoners' complaints. However, the court reversed the dismissal of appellant George Brown's complaint and remanded the case to district court for further findings of fact.

Appellant Brown was an inmate serving a sentence for a misdemeanor in the Richmond, Virginia, City Jail. The jail provided its inmates with a law library. Brown, while admitting that the library was adequate for his needs, claimed that jail regulations restricting his access to that library rendered such access meaningless. Those regulations restricted access to the library to three days a week for only forty-five minutes per

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5 *Id.* at 1336.


5 584 F.2d at 1339. Two of the complainants were prisoners from the Virginia State prison system. The court dismissed their complaints because Virginia provided a program of legal assistance and posted notice of that program at each state prison facility. *Id.*

The other appellant was imprisoned in the South Carolina State prison system. The court found that the state was justified in prohibiting direct access to its prison library where the prisoner presented a maximum security risk and where South Carolina had provided a limited legal assistance program. *Id.*

9 *Id.* at 1340. Three issues were to be resolved on remand: (1) whether a Virginia statute supplying legal counsel to prisoners applied to inmates at the Richmond jail; (2) whether the jail had taken the necessary steps to notify jail inmates of such a program if it applied to them; and (3) whether appellant Brown's claim was simple enough to have been adequately researched in the limited periods of access provided. *Id.*
visit. Furthermore, no research assistance was provided to prisoners.

The court held that Brown's complaint stated a constitutional violation on its face, stating that "meaningful legal research on most legal problems cannot be done in forty-five minute intervals." Chief Judge Haynsworth concluded that such harsh restrictions on library access could be justified only by providing research assistance. Most importantly, the court expressly relied upon Bounds as the basis for its holding. The court noted that "a prisoner in a city jail is entitled to reasonable access to the courts and that is not provided one serving a substantial sentence of confinement if, without other legal assistance, he has access only to a law library which is so restricted as to be meaningless." Thus, the court not only determined that Bounds' imposition of an affirmative duty applies to local jails, it considered the length of the jail inmates' sentences as a criterion to measure the adequacy of the jail's library under Bounds' constitutional standard. While the court recognized that the provision of a law library might be unreasonably expensive, it noted that Bounds could be satisfied by providing adequate legal assistance, which might be somewhat less expensive.

10 Id.
11 "[O]ne cannot expect prisoners to immediately turn to exactly the right case, or to immediately discover the proper legal avenue to explore in search of an answer to their problems." Id.
12 Id. at 1339, 1340 n.2. The soundness of applying Bounds to local jails is discussed in the text accompanying notes 47-73 infra.
13 584 F.2d at 1340-41 (emphasis added).
14 The per-institution cost of adequate law libraries might vary from $6,000 to $30,000 depending on the needs of the institution's inmates. Ancillary expenses include upkeep and library assistance costs. See ABA JOINT COMMITTEE ON THE LEGAL STATUS OF PRISONERS, CRIMINAL JUSTICE SECTION PROJECT ON STANDARDS RELATING TO THE LEGAL STATUS OF PRISONERS (Tent. Draft 1977) reprinted in 14 AM. CRIM. L. REV. 377, 438-43 (1977).

The cost of providing legal assistance in lieu of a library would depend on the size of the institution and its function within the penal system. It has been suggested that "[t]he ratio of attorneys to prisoners should be one attorney for 400 prisoners. If each attorney has the assistance of one full time paralegal and two law students, the ratio can be reduced to one attorney for 800 prisoners." ABA RESOURCE CENTER ON CORRECTIONAL LAW AND LEGAL SERVICES, PROVIDING LEGAL SERVICES TO PRISONERS, reprinted in 8 GA. L. REV. 363, 431 (1974). Assuming that the base salary for the services of a full-time attorney is $16,000, the cost of providing a part-time attorney for the needs of 100 inmates at the suggested ratio would be approximately $4,000 each year.
Circuit Judge Hall wrote a vigorous dissent regarding the disposition of appellant Brown's claim. He argued in the alternative that (1) the Bounds decision imposed an institutional duty "only upon state correctional facilities for prisoners serving long terms of incarceration," but, assuming that Bounds applies to local jails, (2) the library access provided by the Richmond City Jail satisfied Bounds' constitutional requirements.

At the heart of a correct analysis of the Williams decision is a recognition of the constitutional bases of Bounds. Once these foundations can be discovered, traditional concepts of constitutional law may then be utilized to provide a proper resolution of the issues in Williams.

II. Bounds v. Smith: The Source and Strength of its Constitutional Mandate

A. The Fundamental Right of Access to the Courts

The fundamental constitutional right of access to the courts has defied precise location in the United States Constitution. While one provision in the first amendment has been identified as its source, the Supreme Court has relied upon the Due Process and Equal Protection Clauses of the four-

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15 584 F.2d at 1341. Restricting Bounds to require only an institutional duty is tied to the effect incarceration has in discriminating against indigent prisoners. See text following note 48 infra for a more detailed explanation.

16 Id.

17 "The constitutional right of access to the courts is a concept which is nebulous at best. Even the constitutional origins of the right are unclear." Doe v. Schneider, 443 F. Supp. 780, 784 (D. Kan. 1978).

18 Contributing to the complexity of the problem are cases referring to the right of access to the courts in a non-criminal context. Cf. Boddie v. Connecticut, 401 U.S. 371 (1971) (right of access to the courts applies in state controlled divorce proceeding); and NAACP v. Button, 371 U.S. 415 (1963) (right of access to the courts applies where persons are attempting to redress violations of their civil rights).


21 Younger v. Gilmore, 404 U.S. 15 (1971), affirmed a district court decision relying
teenth amendment as its basis in cases involving the derivative right\textsuperscript{21} of access to adequate law libraries or adequate legal assistance. The question of whether the right of access to the courts is derived from the first or fourteenth amendments is relatively unimportant. Even if a right is not specifically included in the Bill of Rights it may be considered fundamental if its exercise is necessary to protect or preserve other constitutional rights.\textsuperscript{22} Thus, the "fundamentalness" of the right of access to the courts is a conclusion drawn from the fact that a constitutional claim cannot be enforced without access to a forum for redress of that claim.\textsuperscript{23}

Therefore, where \textit{Bounds v. Smith}\textsuperscript{24} requires that prisoners should be provided with "meaningful access to the courts,"\textsuperscript{25} the statement cannot be read in the generic sense. It must be read to require such access only if the prisoner alleges a violation of a fundamental constitutional right.\textsuperscript{26} For example, pris-

\textsuperscript{21} A "derivative" right is one that springs out of a broader right. For example, there would be no constitutional right of access to law libraries or legal assistance if the right of access to the courts was fulfilled in some other way. \textit{See Recent Decisions, Prisoners' Right to Access to Legal Material}, 8 \textit{Gonzaga L. Rev.} 340, 344 n.8. (1973).

\textsuperscript{22} For example, the right of travel may protect other rights such as the right to work. Shapiro \textit{v. Thompson}, 394 U.S. 618 (1969).


To label a particular right as fundamental categorically is to avoid analysis, unless a general conclusion concerning the importance of the right has already been drawn from an examination of the nature of the right as exercised or a general conclusion made that the right is of such a nature as not to be readily regulable.

\textit{Id.}

\textsuperscript{24} 430 U.S. 817 (1977).

\textsuperscript{25} \textit{Id.} at 823.

\textsuperscript{26} \textit{See id.} at 825: "The inquiry is rather whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts."

Initially, the right of access to the courts was thought to be fundamental only where the right to present claims of habeas corpus was involved. \textit{See Ex Parte Hull}, 312 U.S. 546 (1941). In Wolff \textit{v. McDonnell}, 418 U.S. 539 (1974), however, the Court found the right of access to the courts to be a fundamental one where the prisoner had asserted a civil rights claim under 42 U.S.C. § 1983. \textit{See also Potuto, The Right of Prisoner Access: Does Bounds Have Bounds?}, 53 \textit{Ind. L.J.} 207, 209, (1978). Professor
oners with valid habeas corpus claims\textsuperscript{27} or complaints regarding living conditions\textsuperscript{28} are guaranteed a meaningful disposition of their claims. Because of its unique importance to prison inmates, the right of access to the courts has been called the "right upon which the integrity of every other constitutional right necessarily exists."\textsuperscript{29}

B. The Role of Constitutional Due Process and Equal Protection in Preserving the Indigent Prisoner's Right of Access to the Courts

Despite uncertainty in deciding where the right of access originates, its application is made constitutionally imperative to the states through the Due Process and Equal Protection Clauses of the fourteenth amendment. Though earlier "right of access" cases explicitly relied upon one protection exclusive of the other,\textsuperscript{30} the Supreme Court apparently utilized both of them in \textit{Bounds}.\textsuperscript{31}

The \textit{Bounds} Court relied upon the Equal Protection Clause to require states to supply "additional measures to assure meaningful access to inmates unable to present their own cases."\textsuperscript{32} Applying the equal protection analyses of \textit{Burns v.}

\textsuperscript{27} Johnson v. Avery, 393 U.S. 483 (1969); Ex parte Hull, 321 U.S. 546 (1941).


\textsuperscript{30} Some courts based their decisions primarily upon the Due Process Clause. This result is particularly true where state action consisted of active or effective interference with a prisoner's access to the courts. Wolff v. McDonnell, 418 U.S. 539 (1974); Johnson v. Avery, 393 U.S. 483 (1969); Ex parte Hull, 312 U.S. 546 (1941); Kirby v. Blackledge, 530 F.2d 583 (4th Cir. 1976); Cruz v. Hauck, 515 F.2d 322 (5th Cir. 1975), cert. denied, 424 U.S. 917; Hatfield v. Bailieux, 290 F.2d 632 (9th Cir. 1961); Mathis v. DiGiacento, 430 F. Supp. 457 (E.D. Pa. 1977); Stevenson v. Reed, 391 F. Supp. 1375 (N.D. Miss. 1975), cert. denied, 429 U.S. 944.

\textsuperscript{31} The word "apparently" is used because the \textit{Bounds} Court failed specifically to mention the fourteenth amendment, due process, or equal protection anywhere in the opinion. This failure leaves some doubts regarding the standard of review. For a discussion of that subject, see notes 42-46 \textit{infra} and accompanying text.

\textsuperscript{32} 430 U.S. at 824.
Ohio, Smith v. Bennett, Griffin v. Illinois, and Douglas v. California by analogy, the Court held that where a state creates classifications which discriminate upon the basis of economic status and the discrimination infringes upon a prisoner's fundamental rights, that state has an affirmative duty to correct the constitutional violation. In Bounds, the Court implicitly found that North Carolina's state prison system discriminated against indigents as a matter law. This finding must have been based on the assumption that an indigent cannot have meaningful access to the courts if he is incarcerated and does not have appointed counsel.

Though Bounds' dependence upon the Equal Protection Clause provides the justification for an affirmative duty, the Due Process Clause measures the parameters of that duty. The Court unmistakably spoke in terms of due process when it stated that access to the courts must be "meaningful" and that a state must provide "adequate" law libraries or

31 360 U.S. 252 (1959). The Burns Court held that a state which makes available an appeal process but requires indigents to pay filing fees violates the Equal Protection Clause. Id. at 257.

32 365 U.S. 708 (1961). The Court found a violation of equal protection where a state required indigents to pay filing fees for writs of habeas corpus. Id. at 714.

33 351 U.S. 12 (1956). The issue in Griffin was whether a state that had provided avenues of appeal must furnish indigent appellants with a trial transcript required for appeal. The Court stated: "Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence." Id. at 17-18. See also Comment, Prisoners' Right of Access to Legal Materials, 26 U. Fla. L. Rev. 161, 182-64 (1973).

34 372 U.S. 353 (1963). The Douglas Court held that states must provide counsel for criminal indigents in their first appeal as of right. Id. at 358.


35 430 U.S. at 824-25. The "affirmative duty" concept is lifted from the line of equal protection cases considered in notes 33-36 supra. Invidious discrimination against indigents as a class arising from the fact of their incarceration is examined in notes 47-73 infra and accompanying text.

The Bounds dissent found no equal protection violation and thus no concomitant duty to provide law libraries or legal assistance. 430 U.S. at 839.

36 430 U.S. at 828. Such an implication arises when the Court's legal analysis and its holding are compared.

37 430 U.S. at 823. Such language suggests that a prisoner's right to be heard must not be a mere sham. This suggestion is precisely what due process contemplates: "minimum or adequate protection." Goodpaster, supra note 23, at 256.
“adequate” legal assistance. What, then, is “adequate”? The Bounds Court held that each plan “must be evaluated as a whole to ascertain its compliance with constitutional standards.” Bounds contemplates a case-by-case determination of adequacy and thus awaits the development of practical guidelines of review.

It is not completely clear what standard of review was applied by the Bounds Court because both the Due Process and Equal Protection Clauses played a role in the decision. If the right being protected is considered to be “fundamental,” both clauses traditionally require the state to justify its action by demonstrating a “compelling” interest. The Court balanced North Carolina’s interests against the prisoners’ interest in being heard. In this balance, while economic factors may be considered by a state in choosing the least expensive method of providing access to the courts, “the cost of protecting a constitutional right cannot justify its total denial.” Therefore, to satisfy Bounds’ standard of scrutiny, a state must provide some justification other than a financial one.

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40 430 U.S. at 828.
41 Id. at 832.

The due process element in Bounds derives from the constitutional rule recognized in Ex Parte Hull, 312 U.S. 546 (1941) (prisoner’s right of access violated when prison officials refused to notarize or mail his petition for writ of habeas corpus); Johnson v. Avery, 393 U.S. 483 (1969) (a regulation prohibiting assistance from “jailhouse lawyers” denied some inmates access to the courts); Wolff v. McDonnell, 418 U.S. 539 (1974) (allowing prisoners bringing statutory civil rights action to invoke the fundamental right of access to the courts). This rule provides that a state may not actively or effectively impair a prisoner’s access to the courts where that prisoner’s claim is a constitutional one. See Goodpaster, supra note 23, at 251.

42 Shapiro v. Thompson, 394 U.S. 618 (1969) (where the fundamental right to travel is involved, the Equal Protection Clause requires a “compelling” state interest to override the fundamental right); NAACP v. Button, 371 U.S. 415 (1963) (where the fundamental right of access to the courts is involved, the Due Process Clause requires a “compelling” state interest). See Note, A First Amendment Right of Access to the Court for Indigents, 82 YALE L.J. 1055, 1069 (1973).

43 430 U.S. at 825.

44 The Court's language in Bounds is so unequivocal that it seems that an economic interest may never be sufficient. However, that thought must be considered in light of the federal funding assistance available to implement the proposed program in Bounds. Id. at 829-30. But see Note, Prison Law Libraries: Meaningful Access to the Courts, 7 CAPITAL U.L. REV. 469, 481-82 (1978): “[T]he dissenting decisions of Justices Burger, Stewart and Rehnquist may be an indicator that the high-water mark has been reached in expanding the duty of the states to bear both the cost of and responsibility for providing adequate research facilities or legal programs.” Id.
Bounds v. Smith thus proposes a bifurcated standard of review. The first level of scrutiny is based upon the Equal Protection Clause and, presumably, requires the state to demonstrate a "compelling" interest if it has failed to take affirmative action to protect indigent prisoners' rights of access to the courts. The second level is based upon the Due Process Clause and, presumably, balances the effect of an inmate's incarceration against the state's interests to determine whether the prison's plan of assistance is adequate.

III. THE PROPRIETY OF APPLYING Bounds v. Smith TO LOCAL JAIL FACILITIES

A. A Possible Limitation: Construing Bounds to Require an "Institutional" Duty

The rule of Bounds v. Smith provides that the state has discriminated against indigent prisoners as a matter of law where its prisons fail to provide law libraries or legal assistance from persons trained in the law. It can reasonably be inferred from Bounds that the discrimination prohibited arises from the very fact of an indigent's incarceration in prison. If such an inference is credible, then perhaps a distinction may be drawn between state prisons and local jail facilities by weighing and comparing the barriers which each place in the way of indigent inmates' access to the courts. Thus, if local jail facilities are not inherently discriminatory the Equal Protection Clause would not apply, leaving only the protection of the Due Process Clause.

The Bounds opinion did not mention whether or not local jails must comply with its holding. One of the defendants in the case was a state correctional system, but the Court did not

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45 This strict standard of scrutiny is not inconsistent with Bounds. There, the Court rejected the state's interest in economic integrity in the face of the fundamental interest of the prisoners. 430 U.S. at 825.

46 "The due process clause, which protects life, liberty, and property, is often described as governing a flexible concept whose parameters depend on the context in which it is asserted." Potuto, supra note 26, at 219. The flexibility of due process regarding the application of Bounds to local jails will be discussed in notes 74-82 and accompanying text infra.

47 430 U.S. 817.

48 This conclusion is based upon the factors appearing in note 38 supra.
expressly limit its holding to the facts. There could be some significance attached to the reference to "prison authorities," in the holding of the case, but that alone cannot provide enough evidence to prove the proposition that local jails were excluded from the decision's mandate. The citation of *Cruz v. Hauck*, though, could be persuasive to indicate that local jails were within the scope of *Bounds*. In *Cruz*, the Supreme Court vacated and remanded a decision holding that legal materials need not be furnished to county jail inmates in light of *Younger v. Gilmore*. However, this case is not controlling because the Court recognized in *Bounds* that "*Gilmore* is not a necessary element in the . . . analysis."

The above considerations, however, are mere tangents to a sound analysis. The crucial inquiry should focus upon the Court's finding of discrimination which triggered the application of the Equal Protection Clause. That is, does discrimination arise from the fact of an indigent's incarceration? The *Bounds* Court concluded that it did. That conclusion could have been based upon one or more of the following factors: (1) the state prison system retains exclusive control of prisoners' activities and therefore prevents indigents from improving their economic status; (2) the fact of a prisoner's incarceration renders him unable effectively to preserve his financial well-being; and (3) the geographic remoteness of the state prison facilities makes contact with legal assistance and the outside world difficult.

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49 404 U.S. 59 (1971).
51 430 U.S. at 828-29. Also, in the *Cruz* case upon remand, Bexar County Jail was held to have assumed some of the functions of a state prison facility and thus owed a duty to provide access to adequate law libraries or adequate legal assistance. *Cruz v. Hauck*, 515 F.2d 322 (5th Cir. 1975), cert. denied, 424 U.S. 917.
52 This factor focuses upon the indigent prisoner's inability to improve his financial situation on his own initiative. Few prisons pay significant wages for work and what little the prisoner earns must go toward articles of daily necessity. See Potuto, supra note 26, at 220. Cf. *Wetmore v. Fields*, 458 F. Supp. 1131 (W.D. Wis. 1978) (prisons radically assault and impair individual freedom).
53 Whatever financial investments a prisoner has on the outside may suffer from the fact of his incarceration. Even those who are not indigent at the beginning of their sentence may be so years later.
54 "This distance makes access to the courts more burdensome. One burden placed on access, for example, is that attorneys and law school clinics may be less able because
The question then becomes whether indigent prisoners in local jails are prevented from having meaningful access to the courts by the fact of their incarceration. In *Williams v. Leeke*, Judge Hall noted in his dissent the functional differences between state prisons and local jails and found that *Bounds* imposed merely an institutional duty upon “state correctional facilities for prisoners serving long terms of incarceration.” The important question was whether the local jail had “assumed some functions served by the state penal system.”

The following criteria were proposed to resolve that question:

1. The average length of incarceration;
2. The makeup of the prison population;
3. The function of the facility;
4. The size of the jail population; and
5. The degree of prisoner access to legal assistance in the jail.

If the average length of imprisonment is relatively brief, the absence of adequate law libraries or adequate legal assistance does not prevent meaningful access to the courts because the jail sentence would be served before it could be challenged. Similarly, the function of an institution and the

53 584 F.2d 1336 (4th Cir. 1978).
54 Id. at 1341.
55 Id. at 1343. This analysis is a useful method for requiring some local jails to comply with *Bounds* and yet allowing others to be beyond its reach. Accordingly, jails that are really not “jails” do not escape the application of *Bounds* even if it is limited to require merely an “institutional” duty. The approach was proposed by the court in *Cruz v. Hauck*, 515 F.2d 322, 332 (5th Cir. 1975), cert. denied, 424 U.S. 917.

A similar distinction was approved by the Supreme Court in *McGinnis v. Royster*, 410 U.S. 263 (1973):

As the statute and regulations contemplate state evaluation of an inmate’s progress towards rehabilitation, in awarding good time, it is reasonable not to award such time for pre-trial detention in a county jail where no systematic rehabilitative programs exist and where the prisoner’s conduct and performance are not even observed . . . by the . . . state prison officials.

56 Id. at 271-72.
57 584 F.2d at 1343-45.
58 In local jails imprisoning inmates for six months or less, the provision of law libraries or legal assistance to raise constitutional grievances would be frustrated by the brevity of confinement.

County jails are generally short-term holding facilities confining individuals serving misdemeanor sentences, or awaiting trial or transfer to prisons . . . Therefore, in determining whether all inmates have adequate access to the courts, the district court need not consider those inmates whose con-
makeup of its population may be dispositive of an equal protection claim. For example, indigent pre-trial detainees have a sixth amendment right to counsel. Convicted felons awaiting transfer to state or federal facilities would only be temporarily deprived of access to the courts. Also, convicted misdemeanants serving short sentences would be released from custody before a proper constitutional challenge to the conditions of their confinement could be made. Finally, the number of inmates incarcerated and the degree of access to legal assistance should be considered. Where the jail population is small and attorneys are easily accessible, the fact of incarceration in such a jail does not discriminate against indigent inmates.

This mode of analysis poses several drawbacks. The first of these is that of nine post-Bounds federal court decisions, all have assumed that Bounds applies equally to local jail facilities. Only three of those cases discuss the above criteria in reaching their decisions, concluding that such distinctions between prisons and jails bear only upon the adequacy of the libraries or legal assistance programs. Until the Supreme

finement is of a very temporary nature.

Cruz v. Hauck, 515 F.2d 322, 333 (5th Cir. 1975), cert. denied, 424 U.S. 917.


584 F.2d at 1343. Judge Hall concluded that temporary denial of access to law libraries or legal assistance would not trigger the onus of the fourteenth amendment.

Id.

See note 59 supra for more discussion. Generally, the difficulty is that no matter where the line is drawn, it will be somewhat arbitrary. Whether that line should be drawn from two years to six months depends on the length of time reasonably required to litigate a constitutional claim before the courts.

584 F.2d at 1344. Similar factors were examined in a district court case decided before Bounds, Tate v. Kassulke, 409 F. Supp. 551 (W.D. Ky. 1976). The Tate court held that even though the jail contained a fairly large population, because attorneys were readily accessible a library was not constitutionally required. Id. at 658.

584 F.2d at 1344. The dissent contends that "attorneys are ever present in local jails representing inmates in criminal prosecutions and thus are generally available."

Id.


Williams v. Leeke, 584 F.2d 1336 (4th Cir. 1978) (jail owed duty to misdemeanor-
Court chooses to create such a distinction, it is likely that these cases will be followed.

Secondly, the Williams dissent considers the "collective need" of jail inmates. It is arguable that even if only one inmate qualified for the protection of Bounds, his fundamental constitutional right of access to the courts is a personal one and "the cost of protecting [that] . . . right cannot justify its total denial." However, if very few indigent inmates would be benefited by requiring local jails to comply with Bounds, the significant economic burden might rise to the status of a "compelling" state interest.

The final factor militating against drawing such a distinction is that local jails house many pre-trial detainees and that these prisoners have a constitutional right to defend pro se. It has been argued that because Faretta v. California grants that right, the pro se defendant has a concomitant Due Process right of access to legal materials. However, the courts have refused to recognize that argument, holding that Bounds is satisfied where the defendant has been appointed counsel.

ants serving substantial sentences of up to twelve months to provide either adequate law libraries, adequate legal assistance, or both); Fluhr v. Roberts, No. C 77-0332-L (B) (W.D. Ky. Oct. 20, 1978) (county jail with average inmate population of from 400 to 650, with an average duration of confinement of one week, held required to establish law library for inmates); O'Bryan v. County of Saginaw, 437 F. Supp. 582 (E.D. Mich. 1977) (county jail with population of 170 inmates, 75% of whom were pretrial detainees, held required to establish an extremely limited library).

"Constitutional rights are personal, not collective."

"The cost of providing similar libraries to the decentralized county jails, where the average number of inmates is far smaller and where most inmates have chosen to be defended by counsel, would be extremely burdensome." Note, The Jail Pro Se Defendant and the Right to Prepare a Defense, 86 YALE L.J. 292, 306 (1976).

Since it is clear that the pro se right acclaimed by the Faretta Court cannot be met if access to legal materials is cut off by virtue of the defendant's incarceration pretrial or during trial, as a due process right access to legal materials must be provided to the pro se incarcerated defendant. It is error to conclude, therefore, that representation by an attorney, certainly adequate . . . under Bounds can satisfy a state's obligation to provide legal materials to an incarcerated pro se defendant since to so conclude would obviate the pro se right.

Potuto, supra note 26, at 231-32.

United States v. Chatman, 584 F.2d 1358 (4th Cir. 1978); United States v. West, 557 F.2d 151 (8th Cir. 1977); Wilson v. Zarhadnick, 534 F.2d 55 (5th Cir. 1976).
B. Judging the Adequacy of Local Jail Libraries or Legal Assistance Programs

Assuming that the failure to provide jail inmates with either law libraries or legal assistance constitutes a violation of the Equal Protection Clause, the adequacy of any jail program must be evaluated as a whole to ascertain its compliance with constitutional standards. What is "meaningful access" to the courts, then, may vary with the context in which the right is asserted. Therefore, indigent jail inmates might require less assistance in some circumstances than in others.

*Williams v. Leeke* reasoned that while the provision of a law library for each small jail might be unreasonably expensive, the use of advanced law student aid programs, paralegals, or attorneys could prove to be less expensive but nonetheless adequate. Similar considerations have caused courts to

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75 584 F.2d 1336 (4th Cir. 1978).

76 Id. at 1340.

77 See note 14 supra for a comparison between the cost-efficiencies of the two alternatives.

Even though the Bounds Court found that "pro se petitioners are capable of using lawbooks to file cases raising claims that are serious and legitimate," 430 U.S. at 826, there is some doubt as to the validity of that assertion.

For example, the Court stated in *Johnson v. Avery* that "[j]ails and penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate." 393 U.S. at 487. For these persons a law library is useless. Larsen, A Prisoner Looks at Writ-Writing, 56 CAL. L. REV. 343, 352-53. See Werner, The Present Legal Status and Conditions of Prison Law Libraries, 66 LAW LIB. J. 259 (1973):

It must not be forgotten that what prisoners really need is legal services rather than law libraries in which they are left to do their own legal work. Such inmate activity may well be educational and therapeutic, but providing them law libraries instead of lawyers is somewhat like sending a sick person to a medical library instead of sending him to a doctor.

Id. at 268. See also Comment, Legal Services for Prison Inmates, 1967 Wis. L. Rev. 514, 523.

Bounds might be seen as an apology for Ross v. Moffitt, 417 U.S. 600 (1976), which held that a state had no duty to provide counsel for indigents on a discretionary appeal. Along this vein, some have suggested that indigents should have appointed counsel for collateral attack proceedings. See ABA Joint Committee on the Legal Status of Prisoners, supra note 14, at 375; Recent Case, State Must Devise System Ensuring
require less complete law libraries and approve of programs failing to provide direct physical access to law libraries. This approach could allow local jails to keep the doors to the courts open while reducing the economic burden of providing what Bounds requires.

Bounds' Due Process component makes considerations regarding the length of incarceration, the jail population, the kinds of inmates involved, and the degree of inmate access to legal assistance relevant as to the extent of affirmative aid required, instead of considering them to decide the issue of state-enforced discrimination. This approach frees city and county jails to decide which alternative imposes the least fiscal burden. More extensive aid could be provided if state or federal funds were made available for local use.

**CONCLUSION**

County and city jails are significantly different from their state and federal counterparts. It appears that some of those differences could justify a distinction that would avoid the application of the Equal Protection Clause. For example, the average length of incarceration in most local facilities seldom exceeds two months, while inmates of state and federal prisons serve sentences that are rarely shorter than one year. This consideration separates the two categories of inmates as a practical matter, the difference resting upon the time required by the judicial system to process a challenge to confinement.

The makeup of the inmate population of the facility should be determined. If the local jail houses only pre-trial detainees, Bounds' requirements need not be satisfied because

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*Indigent Prisoner's Meaningful Access to the Courts, 21 Buffalo L. Rev. 987, 993 (1972).*


78 This approach allows the courts to consider these criteria to determine "how much aid" rather than using them to determine the threshold of a local jail's duty.

79 This freedom is particularly important because the strain on a county budget could be awesome in some circumstances.

80 Perhaps the LEAA could provide funds much as it has in the case of state correctional facilities. Bounds v. Smith, 430 U.S. 817, 830 n. 19 (1977).
the inmates would retain their sixth amendment right to counsel. However, if the institution incarcerates those serving substantial misdemeanor sentences or is a state or federal prison holding convicted felons, the inmates would be unprotected by the sixth amendment.

The size of state and federal institutions similarly affects the ability of indigents to have access to the courts. Larger institutions are plagued by consistently lower attorney/prisoner ratios, thus markedly decreasing the availability of sound legal advice. The unavailability of professional legal advice is closely related to the traditional geographic remoteness of state and federal institutions. If the detention facility is a local one, attorneys are more likely to be available on a regular basis.

Each of the above factors must be weighed in light of the policy behind Bounds—the protection of the indigent inmate’s right of access to the courts. The decisions should reflect a genuine consideration of the unique characteristics of each facility. While all state and federal institutions must comply with Bounds, courts should not require all local jail facilities to provide libraries or comparable legal assistance for their inmates. Local jails which are caused to comply with Bounds would become the exception and not the rule.

If, however, a local jail is found to discriminate against its indigent inmates, the Due Process Clause mandates that such prisoners shall have access to reasonably adequate libraries or comparable legal assistance. By considering the factors recognized in the equal protection analysis as guidelines for the quality and quantity of assistance required by due process, the inmates’ constitutional right of access to the courts shall be safeguarded as well as the fiscal integrity of local governments. Programs providing access to the courts would not be judged by an inflexible standard.

While the majority in Williams v. Leeke properly applied the above due process element of Bounds, only the length of the inmate’s sentence was considered in deciding the equal protection issue. A “litmus-paper” test for determining discrimination against indigent inmates is efficient but undesirable. The important interests of both prisoners and the public demand greater protection. In the future, courts should apply the bifurcated standard of Bounds to determine whether a duty exists, and if so, the proper extent of that duty.

Philip W. Collier