

**LET’S ALL BE . . . GEORGIA? EXPANDING ACCESS TO JUSTICE FOR  
INCARCERATED LITIGANTS BY REWRITING THE RULES FOR WRITING  
THE LAW**

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## I. INTRODUCTION

*“One of the most hateful acts of the ill-famed Roman tyrant Caligula was that of having the laws inscribed upon pillars so high that the people could not read them.”<sup>1</sup>*

Even though some court opinions would have people believe otherwise, incarcerated litigants are considered citizens and are owed the full array of due process rights. Central to those due process rights is the right of access to the courts via access to information, a right which has steadily eroded since the Supreme Court decided *Bounds v. Smith* in 1976.<sup>2</sup> The availability of legal information is central to a litigant’s ability to understand the law and the criminal justice system, yet that access has been systematically minimized for the last thirty years. In the meantime, predatory publishers<sup>3</sup> of legal information have flourished, pay-walling and limiting legal information

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1. *Cutler Corp. v. Latshaw*, 97 A.2d 234, 237 (Pa. 1953).

2. *See Bounds v. Smith*, 430 U.S. 817, 828 (1977) (“[T]he 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.”); *see also Lewis v. Casey*, 518 U.S. 343, 349 (1996) (limiting the effect of the *Bounds* decision by requiring the plaintiffs to show “widespread actual injury”); *McDonald v. Steward*, 132 F.3d 225, 230–31 (5th Cir. 1998) (limiting *Bounds* by allowing the denial of a prisoner’s access to the law library where the prisoner did not note his work hours on his request slips); *Farver v. Vilches*, 155 F.3d 978, 979–80 (8th Cir. 1998) (limiting *Bounds* by noting that the prisoner was required to demonstrate actual prejudice in order to state a claim for being denied access to the court); *see also Simmons v. United States*, 974 F.3d 791, 798 (6th Cir. 2020) (limiting *Bounds* by striking down the prisoner’s allegation that his lack of access to the law library prevented him from filing his claim because the claim was insufficient to satisfy the causal connection requirement that a constitutional impediment prevent the filing). It is also important to note that due process requires that “citizens . . . have free access to the laws which govern them.” *Georgia v. Harrison Co.*, 548 F. Supp. 110, 114 (N.D. Ga. 1982) (quoting *Bldg. Off. & Code Admin. v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980)) (noting the “important and practical policy” of free access to laws); *see also Nash v. Lathrop*, 6 N.E. 559, 560 (Mass. 1886) (explaining that justice requires free access to judicial opinions and statutes because citizens are “presumed to know the law”).

3. For the purposes of this Article, predatory publishers are defined as publishers that take legal information necessary to understand the law and operate as a citizen in any jurisdiction and put said laws and other explanatory legal information behind exorbitant paywalls, making access nearly nonexistent. In addition, these publishers routinely stop publishing legal information in print or inflate the prices of print materials at such a high rate that those libraries or individuals who may have purchased print copies can no longer afford to do so, effectively cutting off access to legal information in print that is more easily accessible by a wider variety of users. These publishers not only put legal information behind a paywall—the same way Caligula posted laws so high no citizens could access them—they also use the data from all of the users of their electronic products to fund government programs. *See generally* SARAH LAMDAN, DATA CARTELS: THE COMPANIES THAT CONTROL AND MONOPOLIZE OUR INFORMATION (forthcoming Nov. 2022) (discussing how large data analytics companies are profiting from information which is crucial to the public).

access that is required for all citizens to understand the law but is especially essential for incarcerated people who lack the ability to negotiate or buy from these for-profit companies.<sup>4</sup> Where incarcerated litigants once had access to prison libraries full of print materials, they now have access to a computer terminal, tablet, or kiosk that may or may not offer prisoners access to an expansive electronic database of information, a database which they may or may not know how to use.<sup>5</sup> Public institutions are not filling in the legal information gaps that publishers create. States may assert copyright ownership over some or all their legal information and may or may not publish things in print, electronically, or both.<sup>6</sup> These inconsistencies mean that incarcerated litigants do not have the same access to information as litigants who aren't incarcerated, legal information that is essential to attack their

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4. Not only have the publishers flourished, but they have eliminated the competition at every turn, creating a legal research duopoly. See Leslie A. Street & David R. Hansen, *Who Owns the Law? Why We Must Restore Public Ownership of Legal Publishing*, 26 J. INTELL. PROP. L. 205, 206 (2020) (explaining that “meaningful access to the law” is fundamental to due process, but private control of legal information is a longstanding problem that is growing worse due to the proliferation of electronic publishing and publisher consolidation); See LAMDAN, *supra* note 3, at 2–4 (discussing the ways in which people collectively pay data analytics companies millions of dollars in order to access legal information platforms, which leads to limitations over access to the very laws Americans need to function).

5. See Stephen Rahe & 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) [hereinafter Rahe & Fenster, *A Tale of Two Technologies*], <https://www.prisonpolicy.org/blog/2020/10/28/digital-law-libraries> [https://perma.cc/NR8H-6QM4]. When we discuss issues surrounding inmates and access to justice, the solutions presented often relate to things like legislative reform surrounding the appeals process, better medical care, and sentencing revisions. See Shon R. Hopwood, *Slicing Through the Great Legal Gordian Knot: Ways to Assist Pro Se Litigants in Their Quest for Justice*, 80 FORDHAM L. REV. 1229, 1234, 1235–36 (2011). A common response to discussions surrounding inmate access to information is to simply give them books. However, the books present their own issues. Shon Hopwood, Associate Professor of Law at Georgetown and former federal inmate, stated that law books are “big . . . thick, and . . . intimidating,” and they feel like they are “written in another language.” *Meet Shon Hopwood*, 23 AALL SPECTRUM 32, 33 (2019). Shon overcame his intimidation and advocated for the release of himself and countless other federal inmates, going on to becoming a successful lawyer; however, millions of other inmates in the United States never have the same opportunity because they are unable to get over that initial intimidation. See Adam Liptak, *A Mediocre Criminal, but an Unmatched Jailhouse Lawyer*, N.Y. TIMES (Feb. 8, 2010), <https://www.nytimes.com/2010/02/09/us/09bar.html> [https://perma.cc/58UK-L8EL]. Adding technology to the mix via a tablet, computer, or kiosk only complicates things further and has the potential to lead to prisoner exploitation, in addition to confusion and intimidation over the materials themselves.

6. See Street & Hansen, *supra* note 4, at 243. In particular, the appendix to Street and Hansen’s article illustrates the publishing and ownership schemes of statutes and codes from each of the fifty states and is helpful in gaining an understanding of how state laws are published by legislatures and whether or not predatory publishers are involved with that process.

sentences either directly or collaterally, thus violating their due process rights.<sup>7</sup>

In 2020, the United States Supreme Court paved the way for a statutory publishing scheme that would enhance access to primary (and some secondary) legal information—they highlighted Georgia’s statutory publishing process as a way to pull some secondary material into the public domain under the government edicts doctrine.<sup>8</sup> To be clear, the Supreme Court set out to more clearly define the classification of government edicts under copyright law and *not* to set forth a new publishing scheme for legal materials, but the result was a glimpse into how federal and state governments could approach the publication of legal information, so information can be consistently and equitably made available to incarcerated litigants in either a print or electronic format, thereby expanding access to the Courts.

Public perceptions of both ownership and access to the law and of access to justice for incarcerated litigants have evolved over time. For most people who are *not* navigating the criminal justice system, access to the law seems like an important—though not essential—ideal. Technology has made it harder for non-incarcerated people to experience diminishing access to legal information. While publication of the law has shifted over time, the information-seeking behaviors of the public have too, making them adept users of technology, if not capable of deeply understanding the electronic legal information to which they do have access. It is because of the Internet, of course, that individuals have so much access to information; average users don’t understand the wildly disparate access to the Internet that exists in the United States.<sup>9</sup> Similarly, they do not understand how excruciatingly slow the government has been to address issues surrounding information access, access to the courts, and due process for incarcerated litigants.<sup>10</sup>

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7. See generally Thomas C. O’Byrant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C. R.-CIV. L. L. REV. 299, 300 (2006) (discussing ways in which the AEDPA curbs “the federal judiciary’s habeas corpus jurisdiction and undermined the ability of pro se petitioners to file meaningful habeas corpus petitions,” leading to individuals in state courts being unable to pursue post-conviction relief simply because they cannot afford to retain counsel).

8. See *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1504 (2020) (applying the government edicts doctrine to non-binding, explanatory legal materials created by a legislative body).

9. See Andrew Perrin & Sara Atske, *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> [https://perma.cc/V64X-NPRD] (describing the types of people who generally do not use the internet, including their educational attainment and socioeconomic status).

10. Cases surrounding access to courts via access to information under the blanket of due process have been pursued since the 1960s and 1970s. See generally *Bounds v. Smith*, 430 U.S.

While the Supreme Court has recognized that the advent of the internet changed the economic landscape of this country, there has been no such desire to discuss—or even acknowledge—how the Internet has changed the lives of millions of incarcerated Americans.<sup>11</sup> Is it because the fundamental rights of incarcerated people “are not quite as important as the rights of States or Corporations”?<sup>12</sup> “Perhaps it is 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.”<sup>13</sup> Or perhaps big corporations simply have not found a way to further exploit prisoners by charging them exorbitant fees for the latest technology.<sup>14</sup>

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817, 828 (1977); *Lewis v. Casey*, 518 U.S. 343, 346, 351–52 (1996) (lending support to the proposition that cases like *Bounds* have been pursued since the 1960s and 1970s and continued for many years); *Gilmore v. Lynch*, 319 F. Supp. 105, 111 (N.D. Cal. 1970); *Hatfield v. Bailleaux*, 290 F.2d 632, 638 (9th Cir. 1961).

11. See Ashley Krenelka Chase, *Neutralizing Access to Justice: Criminal Defendants' Access to Justice in a Net Neutrality Information World*, 84 MO. L. REV. 323, 325, 342 (2019) [hereinafter Chase, *Neutralizing Access to Justice*] (examining the impact of net neutrality's demise on prisoners' access to information and its lack of discussion at the Supreme Court level); see also Ashley Krenelka Chase, *Exploiting Prisoners: Precedent, Technology, and the Promise of Access to Justice*, 12 WAKE FOREST J. L. & POL'Y 103, 131–47 (2022) [hereinafter Chase, *Exploiting Prisoners*] (discussing the standards for providing access to information to incarcerated litigants to ensure due process and highlighting the potential exploitation of inmates if these issues are not resolved); 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) (setting forth sentencing reform proposals stemming from changes to human behavior generated by the Internet in the last two decades).

12. Chase, *Exploiting Prisoners*, *supra* note 11, at 148; see Nina Totenberg, *When Did Companies Become People? Excavating the Legal Evolution*, NAT'L PUB. RADIO (July 28, 2014, 4:57 AM), <https://www.npr.org/2014/07/28/335288388/when-did-companies-become-people-excavating-the-legal-evolution> [<https://perma.cc/XSC6-8NLM>]. Carliss Chatman, a corporate law scholar and Associate Professor of Law at Washington & Lee University, even wrote a children's book explaining corporate personhood. See generally CARLISS CHATMAN, COMPANIES ARE PEOPLE TOO 33–47 (2021).

13. Chase, *Exploiting Prisoners*, *supra* note 11, at 148.

14. See 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](https://www.prisonpolicy.org/phones/state_of_phone_justice.html#consolidation) [<https://perma.cc/S2GV-E89Z>] (discussing the corporation-imposed high cost of phone calls for people in America's prisons and jails); see also 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) [hereinafter Raher, *You've Got Mail*], <https://www.prisonpolicy.org/messaging/report.html> [<https://perma.cc/TS6N-C73H>]; Mack Finkel & Wanda Bartram, *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> [<https://perma.cc/WKY8-47YK>]; Drew Kukorowski et al., *Please Deposit All of Your*

There are two cases that form the foundational precedent upon which courts rely when they consider issues related to due process and incarcerated litigants' access to courts via access to information: *Bounds v. Smith* and *Lewis v. Casey*.<sup>15</sup> These cases established that, for pro se incarcerated litigants to have access to the courts as required by due process, they must have access to legal information (though the cases state that this does not create an independent right to a prison library or access to counsel).<sup>16</sup> They set the stage for addressing prisoners' access to legal information but come nowhere close to acknowledging the role of technology in providing access. If a review of information about the needs of prisoners is any indication of the Court's priorities, access to information for incarcerated litigants appears to be a lower priority concern than issues like access to healthcare, education, or abortion services.<sup>17</sup> In the absence of courts directly addressing the expansion of access to justice via access to information on the Internet, prisoners are being directly and indirectly exploited by predatory publishers who provide expensive access to information through contracts with public and private prison

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*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> [<https://perma.cc/R7VB-FXUQ>] (detailing the hidden costs and fees associated with phone calls for those in prisons and jails in the United States). See generally Raheer & Fenster, *A Tale of Two Technologies*, *supra* note 5 (comparing two different digital law library rollouts in prisons in Oregon and South Dakota after noting that prison law libraries turn electronic to cut costs); Stephen Raheer, *The Wireless Prison: How Colorado's Tablet Computer Program Misses Opportunities and Monetizes the Poor*, PRISON POL'Y INITIATIVE (July 6, 2017) [hereinafter Raheer, *The Wireless Prison*], <https://www.prisonpolicy.org/blog/2017/07/06/tablets> [<https://perma.cc/D6H5-G9LA>] (discussing potential limitations and exploitive functionality of tablets being made available to prisoners in Colorado); 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> [<https://perma.cc/Y46Y-ATHG>] (discussing budget issues affecting access to prison library services).

15. See *Bounds*, 430 U.S. at 828; see also *Casey*, 518 U.S. at 349.

16. *Bounds*, 430 U.S. at 828; *Casey*, 518 U.S. at 351.

17. See Order at 1–2, *Jensen v. Shinn*, No. CV-12-00601-PHX-ROS (D. Ariz. June 30, 2022) (concluding that the state's inaction in providing prisoners with adequate medical and mental care, both critical rights of prisoners, has shown it is acting with deliberate indifference to the risks of poor care and that the state's adopted healthcare system for incarcerated individuals has led to preventable deaths); see also Kathleen Bender, *Education Opportunities in Prison are Key to Reducing Crime*, CTR. FOR AM. PROGRESS (Mar. 2, 2018), <https://www.americanprogress.org/article/education-opportunities-prison-key-reducing-crime/> [<https://perma.cc/WA2Z-HCKL>] (discussing educational inequalities affecting those imprisoned and how quality prison education programs would benefit the general population); see also Kate Weisburd, *Op-Ed: Women in Prison and Under Court Surveillance Will Suffer Under New Abortion Bans*, L.A. TIMES (July 5, 2022, 10:44 AM), <https://www.latimes.com/opinion/story/2022-07-05/op-ed-women-in-prison-and-under-court-surveillance-will-suffer-under-new-abortion-bans> [<https://perma.cc/K6LB-LL7S>] (describing female prisoners' difficulties caused by abortion bans).

systems.<sup>18</sup> But there is no obligation to wait for the Supreme Court to address this important issue, or for some major federal legislative decree; states can solve these access problems now by rewriting the rules for drafting and publishing the law. Through state action, more information can be placed in the public domain under the government edicts doctrine, thereby expanding access to legal information not only for incarcerated litigants but also for anyone with a passing interest in the law or its application.

States can put the Supreme Court's affirmation of the government edicts doctrine, explained in *Georgia v. Public.Resource.Org, Inc.*,<sup>19</sup> into practice by working with publishers to provide free and consistent access to legal information for all citizens, perhaps most importantly 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.<sup>20</sup> Part II of this Article discusses the history of access to information and use of libraries for and by incarcerated litigants, including the decisions of *Bounds*

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18. See Chase, *Neutralizing Access to Justice*, *supra* note 11, at 361–62. In previous articles, I introduced the idea that the fallibility of the Internet is problematic not only for incarcerated litigants who are self-represented, but also for the attorneys—both private and public—who are tasked with defending them. If the internet is not neutral, and access is tiered, throttled, or blocked, those involved in the criminal justice system may not have meaningful access to information. *Id.* at 328. I then suggested that the Supreme Court revisit *Bounds* and *Casey* and use the foundation in *South Dakota v. Wayfair, Inc.* to require prisons to provide online legal research access to incarcerated litigants. See Chase, *Exploiting Prisoners*, *supra* note 11, at 135. See generally *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2087 (2018) (recognizing the expansion of the Internet and its negative financial impact on consumers without courts' regulations). Given the 2022 Supreme Court's "wishy-washy" attitude towards constitutional rights, my suggestion of applying the logic of *South Dakota v. Wayfair, Inc.* to expanding access to justice for incarcerated litigants seems highly unlikely, if not impossible. See generally *Simmons v. United States*, 142 S. Ct. 23, 25 (2021) (Sotomayor, J., concurring) (refusing to grant certiorari on the grounds that the appellate court appropriately held the criminal defendant's pro se habeas corpus petition was time barred despite the fact that his prison did not have any materials on habeas law).

19. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1504 (2020).

20. One author in particular vehemently disagrees with this position. David E. Shipley, former Dean at the University of Georgia, believes that the 11<sup>th</sup> Circuit's decision in favor of *Public.Resource.Org* went too far because "[n]o court has ever held nonbinding annotations and commentary to be unprotectable." David. E Shipley, *Code Revision Commission v. Public.Resource.Org and The Fight Over Copyright Protection for Annotations and Commentary*, 54 GA. L. REV. 111, 122 (2019). But where is the problem with that extension of the government edicts doctrine? Are people not benefited by having more access to not only the law itself but to things that help us understand the law? Those in the legal profession who seek to limit the way we access not only the law but also information that helps others understand the typically complicated, often completely convoluted laws to which we are all beholden act as toxic gatekeepers who actively increase the justice gap by ensuring citizens without significant legal backgrounds cannot comprehend the laws to which they are subject. Everyone in the legal profession should strive to make the law more open and accessible to the citizens who need to understand the law, particularly those who fall in the United States' significant justice gap.

and *Casey*. It will go on to describe proposed solutions for the erosion of access to information by incarcerated litigants, including the application of *South Dakota v. Wayfair, Inc.*, to ensure technology access for litigants who need access to the law while behind bars. Part II will go on to discuss why the ineloquent solution proposed by *South Dakota v. Wayfair, Inc.* will not work, particularly given the ideological makeup of today's Supreme Court. Part III will explain ways in which access to legal information has been expanded to the general public, for individuals outside of prisons who need access to the law. This Part will explain the Supreme Court's decision in *Georgia v. Public.Resource.Org, Inc.* and highlight the ways in which non-incarcerated litigants benefit from this decision. Part IV will propose a new method of drafting and publishing statutes, based on the opinion in *Georgia v. Public.Resource.Org, Inc.* Part V will conclude by discussing the possible outcomes for incarcerated litigants if state and federal governments approach writing and publishing the law in a drastically different way, thereby ensuring broad access and understanding for all citizens, especially those behind bars.

## II. ACCESS, EROSION, AND SOLUTIONS FOR INCARCERATED LITIGANTS

The perceived consistency of access to information is one that citizens who have never been incarcerated take for granted. Books can be found in homes or at libraries. Internet can be accessed in workplaces, schools, homes, airports, and even walking around in some metropolitan areas. And where that access has been eroded by the commodification of information access—most notably in the legal field by vendors like LexisNexis and Westlaw—those who are impacted are reluctant to speak out about that erosion should it impact their ability to access the law needed to perform the tasks for which access is necessary, like legal research.<sup>21</sup> Access to legal resources for incarcerated litigants has been inconsistent at best, and it is increasingly being eroded not only by the way users access that information, but also by the corporations and governments that control it.

### A. *The History of Access to Information for Incarcerated Litigants*

Public awareness of issues surrounding access to information for incarcerated litigants started in 1976 and continues today, with varying

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21. Notably, law librarians who have spoken out about issues with legal research providers have been quickly silenced by the professional organization that purports to represent them, for fear of retaliation by LexisNexis, Westlaw, and others. See Sarah Lamdan, *Librarianship at the Crossroads of Surveillance*, IN THE LIB. WITH THE LEAD PIPE (Nov. 13, 2019), <https://www.inthelibrarywiththeleadpipe.org/2019/ice-surveillance/> [https://perma.cc/F5ZH-QZFW].

degrees of interest.<sup>22</sup> While those who have never been incarcerated may envision access to information in prisons resembling something straight out of *Shawshank Redemption*—dark rooms with old books covered in dust, and carts of well-loved tomes being used for entertainment and education by prisoners looking for a connection to the outside world—incarcerated individuals hoping to access legal information know that the prison libraries of the movies, filled with books, no longer exist.<sup>23</sup> In fact, a prison library with *legal* materials may not exist at all.<sup>24</sup>

### I. *Bounds v. Smith*

*Bounds v. Smith* was the first major Supreme Court case to tackle access to legal information as a fundamental right of incarcerated people. The due process clause requires that “citizens . . . have free access to the laws which govern them.”<sup>25</sup> There is no shortage of cases discussing due process for those navigating the criminal justice system, but the central case for discussing access to the courts for incarcerated litigants is *Bounds v. Smith*.<sup>26</sup> *Bounds* 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.<sup>27</sup> 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,”<sup>28</sup> the Supreme Court assessed whether the need for legal research in new cases versus petitions for discretionary review had any impact on prisoners’ ability to access the courts.<sup>29</sup> 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.<sup>30</sup>

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

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22. See generally *Bounds v. Smith*, 430 U.S. 817, 817 (1977) (hearing the first case on whether states must protect prisoners’ access to courts through law libraries and legal knowledge in 1976).

23. SHAWSHANK REDEMPTION (Castle Rock Entertainment 1994).

24. See Chase, *Exploiting Prisoners*, *supra* note 11, at 114.

25. *Georgia v. Harrison Co.*, 548 F. Supp. 110, 114 (N.D. Ga. 1982); see also *Nash v. Lathrop*, 6 N.E. 559, 560 (Mass. 1886) (claiming that justice, generally, requires free access to statute and judicial opinions because citizens are “presumed to know the law”).

26. *Bounds*, 430 U.S. at 817, *abrogated by* *Lewis v. Casey*, 518 U.S. 343, 365 (1996).

27. *Bounds*, 430 U.S. at 817–18.

28. *Id.* at 828.

29. *Id.* at 827–28.

30. *Id.* at 821–22.

legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.”<sup>31</sup> In determining that inmates have a right to this access, the Court indicated that an attorney would be deemed ineffective and incompetent 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.<sup>32</sup> 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.<sup>33</sup> 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.

## 2. Lewis v. Casey

In 1996, the Supreme Court limited the holding in *Bounds* by emphasizing that what was guaranteed to *pro se* litigants, including prisoners, was the right of access to the courts—not access to libraries.<sup>34</sup> In making that determination, the Court stated that litigants in prison 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.<sup>35</sup> The Supreme Court found that incarcerated litigants 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.<sup>36</sup>

Twenty years after *Bounds* guaranteed access to legal information, the Supreme Court limited that access. The Court reasoned that, while basic access to legal information is part of due process requirements, no government institution needs to confer “sophisticated legal capabilities” on non-lawyers.<sup>37</sup> According to the *Casey* Court, the Constitution doesn’t require (nor can the government provide) that level of information access.<sup>38</sup> In its decision, rather than helping to give meaning to the right of access to the courts through access

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31. *Id.* at 828.

32. *Id.* at 825–26.

33. *Id.* at 825.

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

35. *Id.* at 351.

36. *Id.* at 351–53. In *Casey*, the Supreme Court found that *actual* injury was required to establish standing for a violation of constitutional rights, so the inmates in these cases needed to prove that they were *denied* the tools needed to attack their sentences, not simply state that they should have received more or better access. *Id.* at 349.

37. *Id.* at 354.

38. *See id.*

to information, the Supreme Court used a problem caused largely by the socioeconomic inequity of the incarcerated individuals who would be impacted by its decision to justify denying court access.<sup>39</sup> 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.”<sup>40</sup> 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 in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.<sup>41</sup>

### 3. Recent Decisions

In the nearly thirty years since *Casey* was decided, countless litigants have challenged that precedent, only to find their arguments quickly dismissed. Throughout the 1990s, incarcerated litigants like Degrate<sup>42</sup>, Klinger,<sup>43</sup> and Jones<sup>44</sup> have brought Federal Civil Rights actions under 42 U.S.C. § 1983, alleging that deprivation of access to a law library—and therefore access to

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39. *See id.* The socioeconomic status of those involved in the criminal justice system and the financial marketplace for services for that population are beginning to be more well-researched by attorneys and economists. The Fines and Fees Justice Center is an organization that discusses how socioeconomics plays out in access to the criminal justice system, and the Consumer Financial Protection Bureau has started to look at the ways in which finances impact inmates’ ability to access the criminal justice system. *See Justice-Involved Individuals and the Consumer Financial Marketplace*, CONSUMER FIN. PROT. BUREAU (Jan. 31, 2022), <https://www.consumerfinance.gov/data-research/research-reports/justice-involved-individuals-consumer-financial-marketplace/> [<https://perma.cc/N4XU-ZHU6>]; *see generally* FINES AND FEES JUST. CTR., <https://finesandfeesjusticecenter.org/> [<https://perma.cc/U2GE-3MY8>].

40. *Bounds v. Smith*, 430 U.S. 817, 825 (1977).

41. *Casey*, 518 U.S. at 355.

42. *Degrate v. Godwin*, 84 F.3d 768, 768 (5th Cir. 1996) (holding that prisoner had no constitutional right to access a law library to prepare for his *pro se* defense because the appellant refused assistance from court-appointed counsel).

43. *Klinger v. Dept. of Corrs.*, 107 F.3d 609, 611 (8th Cir. 1997) (holding that 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, because they could not show that any actual injury arose from a failure to access the library).

44. *Jones v. Greninger*, 188 F.3d 322, 325 (5th Cir. 1999) (limiting prisoners to five hours a week of time in a law library does not violate his constitutional right of access to the courts).

legal materials—violated their right of meaningful access to the courts.<sup>45</sup> 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 *Klinger* court noted that, where 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.<sup>46</sup>

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 while incarcerated while also ensuring that they are appropriately punished.<sup>47</sup> But many people would agree that some access to information is good and that those in prison should have access to prison libraries.<sup>48</sup>

#### *B. Practicalities of Information Access and the Erosion of Access to Materials*

*Bounds* and *Casey* discuss the need for those in the criminal justice system to have access to legal information in prison libraries, but, in facilities where prisoners' access to legal resources is treated less like a constitutional right and more like a money-making opportunity provided by large corporations, that need is quickly drowned out by exploitation of this vulnerable population.<sup>49</sup> If the standard for access to legal information involves access to print materials (as suggested in *Bounds* and *Casey*), most incarcerated litigants will have no information available to them at all.

There are many problems with print materials being the sole access point for legal information in prison libraries. Frequently, incarcerated library users will remove pages of books, presumably for their own use (or to keep others from using the material), or possibly because time in the library is limited, and they may wish to reach materials later.<sup>50</sup> The materials provided may be so basic as to be unhelpful, such as state statutes published without context, or

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45. *See, e.g., id.* at 324–25.

46. *Klinger*, 107 F.3d at 617.

47. *See, e.g.,* Abdallah Fayyad, *Prisoners Should Be Allowed to Vote While Serving*, BOSTON GLOBE (July 23, 2020, 12:00 AM), <https://www.bostonglobe.com/2020/07/23/opinion/yes-they-should-be-allowed-vote-while-serving/> [<https://perma.cc/2889-4WXW>] (discussing whether inmates should or should not be allowed to vote); *see also* Bryan Nguyen, *Prisons: Reform or Punishment?*, MEDIUM (Mar. 27, 2017), <https://medium.com/fhsaplant/prisons-reform-or-punishment-2ce135a108c7> [<https://perma.cc/U5C5-W27B>] (discussing the criminal justice system and its ultimate goal).

48. *See, e.g.,* LAMDAN, *supra* note 3, at 1.

49. *See* Chase, *Exploiting Prisoners*, *supra* note 11, at 145.

50. JOHN HOWARD ASS'N, PRISONER ACCESS TO THE COURT AND ADEQUATE LAW LIBRARY: NINE RECOMMENDATIONS FOR SYSTEM IMPROVEMENT 16 (2019).

indexes that are needed to find a particular law. In other cases, print materials may be limited because of cost. The cost of legal materials for libraries has increased by an average of 9.86% every year between 2009 and 2017, while library budgets have largely remained flat or declined.<sup>51</sup> This is particularly problematic because these price increases—increases dictated solely by predatory publishers of legal information—are for materials that are the most helpful: finding aids, annotated statutes, and other explanatory materials that help incarcerated litigants navigate their legal information and attack their sentences, either directly or collaterally. The most helpful legal information is, by and large, published by companies which also hold the copyrights to that legal information.<sup>52</sup> And copyrights over the most helpful legal information do not just extend to print materials; they extend to online materials as well, which means that prisoners may not have meaningful access to the most helpful legal materials if they do not have access to electronic resources either.<sup>53</sup>

Prison libraries—the primary focus of *Bounds* and *Casey*—do not ensure access to online resources, whether copyright-protected or not.<sup>54</sup> The data surrounding prison libraries makes it appear as if those libraries are well-funded and provide access to a lot of information for inmates, but that data is extremely deceptive; prison libraries have largely been eliminated, so budget lines for “education” go to other programming, rather than to prison libraries themselves.<sup>55</sup> “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.”<sup>56</sup> While access to the Internet has changed for many incarcerated litigants in the United States, the access they are being granted today is not to legal materials but to email, books, or other applications deemed acceptable by both those running the prisons and the for-profit companies providing them with access.<sup>57</sup>

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51. Narda Tafuri, *Prices of U.S. and Foreign Published Materials*, in *THE LIBRARY AND BOOK TRADE ALMANAC 2017*, at 347, 352 (62d ed., 2017).

52. See Street & Hansen, *supra* note 4, at 206.

53. See *id.* at 219–21.

54. See generally Jonathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries*, 101 *GEO. L.J.* 1171, 1173 (2013) (discussing both historical and current issues facing prison law libraries and specifically noting that forty states provide some access to electronic legal research).

55. See Chase, *Neutralizing Access to Justice*, *supra* note 11, at 358–61.

56. Jessica Feerman, *Creative Prison Lawyering: From Silence to Democracy*, 11 *GEO J. ON 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)).

57. See Raheer & Fenster, *A Tale of Two Technologies*, *supra* note 5; Raheer, *The Wireless Prison*, *supra* note 14.

In addition, where inmates do have access to electronic legal information through LexisNexis- or Westlaw-provided platforms, that access is limited and heavily controlled.<sup>58</sup> Online legal research resources are purposefully designed to keep incarcerated litigants from engaging in “bad” behavior on the Internet, and the products may only be available at a kiosk with dial-up internet access or on a tablet controlled by prison guards.<sup>59</sup> The marketing materials for these prison-grade products aren’t marketed to incarcerated people at all, but to the guards who control the information; this is another indication that the access to legal materials given to prisoners is anything but free and open.<sup>60</sup>

Because the Internet is rarely viewed as a reasonable means for performing legal research for those in prison, it is not a stretch to think that further limiting prisoner access to legal materials will continue.<sup>61</sup> Pervasive budget cuts to the Government Publishing Office, the official publisher of case law, statutes, other sources of law, and libraries around the country continue to be a problem.<sup>62</sup> 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. There is precedent outside of *Bounds* and *Casey*—in Supreme Court cases that deal with things like taxes and the commerce clause—that have potential to open the door for inmates to have meaningful access to electronic legal research, but the odds of the Supreme Court taking up the case and applying new (and arguably unrelated) precedent to meet the due process rights of incarcerated litigants are nearly zero.<sup>63</sup>

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58. See LAMDAN, *supra* note 3, at 83–85.

59. See *id.*

60. See, e.g., *Inmate Law Library Solutions*, LEXISNEXIS, <https://www.lexisnexis.com/en-us/corrections/default.page> [<https://perma.cc/74YC-KZ92>].

61. See Dan Tynan, *Online Behind Bars: If Internet Access is a Human Right, Should Prisoners Have It?*, GUARDIAN (Oct. 3, 2016), <https://www.theguardian.com/us-news/2016/oct/03/prison-internet-access-tablets-edovo-jpay> [<https://perma.cc/9FDE-3QSJ>]. While this article does not explicitly discuss access to the internet as a means of performing legal research, it does discuss the ongoing conversation regarding internet access for incarcerated persons and the reasons why prisons are reticent to provide internet access for any purpose, let alone legal research. See *id.*

62. See Raheer & Fenster, *A Tale of Two Technologies*, *supra* note 5; see also Michaels, *supra* note 14.

63. The ability for the Supreme Court to use *South Dakota v. Wayfair, Inc.* to expand prisoners’ access to electronic legal research, for example, is discussed in depth in Chase, *Exploiting Prisoners*, *supra* note 11.

C. *A Potential—and Flawed—Solution*

In recent years, the Supreme Court has suggested that certain legal precedents should be revisited in light of technological advances.<sup>64</sup> When *Bounds* and *Casey* were decided, the Supreme Court would have been unable to imagine a world in which incarcerated litigants would need access to electronic resources—let alone the Internet—to perform legal research; the time has come for the Supreme Court to revisit these opinions. Despite the lack of availability of electronic alternatives for legal resources, subsequent decisions of the Supreme Court effectively limited the access to the courts guaranteed by the Due Process Clause of the Constitution.<sup>65</sup> 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.<sup>66</sup> In *South Dakota v. Wayfair, Inc.*, the state of South Dakota had taxed out-of-state sellers of “tangible personal property” with no physical presence in the state at the same rate at which they taxed those sellers who do have a physical presence.<sup>67</sup> South Dakota’s law taxing businesses without a physical presence in the state (passed by the state legislature in opposition to Supreme Court precedent) was put in place because internet sales were increasingly affecting sales tax collections in the state.<sup>68</sup> 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.<sup>69</sup>

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64. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018).

65. See *Lewis v. Casey*, 518 U.S. 343, 355 (1996); see also Chase, *Neutralizing Access to Justice*, *supra* note 11, at 361–62 (introducing the idea that the movement of resources from print to online is especially problematic given that incarcerated litigants do not have reliable access to the internet). Because the Supreme Court used *Casey* to limit the rights granted in *Bounds*, it effectively limited access to the courts via access to information as guaranteed by the Due Process Clause of the Constitution. See Chase, *Exploiting Prisoners*, *supra* note 11, at 135.

66. See *Wayfair*, 138 S. Ct. at 2097.

67. *Id.* at 2092–93.

68. *Id.* at 2088.

69. *Id.* at 2097–99. For background, a review of *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill.*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), is useful. In *Bellas Hess*, the Supreme Court ruled 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. 386 U.S. at 758–60. Nearly thirty years later, in *Quill*, the Supreme Court evaluated *Bellas Hess* again to determine whether North Dakota’s imposition of use taxes upon *Quill*’s merchandise violated the due process or commerce clauses. *Quill*, 504 U.S. at 301–02. The Court noted that, while subsequent cases allowed for more flexibility than was initially allowable under *Bellas Hess*, the precedent shouldn’t be thrown out entirely. *Id.* at 314–17. The Court determined 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. *Id.* at 318–19.

In deciding *Wayfair*, the Supreme Court not only directly discussed the changes in technology since *Bounds* and *Casey* were decided<sup>70</sup> but also explicitly stated that “[t]he Internet’s prevalence and power have changed the dynamics of the national economy”<sup>71</sup> such that a “substantial nexus” to a state is the logical next step from physical presence, which they found to be outdated.<sup>72</sup> In coming to that conclusion, the Court explained that this new nexus requirement was a reaction to the “realities of the interstate marketplace,” where the world’s largest retailer could be a remote, out-of-state internet platform like Amazon.<sup>73</sup> 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.”<sup>74</sup> In fact, Justice Kennedy 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.”<sup>75</sup>

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 economy” at the time of *Wayfair*, so, too, has it changed access to legal information for attorneys and litigants alike.<sup>76</sup>

When the Supreme Court reversed its prior precedent in *Wayfair*, the message was clear; the Internet changed everything.<sup>77</sup> Given the similarly significant changes in use of the Internet and legal research technology since *Bounds* and *Casey* were decided, a similar reversal is warranted, and fairness dictates a reversal of the damaging precedent which held that inmates could attack their sentences without meaningful access to legal resources.<sup>78</sup> The tools needed by prisoners “to attack their sentences, directly or collaterally” have moved online.<sup>79</sup> The “[i]mpairment of any other litigating capacity” the Court in *Casey* deemed “incidental (and perfectly constitutional)”<sup>80</sup> has

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70. *Bounds* and *Casey* were decided in the 1970s and 1990s, respectively.

71. *Wayfair*, 138 S. Ct. at 2097.

72. *Id.* at 2095.

73. *Id.* at 2097.

74. *Id.*

75. *Id.* at 2094.

76. *Id.* at 2086. Some business law professors have said that *South Dakota v. Wayfair, Inc.* is an example of Supreme Court “case baiting,” paving the way for jurisdictions to create conflict by enacting laws in direct opposition to federal law in the hopes that the Supreme Court will grant certiorari and rule in their favor. Kathryn Kisska-Schulze et al., *Case Baiting*, 57 AM. BUS. L.J. 321, 321 (2020).

77. *See 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).

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

79. *Id.*

80. *Id.*

extended beyond what was imagined by the litigants in *Bounds*, *Casey*, and by petitioners since, when they requested more robust law libraries in their correctional institutions.

The parameters of the decisions in *Bounds* and *Casey* are nothing like the decision in *Wayfair*,<sup>81</sup> and today's Supreme Court would likely refuse to hear a case about access to information and due process rights if an incarcerated litigant based her petition on *Wayfair* because the issues are, on their face, completely unrelated. But, while 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, the time may also have come to completely rethink the way the law is written and published and to apply the free law movements gaining traction outside of prison walls to those behind bars who would benefit most from free and open access not just to the law, but to its secondary sources as well.

### III. ACCESS TO THE LAW OUTSIDE PRISON WALLS

For those seeking legal research on the “outside,” there are options available that range from high-tech, to low-tech, to no-tech. An average citizen with reasonable internet access can search legal resources online and access cases, federal statutes, and some state statutes without too much trouble.<sup>82</sup> Interested persons with access to a local public library may find additional “self-help” legal materials or may find a local law library with access to more robust resources.<sup>83</sup> Some law libraries may provide public

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81. One envisions a reader singing, “one of these things is not like the other.” Sesame Street's Bob & Sesame Street's Susan, *One of These Things, on SESAME STREET 1 ORIGINAL CAST RECORD, VOL. 1* (Children's Television Workshop 1970).

82. Free websites for conducting legal research exist and are increasingly useful, particularly when used together. Google Scholar is excellent for research of modern case law, going back to the 1950s, and GovInfo provides access to U.S. government documents ranging from the United States Code to Presidential Documents. GOOGLE SCHOLAR, [www.scholar.google.com](http://www.scholar.google.com) [<https://perma.cc/AW2V-7ADX>]; GOVINFO, [govinfo.gov](http://govinfo.gov) [<https://perma.cc/5554-JWJF>]. States provide free access to their laws with varying degrees of user-friendliness. Cornell's Legal Information Institute has been providing access to the law for decades, and includes state and federal law, regulations, executive orders, and even a legal encyclopedia. And with some basic searching skills, a user can access some law with a simple web search (though they may not know the accuracy of the results they return). The options for free access to the law are many, though their usefulness may vary greatly, particularly depending upon the researcher.

83. For law libraries that can afford it, their stacks are typically lined not only with primary source material, but with secondary sources that provide a more user-friendly entry for researchers who are new to legal information and the way it is organized and used. A legal encyclopedia like *American Jurisprudence*, for instance, may help a novice researcher understand negligence in a way that diving directly into cases might not. Similarly, a handbook

patrons with access to public access terminals for things like LexisNexis or Westlaw, which expands access to legal materials even more.<sup>84</sup> But why should users need access to expensive databases to perform robust legal research? In a country where we need to read and understand the law—law which is solidly in the public domain by virtue of being published by the government—why do we receive the best access through exorbitantly-priced platforms?<sup>85</sup> The answer, of course, is that users *should not* need to pay unnecessarily for legal information, and several movements are underway to make legal materials in the United States more widely available and easier to understand.

#### A. *Movements to Free the Law*

The “free law” movement is not new, though its value is almost exclusively for those who are not incarcerated. Cornell’s Legal Information Institute was founded in 1992, and quickly became the first online resource to offer opinions of the Supreme Court (before the Supreme Court had a website) and the first to publish an online edition of the United States Code.<sup>86</sup> Today, there are countless groups advocating for free access to the law, as well as a group—the Free Access to Law Movement—devoted to making free access to the law a reality around the world.<sup>87</sup> Central to the focus of this movement

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about criminal practice and procedure can help someone navigating the criminal justice system alongside a family member understand the arduous process ahead of them and the standards of review or avenues to achieve particular outcomes.

84. See *Open to the Public: How Law Libraries are Serving Self-Represented Litigants Across the Country*, SELF-REPRESENTED LITIG. NETWORK (July 2019), <https://srln.maps.arcgis.com/apps/MapSeries/index.html?appid=5983e5775fbc4dca9443457ad12559ca> [https://perma.cc/VRE6-V9XK]; see also *Survey: SRLN Library Working Group National Self-Help in Libraries Survey (SRLN 2013)*, SELF-REPRESENTED LITIG. NETWORK (June 3, 2022), <https://www.srln.org/node/551> [https://perma.cc/FMR6-WPRE]; AM. ASS’N OF L. LIBRS., LAW LIBRARIES AND ACCESS TO JUSTICE: A REPORT OF THE AMERICAN ASSOCIATION OF LAW LIBRARIES SPECIAL COMMITTEE ON ACCESS TO JUSTICE 18 (July 2014). See generally J. PAUL LOMIO & ERIKA V. WAYNE, LAW LIBRARIANS AND LEXISNEXIS VS. WESTLAW: SURVEY RESULTS (rev. ed. 2008) (describing individual librarians’ and law libraries’ provisions of access to paid databases for all patron types).

85. Generally speaking, works published by the government in the course of the government conducting itself are not subject to copyright protections because they are designated “government edicts” that belong in the hands of the people. Brief of Professors Shyamkrishna Balganes and Peter S. Menell as Amici Curiae in Support of Respondent at 1–2, *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020) (No. 18-1150) (describing the government edicts doctrine and the role that copyrightable authorship plays in official announcements of law).

86. Legal Info. Inst., *Who We Are*, CORNELL L. SCH., [https://www.law.cornell.edu/lii/about/who\\_we\\_are](https://www.law.cornell.edu/lii/about/who_we_are) [https://perma.cc/ET6G-582M].

87. *The Free Access to Law Movement*, FREE ACCESS TO L. MOVEMENT, <http://www.fatlm.org/> [https://perma.cc/8YMA-XZMM].

is the idea that maximizing access to legal information promotes justice and the rule of law and that organizations have the right to publish legal information so that it can be accessible.<sup>88</sup> Declarations of the need for the law to be accessible by all are one thing, but putting those declarations into practice is quite another, particularly in the United States where legal research providers have been profiting from producing expensive versions of legal materials for decades.<sup>89</sup> The problems with these free law movements are twofold. First, putting materials online is only helpful to those who have consistent and open access to the Internet—incarcerated litigants are certainly not that. Second, primary source legal information is (or should be) in the public domain and accessible by users for free, and in order for that to happen, other groups have had to take matters into their own hands. These efforts take considerable time and knowledge of not only the law but also of the technology needed to digitize the materials and put them online; however, some groups have had success with things like judicial opinions, dockets, and statutes.

### 1. *Judicial Opinions and the Caselaw Access Project*

It has long been accepted that judicial opinions should be available to the public and not subject to copyright protection because judges, acting in their official roles, cannot be the authors of those opinions.<sup>90</sup> Accordingly, the other things that often come with published judicial opinions—syllabi, headnotes, and statements of the case—were also found to be free of copyright protection and can, therefore, be copied, published, and distributed freely, without interference from traditional and often predatory legal publishers.<sup>91</sup> While the Supreme Court opinion about these nonauthoritative parts of a case being free from copyright was drafted in 1888, those involved in the legal system often default to using expensive paid legal resources to perform research anyway.<sup>92</sup> Because of that, LexisNexis and Westlaw cornered the market on publishing legal opinions that include syllabi and statements of the case and coupled them with their own copyright-protected content, making the paywalled versions of these court opinions seem more important than the original opinions themselves. Because the duopoly consumed legal publishing, there was a hole in the market for free and open publication of judicial opinions.

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88. *Declaration on Free Access to Law*, FREE ACCESS TO L. MOVEMENT (2012), <http://www.fatlm.org/declaration/> [<https://perma.cc/3R9G-HXPA>].

89. For information on the history of legal publication in the United States, see Street & Hansen, *supra* note 4, at 216–22.

90. *See, e.g.*, *Banks v. Manchester*, 128 U.S. 244, 253 (1888).

91. *See id.*

92. *See* Street & Hansen, *supra* note 4, at 219.

In an effort to overcome some of the technology and cost-related burdens associated with accessing case law, in 2013, Harvard's Library Innovation Lab created the Caselaw Access Project.<sup>93</sup> The initiative found Harvard digitizing over forty million pages of court decisions in collaboration with Ravel Law, a now-defunct startup acquired by LexisNexis through its predatory practice of acquiring low-cost, open access electronic legal resources and turning them into datasets representing over 360 years of legal history.<sup>94</sup> When the Caselaw Access Project started, the director of the Library Innovation Lab at Harvard noted publicly that projects to publish the law should be unnecessary, “[b]ut many states are still putting stuff in books first.”<sup>95</sup> The “book-first” issue is an ever-present problem in legal publishing, as jurisdictions that publish in books first retain problematic copyrights to those volumes, thereby limiting their use.<sup>96</sup> While the digitization process has published some of those print-first cases—with headnotes redacted—the full scope of American case law is not yet available on the Caselaw Access Project website. Only when jurisdictions transition from print-first publishing to digital-first publishing will the Caselaw Access Project be able to publish the full scope of judicial opinions without the fear of copyright-related takedown notices from the likes of LexisNexis or Westlaw.<sup>97</sup> But the publication of *some* judicial opinions in a way that is more expansive than traditional publishing has been seen as a welcome change by the legal community.<sup>98</sup>

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93. *Project: Caselaw Access Project*, LIBR. INNOVATION LAB, <https://lil.law.harvard.edu/projects/caselaw-access-project/> [<https://perma.cc/NY4N-D89T>].

94. *Id.* Ravel Law is actually not defunct, but it was purchased by Relx/LexisNexis in a move that scooped up more of the market and kept innovation from reaching legal publishing in a way that is meaningful for individuals who can't pay for access to exorbitantly priced legal research platforms. For a summary of Ravel Law's acquisition by LexisNexis, see *LexisNexis Acquires Ravel Law*, BLOOMBERG L. (June 8, 2017, 12:01 AM), <https://news.bloomberglaw.com/business-and-practice/lexisnexis-acquires-ravel-law> [<https://perma.cc/G2PF-S8GL>].

95. Jason Tashea, *Caselaw Access Project Gives Free Access to 360 Years of American Court Cases*, ABA J. (Oct. 30, 2018, 7:10 AM), [https://www.abajournal.com/news/article/caselaw\\_access\\_project\\_gives\\_free\\_access\\_to\\_360\\_years\\_of\\_american\\_court\\_cas](https://www.abajournal.com/news/article/caselaw_access_project_gives_free_access_to_360_years_of_american_court_cas) [<https://perma.cc/TCL5-V3JE>].

96. *About*, CASELAW ACCESS PROJECT: HARV. L. SCH., <https://case.law/about/> [<https://perma.cc/2A6X-AKE7>].

97. *Id.* See Street & Hansen, *supra* note 4, at 221 (discussing commercial publishers' propensity to control the legal research landscape by using copyright law, contract terms, and the Computer Fraud and Abuse Act to litigate disputes over ownership of the law).

98. See, e.g., Mike Masnick, *Harvard Opens Up Its Massive Caselaw Access Project*, TECHDIRT (Oct. 31, 2018, 1:36 PM), <https://www.techdirt.com/2018/10/31/harvard-opens-up-massive-caselaw-access-project> [<https://perma.cc/R3V2-KNJZ>].

## 2. *Dockets, PACER, and RECAP*

A step behind the Caselaw Access Project is the movement to free PACER. PACER—Public Access to Court Electronic Records—is appropriately named because the access to court records is certainly electronic, and technically open to the public, but not without great aggravation and cost.<sup>99</sup> PACER has been in operation for more than thirty years and is supposed to provide electronic access to virtually all documents filed since 1999 by parties to litigation or judges in all federal appellate, district, and bankruptcy courts.<sup>100</sup> In addition to being expensive, PACER's user interface is so badly designed it verges on impossible to use, largely because the document-level search functionality is nearly nonexistent.<sup>101</sup> Documents are sometimes removed or replaced in PACER without notification to the user, so it is rare that a researcher would know whether or not they are getting a true picture of a case.<sup>102</sup> Users also have to register for PACER, and any researcher seeking to retrieve electronic court records anonymously may not do so because of the design interface.<sup>103</sup> Couple the lack of privacy with the requirement that users pay to retrieve court documents, and it is clear that “public access” comes with a hefty price tag for most users.

In recent years, a spotlight has been shone on just how problematic the current iteration of PACER is, and Congress has sought to remedy that issue by introducing several bills which would truly “free” the law.<sup>104</sup> In addition to overhauling the user interface of PACER, the Open Courts Act(s) would initially charge high-volume users (those who access more than \$25,000 in dockets and documents quarterly) to help pay for the overhaul, while any other user would have truly free access to PACER.<sup>105</sup> During floor debates, members of Congress noted that the 2021 version of the bill should modernize the court record system, so it will cost less over time, be easier to maintain,

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99. Jason Kelley, *The Time Has Come to End the PACER Paywall*, ELEC. FRONTIER FOUND. (Sept. 20, 2020), <https://www.eff.org/deeplinks/2020/09/end-pacer-paywall> [<https://perma.cc/DU6F-YDWY>].

100. *Free Access to Court Records: PACER Bill Passes House Despite Objection of Judiciary*, AM. BAR ASS'N (Dec. 20, 2020) [hereinafter *Free Access to Court Records*], [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/publications/washingtonletter/dec-2020-wl/pacer-w11220/](https://www.americanbar.org/advocacy/governmental_legislative_work/publications/washingtonletter/dec-2020-wl/pacer-w11220/) [<https://perma.cc/Q296-ZM6M>].

101. See *Everything Wrong with Pacer*, ADERANT (Mar. 2, 2016), <https://www.alncorp.com/everything-wrong-with-pacer/> [<https://perma.cc/SZB5-8XLV>].

102. See *id.*

103. See *id.*

104. See, e.g., Open Courts Act of 2020, S. 4988, 116th Cong. (2020) (proposing a single electronic system for public court filings that would be free to most citizens); see also Open Courts Act of 2021, S. 2614, 117th Cong. (2021).

105. See S. 4988.

and be more secure, thereby increasing efficiency and bringing transparency to the judicial process.<sup>106</sup> But while these bills gained significant bipartisan traction in Congress, they faced significant pushback from the judiciary.<sup>107</sup> Secretary of the Judicial Conference of the United States James Duff stated that the bill “would result in massive filing fee increases for litigants, severely impairing their access to justice—the core tenet of our judicial system—while providing a commercial windfall to large commercial users (not litigants) who currently fund 87 percent of the costs of PACER,” before going on to argue that “before mandating a massive, untested, disruptive, and costly overhaul” of PACER, a study should be conducted “to assess the feasibility, scope, costs, and impact of the undertaking.”<sup>108</sup>

The head of the Administrative Office of the U.S. Courts, Judge Mauskopf, is also adamantly opposed to opening PACER and freeing the law. She has stated that not only is the Open Courts Act “budgetarily infeasible,” but it would undercut the efforts of the judiciary to modernize the system, putting litigants’ access to justice “at serious risk . . . but also potentially disrupt[ing] the funding needed for modernizing, operating, and maintaining the very systems the bill seeks to improve.”<sup>109</sup> Judge Mauskopf’s actual reason for rejecting the bill is likely to be financial; in 2021, the judiciary estimated that it would take in \$142 million in fees through access to PACER.<sup>110</sup> In June of 2022, the Judicial Conference of the United States released notes from its March 15, 2022 meeting in which its Committee on Court Administration and Case Management considered PACER feedback related to costs and endorsed making all PACER searches free of charge “for all non-commercial users of any future new modernized case management, electronic filings, and public access systems implemented by the judiciary,”

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106. *Free Access to Court Records*, *supra* note 100. The full quote, from Representative Hank Armstrong of Georgia, reads: “The bill will consolidate the judiciary’s electronic court records system, establish certain data standards, and require the records system to follow those standards. These improvements to the case management system will increase the efficiency and improve the availability of court records to the American public . . . [and] will require that Federal court records [be] free and accessible . . . bring[ing] transparency to our judicial process.” 166 CONG. REC. H7018 (2020).

107. Andrew Strickler, *Fed. Judiciary Asks Lawmakers to Pause ‘Free PACER’ Bills*, LAW360 (Jan. 14, 2022, 3:07 PM), <https://www.law360.com/articles/1455522> [<https://perma.cc/94SC-JQZA>].

108. *Free Access to Court Records*, *supra* note 100.

109. Strickler, *supra* note 107.

110. Parker Higgins, *Victory on the Horizon in the “Free PACER” Fight*, FREEDOM OF THE PRESS FOUND. (Jan. 24, 2022), <https://freedom.press/news/victory-on-the-horizon-in-the-free-pacer-fight/> [<https://perma.cc/S8G8-SE9Y>].

but they noted that doing so will take time and development of PACER's current systems.<sup>111</sup>

Timing aside, following the money is always wise when it comes to analyzing access to information, access to the courts, and access to justice. Even though PACER is entitled to charge fees for use by statute, those fees are to be imposed “‘only to the extent necessary,’ and must be ‘reasonable.’”<sup>112</sup> “‘But with [PACER] bringing in about \$142 million annually in revenue, it seems these fees are neither ‘necessary’ nor ‘reasonable.’”<sup>113</sup> As is normally the case when governments are slow to realize solutions to providing people access to things they need, individuals have found a way to expand that access. Aaron Swartz, an online activist who founded SecureDrop<sup>114</sup> as a way for whistleblowers to securely and anonymously submit documents and tips to news organizations, went on to create RECAP. RECAP, part of the Free Law Project, is an online archive of retrieved PACER documents.<sup>115</sup> Once RECAP is installed on your browser, every docket or PDF a PACER user purchases is added to the RECAP archive and is made freely available to other RECAP users directly inside PACER.<sup>116</sup>

In the face of a judiciary that is actively trying to obstruct free access to the law, the importance of grassroots initiatives in the Free Law Movement like Harvard's Caselaw Access Project and RECAP can't be overstated. As Charles Duhigg, a prominent journalist, has noted:

Recap is an invaluable resource for journalists, activists—and really anyone who cares about law and justice in the United States. The work of the Free Law Project puts our courts within reach for everyone, and reinforces a pillar of democracy that is often overlooked. Everyone should support—and contribute—to this effort.<sup>117</sup>

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111. JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12 (2022).

112. Natalie Seales, *Congress Should End Restrictions to Public Records by Passing the Free PACER Bill*, NEWS MEDIA ALL. (Mar. 14, 2022), <https://www.newsmediaalliance.org/congress-should-end-restrictions-to-public-records-by-passing-the-free-pacer-bill/> [<https://perma.cc/68VT-3WRM>].

113. *Id.*

114. *See About Secure Drop*, SECURE DROP, <https://securedrop.org/faq/about-securedrop/> [<https://perma.cc/744F-YLW6>].

115. *RECAP Project—Turning PACER Around Since 2009*, FREE LAW PROJECT, <https://free.law/recap> [<https://perma.cc/U5H2-9UHY>].

116. *Id.*

117. *Id.* (quoting Charles Duhigg, Pulitzer Prize winning journalist for the New York Times).

But often these grassroots efforts and individual attempts to free the law are thwarted by aggressive copyright holders—including state governments—whose interest in cashing checks is seemingly much higher than their interest in giving citizens access to the laws they need to understand in order to function in modern society.

### 3. *Statutes and Georgia v. Public.Resource.Org, Inc.*

The publication of state and federal statutes is another area of access to the law that has come under some scrutiny in recent years.<sup>118</sup> As with case law, statutes at the state and federal level were traditionally accessed in print, and researchers hoping to make use of the law relied on things like indexes and tables of contents to find relevant sections.<sup>119</sup> The shift from print to online access has been beneficial to those hoping to access state and federal statutes, and the federal government, as well as all fifty state legislatures and the District of Columbia, provides free electronic access to the text of its statutory codes.<sup>120</sup> But “[f]or an online statutory code to be accessible, the website needs to provide researchers with *structure* and *context* so they can understand and interpret their results.”<sup>121</sup>

The structure is, to some extent, provided by the organization of the law itself (provided the publication contains something akin to non-positive law).<sup>122</sup> But the problem with statutes, of course, is that they exist entirely without context, and they are often not easily understood by people without legal training.<sup>123</sup> A single statute read alone may be interpreted in drastically different ways by different researchers and interpreted in yet other ways by courts. This is one reason the judiciary exists—to provide context, explanation, and application of statutes—but it is also the reason why those involved in the legal system often turn to secondary sources like annotations in order to get the additional context needed to understand what they are

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118. Professor Sarah Lmdan describes the issues with publication of the laws in a succinct way: “[T]he challenge of maintaining current versions of the law online is so burdensome that governments often won’t vouch for the legal information they share. Official government websites can’t always guarantee that the laws they post on their webpages are up to date and correct.” LAMDAN, *supra* note 3, at 82.

119. Kathleen Darvil, *Increasing Access to Justice by Improving Usability of Statutory Code Websites* (forthcoming 2022).

120. *Id.*; see also Street & Hansen, *supra* note 4, at 208–09.

121. Darvil, *supra* note 119 (emphasis added).

122. “A non-positive law title contains numerous separately enacted statutes that have been editorially arranged into the title by the editors of the Code. The organization, structure, and designations in the non-positive law title differ from those of the incorporated statutes.” *Positive Law Codification*, U.S. CODE, [https://uscode.house.gov/codification/term\\_positive\\_law.htm](https://uscode.house.gov/codification/term_positive_law.htm) [<https://perma.cc/4LCX-JPLA>].

123. Julia Wentz, *Justice Requires Access to the Law*, 36 LOY. U. CHI. L.J. 641, 642 (2005).

reading. Statutory annotations are a popular tool for researchers well-versed in the law with access to paid legal research resources, but such annotations are typically subject to copyright because they are drafted by legal publishers and not by legislative bodies themselves. Because copyrights in annotations are typically held by publishers, they are often not available in books published by state or federal governments or on state or federal websites where those with internet access seek information about the law. And in some instances, states have tried to claim copyright over versions of their statutes when those statutes are published with annotations written by non-state corporations.<sup>124</sup> The state of Georgia is a particularly interesting case study in statutory publishing because, when the state fought hard to enforce the Copyright it held over its annotated statutes, a “copyright infringer” named Carl Malamud fought back . . . and won.

*B. Georgia v. Public.Resource.Org, Inc.*

In order to understand what happened between the state of Georgia and Carl Malamud, one must understand the history of the Copyright Act as it relates to documents drafted by the government—so-called government edicts.<sup>125</sup> The government edicts doctrine traces back to a series of three cases from the nineteenth century, *Wheaton*, *Banks*, and *Callaghan*.<sup>126</sup> In *Wheaton*, the Supreme Court’s third Reporter of Decisions sued the fourth, unsuccessfully asserting a copyright interest in the Supreme Court Justices’ opinions.<sup>127</sup> *Wheaton*, an individual reporter of Supreme Court decisions, was of the view that the opinions of the Court must have belonged to someone because they were more elaborate or original than laws or customs required, not to mention new and original.<sup>128</sup> *Wheaton* went on to argue that the Justices’ ownership in their opinions was gifted and assigned to him and that he should benefit as a copyright holder.<sup>129</sup> The Supreme Court rejected that argument, stating that “no reporter has . . . any copyright in the written

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124. See Street & Hansen, *supra* note 4, at 222–24.

125. The government edicts doctrine is the idea that “officials empowered to speak with the force of law cannot be the authors of . . . the works they create in the course of their official duties,” and, therefore, those works are not original authorship under the Copyright Act. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1504 (2020).

126. See *Wheaton v. Peters*, 33 U.S. 591, 668 (1834) (holding that opinions of the court cannot be copyrighted); *Banks v. Manchester*, 128 U.S. 244, 254 (1888) (holding that a state could not hold a copyright of a court reporter); *Callaghan v. Myers*, 128 U.S. 617, 647 (1888) (affirming that court documents belong in the public domain but not including portions of the books that organized or summarized those works).

127. *Wheaton*, 33 U.S. at 668.

128. *Id.* at 615.

129. *Id.* at 614–15.

opinions delivered by this court; and . . . judges thereof cannot confer on any reporter any such right.”<sup>130</sup>

Over fifty years later, an additional explanation was provided by the Supreme Court in *Banks*, which concerned whether *Wheaton*'s state-court counterpart in Ohio held a copyright in the judges' opinions as well as in non-binding, explanatory materials prepared by the same judges.<sup>131</sup> The United States Supreme Court concluded that he did not and explained that “the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case, and the syllabus, or head-note[ ] [cannot] be regarded as their author or their proprietor” for the purposes of Copyright.<sup>132</sup> The Court went on to state that judges cannot assert copyright in any work they perform in their capacity as judges.<sup>133</sup> Rather, “[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all.”<sup>134</sup>

Later that term, the Supreme Court decided *Callaghan* and introduced an important limiting principle to the government edicts doctrine decisions of *Wheaton* and *Banks*. The Court rejected the claim that an official reporter held a copyright interest in the judges' opinions but upheld the reporter's copyright interest in several explanatory materials that the reporter created himself: headnotes, syllabi, tables of contents, and the like.<sup>135</sup> Although these works mirrored the materials created by judges that were the heart of the issue in *Banks*, they came from an author who had no authority to speak with the force of law; because he was not a judge, he was free to copyright materials that were the result of his own intellectual labor.<sup>136</sup>

There were other government edicts cases decided between *Callaghan* and 2020 but none with the impact of the aforementioned case involving the State of Georgia and Carl Malamud's attempt to free the law by publishing state statutes in a single place online: *Georgia v. Public.Resource.Org, Inc.*<sup>137</sup>

At issue in that case was the Official Code of Georgia Annotated (OCGA), a compilation of Georgia statutes accompanied by various annotations that “generally include summaries of judicial decisions applying a given provision, summaries of any pertinent opinions of the state attorney general, and a list of related law review articles and similar reference materials.”<sup>138</sup> The OCGA is assembled by Georgia's Code Revision

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130. *Id.* at 668.

131. *Banks*, 128 U.S. at 249–50.

132. *Id.* at 253.

133. *Id.*

134. *Id.* (citing *Nash v. Lathrop*, 6 N.E. 559, 560 (Mass. 1886)).

135. *See Callaghan v. Myers*, 128 U.S. 617, 645 (1888).

136. *Id.* at 647.

137. *See generally Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020).

138. *Id.* at 1504.

Commission, a group established by the Georgia Legislature “tasked with consolidating disparate bills into a single Code for reenactment by the legislature and contracting with a third party to produce the annotations.”<sup>139</sup> Under Georgia’s constitution, the Commission’s role in compiling statutes and annotations is done “within the sphere of legislative authority.”<sup>140</sup> Indeed, the Code itself stated at the time that the annotations were official and that the statutes and annotations “shall be merged” together.<sup>141</sup>

Georgia attempted to claim a copyright in the annotations to the OCGA because the annotations are prepared by an “army of researchers” at LexisNexis pursuant to an agreement between LexisNexis and the State of Georgia, under which the state exercises pervasive supervisory control by way of the aforementioned Code Revision Commission.<sup>142</sup> In fact, the Georgia Supreme Court said the very work performed by the Commission in selecting a publisher to draft the annotations and in supervising the publication of the OCGA is all done within the sphere of legislative authority despite the annotations being drafted by LexisNexis.<sup>143</sup>

Carl Malamud’s Public.Resource.Org (PRO) is a non-profit organization seeking to improve public access to government records and primary legal research materials with a mission of improving public access to government records and primary legal materials.<sup>144</sup> In 2013, PRO purchased all 186 volumes of the print version of the OCGA and its supplements, scanned them, and uploaded them to its website to be freely accessible to the public.<sup>145</sup> Additionally, PRO distributed digital copies to Georgia legislators, other organizations, and websites.<sup>146</sup>

Several cease and desist letters were sent to PRO by the Code Revision Commission on the grounds that PRO’s online publication infringes on the State of Georgia’s copyright in their work.<sup>147</sup> After PRO refused to remove the OCGA from its website, the Commission sued PRO in 2015 in federal district court, seeking injunctive relief.<sup>148</sup> PRO openly acknowledged its publication and dissemination of the OCGA but asserted that the State of Georgia cannot hold an enforceable copyright in the OCGA.<sup>149</sup> The Northern District of Georgia sided with the Commission, finding that because the

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139. *Id.*

140. *Harrison Co. v. Code Revision Comm’n*, 260 S.E.2d 30, 33 (Ga. 1979).

141. GA. CODE ANN. § 1-1-1 (2019) (repealed 2021).

142. *Public.Resource.Org*, 140 S. Ct. at 1505.

143. *Harrison Co.*, 260 S.E.2d at 34.

144. *Public.Resource.Org*, 140 S. Ct. at 1505.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Code Revision Comm’n v. Public.Resource.Org, Inc.*, 244 F.Supp.3d 1350, 1354 (N.D. Ga. 2017), *rev’d* 906 F.3d 1229 (11th Cir. 2017).

149. *Id.* at 1355.

annotations of the OCGA lack the force of law, they are not public domain material.<sup>150</sup> On appeal, the U.S. Court of Appeals for the Eleventh Circuit reversed, finding that because of the way they are written and integrated into the “official” code, the annotations in the OCGA are attributable to the constructive authorship of the People and are thus intrinsically public domain material.<sup>151</sup> To reach this conclusion, the Eleventh Circuit examined the identity of the public officials who created the work, the authoritativeness of the work, and the process by which the work was created—finding that each of these markers supported the conclusion that the People were constructively the authors of the annotations.<sup>152</sup>

The United States Supreme Court granted certiorari and determined that, under the government edicts doctrine, the annotations appearing beneath the statutory provisions in the OCGA are ineligible for copyright protection.<sup>153</sup> The majority reviewed historical government edicts decisions which determined that judges cannot be authors of the works they produce in the course of their official duties, regardless of whether the material carries the force of law, and then held that the same reasoning applies to legislators and the works they produce.<sup>154</sup> The “animating principle,” amply supported by precedent, is that “no one can own the law.”<sup>155</sup>

In making its determination, the Court first considered whether the annotations were created by legislators. Although the annotations were prepared by LexisNexis, the agreement between LexisNexis and Georgia’s Code Revision Commission lists the Commission as the sole “author” of the work. Because of the way it was created, received funding and staffing, and operated, the Commission was classified as an “arm” of the Georgia Legislature with “legislative authority” that includes “preparing and publishing the annotations.”<sup>156</sup> This link between the private party (LexisNexis) and Georgia’s Commission was bolstered by the fact that the Commission brought this lawsuit “on behalf of and for the benefit of” the Georgia Legislature and the State of Georgia.<sup>157</sup>

Then, the Court considered whether the annotations were created in the course of legislative duties. Although the annotations were not enacted into law through bicameralism and presentment, the Court cited a decision by the

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150. *Id.* at 1356.

151. *Code Revision Comm’n v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1254–55 (11th Cir. 2018).

152. *Id.* at 1232.

153. *Georgia v. Public Resource.Org, Inc.*, 140 S. Ct. 1498, 1504 (2020).

154. *Id.*

155. *Id.* at 1507.

156. *Id.* at 1508.

157. *Id.*

Georgia Supreme Court holding that the preparation of the annotations under Georgia law constitutes an act of “legislative authority.”<sup>158</sup>

Georgia, of course, argued to the contrary, raising arguments the Court found unpersuasive. First, the Court noted that § 101 of the Copyright Act, which lists “annotations” among the kinds of works eligible for copyright protection, refers only to annotations that represent an original work of authorship, which the annotations cannot be when legislators (in this case, the Commission) are the authors.<sup>159</sup> Second, the fact that the Copyright Act excludes from copyright protection works by federal officials but does not mention state officials does not lead to the negative inference that state officials must be eligible to be authors.<sup>160</sup> Neither the Compendium of U.S. Copyright Office Practices, a non-binding administrative manual, nor the overall purpose of the Copyright Act supported Georgia’s position.<sup>161</sup>

The Court pointedly noted that, if it adopted Georgia’s position and allowed “everything short of statutes and opinions” to be copyrightable, then “States would be free to offer a whole range of premium legal works for those who can afford the extra benefit.”<sup>162</sup> That outcome would force many people “to think twice before using official legal works that illuminate the law we are all presumed to know and understand.”<sup>163</sup>

In highlighting the potential problems with permitting states to copyright not only their statutes but also any related “merged” annotations, the United States Supreme Court set the stage for the possibility of a new statutory publishing scheme, one in which states provide *more* access to the law that people need to move about as citizens of the United States and within individual states. The potential for states (and even the federal government) to rethink the way they publish legal materials, so the likelihood of a Caligula-esque future is even less likely, lies in Georgia’s statutory drafting and codification procedures, which can easily be adopted by other states.<sup>164</sup>

#### IV. REWRITING AND PUBLISHING THE LAW, GEORGIA-STYLE

A suggestion to expand the scope of the *Georgia v. Public.Resource.Org, Inc.* opinion by requiring all states and jurisdictions to provide more access to

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158. *Id.* (citing *Georgia v. Harrison Co.*, 260 S.E.2d 30, 34 (Ga. 1979)).

159. *Id.* at 1509.

160. *Id.* at 1510.

161. *Id.* at 1511.

162. *Id.* at 1512–13.

163. *Id.* at 1513.

164. This Article focuses solely on state statutory publication because the framework presented in the publication of the OCGA is at the state level. This process could easily be adopted at the federal level, if the federal government were truly interested in expanding access to its own legal information.

legal information is hardly novel; 119 law students, 54 solo and small-firm practitioners, and 21 legal educators filed an amicus brief in support of Carl Malamud and PRO in 2019.<sup>165</sup> But their argument for expanding the scope of *PublicResource.Org* was that *students* should not have to rely on predatory publishers in order to access the law, nor should *solo or small firms* who rely heavily on free and low cost resources—resources that are limited in their ability to access copyrighted information published by the likes of LexisNexis.<sup>166</sup> As is often the case, the rights and needs of incarcerated litigants to access legal information were not mentioned, or even alluded to. These students, attorneys, and law professors rightly pointed out in their amici brief filed with the Court that “[m]eaningful access to the law does not merely mean the ability to view through a single, limited, government-chosen service.”<sup>167</sup> They went on to add the particularly salient point, a point repeated here, that “making the law ‘available’ for viewing through a single vendor is . . . inadequate.”<sup>168</sup> “All parties . . . must be free to perform their own analysis of the law and offer it to the public in new, innovative ways, without paying gatekeepers for the right to something that is and should be owned by the public.”<sup>169</sup>

But these salient arguments by student and attorney amici fall short of recommending an approach that can be taken by other jurisdictions to correct this problem. Edicts of government should certainly be expanded in all cases where the government attempts to claim copyright over statutes themselves, but in order to ensure a deep and meaningful understanding of the law, perhaps states and the federal government should be *required* to draft annotations or hire a third party to produce those annotations. Perhaps states should then be *required* to provide those annotations to the public in a meaningful way, free from copyright claims and restrictions that make the law inaccessible and largely controlled by predatory publishers.

#### A. *The History of the OCGA*

The history of the OCGA and the methods by which it is currently published are illustrative of approaches that other jurisdictions can take to ensure access to not only the law itself, but also to annotations which will help citizens understand the law. During the Great Depression, the Harrison Company volunteered to annotate and codify Georgia’s laws for the General

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165. Brief of Amici Curiae et al. in Support of Respondent at 1–2, *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020) (No. 18–1150).

166. *Id.* at 3–6.

167. *Id.* at 6.

168. *Id.* at 6–7.

169. *Id.* at 7.

Assembly.<sup>170</sup> During the same year in which the United States Supreme Court decided *Bounds*, Georgia's legislators and legislative counsel decided to modernize the code and shorten the time it took to draft bills by organizing and centralizing the laws of the state.<sup>171</sup> For the next year, a Code Revision Study Committee was created, and it determined that the Commission would need to be the driving force to plan the logistics to undertake such a massive overhaul of the publication of Georgia law.<sup>172</sup> In a resolution laid before Georgia's House of Representatives, the Commission was given the authority to "formulate . . . all the details associated with the project" and partner with a publisher for execution.<sup>173</sup> In an interview, former representative from the Georgia House of Representatives Larry Walker indicated that the Commission discussed creating an annotated or unannotated version of the code but ultimately decided that they needed "to have some annotations to find how to apply the law to your case."<sup>174</sup>

It is worth noting, again, that these discussions occurred prior to the invention of the Internet. Citizens who needed access to Georgia's laws were certainly being considered by those debating the adoption of a new publishing scheme, and the legislature determined that they "wanted control over the annotations to ensure that the explanations of the law reflected what the General Assembly, as the entity that had the constitutional authority to enact the law, actually meant."<sup>175</sup> The goal in producing the OCGA was to ensure citizens had access to the law *from the entity that enacted it*, along with the explanations from that entity, to ensure all citizens could read and understand the laws that applied to them—the opposite of Caligula's Rome.<sup>176</sup>

In the end, the Commission chose to contract with the Michie Company; under their contract, the code would be considered a work made for hire, and Michie would sign the copyright in the annotated code over to the state of Georgia.<sup>177</sup> In exchange, Michie was given the exclusive right to sell the print version of the official code at a price set by the state.<sup>178</sup> As part of the work-made-for-hire contract between Michie and the state, Michie was required to annotate the "decisions of the appellate courts of Georgia plus applicable federal cases construing state law and federal and state constitutions"; this

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170. Elizabeth Holland, *Will You Have to Pay for the O.C.G.A.?: Copyrighting the Official Code of Georgia Annotated*, 26 J. INTELL. PROP. L. 99, 109–10 (2019).

171. *Id.* at 110.

172. *Id.*

173. *Id.* at 110–11.

174. *Id.* at 111.

175. *Id.* at 111–12.

176. *See id.* at 100, 115.

177. *See* Terry A. McKenzie, *The Making of a New Code: The Official Code of Georgia Annotated: Recodification in Georgia*, 18 GA. STATE BAR J. 102, 102, 106 (1982).

178. *Georgia v. Harrison Co.*, 548 F. Supp. 110, 112 (N.D. Ga. 1982).

annotation drafting was supported by legislators.<sup>179</sup> Litigation ensued between the Harrison Company and Georgia’s Commission, but the Court sided with the Commission and “established that the Commission had the authority to create an annotated code.”<sup>180</sup>

In 1981, the OCGA was adopted by a special session of Georgia’s General Assembly.<sup>181</sup> The language of the OCGA §1-1-1 then provided that:

The statutory portion of the codification of Georgia laws prepared by the Code Revision Commission and the Michie Company . . . is enacted and shall have the effect of statutes enacted by the General Assembly of Georgia. The statutory portion of such codification shall be merged with annotations, captions, catchlines, history lines, editorial notes, cross-references, indices, title and chapter analyses, and other materials . . . [and] shall be known and may be cited as the “Official Code of Georgia Annotated.”<sup>182</sup>

The process for publication of the OCGA involved several steps. First, “the Commission submit[ted] its proposed statutory text and accompanying annotations to the legislature for approval.”<sup>183</sup> From there, the legislature voted to do three things: “enact[ ]” the “statutory portion of the codification of Georgia laws”; “merge[ ]” the statutory portion “with the annotations”; and “publish[ ]” the final merged product “by authority of the state as the Official Code of Georgia Annotated.”<sup>184</sup>

The annotations of the current OCGA are no longer published by Michie but by Matthew Bender & Co., Inc., a division of LexisNexis, under a similarly-drafted work-for-hire agreement as originally existed between Michie and the state.<sup>185</sup> The work-for-hire agreement “between Lexis and the Commission state[d] that any copyright in the OCGA vests exclusively in ‘the State of Georgia,’ acting through the Commission.”<sup>186</sup> LexisNexis was then required to provide the unannotated text on a public website for free while the annotated merged version of the OCGA was behind a paywall.<sup>187</sup> This merger of the work of the Commission and LexisNexis was made clear in the OCGA itself through the aforementioned merger language contained in OCGA §1-1-

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179. *Id.*; Holland, *supra* note 170, at 112.

180. Holland, *supra* note 170, at 113.

181. J. OF THE H.R. OF THE STATE OF GA., Extraordinary Sess. at 8, 10, 17, 294 (1981).

182. GA. CODE ANN. § 1-1-1 (2019) (repealed 2021).

183. *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1504 (2020).

184. *Id.* at 1504–05 (quoting GA. CODE ANN. § 1-1-1).

185. *See id.* at 1505.

186. *Id.*

187. *See* Eric E. Johnson, *The Misadventure of Copyrighting State Law*, 107 KY. L.J. 593, 619–20 (2019).

1; that language was, of course, the crux of *Georgia v. Public.Resource.Org, Inc.* After the Supreme Court issued its opinion, the State of Georgia, not wanting to provide too much access to its laws or explanatory materials, promptly revised OCGA §1-1-1. The section, amended in 2021 and effective July 1, 2021, now reads:

The statutory portion of the codification of Georgia laws prepared by the Code Revision Commission and the Michie Company . . . is enacted and shall have the effect of statutes enacted by the General Assembly of Georgia. The statutory portion and numbering and arrangement of such codification, along with supplementary content determined to be useful to users, shall be published by the state and when so published shall be known and may be cited as the “Official Code of Georgia Annotated.”<sup>188</sup>

The removal of the merger language all but ensures that the choice to publish “supplementary content determined to be useful to users” written under Georgia’s contract with LexisNexis will be copyrightable because the state can now argue that those work-made-for-hire annotations are never merged with the OCGA.<sup>189</sup>

#### *B. Drafting and Merging the (Old) Georgia Way*

The State of Georgia undoubtedly went through a thorough and complicated process when it made the decision to contract with the Michie company and to merge the laws written by the Georgia General Assembly with the annotations drafted by Michie, resulting in a finalized OCGA. But the process is not so complicated that it is not replicable. In fact, there are twenty-five other jurisdictions that *also* claim copyrights on the annotations of their official codes, and they do so because of a process similar to the process employed by Georgia.<sup>190</sup> While the *Public.Resource.Org* decision likely felt like an insurmountable burden to the publication of statutes for these jurisdictions, it also put them in the best position to ensure equal access to statutes and annotations that will make the law understandable for citizens who are subject to the laws of those jurisdictions.

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188. GA. CODE ANN. § 1-1-1(a) (2021).

189. *Id.*

190. Elizabeth Selph, *Death of the Author: The Evolution and Expansion of the Government Edicts Doctrine in Copyright Law*, 72 MERCER L. REV. 657, 686 (2021). These jurisdictions include Alabama, Alaska, Arkansas, Idaho, Kansas, Mississippi, Nebraska, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, and the District of Columbia, all of which filed an amicus brief in support of the state of Georgia in *Georgia v. Public.Resource.Org., Inc. Id.*

The proposal for rewriting laws to expand access to justice is quite simple: states should be required to produce annotations that may prevent citizens from making an incorrect interpretation of the law; access to the law is only meaningful if it includes information found in annotations.<sup>191</sup> While things are trending that way, as with movements to free case law and access to dockets, the movement to free statutes and explanatory materials “seems to be driven by litigation and activist efforts, not by a shift in philosophy among state legislators and officials toward valuing open access to the law.”<sup>192</sup> Because the compilation of annotative materials takes a great deal of work, it makes sense for states to partner with legal publishers—who already draft annotations, whether the states have a role in those efforts or not—to ensure that those interpretive materials are made available with the text of the laws themselves and are considered official publications of the state.<sup>193</sup> States could contract with a publisher of their choosing, sign a work-for-hire agreement similar to the contract between Georgia and Michie or LexisNexis, and then designate a state body to review the annotations before presenting them with the text of the law to be passed into the state’s official version of its laws. This solution (which is admittedly potentially expensive) would not require the use of any additional state resources at the drafting phase. Further, provided the state chooses to contract with a reputable (if predatory) legal publisher in drafting the annotations, it all but ensures annotations that are helpful to the understanding of the laws themselves.

But what works for jurisdictions without the means to sign expensive work-for-hire contracts? In jurisdictions where signing multimillion-dollar drafting and publication contracts would present a financial burden, the legislative body could opt to draft annotations itself or create a commission or other legislative subgroup to perform the work. This, of course, would take considerable time, effort, energy, and understanding on the part of the jurisdiction’s legislatures and would require the appointment of individuals well-versed in not only the law but also in the way legal research is performed (and the purpose of annotations) in order to ensure that the purpose of the annotations is met through the drafting process. If this entity was a group enacted by and working on behalf of the state legislature, the merger with the laws of the state would present much less of a copyright issue than was presented in *Public.Resource.Org* simply because it is the state or jurisdiction

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191. *See id.* at 691; *see also* Debora Halbert, *Expanding the Public Domain after Georgia v. Public.Resource.Org., Inc.*, 61 IDEA 328, 328 (2021); Ann Bartow, *Open Access, Law, Knowledge, Copyrights, Dominance and Subordination*, 10 LEWIS & CLARK L. REV. 869, 869, 874 (2006).

192. Johnson, *supra* note 187, at 605.

193. If you look at LexisNexis, Westlaw, or Bloomberg’s databases of statutes, all of them contain annotations. It is when you look at the breakdown of the states that consider annotations “official” that things start to fall apart. *See* Street & Hansen, *supra* note 4, at 217.

acting on behalf of itself in providing this additional information that is rounding out the laws and the understanding thereof.

### C. *Expanding Access for All*

Creation of the annotations and merger of those annotations with the laws of a jurisdiction, itself, is only half the battle; citizens need to be able to *access* the law and the now-required annotations in order to read and understand the information presented. Predatory publishers in the private sector “will do what [they are] paid to do and no more than that.”<sup>194</sup> LexisNexis certainly did the bare minimum in providing online access to the OCGA, creating a version that was so difficult to use that one researcher described a transition from the free version of the OCGA to the paid version as “finally being allowed out of the cupboard under the stairs.”<sup>195</sup> This begs the question: What counts as access? Due process requires people to have notice of the law, and the power to shut off that access obviously implicates due process.<sup>196</sup> The variation of access on state websites is significant, with some states providing access to well-functioning and easy-to-search websites and others providing access to bare bones websites that are nearly impossible to search.<sup>197</sup>

For states with the means to enter into work-for-hire contracts with traditional publishers, an agreement similar to the one between Georgia and LexisNexis would serve the double purpose of supplying annotations that can be merged with the state’s laws and providing an online resource on which those annotated laws can be accessed for free.<sup>198</sup> In states that do not enter into those agreements and, instead, opt to draft both the laws and annotations within their own legislative system, the website provided should be required to include the text of the law, the history of the law, the required annotations

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194. *Government Objectives: Benefits and Risks of PPPs*, WORLD BANK GRP., <https://ppp.worldbank.org/public-private-partnership/overview/ppp-objectives> [<https://perma.cc/7DYU-778D>] (explaining the potential benefits of public-private partnerships (PPPs) as well as some of the potential problems).

195. Johnson, *supra* note 187, at 620. The issue with online provision of access to the OCGA did not come to be an issue until LexisNexis became the drafter of the annotations; Michie’s role in producing annotations involved pre-electronic access to legal materials.

196. *Id.* at 609–10.

197. Darvil, *supra* note 119. Darvil painstakingly evaluated the state legislative and statutory websites to expose problems with access and formatting, as well as discussed the general style and usability of each site. In so doing, she exposed a major problem in providing free and open access to a jurisdiction’s laws when the government is in charge: consistency. A researcher who is not adept at researching the law in the first place and then seeks to access a jurisdiction’s laws and related annotations will find wildly different experiences depending on where she is located and may or may not even be able to access the information she sets out to find.

198. See generally *Official Code of Georgia Annotated*, LEXISNEXIS, <http://www.lexisnexis.com/hottopics/gacode> [<https://perma.cc/F9HQ-4MKT>].

to explain and give context to the law, and a search engine sophisticated enough to search the full text of each of those pieces. The statutory website should be housed on a secure server and hosted in a way that will ensure equal and unwavering access to the state's laws and their annotations for any citizen who requires access.

*D. Arguments Against Expanded and Open Access to the Law*

Legislators are unlikely to view the limitations on access to legal information as anything more than a trivial problem for those who can't afford access, like incarcerated litigants, and not one worth addressing in a meaningful way.<sup>199</sup> They may argue that as long as there is *some* way for litigants to gain access, through an attorney or a public library, "then it doesn't matter that such access is cumbersome to the point of deterring all but the most doggedly persistent."<sup>200</sup> One illustration of the way in which legislators think about citizens' awareness of the law is to think about how states may approach educating citizens on a change to traffic laws:

Temporary signage near schools and a billboard campaign would get the word out [about a law change]. Word-of-mouth would take over from there. In later years, message about what the law requires would be perpetuated through drivers' education courses and parents teaching their kids to drive. Access to law books would be superfluous . . . [I]t seems fair to assume that the everyday law—the law ordinary citizens need to know to navigate society on a day-to-day basis—is already accessible to the public because it diffuses into common knowledge.<sup>201</sup>

While that argument may seem plausible for something like traffic laws, and while citizens who aren't incarcerated likely haven't been irreparably harmed by decades of poor or nonexistent access to the OCGA and its equivalent in other jurisdictions, there are other situations where this very basic scenario doesn't work.<sup>202</sup>

One can think of *Miller v. Alabama*, in which the United States Supreme Court ruled that mandatory sentences of life in prison without the possibility of parole for juvenile offenders violated the Eighth Amendment's prohibition

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199. See Chase, *Exploiting Prisoners*, *supra* note 11, at 106, 108 (examining incarcerated persons' ability to access information, the Internet, and justice through decades of precedent).

200. Johnson, *supra* note 187, at 622.

201. *Id.* at 623.

202. *Id.*

of cruel and unusual punishment.<sup>203</sup> Taking the previous illustration: “Temporary signage and a billboard campaign would get the word out about this law change, and word of mouth may take over. In later years, messaging about what laws require would be perpetuated through public defenders’ and private attorneys’ offices (certainly not the prosecutors’ offices).”<sup>204</sup> But in this rewritten illustration, the law citizens would read about on a billboard doesn’t apply to them. Juvenile offenders who are sentenced to life without the possibility of parole aren’t out on the streets reading billboards, and while a friend or family member may see the temporary sign or billboard and make a passing reference to it with their incarcerated loved one, the ability for that message to diffuse throughout the prison population would be minimal. If the attorneys involved in representing these individuals only hear about *Miller* through temporary signage or a billboard, they may be unable to access the case or the secondary sources needed to understand its implications and may have a difficult time representing their clients. In this example, “access” to a change in the law, or the material needed to understand the law, via a sign does not sufficiently relay the information; a better, more permanent solution is needed.

Coupled with the argument that one-time notifications like the temporary signs are enough to notify citizens about changes in the law are arguments that merging annotations with the law and making them freely available to all citizens would be too costly. These arguments are a direct slap in the face to our country’s most vulnerable. Comparing traffic laws and the ability to diffuse legal information through word of mouth in those instances to situations where people’s lives are on the line, all because it is expensive to disseminate information about the law, shows a complete and utter disregard for those who need free and open access to the law the most: our nation’s millions of incarcerated individuals. Jurisdictions that draft and publish laws should be required to do so with explanatory, contextual information contained in annotations and available in a free or low-cost way so that the information is accessible to our nation’s incarcerated individuals.

An additional argument against requiring states to provide incarcerated individuals with access to both laws and related annotations as laid out in this Article is that the easiest way to provide inmates access to this information is via the Internet, and, in the United States, we do not believe that internet access is a good or positive resource for those in prison; in fact, adding the option for inmates to perform legal research has been considered by some to be “merely a cosmetic improvement with no substantive impact.”<sup>205</sup> In the absence of advocating for incarcerated individuals to have unfettered access

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203. *Miller v. Alabama*, 567 U.S. 460, 489 (2012).

204. *See Johnson*, *supra* note 187, at 623.

205. *Abel*, *supra* note 54, at 1212.

to the Internet, it is reasonable to provide those individuals access to websites published by jurisdictions or the publishers with whom those jurisdictions contract to publish legislative materials and to ensure that those in prison have access to current information that isn't behind a paywall.<sup>206</sup> If the nation's incarcerated litigants can be provided basic access to the Internet and to the laws and annotations of the jurisdictions needed to directly or collaterally attack their sentences as required by Due Process, and that internet access can be provided at a speed that makes access to the Internet a reasonable means of access to that information, then inmates can have both access *and* contextual and explanatory information regarding the laws that they need.<sup>207</sup>

#### V. OUTCOMES AND HOPE FOR INCARCERATED LITIGANTS

For those who have access to the Internet and can reasonably find their ways to the laws that govern them, providing consistent access to legal information and the related contextual materials to incarcerated individuals may seem like a non-issue. An average citizen may learn about a change to local laws on the news and be able to access a statute online and call a local law library to have a copy of any related annotations—published by a large publisher—emailed to their home or office. They may quickly come to understand that a law was overturned because of something they read in those annotations and may modify their behavior or the way they approach a certain situation accordingly. Our nation's incarcerated litigants do not have that luxury. In the *Public.Resource.Org* case, the Supreme Court illustrated such an example:

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

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206. This presupposes that the prisons are not engaged in massive contracts with the likes of LexisNexis and Westlaw who contract with public and private prison systems to the tune of hundreds of millions of dollars to provide prisoners with “access” to information, but at what cost? See Chase, *Exploiting Prisoners*, *supra* note 11, at 124–25 (examining the impact of net neutrality in prisons and its impact on incarcerated persons' ability to access legal information).

207. See generally Chase, *Neutralizing Access to Justice*, *supra* note 11.

respects, unenforceable relics that the legislature has not bothered to narrow or repeal.<sup>208</sup>

This Georgia citizen has rights and privileges that incarcerated litigants can only dream of, because the situation for Georgia's incarcerated litigants is markedly different in this scenario:

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.<sup>209</sup>

If jurisdictions adopt the approach presented in this Article and engage in merging annotations with the jurisdiction's laws—drafted by the jurisdiction, itself, or under a work-for-hire arrangement with a legal publisher—and make those laws available to prisons around the country on a free or low-cost basis, this situation dissolves, making access to legal information and the necessary contextual information a reality for incarcerated litigants around the country. Under this publishing scheme, the scenario above takes a markedly different—and much more just—approach for incarcerated litigants:

Imagine a Georgia [prisoner] interested in learning his legal rights and duties. If he reads the . . . Georgia Code available online [in the prison library] . . . with access to annotations, he will see laws . . . criminalizing broad categories of consensual sexual conduct[ ] and exempting certain key evidence in criminal trials from standard evidentiary limitations . . . and be made quickly aware that those laws have been held unconstitutional by the Georgia Supreme Court. [Because of access] to the annotations, he will be assured that these

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208. *Georgia v. Public Resource.Org, Inc.*, 140 S. Ct. 1498, 1512 (2020) (emphasis added) (internal citations omitted).

209. Chase, *Exploiting Prisoners*, *supra* note 11, at 126.

laws are, in crucial respects, unenforceable relics that the legislature has not bothered to narrow or repeal.<sup>210</sup>

In this scenario, the Supreme Court hasn't had to revisit *Casey* or reverse precedent. It hasn't had to expand the scope of a tax decision like *Wayfair* to apply to prisoners' rights. The Supreme Court hasn't been involved at all. If state and federal jurisdictions can thoughtfully rethink the way they publish primary source information and the contextual annotations that accompany the law, and prisons can find a way to provide meaningful internet access to incarcerated people, then people in prison will have free and open access to our nation's laws that they've never known before, without reliance on major corporations or predatory legal publishers.<sup>211</sup>

## VI. CONCLUSION

If jurisdictions in the United States rethink the way they publish the law and adopt a publishing scheme similar to Georgia's—publishing public domain annotations alongside statutes and making them both available online—the significant justice gap which exists for the millions of incarcerated Americans will grow smaller. These incarcerated litigants' due process rights, as guaranteed by *Bounds*, will remain intact. They can research and draft *pro se* motions to attack their sentences collaterally or directly. Those motions may or may not be successful, but that's hardly the point. When we give incarcerated litigants access to legal information, we ensure their access to the courts and give them the possibility of a future that doesn't involve a prison. With free and open access to legal information and helpful explanatory materials, we give these incarcerated litigants hope; we may even give them freedom.

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210. This is a rewording of the examples set forth above to illustrate how meaningful this change will be to incarcerated litigants. See *Public.Resource.Org, Inc.*, 140 S. Ct. at 1512; see also Chase, *Exploiting Prisoners*, *supra* note 11, at 126.

211. See generally Chase, *Neutralizing Access to Justice*, *supra* note 11.