

A KNIGHT IN SHINING NASCENCY: UNDER-THE-RADAR PLATFORMS AS A SOLUTION TO ACCESS TO JUSTICE FOR INCARCERATED LITIGANTS

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ABSTRACT

Access to justice in the criminal legal system and antitrust laws are inextricably intertwined, though not obviously so. But when major corporations behave in a way that creates a moat between incarcerated people and the laws they need to experience access to justice, the relationship of the two cannot be ignored. The “Curse of Bigness” in the legal information industry – the idea that corporations can get too big to collapse and then fail to benefit the market in a meaningful way – widens that moat and demonstrates that the companies that provide legal research services to prisons present both a social and industrial menace. This menace is damaging to all who seek legal information but is particularly and uniquely problematic when looking through the lens of access to justice for incarcerated litigants, individuals whose access to legal information is directly tied to their constitutional rights, and whose access is controlled by a massive monopsony in the industry: the prisons, themselves. This Article discusses the history of antitrust law and the legal principles needed to understand how antitrust interplays with access to justice for incarcerated litigants. It reviews the history of prison libraries and the ways in which reforms have been moved through the courts and then

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retracted, most recently watering down access to the courts and access to justice for incarcerated people. In describing prison monopsonies, legal publishing monopolies over legal information, and the legal publishing duopoly that controls access to information, it explains how giving prisons and the legal publishing duopoly power over the provision of legal information, they are, essentially, handing incarcerated people's constitutional right of access to the courts via access to information over to a knight in shining armor – a knight who is actually a dragon in disguise. Finally, this Article suggests ways prisons can embrace new platforms – the knights in shining nascency – for legal information and change the ways they buy and provide legal services to those who need them most, and truly effectuate access to justice for incarcerated people.

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“Each step in [the] course of conduct built and reinforced the moat around its . . . monopoly.”¹

INTRODUCTION

ACCESS to justice in the criminal legal system cannot be effectuated by antitrust laws, alone. As a whole, United States antitrust laws aim to promote fair competition, prevent unfair practices that could harm consumers, and maintain competition within marketplaces for the benefit of consumers.² Access to justice—a seemingly unrelated topic—is the opportunity for individuals to exercise their rights, whether civil or criminal, under the law.³ But what happens when major corporations behave in a way that harms not only consumers, but creates a moat between incarcerated people and the laws they need to experience access to justice in the criminal legal system?⁴

¹ Amended Complaint at 29, *United States v. Apple Inc.*, No. 2:24-cv-04055 (D.N.J. June 11, 2024). The recent antitrust case against Apple by the United States has, of course, absolutely nothing to do with access to justice, incarcerated litigants, or even legal technology. What it does demonstrate, however, is that the DOJ is capable of recognizing industries and corporations that are engaging in problematic behavior that damages not only the consumers who operate within the market, but the markets themselves. The idea of a moat around information is recurrent throughout this Article because that is precisely the image one needs to conjure when discussing incarcerated people. There are moats between those who are incarcerated and their loved ones, moats between them and the courts, moats between them and legal information, and, perhaps most importantly, moats between them and true access to justice—moats that are widened and made nearly impassable by the legal research duopoly that operates within the United States.

² *The Antitrust Laws*, U.S. DEP’T. OF JUST., <https://www.justice.gov/atr/antitrust-laws-and-you> (last visited Apr. 17, 2025).

³ See Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785 (2001); U.S. DEP’T. OF JUST., OFF. FOR ACCESS TO JUST., <https://www.justice.gov/atj> (last accessed Mar. 4, 2025); *What is Access to Justice?*, NAT’L CTR. FOR ACCESS TO JUST., <https://ncj.org/what-access-justice> (last updated Nov. 20, 2023).

⁴ As many have before me, I choose to use the term “criminal legal system” instead of “criminal justice system” to reflect the larger nature of the problem. Prosecution, courts, policing, and corrections in the United States are not just, and it’s important to put an accurate title on the systems at play. For a great overview of the terms, see Erica Bryant, *Why We Say “Criminal Legal System,” Not “Criminal Justice System,”* VERA INST. (Dec. 1, 2021), <https://www.vera.org/news/why-we-say-criminal-legal-system-not-criminal-justice-system>.

The “Curse of Bigness”—within antitrust, the idea that the government must prevent corporations can become so dominant in a given industry that their presence prevents competition in the marketplace—widens that moat and demonstrates that corporations with a lot of power in any given a lot of power in any given market can be both a social and industrial menace.⁵ And while lawyers typically discuss this menace in terms of markets like steel, live entertainment, or television (and never discuss it in terms of the legal industry itself), the Curse of Bigness is also apparent within the legal information industry, which presents a social and industrial menace all its own.⁶ This menace is damaging to all who seek legal information,⁷ but it is particularly and uniquely problematic when looking through the lens of access to justice for incarcerated litigants,⁸ individuals whose access to legal information is directly tied to their constitutional rights and whose access is controlled by a massive monopsony in the industry: the prisons themselves.⁹

It is difficult to gauge just how problematic the current legal publishing market is because the market for those seeking to purchase or license legal information is just as problematic, particularly when it comes to licensing information for those who are currently incarcerated. While lawyers, the government, and even average citizens can navigate any number of

⁵ Douglas discusses the Curse of Bigness in his dissent in *United States v. Columbia Steel Co.*, but the idea originated with Justice Brandeis. 334 US 495, 535-36 (1948) (Douglas, J., dissenting); LOUIS D. BRANDEIS, *The Curse of Bigness*, in MISCELLANEOUS PAPERS (Osmond K. Fraenkel ed., 1934). Brandeis took particular issue with bid rigging, crushed labor movements, and patent fraud that swayed prices and destroyed markets during the height of the oil, steel, rubber, tobacco, sugar, and railroad industries. *Id.* Tim Wu discusses the current state of corporate concentration in global industry in his recent book and explains the ways in which the Curse of Bigness has spilled into policy and politics. TIM WU, *THE CURSE OF BIGNESS* 71-72 (Colum. Glob. Reps. ed., 2018). While neither Brandeis nor Wu frame the Curse of Bigness in terms of access to justice, the author likes to believe that they would both be firmly supportive of the idea that big business is bad for justice, and particularly bad for America’s incarcerated litigants.

⁶ 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 (2020); SARAH LAMDAN, *DATA CARTELS* (Stan. Univ. Press ed., 2022); Kathleen Darvil, *Increasing Access to Justice by Improving Usability of Statutory Code Websites*, 115 LAW LIBR. J. 123 (2023); see generally Blythe Alison Balestrieri & Dominic Zicari, *Access to Justice for Inmates Jailed in Virginia*, 115 LAW LIBR. J. 179 (2023).

⁷ See Street & Hansen, *supra* note 6; see also Jennifer A. Brobst, *The Lawyer’s Duty to Understand the Disparate Impact of Technology in the Legal Profession*, 20 U. ST. THOMAS L.J. 150 (2024); LAMDAN, *supra* note 6, at 72–88.

⁸ Ashley Krenelka Chase, *Aren’t We Exhausted Always Rooting for the Anti-Hero? Publishers, Prisons, and the Practicing Bar*, 56 TEXAS TECH. L. REV. 525 (2024).

⁹ *Id.*

avenues to access legal materials—whether expensive, low cost, or no cost¹⁰—those who are behind bars are not so lucky; their very existence is closely monitored, and their access to information is no exception, often being limited or outright denied by the correctional institutions which control their daily lives.¹¹ Those unfortunate millions are given access to information at the whims of the prison monopsony,¹² whose anticompetitive behavior harms not only the markets for legal information but access to justice itself.¹³ Courts and legislators have shown an increased interest in dealing with anticompetitive behavior in a number of industries, but the legal information industry is not one of them.¹⁴ Nor have they attempted to deal with prisons

¹⁰ The annual ABA Legal Technology Survey Report provides a small glimpse into the legal materials available to attorneys around the country, whether in print, online, or otherwise. Over time, this survey shows attorneys' clear preference for online information and their ability to pick and choose how they access that information, as well as how much they want to pay for those services. *E.g.*, ABA LEGAL TECH. SURV. REP. (2023) (on file with the author).

¹¹ According to the Equal Justice Initiative, "[t]here is arguably no government institution that censors reading material more broadly and arbitrarily than American jails and prisons." Michael Stravato, *Banning Books in Prisons*, EQUAL JUSTICE INITIATIVE (Jan. 7, 2020), <https://eji.org/news/banning-books-in-prisons/>. And while some progress has been made to address the access to digital materials one might need in prison, the companies that are in charge of providing that access "charge an arm and a leg for crappy substandard service." *Bridging the Digital Divide: Navigating the Challenges of Digital Access for Incarcerated (and Formerly Incarcerated) Individuals*, COMMUNITY TECH NETWORK (Mar. 18, 2024), <https://communitytechnetwork.org/blog/bridging-the-digital-divide-navigating-the-challenges-of-digital-access-for-incarcerated-and-formerly-incarcerated-individuals/>.

¹² For a full definition of a monopsony—a situation where there is a single buyer of goods from multiple sellers—see *infra* Section II.B.3.

¹³ It is possible that the difficulty in getting low-cost materials into the hands of those behind bars doesn't always have to do with finances but rather has to do with the fact that government contracts are written to include very specific information they want included in any legal information services contract. As an example, a government request for proposal (or RFP) may include language that the prison wants access to Black's Law Dictionary, which is copyrighted. A free or low-cost platform won't have access to Black's because they don't have the means to pay to license that content for their site. They may have another legal dictionary that is just as good but doesn't have the name recognition. Such a nascent or potential competitor—one who could easily provide information to incarcerated people and give them access to information they so desperately need—cannot meet the needs explicitly stated in the RFP, so they lose out on a corrections contract to another competitor who can afford the licensing fees to include Black's in their database.

¹⁴ The Department of Justice has filed dozens of notable antitrust suits in recent years, alleging anticompetitive behavior by the likes of Google, Ticketmaster, and Apple, as well as announced investigations into countless other industries. *See, e.g.*, Complaint at 7, *United States v. Live Nation Ent., Inc.*, 1:24-cv-03973 (S.D.N.Y. May 23, 2024); Amended

in any meaningful way; major Supreme Court decisions regarding access to the courts via access to information are approaching forty years old,¹⁵ and Congress has been unable to legislate any real change.¹⁶

While the goal of access to information should, in theory, apply to everyone, legal publishers act in an anticompetitive way (whether tacit or not) which directly impacts access to justice for incarcerated people because they are denied access to many forms of legal information.¹⁷ By giving the power over to prisons and the legal information publishers, incarcerated litigants are essentially handing their constitutional right of access to the courts via access to information over to a knight in shining armor—a knight who is actually a dragon in disguise. This violation of incarcerated litigants’ constitutional right of access to the courts via access to information puts them at an even further

Complaint, United States v. Apple Inc., 2:24-cv-04055 (D.N.J. June 11, 2024); Proposed Final Judgment, United States v. Koch Foods Inc., 1:23-cv-15813 (N.D. Ill. Nov. 9, 2023); Plaintiffs Post-Trial Brief, United States v. JetBlue Airways Corp., 1:23-cv-10511 (D. Mass. Dec. 13, 2023); *see also* David McCabe, *U.S. Clears Way for Antitrust Inquiries of Nvidia, Microsoft and OpenAI*, N.Y. TIMES (June 5, 2024), <https://www.nytimes.com/2024/06/05/technology/nvidia-microsoft-openai-antitrust-doj-ftc.html>; Debra Kamin, *Justice Department Says It Will Reopen Inquiry Into Realtor Trade Group*, N.Y. TIMES (Apr. 5, 2024) <https://www.nytimes.com/2024/04/05/realestate/doj-realtors-nar-inquiry.html>.

¹⁵ *See, e.g.*, *Bounds v. Smith*, 430 U.S. 817 (1977); *Lewis v. Casey*, 518 U.S. 343 (1996).

¹⁶ On April 25, 2023 H.R. 2825, the Prison Libraries Act of 2023, was introduced in the House. It was referred to the House Committee on the Judiciary and died in committee.

¹⁷ There is no shortage of writing on the impact lack of access to information has on citizens around the world. *See, e.g.*, UNESCO’s publications on the Right to Information, advocating for “access to information as a fundamental freedom and a key pillar in building inclusive knowledge societies.” UNESCO, *Right to Information* <https://www.unesco.org/en/right-information> (last visited Apr. 18, 2025). Those in the social work field have framed the digital divide surrounding information as particularly problematic, particularly after the United Nations General Assembly declared access to the Internet (a primary way to access information) as a basic human right in 2016. Cynthia K. Sanders & Edward Scanlon, *The Digital Divide is a Human Rights Issue: Advancing Social Inclusion Through Social Work Advocacy*, 6 J. HUMAN RIGHTS SOC. WORK 130 (2021). There is also no shortage of writing on the impact of a lack of legal information. *See, e.g.*, *Open to the Public: How Law Libraries Are Serving Self-Represented Litigants Across the Country*, SELF-REPRESENTED LITIG. NETWORK (July 2019), <https://perma.cc/VRE6-VpXK>; *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>, . Incarcerated litigants, however, are not average people who need average access to average information. Many of them need access to legal information to pursue civil legal claims, appeals and post-conviction actions, or administrative challenges that impact their lives in prison. It is arguable that incarcerated people actual need *more* access to legal information than the average citizen, and they are failing to have access on every front.

disadvantage in navigating the criminal legal system than they already are, making access to justice nearly impossible for those who need it most.

In Part II, this Article will discuss a brief history of antitrust law and the legal principles needed to understand how antitrust interplays with access to justice for incarcerated litigants.¹⁸ Part III will review the history of prison libraries and the ways in which reforms have been moved through the courts and then retracted, most recently watering down access to the courts and access to justice for incarcerated people.¹⁹ Part IV will bring together antitrust and legal information, describing prison monopsonies, legal publishing monopolies over legal information, and the legal publishing duopoly that controls it all.²⁰ It will continue by explaining the path dependency of the current system which is leading to substandard services for incarcerated people. The Article will conclude in Part V with suggestions for ways prisons can embrace new platforms for legal information and change the ways they buy and provide legal services to those who need them most.²¹

I. A KNIGHT IS NOT BORN, BUT MADE THROUGH ADVERSITY AND CHALLENGES²²: THE CURSE OF BIGNESS, SOCIAL MENACE, AND IMPACTS ON ACCESS TO JUSTICE

Given the amount of information available online, it can be difficult for the average person to believe that there is a problem with the information access industry.²³ In general, there may not be a problem; average citizens can use their home computer or smartphone to access the internet and find

¹⁸ See *infra* Part II (discussing antitrust law and the legal principles needed to understand the parties at play).

¹⁹ See *infra* Part III (discussing the history of prison libraries, including Supreme Court precedent and recent cases).

²⁰ See *infra* Part IV (discussing the interaction of antitrust law, prison libraries, and access to justice, and describing the monopsony, monopoly, and duopoly controlling the market).

²¹ See *infra* Part V (suggesting ways prisons can embrace new platforms and change the ways legal information services are purchased and/or licensed and provided to incarcerated people).

²² GENE WOLFE, *THE KNIGHT* (David G. Hartwell ed., 2004).

²³ A study shows that in 2022, 97% of the United States population used the internet. *Individuals Using the Internet*, World Bank Group, <https://data.worldbank.org/indicator/IT.NET.USER.ZS?> (last visited Apr. 17, 2025). But while people have the ability to get online—and therefore believe that everything they need may be available to them—there are still significant barriers to understanding information once it is accessed on the internet. See Kevin Hernandez & Becky Faith, *Online but Still Falling Behind: Measuring Barriers to Internet Use ‘After Access,’* 12 *INTERNET POL’Y. REV.* 1 (2023).

anything they need.²⁴ Individuals for whom internet access is an issue will likely have access to a public library, school, or even workplace where they can get the information they need²⁵ (and when all else fails, they can always phone a friend²⁶ for that information). But for incarcerated people, access to information is a battle they must fight and win, and the impact the Curse of Bigness has on legal research platforms in particular has the potential to infringe on access to justice in a way that demonstrates that the largest social menace of our time may be the one impacting the people we often think about the least.

Antitrust laws weren't passed with incarcerated people in mind, nor were they passed with the idea that legal publishers would monopolize information needed to understand the law. Additionally, they weren't passed to protect incarcerated people from the prison monopsony that acts as the sole purchaser of legal information needed to provide them with access to justice. Antitrust laws were drafted to protect consumers and competition in a capitalist society.²⁷

²⁴ This statement, too, is far more nuanced than it seems when discussing legal information. Because the information needed to actually understand the law is created, copyrighted, and owned by massive legal publishers, that information is completely inaccessible to anyone who does not have the financial and logistical means to access it. This wildly problematic publishing scheme has been discussed by many legal scholars and is not the subject of this article. See Street & Hansen, *supra* note 6; Ashley Krenelka Chase, *Let's All Be...Georgia? Expanding Access to Justice for Incarcerated Litigants by Rewriting the Rules for Writing the Law*, 74 S.C. L. REV. 389 (2022); Darvil, *supra* note 6; Balestrieri & Zicari, *supra* note 6; Leesi Ebenezer Mitee, *The Right of Public Access to Legal Information: A Proposal for its Universal Recognition as a Human Right*, 18 GERMAN L.J. 1429 (2017); Ashley Krenelka Chase, *Neutralizing Access to Justice: Criminal Defendants' Access to Justice in a Net Neutrality Information World*, 84 MO. L. REV. 323 (2019).

²⁵ *Internet, Broadband Fact Sheet*, PEW RSCH. CTR. (Nov. 13, 2024), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/>.

²⁶ The phrase "phone a friend" has been used colloquially but was made famous as a "lifeline" on the television game show "Who Wants to Be a Millionaire" (it seems unlikely Regis Philbin would have ever considered his name being used in this context). WHO WANTS TO BE A MILLIONAIRE? (ABC 1999).

²⁷ See generally George W. Wickersham, *Recent Interpretation of the Sherman Act*, 10 MICH. L. REV. 1 (1911) (discussing interpretations of the Sherman Act that were recent in the early 20th century); George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1 (1985); Thomas W. Hazlett, *The Legislative History of the Sherman Act Re-Examined*, 30 ECON. INQUIRY 263 (1992); James May, *Historical Analysis in Antitrust Law*, 35 N.Y.L. SCH. L. REV. 857 (1990); Daniel R. Ernst, *The New Antitrust History*, 35 N.Y.L. SCH. L. REV. 879 (1990); Albert A. Foer & Robert H. Lande, *The Evolution of United States Antitrust Law: The Past, Present, and (Possible) Future*, 16 NIHON U. COMPAR. L.J. 149 (1999).

A. The Reasons for Antitrust Law

Antitrust laws were passed with the aim of promoting fair competition in the marketplace and preventing practices that can harm consumers or stifle innovation.²⁸ Non-incarcerated consumers benefit by being given choices. Antitrust laws provide non-incarcerated consumers greater choices about which companies they want to deal with and access to a wider range of goods and services than they would otherwise have if the market had a single player.²⁹

The competition created by antitrust laws encourages efficiency and innovation, which then leads to better products or services.³⁰ This efficiency benefits consumers as well as the economy, leveling the playing field for startups to attempt to enter a market and change the ways in which consumers interact with it.³¹ Antitrust laws also provide a level playing field for businesses—particularly those that are new to the market—by ensuring they will not be disadvantaged by big companies’ roles in any given field.³²

When antitrust laws work and companies are prevented from cornering the market on goods or services, consumers, new market entrants, and the economy benefit. There are many industries in which antitrust laws work well. For example, airlines have been prevented from merging into mega-corporations, providing the ability for smaller airlines to join the marketplace, which has led to increased choice among consumers.³³ Antitrust

²⁸ *The Antitrust Laws*, *supra* note 2.

²⁹ *Id.*

³⁰ See generally Giulio Federico, Fiona Scott Morton & Carl Shapiro, *Antitrust and Innovation: Welcoming and Protecting Disruption*, 20 INNOVATION POL’Y & ECON. 125 (2020) (discussing the goals of antitrust laws, the importance of rivalries, and the benefits on industry).

³¹ *Id.*

³² *Id.*

³³ Robert D. Willig, *Antitrust Lessons from the Airline Industry: The DOJ Experience*, 60 ANTITRUST L.J. 695 (1991). This is not to say there hasn’t been significant merger activity within the airline industry. American Airlines (American) combined with US Airways, Delta Air Lines with Northwest Airlines, United Airlines with Continental Airlines, American with Trans World Airlines, Southwest Airlines with AirTran Airways and together the industry went from many major airlines to only four. That being said, there are many small airlines who continue to compete in the market, including Avelo Airlines, Spirit Airlines, Jet Blue, WestJet, and Allegiant Air. U.S. *Airline Mergers and Acquisitions*, AIRLINES FOR AMERICA (Jan. 16, 2024), <https://www.airlines.org/dataset/u-s-airline-mergers-and-acquisitions/> (providing data and statistics for completed and proposed mergers and acquisitions since the inception of the U.S. airline industry).

has also had a positive impact on the telecommunications industry, where users can choose from a variety of phone companies and choose the best service plan based on their needs.³⁴ However, while antitrust has operated well for those who aren't incarcerated, that has not always been the case for those in America's prisons, for whom choice is not always an option.³⁵

A perfect example of how antitrust laws initially failed incarcerated people is that same telecommunications industry that has otherwise benefited consumers. Prior to the passage of the Martha Wright-Reed Just and Reasonable Communications Act of 2022³⁶, incarcerated people's ability to choose how they corresponded with friends and family outside of prison was anything but an easy choice.³⁷ Historically, while average Americans outside of prison could make a phone call for a cost that was near zero, some phone companies—whose services were being contracted for and negotiated by the prisons themselves—were charging people in prisons and their families exorbitant fees.³⁸ Martha Wright-Reed's family experienced this price gouging

³⁴ See Alfred E. Kahn, *Telecommunications: The Transition from Regulation to Antitrust*, 5 J. TELECOMM. & HIGH TECH. L. 159 (2006) (describing the benefits of antitrust on various industries).

³⁵ See generally Ashley Krenelka Chase, *Exploiting Prisoners: Precedent, Technology, and the Promise of Access to Justice*, 12 WAKE FOREST J.L. & POL'Y 103 (2022) (examining the evolution of access to information for incarcerated litigants and the role that internet access, libraries, and ownership of the law plays in providing access to justice and the ways in which access to justice can be effectuated without exploiting incarcerated people in the process).

³⁶ Martha Wright-Reed Just and Reasonable Communications Act of 2022, Pub. L. No. 117-338, 136 Stat. 6156 (2023).

³⁷ See generally Coleman Bazelon et al., *Product Bundling and Exploitative Pricing in Prison Telecommunications Contracts* (Aug. 3, 2023) (unpublished manuscript), <https://ssrn.com/abstract=4528780> (describing the FCC's regulation of interstate rates for calling services and the problems that arise when correctional facilities rely on the same provider for both voice and other digital services).

³⁸ Wanda Bertram, *Since You Asked: What's Next for Prison and Jail Phone Justice Now that the Martha Wright-Reed Just and Reasonable Communications Act is Law?*, PRISON POL'Y INITIATIVE (Jan. 19, 2023), <https://www.prisonpolicy.org/blog/2023/01/19/martha-wright-reed-act/>. The passage of the Wright-Reed Act isn't the only notable development in prison phone policy compliance. On May 25, 2023, the Fourth Circuit vacated a district court decision that determined that two prison phone call providers, Securus Technologies, LLC and Global Tel*Link Corp, did not proximately cause the Plaintiff's injuries. *Albert v. Glob. Tel*Link Corp.*, 68 F.4th 906 (2023). In vacating the decision, the Fourth Circuit discussed in great detail the price gouging and collusion engaged in by the phone companies, as well as by 3Ci, which provided marketing services and managed the phone companies' websites. The Fourth Circuit found that the appellants were immediate victims of the price gouging and well-situated to sue, and that the government entities involved may also have RICO claims that could be asserted against the phone companies. *Id.* at 914-15.

firsthand.³⁹ Every Sunday, Martha called her incarcerated grandson after she returned home from church.⁴⁰ At the time of these calls, an out-of-state phone call from Martha to her grandson could amount to \$17 for 15 minutes.⁴¹ The price-gouging experienced by not just Martha's family but all of those behind bars is notable because of the high costs and unique nature of those subjected to the charges, issues which may have been ignored because the people impacted were incarcerated.⁴² Thankfully, the Martha Wright-Reed Act changed that, but there is a new frontier for antitrust violations that impact access to justice for incarcerated people: legal information services.⁴³

B. Understanding the Legal Principles and Parties to the Access to Justice Problem in Prisons

While the antitrust principles that underscore the issue are the same as in other industries, the ability of the players to control the game is far more

³⁹ Candice Norwood, *A Woman's Calls Sustained Her Incarcerated Grandson. Now a Law in Her Name Will Lower Prison Phone Rates*, THE 19TH (Jan. 31, 2023), <https://19thnews.org/2023/01/prison-phone-call-costs-biden-martha-wright-reed/>.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* Since the passage of the Wright-Reed Act, however, the Department of Justice has indicated its support for competition in phone services for people behind bars, claiming to understand that “[t]elephone services are a lifeline between incarcerated people and the outside world.” Press Release, U.S. Dep’t of Just., The Justice Department Supports More Competition and Lower Prices for Communications from Jails and Prisons (Apr. 29, 2024), [https://www.justice.gov/opa/pr/justice-department-supports-more-competition-and-lower-prices-communications-jails-and#:~:text=The%20department%20works%20closely%20with,incarcerated%20people%20and%20their%20families](https://www.justice.gov/opa/pr/justice-department-supports-more-competition-and-lower-prices-communications-jails-and#:~:text=The%20department%20works%20closely%20with,incarcerated%20people%20and%20their%20families.). It would be nice, of course, if the DOJ indicated similar support for and understanding of the need for access to the internet in prisons, not only for the purposes of legal research but for connection to the outside world, which in turn could help reduce recidivism (in some cases). That argument is outside the scope of this article. Another prescient issue is intrastate phone calls, where the FCC does not have jurisdiction because they can only regulate calls between states. See Benj Azoze, *Access to Technology in the American Carceral State*, Tech Policy Press (Dec. 7, 2021), <https://www.techpolicy.press/access-to-technology-in-the-american-carceral-state/>. Azoze asserts that prisons and jails in the US are some of the last places you can find pay-per-minute phone plans that are prohibitively expensive, in some instances causing public defender offices to rack up bills of more than \$50,000 annually.

⁴³ See generally Chase, *supra* note 8.

nuanced than it may seem.⁴⁴ Each party in the access to information and access to justice marketplace is responsible for keeping legal information out of the hands of incarcerated people, and they are responsible for very different reasons. The legal research publishing duopoly controlled by Lexis and Westlaw monopolizes legal information through its harmful creation, ownership, and dissemination practices—practices which present a significant social menace and threat to access to justice. The prison monopsony piggybacks on those harmful practices by acting as the sole resource for providing access to information to incarcerated people. The only way to save incarcerated people from this social menace is the existence of nascent and potential competitors who may one day sweep in to save them all and consistently provide access to justice for those who need it most.

1. Monopoly

Antitrust law in the United States prohibits a single business or firm from unreasonably restricting competition by maintaining exclusive control over a particular product or service within a specific market.⁴⁵ A firm's obtaining of a monopoly may be legal⁴⁶ if it was achieved through superior

⁴⁴ Sarah Lamdan, *Librarianship at the Crossroads of ICE Surveillance*, IN THE LIBR. WITH THE LEAD PIPE (Nov. 13, 2019), <https://www.inthelibrarywiththeleadpipe.org/2019/ice-surveillance/>; Josh Moody, *Law Students Protest Research Database Contracts with ICE*, INSIDE HIGHER ED (Dec. 5, 2021), <https://www.insidehighered.com/news/2021/12/06/law-students-protest-lexisnexis-westlaw-contracts-ice>; Chase, *Let's All Be...Georgia*, *supra* note 24 (highlighting Georgia's former statutory publishing process and the Supreme Court case that provided a glimpse into a way statutes could be published to increase access to justice).

⁴⁵ 15 U.S.C. §§ 1–7 (2025); *Monopolization Defined*, FED. TRADE COMM'N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined> (last visited Apr. 17, 2025).

⁴⁶ There is an important distinction between monopolies and monopolization. A monopoly is completely legal if there was no illegal conduct used that led to the monopoly. Monopolization—the act of behaving in a way that eliminates competition—is illegal. Firms may not act in a way that precludes others from entering or participating in the market. See *Anticompetitive Practices*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/anticompetitive-practices> (last visited Apr. 17, 2025). In the case of Westlaw, for instance, they “achieved dominance beginning in the 1870s at least in part by virtue of superior performance: it published its reporters quickly, worked closely with the judiciary, had high production standards, hired only lawyers as its book salespeople, and had a reputation for humorless intensity.” Olufunmilayo B. Arewa, *Open Access in a Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market*, 10 LEWIS & CLARK L. REV. 797, 821 (2006) (citing L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 812 (1989)).

products, innovation, or business acumen, but if that firm or business engaged in exclusionary or predatory conduct—things like exclusive supply or purchase agreements, predatory pricing, or refusing to deal with certain markets or consumers—antitrust concerns may be raised.⁴⁷

There are two pieces of legislation that govern antitrust law in the United States: the Sherman Act and the Clayton Act.⁴⁸ The Sherman Act prohibits monopolistic practices that unreasonably restrain interstate trade or commerce.⁴⁹ It specifically outlaws monopolization, attempts to monopolize, and conspiracies to monopolize.⁵⁰ The Sherman Act aims to prevent the formation of monopolies and the abuse of monopoly power.⁵¹ The Clayton Act complements the Sherman Act by prohibiting specific business practices that may lead to anticompetitive behavior, such as mergers and acquisitions that substantially lessen competition or tend to create a monopoly.⁵²

In addition to these pieces of legislation, the Federal Trade Commission Act, which established the Federal Trade Commission (FTC) in 1914, empowered the FTC to regulate unfair methods of competition and unfair or deceptive acts or practices in interstate commerce.⁵³ The FTC's primary purpose today is to protect American consumers by monitoring monopolization in all marketplaces, preventing consumer harm, and enforcing antitrust (and other consumer-focused) laws.⁵⁴ Enforcement of these laws is carried out by both the FTC and the U.S. Department of Justice.⁵⁵

2. Duopoly

⁴⁷ *Id.*

⁴⁸ *The Antitrust Laws*, *supra* note 2.

⁴⁹ 15 U.S.C. §§ 1–7 (2025); *The Antitrust Laws*, FED. TRADE COMM'N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Apr. 17, 2025).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² 15 U.S.C. §§ 12–27 (2025).

⁵³ 15 U.S.C. §§ 41–58 (2025).

⁵⁴ *Mission*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/mission> (last visited Apr. 17, 2025).

⁵⁵ *The Enforcers*, FED. TRADE COMM'N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers> (last visited Apr. 17, 2025).

A duopoly is a market situation where two firms or entities dominate the supply of a particular product or service within a specific market.⁵⁶ In contrast to a monopoly, where there is only one dominant firm, a duopoly involves two major players.⁵⁷ The legal principles and considerations regarding duopolies in the United States are similar to those applied to monopolies, but there are some important distinctions and implications.⁵⁸

Like monopolies, duopolies are subject to antitrust laws in the United States, such as the Sherman Antitrust Act and the Clayton Antitrust Act.⁵⁹ Duopolies can have the same impact on the market as a monopoly if there is collusion or interdependent decision-making on the part of the firms, either explicitly or tacitly; both forms of collusion are illegal under antitrust laws.⁶⁰

In looking at access to justice via access to information in America's prisons, a very powerful duopoly is at play: that of massive legal publishers who control not only access to legal information, but whose copyrights over that very same information often prohibit those who are unwilling to pay for their services from accessing the information, at all.⁶¹ While collusion may not exist between the major players in legal publishing, the duopoly is obvious and problematic, and it is actively harming those who need access to legal information.⁶²

A significant distinction between monopolies and duopolies exists with entry barriers.⁶³ In a monopoly those barriers are high and it is extremely difficult for new firms to enter the marketplace.⁶⁴ In a duopoly those barriers are lower – but not nonexistent – so new competitors may enter the market

⁵⁶ Caroline Banton, *Duopoly: Definition in Economics, Types, and Examples*, INVESTOPEDIA, <https://www.investopedia.com/terms/d/duopoly.asp> (last updated July 23, 2024).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See 15 U.S.C. §§1–7, 15–25 (2025).

⁶⁰ For general information about duopolies and the role they play in the market, see George J. Stigler, *Notes on the Theory of Duopoly*, 48 J. POL. ECON. 521 (1940).

⁶¹ See generally Chase, *supra* note 8.

⁶² Lexis and Westlaw, sometimes collectively referred to as “Wexis,” have been described as a “noncollusive duopoly.” Arewa, *supra* note 46, at 821.

⁶³ Courts define an entry barrier as “additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants.” *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995) (quoting *L.A. Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1427–28 (9th Cir. 1993)).

⁶⁴ Roger D. Blair & John E. Lopatka, *Predatory Buying and the Antitrust Laws*, 2008 UTAH L. REV. 415 (2008) (describing the difficulty of entry for new firms in a monopolized market).

and increase competition, if they break through the barrier.⁶⁵ The distinction between a monopoly and a duopoly is important because it has implications for consumer welfare, market dynamics, and the appropriate regulatory response. While both situations involve concentrated market power, the presence of two firms in a duopoly introduces an element of competition that can potentially benefit consumers and limit the abuse of market power, leaving the FTC less likely to step in on behalf of consumers when the duopoly seems to be harming them in some way.⁶⁶ However, duopolies are still closely monitored by antitrust authorities to ensure that the firms do not engage in collusive or exclusionary practices that harm competition and consumer interests.⁶⁷ The trick, of course, is whether or not collusive or exclusionary practices are happening actively or tacitly. In the case of legal publishers, the collusion and exclusionary practices are obviously occurring (to the detriment of millions of people, both in and out of prison) but the active collusion to dominate the marketplace or exclude competitors is much harder to pinpoint.⁶⁸

3. Monopsony

A monopsony is a market situation where there is a single buyer or a dominant buyer of a particular product or service.⁶⁹ The mirror image of a monopoly, where there is a single seller or dominant seller, a monopsony involves a player who reduces their purchases of a product or input and

⁶⁵ Fritz Machlup, *Monopoly and Competition: A Classification of Market Positions*, 27 AMERICAN ECON. REV. 445 (1937) (describing the many concepts of monopolies and duopolies in a capitalist market).

⁶⁶ Thomas B. Leary, *Efficiencies and Antitrust: A Story of Ongoing Evolution*, PREPARED REMARKS BEFORE ABA SECTION ON ANTITRUST LAW, 2002 FALL FORUM (Washington, DC Nov. 8, 2002), <https://www.ftc.gov/news-events/news/speeches/efficiencies-antitrust-story-ongoing-evolution>.

⁶⁷ See generally William Kovacic, *Dominance, Duopoly and Oligopoly: the United States and the Development of Global Competition Policy*, 14 GLOBAL COMPETITION REV. 39 (2010).

⁶⁸ *Id.*

⁶⁹ ROGER D. BLAIR & JEFFERY L. HARRISON, MONOPSONY IN LAW AND ECONOMICS 1 (2010); Natalie Rosenfelt, *The Verdict on Monopsony*, 20 LOY. CONSUMER L. REV. 402 (2008) (suggesting that similar legal standards should apply to buy-side and sell-side conduct and they have always been treated the same in antitrust enforcement and jurisprudence, both before and after *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007)).

therefore controls the market and changes the competitive levels.⁷⁰ Put another way, “[a] monopsonist obtains a lower price by reducing the quantity it purchases. The defining characteristic of monopsony power, therefore, is the depression of quantity purchased by a buyer.”⁷¹ In the context of American legal principles, monopsonies are subject to antitrust laws and regulations aimed at preventing anticompetitive practices and protecting the interests of sellers or suppliers.⁷²

In the example of telecommunications issues in America’s prisons, there were not only issues of potential monopolization or duopolization within the industry but also monopsonization; the prisons were negotiating with the telecommunications carriers to provide access to phone calls, not the incarcerated people who were attempting to speak with their loved ones.⁷³ Prior to the Martha Wright-Reed Act the prisons were responsible as sole purchasers for telecommunications services, so they effectively acted as a monopsony in the prison telecommunications industry.⁷⁴

The Sherman Antitrust Act, which prohibits monopolistic practices that unreasonably restrain interstate trade or commerce, applies to both monopolies and monopsonies.⁷⁵ It specifically prohibits monopsonization, attempts to monopsonize, and conspiracies to monopsonize.⁷⁶ Correspondingly, the Clayton Antitrust Act prohibits specific business practices that may lead to anticompetitive behavior, including mergers and acquisitions that substantially lessen competition in the buyer’s market (monopsony).⁷⁷

⁷⁰ See Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669 (2005) (Analyzing two types of single-firm overbuying, predatory and raising rivals’ costs overbuying); See also FTC & DEP’T OF JUSTICE, IMPROVING HEALTHCARE: A DOSE OF COMPETITION ch. 6 (2004), <http://www.ftc.gov/reports/healthcare/040723healthcarerept.pdf>.

⁷¹ Zhiqi Chen, *Defining Buyer Power*, 53 ANTITRUST BULL. 241, 243 (2008) (reviewing definitions of buyer power and examining their relationship to monopsony).

⁷² *Id.* The job market in the United States is commonly described as a monopsony, since there are few places to work but many people who need jobs. See Orley C. Ashenfelter, Henry Farber & Michael R. Ransom, *Labor Market Monopsony*, 28 J. LABOR ECON. 203 (2010).

⁷³ Norwood, *supra* note 39.

⁷⁴ Memorandum in Support of the Twenty-First Century Antitrust Act, American Economic Liberties Project (Nov. 1, 2021); LAMDAN, *supra* note 6.

⁷⁵ Debbie Feinstein & Albert Teng, *Buyer Power: Is Monopsony the New Monopoly?*, 33 ANTITRUST 12 (2019) (describing the ways in which the Sherman and Clayton Acts apply to monopsony).

⁷⁶ *Id.*

⁷⁷ *Id.*

While the primary focus of antitrust laws is on protecting consumer welfare, monopsonies can indirectly harm consumers by reducing innovation, quality, or output in the downstream product market due to the suppression of input prices or quantities; predatory bidding and predatory pricing are similar because of the close theoretical connection between monopoly and monopsony.⁷⁸ If a firm is found to have engaged in monopsonistic practices, the DOJ and FTC can impose remedies such as breaking up the monopsony, imposing restrictions on its business practices, or imposing fines and penalties.⁷⁹

And just as a monopsony existed in the telecommunications in prison scenario above, so too does it exist in the access to legal information scenario currently playing out in America's prisons. The duopoly of legal publishers, effectively the only two publishers being allowed in prisons to provide access to legal information to incarcerated litigants, has its products and services contracted for by a single buyer: prisons. The monopsony in the prison industry is pervasive, problematic, and, unlike the potential collusive or exclusionary conduct by the legal publishing duopoly, *very* easy to pinpoint, and it stands directly in the way of true access to justice for incarcerated people.

4. *Nascent and Potential Competitors*

Unlike the problematic monopolies, duopolies, and monopsonies at play in providing incarcerated people with access to information and access to justice, nascent and potential competitors represent a potential knight in shining armor that could drastically change the legal information industry. A nascent competitor is a business “whose prospective innovation represents a serious future threat to an incumbent . . . For example, a new, fast-growing and evolving online platform is a nascent competitor to the currently dominant platform.”⁸⁰ In the context of antitrust law and competition policy in the United States, nascent competitors are given special consideration because they represent potential sources of future competition.⁸¹ In assessing the competitive significance of nascent competitors, antitrust authorities may consider broader market definitions that take into account potential competition and future market developments, rather than relying solely on

⁷⁸ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007).

⁷⁹ Feinstein & Teng, *supra* note 75.

⁸⁰ C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PENN. L. REV. 1879, 1880 (2020).

⁸¹ *Id.*

current market shares or positions.⁸² In fact, “current competition is not an essential feature of nascent competition. It is the further, future developments that give nascent competition its distinctive importance.”⁸³

Potential competitors and nascent competitors are related but distinct concepts in the context of antitrust law and competition policy. Unlike nascent competitors, which already have a place (albeit small and emerging) in a given market, potential competitors refer to firms or entities that are not currently active participants in a particular market but have the ability and resources to enter that market if conditions become favorable.⁸⁴ These are firms that are not yet in the process of entering the market but possess the necessary capabilities and assets to do so if they decide to, and the threat of entry disciplines competition.⁸⁵

The importance of protecting nascent competitors lies in the recognition that competition is a dynamic process, and potential entrants can play a crucial role in driving innovation, efficiency, and consumer welfare in the long run.⁸⁶ By considering the impact on nascent competitors, antitrust laws aim to preserve the conditions for future competition and prevent incumbent firms from entrenching their market power through anticompetitive means.⁸⁷ “New firms with new technologies can challenge and even displace existing firms; sometimes, innovation by an unproven outsider is the only way to introduce new competition to an entrenched incumbent. That makes the treatment of nascent competitors core to the goals of the antitrust laws.”⁸⁸

Potential competitors, on the other hand, are considered important in antitrust analysis because their presence can exert competitive constraints on incumbent firms, even without actively participating in the market.⁸⁹ While

⁸² *Id.*

⁸³ *Id.* at 1888.

⁸⁴ Herbert Hovenkamp, *Potential Competition*, ANTITRUST L. J. (2024) (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4540413#:~:text=%E2%80%9C9C%20competition%E2%80%9D%20refers%20to%20the,in%20a%20different%20geographic%20area (describing potential competition and the varieties of problems they present).

⁸⁵ John M. Yun, *Are We Dropping the Crystal Ball? Understanding Nascent & Potential Competition in Antitrust*, 104 MARQUETTE L. REV. 613 (2021) (describing the vital source of innovation and growth nascent and potential competitors bring to a marketplace and offering a clear legal and analytical delineation between nascent and potential competition).

⁸⁶ Hemphill & Wu, *supra* note 80.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Hovenkamp, *supra* note 84.

they may not be actively producing (or making a profit) in a given market, they typically have a threat of entry or in the near future.⁹⁰ The threat of potential entry can discourage incumbent firms from exercising market power or engaging in anticompetitive practices as they risk attracting new entrants and increased competition.⁹¹

Both potential and nascent competitors are important considerations in antitrust analysis and competition policy. Antitrust authorities aim to protect not only existing competition but also the conditions that foster potential and future competition, as these factors ultimately contribute to consumer welfare, innovation, and a dynamic and efficient market environment.⁹²

In the legal information marketplace, there are a handful of nascent competitors and countless potential competitors seeking to impact the market and make a difference to people who are outside and inside prison.⁹³ The major firms within the duopoly, Lexis and Westlaw, have identified Wolters Kluwer as another major competitor in the marketplace.⁹⁴ Wolters Kluwer, however, does not provide access to traditional legal sources and instead provides access to secondary sources that are incredibly helpful. It doesn't present a threat to the duopoly.⁹⁵ Likewise, Bloomberg Law, which *does* provide access to cases and statutes, does not present itself as a threat to the duopoly because they are expensive, not as popular as the others, and have historically been a business platform that has only recently expanded into the

⁹⁰ Yun, *supra* note 85, at 624.

⁹¹ See generally Harold Demsetz, *Barriers to Entry*, 72 AM. ECON. REV. 47 (1982) (describing the substantial problems inherent in entry barriers).

⁹² *The Antitrust Laws*, *supra* note 2.

⁹³ A small smattering of the competitors in the marketplace can be seen by evaluating the ABA Legal Technology Survey Report. They include Versus Law, Checkpoint, HeinOnline, CCH (a division of Wolters Kluwer), Fastcase, Bloomberg Law, Practical Law (a division of Thomson Reuters), and Ravel Law (a division of Lexis). ABA LEGAL TECH. SURV. REP., *supra* note 10, at 38.

⁹⁴ Thomson Reuters, *Annual Report 2023*, at 6 (Mar. 7, 2024), <https://ir.thomsonreuters.com/static-files/47412ad2-d720-4a02-99c7-cbd7c425c16d>. See also ELX, *Annual Report 2023*, at 222, <https://www.relx.com/~media/Files/R/RELX-Group/documents/reports/annual-reports/relx-2023-annual-report.pdf>

⁹⁵ In their role in the legal information market, Wolters Kluwer has acquired Aspen Law and Business in 1994, Commerce Clearing House (CCH) in 1995, and the Little Brown & Company in 1996. See John Dethman, *Trust v. Antitrust: Consolidation in the Legal Publishing Industry*, in LAW LIBRARY COLLECTION DEVELOPMENT IN THE DIGITAL AGE (Michael Chiorazzi & Gordon Russell eds., 2003).

legal market.⁹⁶ While no one would call Bloomberg or Wolters Kluwer a nascent or potential competitor, they also could not be called major players in the legal research marketplace.⁹⁷ Despite the fact that the market is shifting, there remain very few actual nascent competitors in the marketplace. The largest nascent competitor in the legal research market, Fastcase, has remained a strong player for decades, but despite its longstanding position in the legal research industry remains is no less nascent in its market force.⁹⁸ Even with a recent merger with vLex, Fastcase remains nascent.⁹⁹ Potential competitors pop up in the marketplace all the time and are either acquired or dissolved as quickly as they start.¹⁰⁰

The nascent competitors have remained steadfast in their pursuit of providing legal information to the masses (at affordable prices) while the potential competitors are routinely acquired by the legal publishing duopoly, constantly changing the landscape of available resources.¹⁰¹ While potential competitors play an important role in this knight-in-shining armor tale of access to justice, it is the nascent competitors for whom incarcerated people

⁹⁶ ABA LEGAL TECH. SURV. REP., *supra* note 10, at 38.

⁹⁷ See *id.* for data on how many firms are actually using the nascent competitors.

⁹⁸ Why Fastcase remains nascent is purely speculative.

⁹⁹ *Id.*

¹⁰⁰ A simple google news search reveals just how many competitors enter the market and are then acquired or dissolved. See, e.g., Stephanie Palazzolo & Kate Clark, *AI Startup Harvey Targets \$2 Billion Valuation and Mulls Buying a Legal Research Company*, THE INFO. (June 7, 2024), <https://www.theinformation.com/articles/ai-startup-harvey-targets-2-billion-valuation-and-mulls-buying-a-legal-research-company>; Frank Ready, *Legal Research Companies Fastcase and Casemaker Announce Merger*, LAW.COM (Jan. 5, 2021), <https://www.law.com/legaltechnews/2021/01/05/legal-research-companies-fastcase-and-casemaker-announce-merger/>; Bob Ambrogi, *Building on its Jurisage Merger, CiteRight Launches AI-Powered Tool for Litigators to Summarize and Synthesize Case Law*, LAWNEXT (June 4, 2024), <https://www.lawnext.com/2024/06/building-on-its-jurisage-merger-citeright-launches-ai-powered-tool-for-litigators-to-summarize-and-synthesize-case-law.html>; *Thomson Reuters to Acquire Legal AI Firm Casetext for \$650 Million*, REUTERS (June 27, 2023), <https://www.reuters.com/markets/deals/thomson-reuters-acquire-legal-tech-provider-casetext-650-mln-2023-06-27/>.

¹⁰¹ In recent years, the acquisitions by Lexis/RELX and Westlaw/Thomson Reuters have been extensive. Lexis/RELX has acquired Ravel, LexMachina, Caselex, Intellifiles, Statenet, and MLex, to name a few. Westlaw/Thomson Reuters has acquired Casetext, ThoughtTrace, IndLaw Communications, Avox, and LexNova, among others. Greg Lambert, *Graphing the Shrinking Legal Publishing World*, 3 GEEKS AND A LAW BLOG (April 22, 2010), <https://www.geeklawblog.com/2010/04/graphing-shrinking-legal-publishing.html>.

should hold out the most hope, provided the prison monopsony can put down the drawbridge and let them change the market.

II. Aren't You My Knight in Shining Armor?¹⁰²: Prisons and Access to Legal Information

There is nothing specific in the United States Constitution that deals with access to justice, access to the courts, or access to prison libraries, and the Supreme Court has often been wary of extending constitutional rights where they do not explicitly exist.¹⁰³ Beginning in the 1940s, however, the Supreme Court did begin to recognize that incarcerated litigants have certain Due Process rights within the criminal legal system, and those rights expanded for decades before contracting again in the 1990s.

A. A Brief History of Prison Libraries

The cases that deal directly and extensively with access to justice via access to the courts (and, in later cases, access to information as a means to facilitate access to the courts) for incarcerated litigants are from the 1940s, 1970s, and 1990s. Before the United States Supreme Court found it appropriate to provide inmates with a constitutional right to access to legal information, it first had to establish a constitutional right of access to the courts.¹⁰⁴ Once that right was well established, and nearly thirty years later, the Court established a basic constitutional right to information that paved the way for not only the necessity of prison libraries around the country, but their success.¹⁰⁵

¹⁰² Video Game: Kingdom Hearts 3D: Dream Drop Distance (Square Enix 2010).

¹⁰³ That was, of course, the justification for the recent *Dobbs* decision. *See generally* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). The fact that the Constitution doesn't specifically address abortion was a reason the court decided to overrule *Roe v. Wade*, 410 U.S. 113, reversing decades of precedent in a manner not entirely dissimilar to what we've seen here, though one can't argue they have the same consequences. Justice Alito stated "[e]ven though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever recognized such a right, and its survey of history ranged from the constitutionally irrelevant...to the plainly incorrect...." *Dobbs*, 597 U.S. at 226. Arguing the insanity of *Dobbs* is not the point of this Article, nor is this article meant to be an attack on whether originalism is the correct approach to constitutional interpretation. It is worth noting, however, that the risk the Supreme Court runs by adhering to originalist readings is that many individuals—and certainly those incarcerated—have nearly no rights at all.

¹⁰⁴ *Ex Parte Hull*, 312 U.S. 546, 548 (1941).

¹⁰⁵ *Younger v. Gilmore*, 404 U.S. 15 (1971).

Unfortunately, the spotlight cast on libraries by the Court in 1971 opened the door for future cases in which the importance of prison libraries was discussed in depth, which went on to diminish their value to incarcerated people. Both *Bounds* in the 1970s and *Casey* in the 1990s dealt with access to and the sufficiency of prison libraries.¹⁰⁶ The opinion in *Casey* culminated in the true evisceration of meaningful access to legal information and access to justice for already-vulnerable incarcerated litigants.

Both *Bounds* and *Casey* addressed access to the courts and the impact that libraries and legal information have on effective and meaningful access to the criminal justice system.¹⁰⁷ While both discussed the need to have access to legal information in order to pave the way for access to the courts, neither case contemplated the current state of legal resource publication: legal resources are now available in (typically) expensive online platforms, controlled by a powerful duopoly, and then purchased by the prison monopsony that controls how prisoners gain access to that online information.¹⁰⁸ While neither *Bounds* nor *Casey* considered the possibility that legal research would someday be performed largely online, both cases are pivotal to understanding the harm being done to those who are currently incarcerated through restriction of their access to legal information.

B. The Right to Information: Forced Reforms Based on Litigation

The Supreme Court cases that dealt with legal information and prison libraries did so in the abstract. In those cases, the Court established, first, that inmates have a right of access to the courts and, second, that a means of accessing the courts could be achieved through access to information (and, therefore, access to prison libraries). But while an establishment of libraries in the nation's prisons was clearly important to achieving access to justice, the reforms could only go so far before being stripped to the bare minimum, ensuring prisoners had no absolute guarantees of access to libraries—and therefore access to information—with which to approach their appeals.

1. Bounds

¹⁰⁶ *Bounds v. Smith*, 430 U.S. 817 (1977); *Lewis v. Casey*, 518 U.S. 343 (1996).

¹⁰⁷ *Id.*

¹⁰⁸ *Chase, Let's All Be...Georgia*, *supra* note 24, at 391.

In the first major case addressing access to legal information to reach the Supreme Court, the Court addressed 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.¹⁰⁹ In determining 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,"¹¹⁰ the Supreme Court considered whether the need for legal research in new cases versus petitions for discretionary review had any impact on prisoners' ability to access the courts.¹¹¹ The Supreme Court recognized 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.¹¹²

The Court in *Bounds* held that "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."¹¹³ In making this determination, the Court indicated that an attorney would be deemed ineffective and incompetent if he filed an initial pleading without performing adequate legal research, and that research tasks are no less important for an incarcerated litigant representing himself *pro se* when navigating the criminal justice system.¹¹⁴ Economic factors could be considered, the Court said, when making a determination about whether the methods used to provide the required access to prison law libraries or assistance from those trained in the law would satisfy due process.¹¹⁵ *Bounds* opened the door for countless cases in federal and state courts discussing the constitutional right to access the

¹⁰⁹ *Bounds*, 430 U.S. at 817–18.

¹¹⁰ *Id.* at 828.

¹¹¹ *Id.* at 827–28.

¹¹² *Id.* at 821–22.

¹¹³ *Id.* at 828.

¹¹⁴ *Id.* at 825–26.

¹¹⁵ *Id.* at 825.

courts via use of legal information,¹¹⁶ but after the decision in *Lewis v. Casey*¹¹⁷ nearly twenty years later, the holding of *Bounds* became so limited that it practically stripped away access to prison libraries, even though the opinion didn't require that directly.

2. *Casey*

Thirty years later, Arizona prisoners brought a class action suit alleging inadequate access to legal research facilities in over twenty different prisons around the state.¹¹⁸ When the case reached the Supreme Court in 1996, the Court emphasized that *pro se* litigants, including prisoners, have a right to access to the courts and nothing more—certainly not a right to access to prison libraries.¹¹⁹ The Supreme Court rejected the caution issued in *Bounds* that “[t]he cost of protecting a constitutional right cannot justify its total denial.”¹²⁰ The *Casey* decision further reasoned 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.¹²¹

¹¹⁶ Citators list over 5,000 cases as citing *Bounds v. Smith* for the proposition that prisoners should have access to legal materials – to list them all would be an article in and of itself. See generally *McCamey v. PA Dept. of Corrections*, 276 A.3d 1217 (Pa. Commw. Ct. 2022) (inmate could not prove actual injury under the standard set forth in *Bounds* and *Casey* because he was unable to specifically plead the dates he was denied access to a prison law library or specify the harm he was subjected to because of that denial). See also *Hooks v. Wainright*, 536 F. Supp. 1330 (M.D. Fla. 1982); *Carper v. DeLand*, 851 F. Supp. 1506 (D. Utah 1994).

¹¹⁷ *Lewis v. Casey*, 518 U.S. 343 (1996).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 343, 355.

¹²⁰ *Bounds*, 430 U.S. at 825.

¹²¹ *Casey*, 518 U.S. at 355.

The Supreme Court found that prisoners specifically are entitled only to “minimal access” to legal information and established strict standing requirements for incarcerated litigants suing about obstacles they encounter in the process of accessing legal information.¹²² So while the opinion didn’t say “prison libraries are unnecessary” in its wording, its impact on prison libraries was significant, and it damaged access to justice for the millions of Americans who were incarcerated in the 1990s, many of whom remain incarcerated today, and those who have been incarcerated since.

C. Retrenchment – Recent Court Rules Watering Down Access to the Incarcerated

The path to today’s legal research landscape has been anything but straightforward, but the Supreme Court has not waived; it has not heard another information/court access case since 1996. But while the Supreme Court has been turning a blind eye to the problems that still exist in the legal information landscape, many incarcerated litigants have challenged *Casey*’s precedent, only to have their cases dismissed.

Countless incarcerated people have brought actions that are similar, if not identical, to the arguments raised in *Bounds* and *Casey*, alleging that deprivation of access to a law library and legal materials violated their rights under the Civil Rights Act because they were denied meaningful access to the courts.¹²³ The federal appellate courts have been quick to restate the Supreme Court’s stance that incarcerated litigants should have as much access to law libraries as is needed to effectuate their right to the courts. The Eighth Circuit has noted that even where the inmates *could* have had more access to legal materials in prison libraries, additional access would not have impacted the

¹²² *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.

¹²³ See, e.g., *Degrade v. Godwin*, 84 F.3d 768, 768 (5th Cir. 1996) (finding that a prisoner’s rights were not violated when he was unable to access a prison library to prepare for his *pro se* defense because other inmates were using the space as a rec room, as adequate legal assistance, in the form of court-appointed counsel, was refused); *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); *Jones v. Greninger*, 188 F.3d 322, 324–25 (5th Cir. 1999) (holding that limiting prisoners to five hours a week of time in a law library does not violate their constitutional right of access to the courts).

outcome of their cases.¹²⁴ Because of that, the lack of access to legal materials did not violate their constitutional due process right of access to the courts.¹²⁵ As recently as 2022, the Sixth Circuit refused to define the “contours” of a right to access to legal materials, instead assuming “that a lack of federal materials for a prisoner to challenge his conviction or confinement, combined with a lack of legal assistance program, constituted a constitutional impediment” to access to the courts.¹²⁶

Legislatively, the Prison Libraries Act was introduced in the House of Representatives on April 25, 2023.¹²⁷ The bill, which was immediately sent to the House Committee on the Judiciary and seemingly died in committee during the 118th Congress,¹²⁸ sought to establish a program to make grants for the establishment of prison libraries.¹²⁹ While the enumerated purpose of the act is noticeably *not* to provide access to legal information, the introduced bill did state that grant funds may be used for library services for incarcerated people to acquire modern materials and equipment and expand prison library infrastructure. A logical jump would be to assume those funds could be used for legal materials and much-needed updates to prison library internet systems needed to access legal materials that are nearly all electronic.¹³⁰

Given the politics at play in both the legislative and judicial branches, it is not surprising that neither Congress nor the Supreme Court has been able to solve the access to legal information and access to justice problem in America’s prisons, particularly because there are companies that could facilitate access to legal information in a quick and meaningful way: the legal research duopoly of Lexis (owned by RELX) and Westlaw (owned by

¹²⁴ Klinger, 107 F.3d at 617.

¹²⁵ *Id.*

¹²⁶ *Id.* at 795. In making this determination, the Sixth Circuit cited other appellate cases including Egerton v. Cockrell, 334 F.3d 433 (5th Cir. 2003) (concluding that where no federal materials or alternatives thereof are available in a prison law library, prisoners’ rights of access to the courts are violated); Estremera v. United States 724 F.3d 773 (7th Cir. 2013) (holding that a lack of access to a prison law library can be an impediment to filing a collateral attack in principle, but whether or not the prisoner has demonstrated that the state created an impediment will be highly fact-specific).

¹²⁷ Prison Libraries Act of 2023, H.R. 2825, 118th Cong. (2023). This bill was introduced in the House on April 25, 2023 and referred to the House Committee on the Judiciary, never to be seen or heard from again.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See Chase, *Neutralizing Access to Justice*, *supra* note 24 (examining net neutrality and its impact on criminal defendants’ ability to access the courts—and justice—through access to legal information).

Thomson Reuters). While those companies have a stated goal of providing legal information to the masses, it is hardly that simple when it comes to providing legal information to millions of incarcerated people, and when that access to information is effectuated by a powerful prison monopsony with a vested interest in controlling that access to information and navigating the payment for that information in a way that has the potential to exploit prisoners in a not-so-obvious way.¹³¹

III. A NOBLE GOAL TO BE CERTAIN, BUT A SELFISH ONE AS WELL¹³²: PUBLISHERS AND PRISONERS

The moat around legal information in the United States is wide and expands regularly as large corporations increase their control over both the information and the means of accessing it.¹³³ Concurrently, prisons are increasing their control over the business of providing access to information in prisons, acting as the legal licensor of legal research database to the tune of millions (if not billions) of dollars each year.¹³⁴ This subversive anticompetitive behavior occurring on the part of both the duopoly of publishers and the monopsony of the prison complex presents a unique challenge to access to justice that many are cautious to explore.¹³⁵

A. Legal Publishers Act Anticompetitively to Deny Prisoners Access to Information

¹³¹ Chase, *supra* note 35.

¹³² Video Game: Prince of Persia: The Two Thrones (Ubisoft 2005).

¹³³ See Victoria Baranetsky, *Corporate Control of Public Information*, COLUM. JOURNALISM REV. (May 11, 2023), https://www.cjr.org/tow_center_reports/corporate-control-of-public-information.php.

¹³⁴ *Id.*

¹³⁵ It is notable that one of the largest licensors of legal information from the Thomson Reuters/RELX duopoly is the United States government, not only by government-funded prisons but also by the Department of Justice, the very department that is responsible for working with the FTC to enforce antitrust laws. While this Article does not aim to suggest the DOJ is behaving in an unethical way, the potential conflict of interest in pursuing these issues has to be mentioned. *Thomson Reuters to Provide US DOJ, FBI with Legal and Investigative Tools Under New Multi-Year Contract*, THOMSON REUTERS (Oct. 28, 2019), <https://www.thomsonreuters.com/en/press-releases/2019/october/thomson-reuters-to-provide-us-doj-fbi-with-legal-and-investigative-tools-under-new-multi-year-contract.html>. RELX also maintains an active, multi-year contract with the DOJ. See *Contract Summary*, USA SPENDING, https://www.usaspending.gov/award/cont_awd_15jl1b25f00000139_1501_03310323d0035_0300 (last visited Mar. 4, 2025).

The anticompetitive behavior on the part of the legal publishers may not be illegal, and the collusive behavior may not be tacit, but it is obvious that the two major publishers of legal information in the United States—legal information for which the publishers often possess copyrights—prevent millions of Americans from accessing legal materials.¹³⁶ Because the existence of anticompetitive results does not necessarily equate to antitrust violations, shedding light on these issues is challenging, particularly when framed around access for incarcerated people—people for whom access to any information, let alone legal information, is not a priority.¹³⁷ But because due process necessitates access to the courts, and that access may be effectuated by access to legal information, an exploration of the ways the legal publishing duopoly and the prison monopsony operate is necessary to understand potential solutions.

1. The Prison Monopsony's Impact on Access to Justice

While monopolies (and by extension duopolies) are relatively easy to understand, understanding of monopsony is not as common. If you picture a small fishing town in Maine¹³⁸, you may envision many boats of deep-sea fishermen, leaving the docks early in the morning and heading out into icy waters to collect the biggest catch they can, in the highest quality possible. There may be dozens of these fishermen going out on a daily basis and returning home to the town of 1,000 people where they live. In that town is a single, wealthy fish distributor who has the means to transport the catch of the day quickly south, maybe by private plane. That wealthy fish distributor is the sole buyer of the catch of the day, the only buyer available to purchase fish from those dozens of fishermen who have been working tirelessly. If the wealthy fish distributor decides he will pay \$25 a pound for fish on Saturday, the fishermen gladly accept; they have no choice, as the distributor is the only

¹³⁶ *Id.*

¹³⁷ The FTC issued Antitrust Guidelines for Collaborations Among Competitors, which was concrete evidence that competitors can collaborate and the result may not be a violation of U.S. Antitrust law. These guidelines were withdrawn in December of 2024, so the ability of competitors to collaborate remains to be seen. <https://www.ftc.gov/news-events/news/press-releases/2024/12/ftc-doj-withdraw-guidelines-collaboration-among-competitors>.

¹³⁸ Interestingly, the United States government did step into the fishing industry with individual transferrable fishing quotas, which some scholars have discussed in relation to antitrust law. Fishing is, of course, not the subject of this article. See generally William J. Milliken, *Individual Transferrable Fishing Quotas and Antitrust Law*, 1 OCEAN & COASTAL L.J. 35 (1994).

purchaser in town. The next day, the wealthy distributor decides he'll pay a single dollar per pound. The fishermen are shocked, but \$1.00 per pound is better than nothing, so they accept. This is a monopsony, and in this scenario no one would argue that it isn't harmful. The fishermen are in a lose-lose situation with regard to the sale of their fish, and the market that receives the fish from the wealthy distributor is none the wiser; they are likely paying high prices for fish regardless of what happens up-market. The wealthy fish distributor is in a position of power, and his harmful monopsony controls the market in that area.

The case would be the same if there were two wealthy fish distributors working together as a buy-side cartel, which is just as damaging as the single fish-distributor scenario.¹³⁹ The fish market needs its own knight—probably in the form of a nascent competitor from another town nearby—to swoop in and disrupt the industry, creating some competition within the market. If that doesn't happen, the distributor will continue to rule, and the market will continue to suffer.

Likewise, prisons maintain a monopsony in the provision of information services for incarcerated people. Like the fishermen, the incarcerated people need a knight (in shining nascency) to swoop in and shake up the market. The difference, of course, is that the result of the prison monopsony isn't people paying too much or too little for fish (or being paid too much or too little for catching fish), but a blockade being put in place for the affordability of legal materials. Prisons are solely responsible for signing contracts and purchasing or licensing legal information that will then be accessed by incarcerated persons.¹⁴⁰ Prisons make an offer and the legal

¹³⁹ Buy side cartels, where members of a group collude to pay a uniform price for a good or service, have been found *per se* illegal by the Supreme Court. *See* *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948). Even though those who were specifically injured by the collusive conduct and price-fixing were sellers, not consumers, the conduct seeks to drive out competition and therefore violates the Sherman Act. *See* *National Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421 (7th Cir. 1965); *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946); *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030 (9th Cir. 1983).

¹⁴⁰ There are other factors that impact access to information for incarcerated people in the federal system in a significant way, one of them being Special Administrative Measures put in place by the Bureau of Prisons. *See* *National Security Cases*, 28 C.F.R. § 501.2 (2025). These SAMs, as they're known, "deny individuals almost any connection to the human world . . . [and] include gag orders on prisoners, their family members, and their attorneys, effectively shielding this extreme use of government power from public view." CENTER FOR CONSTITUTIONAL RIGHTS, *THE DARKEST CORNER: SPECIAL ADMINISTRATIVE*

publishers accept it or reject it—a very typical way for contract negotiations to proceed. Once the contracts are signed, though, the prisons are free to attach whatever strings they want to the legal information at a rate determined solely by the monopsony. This means that the prisons may opt to charge prisoners outrageous fees to access information that they are paying very little to license.¹⁴¹ They may charge administration fees, technology fees, or attach time limits for the people who seek to access information.¹⁴² And much like the fishermen, the incarcerated people seeking to access information purchased or licensed by the prison monopsony have no choice but to accept whatever terms are passed on to them. The problem is deeply entrenched in the administration of prison services. While the prison monopsony is a huge part of the problem, it is not the only part of the problem with access to information for incarcerated people.

2. *The Legal Publishing Monopoly on Some Legal Information*

It is undeniable that Lexis and Westlaw are the major players in legal information services and have, in fact, “perfected the art of collecting large sums of money for access to material that is already in the public domain.”¹⁴³ While this powerful duopoly’s control of that information is harmful to the average person,¹⁴⁴ it is their monopoly over some legal information that poses

MEASURES AND EXTREME ISOLATION IN THE FEDERAL BUREAU OF PRISONS 1 (Sept. 2017), https://ccrjustice.org/sites/default/files/attach/2017/09/SAMs%20Report.Final_.pdf. Included in the SAMs is information isolation, where incarcerated people have their access to information restricted. *Id.* This censorship of information typically applies to information about current events and the outside world, but as the law changes before our very eyes it is easy to guess that legal information – or current information, at the very least – is being swept into that bucket of censorship. *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Jessica Litman, *The Economics of Open Access Law Publishing*, 10 LEWIS & CLARK L. REV. 779, 792 (2006).

¹⁴⁴ *Id.* Legal academics are the exception, as they “have long had ‘feels free’ access to electronic versions of published law review articles through Lexis and Westlaw, which make their databases available to law schools at a bulk discount rate.” *Id.* While Professor Litman’s point about law reviews is well taken, it is equally as salient when discussing access to the rest of the legal materials that are in the public domain, like cases and statutes, which many academics only access through paid databases despite being free through open access websites available elsewhere on the Internet. While average people don’t have access to products like Lexis and Westlaw, either because they don’t know about them or can’t afford them, the law firms that can afford them pay high prices with differential pricing structures, but because law students have had “feels free” access while in law school, firms will pay

a massive problem to incarcerated persons. This monopoly over legal information has not gone entirely unnoticed by the Department of Justice. In 1996, the DOJ, together with several state Attorneys General, brought a civil antitrust action in the DC District Court to prevent the acquisition of then West Publishing Company (West) by The Thomson Corporation (Thomson).¹⁴⁵ At the time, the DOJ alleged that Thomson and West were the nation's largest publishers of legal materials and that the common ownership would harm consumers by reducing competition in a market where Thomson and West were direct competitors.¹⁴⁶ In addition, and importantly for the current analysis, the DOJ alleged that the acquisition was

Likely to reduce competition in the provision of comprehensive online legal research services by reducing Thomson's incentive to continue providing products, including its electronic case law citator, Auto-Cite, to Lexis-Nexis, a division of Reed Elsevier, Inc. ("Lexis-Nexis"), at current levels of price and quality. Lexis-Nexis, a major provider of comprehensive online legal research services, depends upon its access to some of these products to compete effectively against the only other online legal research service, WESTLAW, which is now owned by West and would be owned by Thomson following the transaction. *Reduced competition in the provision of comprehensive online legal research services would mean higher prices and reduced product quality for consumers of those services* (emphasis added).¹⁴⁷

Those in the legal profession know how this story ends, but the opinion in the case is illuminating on several points. First, Thomson licensed a great deal of content to LexisNexis, including the Auto-Cite citation information used by both competitors.¹⁴⁸ While one might not see this as

the high prices for these platforms because the students are already trained and it is not worth their time or money to train them in a product with which they are unfamiliar. Arewa, *supra* note 46, at 821, 829.

¹⁴⁵ United States v. The Thomson Corp., 949 F. Supp. 907 (D.D.C. 1996).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* It is also important to understand that while Thomson, West (and now Thomson Reuters) and Lexis licensed information back and forth, they do not share the same relationship with other competitors, regardless of size or placement in the market. Lexis and Westlaw's copyrighted materials, like Corpus Juris, American Law Reports, or

evidence of collusion or anti-competitive practice (when the market had three main competitors, Thomson, West, and Lexis) it certainly shows some degree of collaboration between the now-duopoly.¹⁴⁹ Second, Thomson and West attempted to assert a copyright claim over the star pagination in the reporters they published.¹⁵⁰ The claim of copyright over something as simple as a page number certainly indicates an intent to control information (in this case, opinions of the court) that would otherwise be in the public domain, thereby making access to legal information significantly more difficult (and expensive) for consumers.

Finally, and perhaps most importantly, the Circuit Court made passing reference to the allegation in the complaint that Lexis and Westlaw maintain the market of online legal research, for which there are no direct competitors.¹⁵¹ The complaint itself alleged that “[t]imely and sufficient entry into comprehensive online legal research services is difficult, if not impossible. No other legal research commercial database has been able to establish a presence in the market, or is likely to be able to do so.”¹⁵² This prediction—a bad omen for access to justice for those in prison—has certainly come true today. The Thomson acquisition of West was, in fact, allowed to move forward.¹⁵³ Entry into comprehensive online legal research services is difficult (but not impossible); and the competitors who have tried to enter the market face an uphill battle which often includes litigation against Thomson Reuters or RELX.

Indeed, there is an ongoing lawsuit between Thomson Reuters and ROSS Intelligence, wherein Thomson Reuters alleged that ROSS violated their copyrights in legal resources like judicial opinions, statutes, and

American Jurisprudence, cannot be found on any databases outside of Lexis or Westlaw. While this is not evidence of any sort of illegal collusion, this type of sharing of copyrighted materials between the players in the duopoly (and no one else) certainly demonstrates a level of cooperation that likely helps to keep them on top and in near-total control of the legal information marketplace.

¹⁴⁹ Mark J. McCabe, *Merging West and Thomson: Pro-or Anti-Competitive?*, 97 L. LIBR. J. 423, 428-29 (2005) (noting that Thomson, Reed Elsevier, and Wolters Kluwer control 90% of the legal publishing business in the United States). Reed Elsevier’s acquisition by RELX has only furthered the power and expansion of Lexis’s platform, which has, in turn, somewhat decreased Wolters Kluwer’s role in the market.

¹⁵⁰ *Id.* at 927.

¹⁵¹ *Id.* at 911.

¹⁵² *United States v. The Thomson Corp.*, 949 F. Supp. 907 (D.D.C. 1996); Complaint for Injunctive Relief Against Combination in Violation of Section 7 of the Clayton Act, at 19 (D.C. Dist. June 19, 1996).

¹⁵³ *United States v. The Thomson Corp.*, 949 F. Supp. 907 (D.D.C. 1996).

regulations.¹⁵⁴ Thomson Reuters essentially admitted, just as they did in the 1996 antitrust lawsuit, to trying to monopolize legal information, information that should be in the public domain.¹⁵⁵ While Thomson Reuters's stated claim is that the copyrights are in things like headnotes, the effect of those copyrights is to gatekeep all of the legal information available on the site, deepening the moat around legal information and making it increasingly inaccessible to those who can't afford an expensive subscription, which includes millions of incarcerated people.¹⁵⁶

While there is no active litigation about Lexis's control over legal information,¹⁵⁷ the same issues present in *Thomson Reuters v. ROSS* apply to information provided by Lexis. Lexis provides access to cases in the public domain attached to headnotes over which they claim copyright and therefore

¹⁵⁴ Thomson Reuters Enterprise Centre GmbH et al v. ROSS Intelligence Inc., No. 1:20-CV-00613 (D. Del. filed May 6, 2020).

¹⁵⁵ In the Answer and Countersuit, ROSS alleges that Thomson Reuters is asserting a copyright over the information in the Westlaw database, including opinions written by judges, statutes written by legislatures, and regulations written by government agencies; for their part, ROSS denied that any of Westlaw's copyrights are valid. Thomson Reuters Enterprise Centre GmbH et al v. ROSS Intelligence Inc., 1:20-CV-00613-SB, Defendant and Counterclaimant Ross Intelligence Inc.'s Amended Answer and Defenses to Amended Counterclaims in response to Plaintiff's Complaint and Demand for Jury Trial, at 4 and 17, paras. 23 and 40 (Del. Dist. May 6, 2020). Thomson Reuters, of course, did just that. The complaint alleges that ROSS infringed Thomson Reuters's "copyrights by directly contracting . . . to reproduce and distribute Westlaw content to ROSS." The content at issue, of course, was cases and statutes that are in the public domain. *Id.* at 13, para. 44. Most recently, the Court rejected Ross's fair use defense, finding (among other things) that Ross's "copying" of West's information for the purposes of training its AI model demonstrated that ROSS was trying to compete with Westlaw. *Thomson Reuters Enterprise Centre GmbH v. Ross Intelligence Inc.*, No. 1:20-CV-613-SB (D. Del. Feb. 11, 2025). Despite the ruling in Thomson Reuters's favor, this case remains ongoing and will surely be litigated for years to come.

¹⁵⁶ Incarcerated people are identified as vulnerable when it comes to performing research *about* them, but not necessarily as vulnerable when it comes to their rights to access to information. NATIONAL INSTITUTE OF JUSTICE, Challenges of Conducting Research in Prisons (Mar. 25, 2012), <https://nij.ojp.gov/topics/articles/challenges-conducting-research-prisons>. But electronic materials are not always best for prisoners, particularly when those electronic resources are owned and controlled by major publishers that control the market. See generally Stephen Raher & Andrea Fenster, *The Tale of Two Technologies: Why "Digital" Doesn't Always Mean "Better" for Prison Law Libraries*, PRISON POLICY INITIATIVE (Oct. 28, 2020), <https://www.prisonpolicy.org/blog/2020/10/28/digital-law-libraries/>.

¹⁵⁷ While there is no current major merger or acquisition activity being reported with Lexis/RELX, there were proposals in the past that would have caused major market shakeups related to Lexis, including a proposed merger of Reed Elsevier and Wolters Kluwer. See William M. Hannay, *The Publishing Merger that Failed: Reed Elsevier and Wolters Kluwer*, 26 ACQUISITIONS LIBR. 173 (2001).

charge exorbitant access fees.¹⁵⁸ Again, a moat is created. The “proprietary” information attached to cases and statutes by Lexis is different than that attached by Westlaw, but it is no less problematic that these two monstrous publishers claim copyright over things that they attach to public domain materials, thereby making them inaccessible. To slay the monster, a new approach is needed, but the two-headed legal publishing duopoly is not easy to understand, let alone slay in order to provide better access to individuals both in and outside of prison.

3. The Legal Publisher Duopoly Undermining Prisoner Access

Thomson Reuters (the parent company of Westlaw) and RELX (the parent company of LexisNexis) represent what is perhaps the most stealthily harmful duopoly currently in existence. These legal publishing powerhouses control the market for legal information providers while also operating massive data aggregation businesses that distribute private information to governments around the world.¹⁵⁹ Everyday Americans are harmed by an inability to access and understand the law that is caused, in part, by the protective practices implemented by these publishers. The individuals who most need access to the law, those who are currently incarcerated and navigating the criminal legal system, have a constitutional right to access that information and no means to do so because of the practices of the duopoly.¹⁶⁰ These individuals are unable to access legal information in a meaningful way, unable to access free legal information—like libraries or free

¹⁵⁸ While the price schedules for Lexis make the fees look reasonable, they add up quickly. *See LexisNexis Price Schedule Large Legal Pricing December 5, 2023*, LEXISNEXIS, <https://www.lexisnexis.com/en-us/terms/SALargeLegal/pricing.page> (last visited Mar. 4, 2025); *Law Firm Per Search Pricing*, LEXISNEXIS, <https://www.lexisnexis.com/en-us/terms/21/pricing.page> (last visited Mar. 4, 2025).

¹⁵⁹ *See generally* LAMDAN, *supra* note 6.

¹⁶⁰ While the right of access to the courts and access to information has been discussed in case law, courts are not clear about where in the Constitution this right comes from. Courts have cited Article IV’s Privileges and Immunities Clause, the First Amendment Petition Clause, the Due Process Clause of the Fourteenth Amendment, and the Fifth Amendment Due Process Clause. *See* Christopher v. Harbury, 536 U.S. 403, 415 n.12 (2002). In addition to incarcerated people navigating the criminal legal system, indigent people, whether in the criminal or civil justice system, are equally harmed by the monopolization and gatekeeping of legal information. Unfortunately, individuals who are *not* incarcerated have not been deemed to have a constitutional right of access to the courts via access to information. So, there are different challenges in identifying exactly why the lack of access is problematic, particularly when these individuals can (arguably) walk into a public library and seek and receive the information they need.

information available online—available to those who are not in prison, and unable to negotiate around the power of this duopoly when they do gain access to legal information.

Compounding these problems is the merger and acquisition activity undertaken by both RELX and Thomson Reuters.¹⁶¹ It seems that any time a potential competitor enters the market and becomes popular, it is swiftly acquired by one of the duopoly.¹⁶² In 2012, law schools and law firms around the country were abuzz about Ravel, “a new category of intelligent tool that combines legal research and analytics. Powered by expert legal knowledge, machine learning, and comprehensive caselaw from the Harvard Law Library, Ravel [was] built by digital natives for 21st century practice.”¹⁶³ Ravel was created at Stanford’s Law School, Computer Science Department, and the d.school Institute of Design (with the support of CodeX) and was poised to take on the duopoly and change the way researchers thought about legal research and the platforms they could use.¹⁶⁴ No sooner did Ravel gain popularity than LexisNexis announced it was acquiring the platform, “expand[ing] the LexisNexis Legal Analytics suite of products through full integration of Ravel Law’s judicial analytics, data visualization technology and unique case law PDF content.”¹⁶⁵

¹⁶¹ As of April 9, 2024, Thomson Reuters had made seventy-one acquisitions across many sectors (not just legal research). Those acquisitions represented over four billion dollars and included companies like Clarivate, an intelligence company with ties to academia, government, and more. *See Acquisitions by Thomas Reuters*, TRACXN TECHNOLOGIES LIMITED (Jan. 10, 2025), https://tracxn.com/d/acquisitions/acquisitions-by-thomson-reuters/_jbQJMNA6tZdcpdNybJQ90ijoRdLIJXRp4sdxV9slWxQ. Similarly, RELX (and before that, LexisNexis) has made dozens of acquisitions of their own, accounting for over \$775 million. *See Acquisitions by LexisNexis*, TRACXN TECHNOLOGIES LIMITED (Jan. 10, 2025), https://tracxn.com/d/acquisitions/acquisitions-by-lexisnexis/_s02JsRhsrukycYYwP5AU5k9UDz_QG2MDPT_l652pwaE.

¹⁶² There was a significant amount of acquisition activity in the 1990s. At that time, there were eighteen publishers of commercial law products. By 2000, there were only twelve publishers. *See* Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1695 (2000); *see* Arewa, *supra* note 46, at 824 (stating there are even fewer publishers today).

¹⁶³ Library News, *eResources Spotlight: Ravel Law*, FIU L. (June 10, 2019), <https://law.fiu.edu/2019/06/10/eresources-spotlight-ravel-law>.

¹⁶⁴ *AI Interview: Ravel and the AI Revolution in Legal Research*, ARTIFICIAL LAWYER (Jan. 23 2017), <https://www.artificiallawyer.com/2017/01/23/al-interview-ravel-and-the-ai-revolution-in-legal-research>.

¹⁶⁵ *LexisNexis Announces Acquisition of Ravel Law*, LEXISNEXIS PRESS ROOM (June 8, 2017), <https://www.lexisnexis.com/community/pressroom/b/news/posts/lexisnexis-announces-acquisition-of-ravel-law>.

Another massive acquisition stunned the legal research landscape when, in 2023, Thomson Reuters announced it signed an agreement to acquire Casetext for \$650 million.¹⁶⁶ Casetext was founded in 2013 to help attorneys practice more efficiently.¹⁶⁷ Like Ravel, the legal world was poised to change with the affordability of Casetext and its innovative resources for helping those in the legal field perform the research and writing tasks that make up the bulk of most attorneys' day-to-day work.¹⁶⁸

These major acquisitions by the legal research duopoly represent a drop in the bucket when it comes to the amount of time and money they spend actively acquiring potential and nascent competitors who attempt to enter the legal research marketplace.¹⁶⁹ This acquisition behavior is not unusual in the legal research industry (or any other industry) and is a part of being an economic player in a capitalist society. And this approach to dealing in the marketplace is not, on its face, violative of antitrust laws because there is no clear evidence of tacitly collusive or exclusionary behavior on the part of these publishers (as has been demonstrated in other industries). But unlike

¹⁶⁶ *Thomson Reuters Corporation Signs Definitive Agreement to Acquire Casetext*, THOMSON REUTERS PRESS RELEASE (June 26, 2023), <https://www.thomsonreuters.com/en/press-releases/2023/june/thomson-reuters-corporation-signs-definitive-agreement-to-acquire-casetext.html>.

¹⁶⁷ *Pablo Arredondo*, SILICON FLATIRONS, <https://siliconflatirons.org/people/pablo-arredondo/> ("Pablo Arredondo is Co-founder and Chief Innovation Officer at Casetext, a legal technology company that develops...tools to...help attorneys practice more efficiently.").

¹⁶⁸ See Taryn Marks, *Surveying Transactional Law Attorney's Research Habits*, 23 *TRANSACTIONS: TENN. J. BUS. L.* 77 (2021). It is a common misconception that transactional attorneys (and trial attorneys, for that matter) don't spend much time on research. This survey suggests otherwise, as do anecdotal conversations with almost any attorney, particularly those who have recently entered practice and perform research not only for their own cases, but for those in their organization to whom they are junior.

¹⁶⁹ LAMDAN, *supra* note 6.

airline,¹⁷⁰ steel,¹⁷¹ mattress,¹⁷² or even grocery store¹⁷³ mergers and acquisitions, the elimination of competitors who may increase access to justice does one thing and one thing only: contributes to the expansive moat between legal information and the people who need it most.

B. The Current System Is Path Dependent, Leading to Entrenched Parties Reaping Above Market Rewards and Providing Substandard Service

Undoubtably, the parties reaping the benefits of this duopoly/monopsony system do not want to see change, and they certainly don't want to see the marketplace shift to welcome the nascent competitors that could provide better opportunities for access to information, and therefore access to justice, for incarcerated people. The financial rewards for the duopoly are simply too good for these companies to reevaluate and change course.

¹⁷⁰ On January 16, 2024, a federal judge blocked a merger of JetBlue and Spirit airlines on antitrust grounds. *United States v. JetBlue Airways Corp.*, 712 F.Supp.3d 109 (2024) (holding that the proposed merger violates Section 7 of the Clayton Act). Shortly thereafter, JetBlue abandoned the acquisition, and Attorney General Merrick Garland declared it “a victory for the Justice Department’s work on behalf of American consumers.” See JUSTICE DEPARTMENT STATEMENTS ON JETBLUE TERMINATING ACQUISITION OF SPIRIT AIRLINES (Mar. 4, 2024), <https://www.justice.gov/opa/pr/justice-department-statements-jetblue-terminating-acquisition-spirit-airlines>.

¹⁷¹ For cases discussing steel monopolies in history, see *United States v. United States Steel Corp.*, 251 U.S. 417 (1920); *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495 (1969). More recently, the DOJ opened a probe into Nippon Steel’s \$14.1 billion takeover of U.S. Steel. See Josh Sisco, *DOJ Opens Formal Investigation of US Steel Takeover*, POLITICO (Apr. 10, 2024), <https://www.politico.com/news/2024/04/10/doj-opens-formal-investigation-us-steel-takeover-00151615>.

¹⁷² On July 2, 2024, the FTC moved to block Tempur Sealy’s Acquisition of Mattress firm. In a 5-0 vote, the Commission voted to challenge a vertical deal that would have seen a merger between the largest mattress retailer in the US with the largest mattress supplier. The author finds it interesting, of course, that the FTC can devote so much time to mattresses, airlines, and grocery stores but not access to information. See Press Release, FTC, FTC Moves to Block Tempur Sealy’s Acquisition of Mattress Firm (July 2, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/07/ftc-moves-block-tempur-sealys-acquisition-mattress-firm>.

¹⁷³ The FTC recently stepped in to stop the merger between Kroger and Albertsons, alleging that the merger of two supermarket giants would lead to higher prices, store closures, and job losses. See Nathaniel Meyersohn, *US Government Sues to Block Largest Supermarket Merger in History*, CNN BUSINESS (Feb. 28, 2024), <https://www.cnn.com/2024/02/26/investing/kroger-albertsons-merger-blocked-ftc/index.html>.

The power comes not just in the control of information, but in cold hard cash. In 2023, Thomson Reuters reported \$2.8 billion in revenues for their legal professionals segment alone.¹⁷⁴ 16% of that segment is made up of government contracts, with identified primary global competitors being LexisNexis and Wolters Kluwer (which does not provide traditional legal research services).¹⁷⁵ Similarly, 20% of RELX's revenue comes from the legal sector, with \$11.36 billion dollars of total revenue being reported for RELX, as a whole, in 2023.¹⁷⁶

Fastcase, one of the most promising potential competitors in the legal research marketplace, has revenues that stand in stark contrast to the publishing duopoly. Unofficial reports place Fastcase's 2023 revenue at less than \$50 million.¹⁷⁷ Fastcase recently merged with vLex, whose revenues are harder to track.¹⁷⁸ These new platforms, with their smaller market shares, are certainly the best nascent competitors poised to change the legal research landscape, but there is a long road ahead if the duopoly can truly be challenged and access to justice for incarcerated people can be achieved.

Were Lexis and Westlaw to welcome nascent and potential competitors with open arms, it could affect their bottom lines. No company, regardless of size, wants to decrease profitability just to benefit the marketplace. Combining that desire to control the market and turn a profit with the control Lexis and Westlaw have over legal information, it is easy to see why the duopoly has remained as powerful as it is, and why that will be difficult to change. In order for the duopoly to fall (or even weaken), the parties involved in the marketplace must actively choose different paths. The biggest two players in the game must be willing to accept opposition (or at least some spirited competition) from nascent competitors. The prison monopsony must be willing to engage with those nascent competitors and provide those services to incarcerated people. And those who are

¹⁷⁴ THOMSON REUTERS, ANNUAL REPORT 2023 6 (2024), <https://ir.thomsonreuters.com/static-files/47412ad2-d720-4a02-99c7-cbd7c425c16d>.

¹⁷⁵ *Id.* at 7.

¹⁷⁶ RELX, 2023 ANNUAL REPORT 222 (2024), <https://www.relx.com/~media/Files/R/RELX-Group/documents/reports/annual-reports/relx-2023-annual-report.pdf>.

¹⁷⁷ Fastcase, LEADIQ (last visited Mar. 4, 2025), <https://leadiq.com/c/fastcase/5a1d89cb240000240063227e#:~:text=As%20of%20May%202024%2C%20Fastcase,annual%20revenue%20reached%20%2435M> (estimating Fastcase's revenue to be in the range of \$10–15 million).

¹⁷⁸ vLex, CB INSIGHTS, <https://www.cbinsights.com/company/vlex/financials> (last visited Mar. 4, 2025).

incarcerated need to trust that the information they receive from *any* provider of legal resources is valid. The road ahead for access to justice for incarcerated people is dependent upon the path the duopoly and monopsony players choose to take, but the nascent competitors present the best opportunity to provide that very access so desperately needed by incarcerated people.

**IV. THEY SERVE THE WEAK UNTIRINGLY, CHALLENGE THE STRONG
UNFLINCHINGLY AND NEVER RETREAT IN THE FACE OF
ADVERSITY.¹⁷⁹**

A. New Competitors Have Emerged to Challenge the Legal Research Duopoly

There have been movements around the United States to free the law and make it more accessible to those who otherwise have difficulty finding and understanding the legal principles that guide the criminal and civil systems.¹⁸⁰ And while the “free law” movement is not new, the value that exists from having access to both free and low cost competitors exists almost entirely for the benefit of those outside of prison.¹⁸¹ While the benefit of these resources to the unincarcerated is certainly higher than to those in prison, these nascent and potential competitors could provide another avenue of access to legal information and access to justice within prison walls that does not already exist.

1. Open Source/Free Competitors

There is no shortage of websites that purport to provide open source and/or free access to legal materials.¹⁸² And while the world wide web can be an excellent starting point for those who are seeking the most basic of information, the ability to utilize trusted websites that have the sole purpose

¹⁷⁹ Video Game: Dragon Quest XI (Square Enix, 2017).

¹⁸⁰ *About Free Law Project*, FREE LAW PROJECT, <https://free.law/about> (last visited Mar. 4, 2025).

¹⁸¹ Chase, *Let's All Be...Georgia*, *supra* note 24, at 406.

¹⁸² It's important to understand that open source and free are not synonyms, nor are they mutually exclusive. A website can be free without the code that runs it being open source, and a website can be built on open-source software without being free to use. See Scott K. Peterson, *What's the Difference Between Open Source Software and Free Software?*, OPENSOURCE.COM (Nov. 7, 2017), <https://opensource.com/article/17/11/open-source-or-free-software>.

of providing access to primary legal materials – cases and statutes – is important when discussing access to justice for those inside and outside of prison.

a. Case Law

In 1990 the Supreme Court partnered with the Hermes project at Case Western Reserve University to make the Court's opinions available on the internet via a File Transfer Protocol (FTP) site.¹⁸³ FTP sites are neither intuitive nor easy to navigate (as many think of websites), and even people who know about the site often lacked the skills to gain access to the materials.¹⁸⁴ The first website to offer Supreme Court opinions—before the Supreme Court's non-FTP website was created—was Cornell's Legal Information Institute.¹⁸⁵ Founded in 1992, it became the first to publish not only these important cases, but the first to publish an online edition of the United States Code as well.¹⁸⁶ Cornell has made significant strides in opening up legal information and providing it to the masses, and other groups have sprung up with similar goals.

Today the Free Access to Law Movement (FALM) operates globally with a goal of maximizing access to legal information to improve and promote access to justice.¹⁸⁷ The FALM's goals are admirable, but putting those goals into practice has proved challenging, particularly in the United States where legal research providers have a demonstrated history of producing expensive versions of the most essential legal information—cases and statutes—for decades.¹⁸⁸ Primary source legal information is, or at least should be, in the public domain and accessible for free. In order for that to happen, groups other than Cornell or FALM have had to take matters into their own hands. These efforts take considerable time and knowledge of not only the law, but of the technology needed to digitize the materials and put them online. Fortunately, some groups have had success with things like

¹⁸³ Michael W. Carroll, *The Movement for Open Access Law*, 10 LEWIS & CLARK L. REV. 741, 743-44 (2006).

¹⁸⁴ *Id.*

¹⁸⁵ *Our People*, LEGAL INFO. INST., <https://about.law.cornell.edu/our-people/> (last visited Mar. 4, 2025).

¹⁸⁶ *Id.*

¹⁸⁷ *Declaration on Free Access to Law*, FREE ACCESS TO LAW MOVEMENT (2012), <http://www.fatlm.org/declaration/>.

¹⁸⁸ For information on the history of legal publication in the United States, see Street & Hansen, *supra* note 6, at 216.

judicial opinions, dockets, and statutes.¹⁸⁹

Judicial opinions are the cornerstone of common law countries like the United States and it has long been accepted, both within the legal profession and by society generally, that those opinions should be available to the public and not subject to a system of complex copyright laws because they are drafted by the government, for the people.¹⁹⁰ Accordingly, the other things that often come with published judicial opinions—syllabi, court-created headnotes, 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.¹⁹¹ While the Supreme Court made its decision about the copyrightable nature of these materials in 1888,¹⁹² those involved in the legal system (namely attorneys and judges) often default to using expensive paid legal resources to perform research anyway. Because of that, Lexis 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.¹⁹³ Because the duopoly consumed legal publishing, there was a hole in the market for free and open publication of judicial opinions.

¹⁸⁹ Graham Greenleaf et. al, *Legal Information Institutes and the Free Access to Law Movement*, GLOBALEX, https://www.nyulawglobal.org/globalex/legal_information_institutes1.html (last visited Mar. 4, 2025).

¹⁹⁰ See *Banks v. Manchester*, 128 U.S. 244, 253 (1888); see Chase, *Let's All Be...Georgia*, *supra* note 24, at 407.

¹⁹¹ Banks, 128 U.S. at 253; see Chase, *Let's All Be...Georgia*, *supra* note 24, at 407.

¹⁹² Banks, 128 U.S. at 244.

¹⁹³ The impression that the copyrighted opinions are more important than the public domain opinions is furthered by the legal field's reliance on the Bluebook, which indicates that the "official" version of cases are those which are published by Westlaw's reporter series. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.3.1(a)(b), at 103 (Columbia L. Rev. Ass'n et al eds., 21st ed. 2020). The academy is home to people who criticize the Bluebook and still others who will opine on its importance. It is the opinion of the author that the Bluebook actively damages access to justice—a topic for another paper—and gets in the way of actually understanding legal materials. For other thoughts on the Bluebook, see generally Paul Gowder, *An Old-Fashioned Bluebook Burning*, 1 NW. L.J. DES REFUSÉS 1 (2024); Alexa Z. Chew, *Citation Literacy*, 70 ARK. L. REV. 869 (2018); David J.S. Ziff, *The Worst System of Citation Except for All the Others*, 66 J. LEGAL EDUC. 668 (2017); Steven K. Homer, *Hierarchies of Elitism and Gender: The Bluebook and the ALWD Guide*, 41 PACE L. REV. 1 (2020).

In 2013, Harvard's Library Innovation Lab created the Caselaw Access Project which led to the digitization of over forty million pages of court decisions.¹⁹⁴ At the Caselaw Access Project's inception, the director of the Library Innovation Lab noted publicly that projects like theirs should be unnecessary, "but many states are still putting stuff in books first."¹⁹⁵ The "book-first" issue is an omnipresent and irritating problem in legal publishing, as jurisdictions that publish in books first retain problematic copyrights to those volumes, thereby limiting the ability of the opinions to be published online and making their use dependent upon access to either a library that has purchased the print copy or an expensive legal database tailored to those in the legal profession.¹⁹⁶ While the Caselaw Access Project's digitization of these cases has published some of the 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 Lexis or Westlaw.¹⁹⁷ 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.¹⁹⁸

b. Statutes

As they did with cases, Cornell's LII sought to put statutes online, but so did members of the legislative branch. When Newt Gingrich was Speaker of the House, he recognized that the legislature has a responsibility in making the law available, so he redirected budget funds to enable the creation of what is now the Library of Congress's congress.gov site, which provides public

¹⁹⁴ *Caselaw Access Project*, HARV. L. SCH. LIBRARY INNOVATION LAB, <https://lil.law.harvard.edu/projects/caselaw-access-project/> (last visited Mar. 4, 2025).

¹⁹⁵ 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.

¹⁹⁶ *About*, CASELAW ACCESS PROJECT, <https://case.law/about/> (last visited Mar. 4, 2025).

¹⁹⁷ *Id.* See generally Street & Hansen, *supra* note 6, 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).

¹⁹⁸ 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/>.

access to both proposed and enacted legislation as it makes its way through Congress (or not).¹⁹⁹ More recently, the publication of both federal and state statutes has been under a microscope. As with case law, statutes have typically been accessible in print, with secondary materials like indexes and tables of contents attached to aid researchers in using the law they've found.²⁰⁰ Because published statutes exist entirely without context, they are not easily understood by those without some training in the law.²⁰¹ Statutes may be read and interpreted a dozen different ways by a dozen different people or courts, so additional information about interpretation is often required to make sense of statutory language.²⁰² Because annotations are considered secondary material published by the legal research duopoly, they are often not available in books published by governments or on state or federal websites.²⁰³

The publication of annotations alongside statutes was at issue in *Georgia v. PublicResource.org* (“PRO”).²⁰⁴ In *PRO*, the state of Georgia asserted a copyright claim over the Official Code of Georgia Annotated, a compilation of Georgia statutes and annotations that were written pursuant to an agreement between Lexis and the State.²⁰⁵ While Georgia claimed the annotations did not have the force of law, they asserted a copyright claim over both the annotations and the statutes to which they were attached—statutes that were squarely within the public domain. In determining that the annotations at issue in *PRO* were in the public domain and therefore not copyrightable, the Supreme Court set the stage for the possibility of a new statutory publishing scheme, one in which states could use annotations to provide more access to the law and explanatory legal materials that people need to move about as citizens of the United States and within individual

¹⁹⁹ Carroll, *supra* note 182, at 744. Carroll discusses Gingrich’s role in directing funds to the Library of Congress to create Thomas, which launched on January 4, 1995. See Lisa LaPlant (llaplan), *USGPO Innovation Technology Timeline*, GITHUB (June 9, 2024), <https://github.com/usgpo/innovation/blob/master/resources/tech-timeline-2023.md>. Thomas transitioned to Congress.gov, which was transitioned from its beta site and went live in 2014. *Id.*

²⁰⁰ See generally Darvil, *supra* note 6, at 123 (discussing the importance of access to reliable state statutory code websites in order to improve access to justice).

²⁰¹ Julia Wentz, *Justice Requires Access to the Law*, 36 LOY. U. CHI. L.J. 641, 642 (2005) (explaining that in order to ensure justice, people need to have access to the language of the law itself).

²⁰² CONGRESSIONAL RESEARCH SERVICE, R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 3 (2018), <https://crsreports.congress.gov/product/pdf/R/R45153/2>.

²⁰³ Chase, *Let’s All Be...Georgia*, *supra* note 24, at 412–413.

²⁰⁴ *Ga. v. Pub-Res. Org., Inc.*, 590 U.S. 255, 140 S. Ct. 1498, 206 L. Ed. 2d 732 (2020)

²⁰⁵ *Id.*

states.²⁰⁶ Unfortunately, however, that possibility has yet to come to fruition, and those seeking to access state and federal statutes are left to cobble together statutes from at least fifty-two different websites (one for each state, the federal government, and the District of Columbia) and the related explanatory materials from around the web, if they exist at all.²⁰⁷ The movement to free the law continues to encounter “numerous difficulties, as commercial publishers have fought or co-opted efforts to make legal materials freely available.”²⁰⁸

2. *Low Cost / Subscription Based Competitors*

There is additional hope for access to justice in the form of low cost, subscription-based competitors. These competitors—nascent competitors in the truest sense of the word—provide access to primary legal information (and some of their own secondary sources) and offer their resources at an extreme discount. The two largest nascent competitors, Fastcase and vLex, merged in 2023 but together remain a nascent competitor in the legal research marketplace.²⁰⁹

vLex was founded in Barcelona in 2000, and within a decade, it expanded its technology and reach to Latin America and other jurisdictions around the world.²¹⁰ It acquired Justis Publishing in 2019, another nascent competitor in the global market that added coverage for the UK, Ireland, Southeast Asia, Australia, New Zealand, and the Caribbean.²¹¹ At the same time, Fastcase was established with the stated goal of “democratiz[ing] the law and encourage[ing] smarter legal practice” in the United States.²¹² When these two small, nascent competitors merged in 2023, they became the world’s largest online library, yet they remain a very small player compared to

²⁰⁶ *Id.*

²⁰⁷ See generally Darvil, *supra* note 6, at 131, 153. See also Street & Hansen, *supra* note 6, at 211–212. Of course, in order to truly be inclusive of all of the laws in the United States the number of websites being compiled would be much higher, to potential include the laws of Puerto Rico, other territories, and the 574 recognized tribes.

²⁰⁸ Carroll, *supra* note 182, at 744 (demonstrating why current methods for accessing the law are unsatisfactory and arguing that society should embrace the movement for open access to the law).

²⁰⁹ *Fastcase and vLex Announce Merger*, 332 BAR LEADER WEEKLY (Apr. 12, 2023), <https://www.americanbar.org/content/dam/aba/publications/barleaderweekly1/2023/041223.pdf>.

²¹⁰ *Our Mission*, vLEX, <https://vlex.com/company> (last visited Mar. 4, 2025).

²¹¹ *Id.*

²¹² *About Fastcase*, FASTCASE, <https://www.fastcase.com/team/> (last visited Mar. 4, 2025).

their counterparts that make up the duopoly.²¹³

Even though Fastcase/vLex provides access to hundreds of thousands of attorneys throughout the US (and the world) by offering discounted or free access through state and local bar associations,²¹⁴ it is not enough to keep them competitive on a major scale.²¹⁵ In its annual technology survey for 2022, the ABA reported that 99.5% of respondent attorneys use some form of Westlaw and 67% of attorneys report using some form of Lexis.²¹⁶ In 2023, the percentage of users listing Westlaw and Lexis for fee-based legal research was 59.5% and 47%, respectively.²¹⁷ By contrast, 33.5% of attorneys in 2022 and 12.2% of attorneys in 2023 report regularly using Fastcase.²¹⁸

²¹³ Bob Ambrogi, *In Major Legal Tech Deal, vLex and Fastcase Merge, Creating a Global Legal Research Company, Backed by Oakley Capital and Bain Capital*, LAWSTATES (Apr. 4, 2023), <https://www.lawnext.com/2023/04/in-major-legal-tech-deal-vlex-and-fastcase-merge-creating-a-global-legal-research-company-backed-by-oakley-capital-and-bain-capital.html>.

²¹⁴ *Bar Associations*, FASTCASE, <https://www.fastcase.com/bar-associations/> (last visited Mar. 4, 2025) (“Every state bar association in America, and many . . . metro, county, and specialty bar associations offer Fastcase legal research as a free bar member benefit.”).

²¹⁵ Interview with Phil Rosenthal, Co-Founder and former CEO, Fastcase, and CSO, vLex (July 3, 2024) (notes on file with the author).

²¹⁶ ABA LEGAL TECH. SURV. REP. 41 (2022). The top online fee-based legal research providers in the 2022 and 2023 ABA Legal Technology Survey Reports were Lexis and Westlaw (by a significant margin), followed by Practical Law (which is owned by Thomson Reuters), then Bloomberg Law (with 13.8%), then Fastcase. It is worth noting that LexisNexis and West are both named sponsors of the ABA Legal Technology Survey. The extent of their reach truly touches every sector of the legal profession; it is difficult to find an area where they are not mentioned. *See* ABA LEGAL TECH. SURV. REP. (2022); *Thank You to Our Sponsors*, AALL, <https://aall2024.eventscribe.net/sponsors.asp?pf=Sponsors> (last visited Mar. 4, 2025) (identifying LexisNexis and Thomson Reuters as the highest-tiered sponsors, Platinum tier, of the American Association of Law Libraries Annual Conference for 2024); *LWI 2024 Biennial Conference*, EVENTZILLA, <https://www.eventzilla.net/e/lwi-2024-biennial-conference-2138573519?preview=1705937269245> (last visited Mar. 4, 2025) (identifying LexisNexis and Thomson Reuters as Titanium and Palladium sponsors of the 2024 Legal Writing Institute Annual Meeting). These two sponsorships alone allow them to interact with groups of legal professionals who shape the ways in which the law is accessed and the way professionals communicate about how the law is accessed.

²¹⁷ ABA LEGAL TECH. SURV. REP. 38 (2023). Between 2022 and 2023, the ABA changed the way the survey questions were reported. The 2022 report asks users which fee-based resources they use for legal research, and the options included Westlaw and Westlaw Edge, Lexis and Lexis+. *Id.* at 33. In 2023, the choices were Westlaw and Lexis/Lexis+. *Id.* at 38. This likely explains the significant difference in results between the two years.

²¹⁸ ABA LEGAL TECH. SURV. REP. 38 (2022). These numbers report the percentage of attorneys using Fastcase as a “free” resource provided through a bar association. When Fastcase is

Another legal research platform has entered the marketplace in recent years, but its fate has yet to be determined and its role is more potential than nascent. Paxton AI bills itself as an alternative to Lexis, Westlaw, and vLex (though notably does not mention Fastcase).²¹⁹ And while the platform touts major advantages for contract management and drafting, it also offers faster AI-driven legal research and a recently-launched AI Citator, which it claims will be largely free of human error.²²⁰ Paxton represents another potential competitor in a long line of competitors that have come before, and time will tell whether it remains competitive and advances into nascency, remains a potential competitor, is acquired by the duopoly or, in what would surely be a rare turn of events, rises the ranks to challenge the duopoly to truly change the face of legal research in the United States.²²¹ But in order to combat the social menace caused in large part by the bigness of the duopoly, new platforms must be considered and even heralded for their better services and competitive prowess.

B. New Platforms Provide Better Services

Not only is the curse of the duopoly's bigness impacting the market for legal research services, it is also impacting the services being provided. The internet is replete with complaints about the services provided by major players in any industry, and legal research is no exception. While the duopoly has been focused on annual updates to their platforms that focus more on

listed alongside fee-based providers like Lexis and Westlaw, only 10.8% of users report using it. *Id.* at 41. Interestingly, vLex is not even listed as an option for available research resources, likely because prior to its merger with Fastcase it was largely comprised of foreign and international resources that would not be of use to most U.S. attorneys.

²¹⁹ *About Us*, PAXTON, www.paxton.ai/about (last visited Mar. 4, 2025).

²²⁰ *Paxton AI Launches "Citator", Publishes Accuracy Scores*, ARTIFICIAL LAWYER (July 8, 2024), <https://www.artificiallawyer.com/2024/07/08/paxton-ai-launches-citator-publishes-accuracy-scores/>; *Introducing the Paxton AI Citator: Setting New Benchmarks in Legal Research*, PAXTON LEGAL AI BLOG (July 8, 2024), <https://www.paxton.ai/post/introducing-the-paxton-ai-citator-setting-new-benchmarks-in-legal-research>.

²²¹ There are, of course, additional potential competitors. Those competitors are but a blip on the radar of the legal research market and seem to come and go as quickly as the sun rises and sets. Particularly with the rise in popularity of generative AI, companies are adding "legal research" to their portfolio of possibilities. Some potential competitors who have yet to gain much traction are Trellis, NexLaw, Scrible (which is not exclusively legal but does market to legal professionals), Harvey, *id.*, and probably more that have yet to reach any sort of findability online. See *26 Top Legal Research Companies and Startups in United States in July 2024*, F6S (July 4, 2024), <https://www.f6s.com/companies/legal-research/united-states/co>.

form over substance, the nascent competitors have been finding new and innovative ways to broaden their reach, improve services, and lessen the moat surrounding true access to justice.

There is no greater threat to the duopoly than the opening of the black box²²² surrounding legal research algorithms. While scholars have been discussing this problem for nearly a decade, it has resurfaced as artificial intelligence has gripped the fascination of the legal profession.²²³ Artificial intelligence has shone a light on the problematic black box, a problem that existed long before artificial intelligence was a part of mainstream discussions surrounding legal research.²²⁴ While consumers in the legal research marketplace hem and haw about what needs to be known and understood about legal research algorithms, the nascent competitors are leading the way in cracking that box wide open and making their algorithms understandable.

In 2016, Fastcase finalized its advanced search feature, which allows for deeper research and understanding about how the research is being performed.²²⁵ As the duopoly dove deeper and deeper into hiding the work of their algorithms and applying shiny bells and whistles that only appeared to provide better access to legal information, Fastcase rolled out a search engine that “uses 16 different factors to rank search results, including TF-IDF keyword relevance, proximity, authoritativeness (citation counts), recency, and the aggregate history of more than 100 million searches in the system.”²²⁶

²²² The term black box comes from science, computing, and engineering and is used for systems whose operation and/or implementation are opaque (or black), meaning users don’t understand the internal workings of the system. For a detailed account of explanations of black box models, see Riccardo Guidotti et al., *A Survey of Methods for Explaining Black Box Models*, 51 ACM COMPUTING SURVS. 93 (2018).

²²³ Emeritus Professor Susan Nevelow-Mart introduced the academy to the issues surrounding legal research black boxes in her article Susan Nevelow Mart, *The Algorithm as a Human Artifact: Implications for Legal [Re]Search*, 109 LAW LIBR. J. 387, 389-390 (2017), but even before the publication of that article her work explored the relevance of results researchers were able to find in Lexis and Westlaw. See Susan Nevelow Mart, *The Relevance of Results Generated by Human Indexing and Computer Algorithms: A Study of West’s Headnotes and Key Numbers and LexisNexis’s Headnotes and Topics*, 102 LAW LIBR. J. 221 (2010); Susan Nevelow Mart, *The Case for Curation: The Relevance of Digest and Citator Results in Westlaw and Lexis*, 32 LEGAL REFERENCE SERVS. Q. 13 (2013).

²²⁴ Clayton Vickers, *How AI Risks Creating a ‘Black Box’ at the Heart of US Legal System*, THE HILL (Apr. 7, 2024), <https://thehill.com/business/personal-finance/4571982-ai-black-box-legal-system/>.

²²⁵ LinkedIn Conversation with Edward Walters, CEO & Founder, Fastcase (July 7-9, 2024) (notes on file with the author).

²²⁶ Susan Nevelow Mart et al., *Inside the Black Box of Search Algorithms*, AALL SPECTRUM, 10, 13 (2019).

This innovation represented a huge step forward for those performing legal research who were not incarcerated and demonstrated that Fastcase was willing to provide better, more transparent services in its goal of democratizing the law. Unfortunately, the advancement of this feature does not represent significant improvements for those who are incarcerated, for whom access to the law and access to justice is uniquely (and constitutionally) required.

Thankfully (and unlike the duopoly) the nascent competitor's drive to democratize the law did not stop at those who can afford and/or routinely access the platform. Fastcase/vLex are also responsible for providing legal research services to over 1,400 corrections facilities in the United States,²²⁷ and they have actively made changes to the platform to best meet the needs of incarcerated users (while also keeping in mind the security concerns of the prisons themselves).²²⁸ Simple improvements and updates, like ensuring the platform could be built with a keyboard that pops up on the screen for inmates who perform legal research on a tablet, were swiftly implemented in order to meet the needs of incarcerated populations.²²⁹ At the same time, security measures were put in place to ensure access to the open internet could not be made available in any way through the platform.²³⁰ Correctional facilities with robust access to nascent competitors like Fastcase have also seen a decrease in grievances since providing inmates with access to legal information; when incarcerated people feel empowered to access and understand the law, they are less likely to find fault in the services being provided by the correctional facility itself.²³¹

Interestingly, in marketing their correctional platforms, the duopoly firms both tout access to annotations and secondary sources over which they

²²⁷ This is, of course, a drop in the bucket. There are 1.9 million people in prison in the United States, in 98 federal prisons, 1,566 state prisons, and 3,116 local jails. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POLICY INITIATIVE (Mar. 14, 2024), <https://www.prisonpolicy.org/reports/pie2024.html>.

²²⁸ Interview with Phil Rosenthal, *supra* note 214.

²²⁹ *Id.*

²³⁰ While the author believes internet access is a human right—one that should be applied equally to all people regardless of their status in the criminal legal system—this “feature” came up in many anecdotal conversations about why correctional facilities may choose one legal research platform over another. *Id.*

²³¹ *Id.*

maintain copyright.²³² In maintaining relevancy – not by enhancing customer service or providing innovative products, but by clutching to copyrighted material and charging high fees – the duopoly’s social menace becomes more apparent and the moat around access to justice for incarcerated litigants expands.

C. Access to New Platforms is Cost Competitive

While the marketing sites of the duopoly’s prison solutions tout competitive and flexible pricing, the nascent competitors provide the most cost-competitive access to legal information in the market today.²³³ Not only are the nascent competitors striving to provide innovative services that meet the needs of both incarcerated litigants and correctional facilities, they are doing so at prices that are much lower than the duopoly competitors. In reviewing public contracts between correctional facilities and legal research competitors, there is a stark contrast between the market position of the duopoly and nascent competitors—a contrast that is reflected in the amount the prison monopsonies are paying these companies for access to their resources.

In 2020, the value of the contract for the electronic law library being provided to the Michigan Department of Corrections²³⁴ by RELX/Lexis was valued at over \$21,666 dollars per month.²³⁵ A similar contract between RELX/Lexis and the state of Nevada was valued at nearly \$7,444 per month.²³⁶ By contrast, a contract between Fastcase/vLex (facilitated by

²³² See *Westlaw Correctional*, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/c/westlaw-corrections> (last visited Mar. 4, 2025); *Legal Research Solutions for Correctional Facilities*, LEXISNEXIS INMATE LAW LIBRARY SOLUTIONS, <https://www.lexisnexis.com/en-us/corrections/default.page> (last visited Mar. 4, 2024).

²³³ *Westlaw Correctional*, *supra* note 223.

²³⁴ The Michigan Department of Corrections includes twenty-seven correctional facilities around the state. SEE MICH. HOUSE FISCAL AGENCY, FY 2023-24: CORRECTIONS (2023), https://www.house.mi.gov/hfa/Archives/PDF/Summaries/23s191_MDOC_Summary_Senate_Passed.pdf (“The Michigan Department of Corrections... is responsible for operation and maintenance of the state’s 27 correctional facilities”).

²³⁵ Contract on file with the author. This valuation was over a five-year period, making the contract worth roughly \$260,000 annually over the contract period, for a total of over \$1.3 million. Given that the contract also provides access to inmates at the state’s 27 correctional facilities, this equates to just over \$800 per month, per facility.

²³⁶ Contract on file with the author. This valuation was over a 4-year period, making the contract worth roughly \$89,000 annually over the contract period, for a total of \$357,350.

Turnkey Technologies) was valued at \$1 per bed, per inmate, per month.²³⁷ Another Fastcase contract was valued at \$156 per month, for a total of roughly \$1,872 per year.²³⁸ This significant disparity in the amount of resources that must be allocated in order for incarcerated people to receive access to legal information is staggering. And the ways in which some of these corrections facilities pay for these items is shocking.

The contract between the state of Nevada and RELX/Lexis indicates that the money to pay for the massive contract for “specific legal materials” comes from the Inmate Welfare Account.²³⁹ It’s possible, however, that those funds actually came from the financial exploitation of incarcerated people and their communities through kickbacks paid to private firms to secure entry into (and often monopoly control over) further commercial transactions in prison.²⁴⁰ This practice of “prison retailing”²⁴¹ creates a market within prisons that often pays for legal research:

Prison systems deposit their kickbacks into opaque, unaccountable, and ill-defined funds allegedly intended for the “general welfare” of the imprisoned population, but which prison administrators can use on practically whatever they want. This carceral sleight of hand displaces the financial responsibilities of jails and prisons onto impacted communities and rebrands it as the selfless goodwill of corrections agencies.²⁴²

This contract provides Lexis access to inmates at the state’s twelve conservation camps and correctional facilities, which is just over \$620 per month, per facility.

²³⁷ Contract on file with the author. Because the contract specifically associated costs with inmates and beds per month as opposed to a standard monthly fee, and because the occupancy of the facility changes from day to day, a typical monthly fee could not be determined.

²³⁸ Contract on file with the author.

²³⁹ Contract on file with the author.

²⁴⁰ See Mary Fainso Katzenstein et al., *Alabama is US: Concealed Fees in Jails and Prisons*, 4 UCLA CRIM. JUST. L. REV. 259, 260 (2020) (describing concealed fees in jails and prisons and the ways in which those fees are used for both legal and illegal purposes).

²⁴¹ Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 HASTINGS RACE & POVERTY L.J. 3, 5 (2020) (exploring the practices of prison retailers and suggesting potential legal protections).

²⁴² Brian Nam-Sonenstein, *Shadow Budgets: How Mass Incarceration Steals from the Poor to Give to the Prison*, PRISON POLICY INITIATIVE (May 6, 2024), <https://www.prisonpolicy.org/reports/shadowbudgets.html>.

This perverse, wannabe-Robin-Hood approach to providing inmates access to legal information by charging them for everything needed to make prison remotely livable was expressed uniquely by the Sheriff of Jefferson County, Montana, who submitted an annual report stating:

I utilize our inmate welfare fund for multiple things to make the inmates' stay in our facility much more pleasant. This is a simply a summary of what we do but it is certainly not a detailed list. The inmate fund in our facility is utilized for purchasing of better jail equipment. For this example, I will use mattresses. I utilize this fund so I don't have to shop for the cheapest, thinnest mattress on the market that fits our budget. I will use the inmate fund to spend more on a thicker mattress that will be more comfortable for the inmate. We also pay for Cable and purchase TVs for the inmates out of this fund. *We pay for the fast case system monthly out of the inmate fund, which gives the inmate access to not only Montana law, but laws from other states as well, as frequently inmates have pending cases in other states at the time of their stay here.* It also gives them access to case law for research purposes. Additionally, I like to provide special things to the inmates on Holidays or special occasions. For example, over the last year, inmates got Pizza and Wings for the super bowl, Banana splits on the 4th of July, Christmas goodie bags from Santa on Christmas (these bags cost about \$70 each). We also provide traditional meals for the inmates on Easter, Thanksgiving and Christmas. Once again this is just a summary and not an entire list. If money is spent out of our inmate fund, it is spent for inmate related items or activities (emphasis added).²⁴³

Including legal research materials—materials that are required for incarcerated people to have even the slimmest chance at true access to justice—in the same budgetary bucket as pizza and cable TV is a clear indicator that there is a problem with the way legal research is considered,

²⁴³ MONTANA SHERIFFS & PEACE OFFICERS ASS'N, SB 303 – LOCAL DETENTION CENTER INFORMATION 4–5, <https://leg.mt.gov/content/Committees/Interim/2021-2022/Law-and-Justice/Studies/SB-303/sb303-detention-center-responses-march-2022.pdf> (emphasis added) (last visited Apr. 17, 2025).

provided, and paid for in America's correctional facilities. Something must be done.

V. REJOICE, FOR WE...WILL BE YOUR SHIELD²⁴⁴: PRISONS SHOULD EMBRACE NEW PLATFORMS AND CHANGE HOW THEY BUY AND PROVIDE LEGAL SERVICES

There is no immediate solution to the myriad problems presented in this Article, but prisons changing how they buy and provide legal information services to incarcerated people is the best first step. Prison retailing has gone on for a long time, and even where workarounds like the Martha Wright-Reed Act are put in place for certain industries or specific means of prisoner exploitation, new ways will be found or invented to take advantage of the country's (literally and figuratively) captive and vulnerable incarcerated people.²⁴⁵ But those working in prisons—people who believe that licensing legal information is the same as ordering goodie bags for holidays or providing pizza for the Super Bowl—should embrace new legal research platforms and the ways in which they think about buying legal services. Publicly available contracts clearly indicate that even where inmate welfare funds *aren't* being used to fund legal research programs in prisons, use of nascent competitors to fill the void in legal research for incarcerated people is significantly less expensive than relying on the duopoly, while providing the same (if not superior) services.

Looking simply at the numbers, it's possible that correctional facilities could save hundreds of dollars per month by providing access to a nascent legal information competitor instead of one of the duopoly competitors. In doing that, prisons may be able to provide additional access points for incarcerated people to research and read this information, fund additional tools to help with understanding, or add additional resources to prisons that have nothing to do with legal research or access to justice. The freeing up of funding alone is a great reason to consider rethinking access to legal information for incarcerated people.

In order to utilize nascent competitors at their highest potential, however, the prison monopsony must change the way it *thinks* about legal research services for the incarcerated people in their correctional facilities. It is not enough to refuse to use a nascent competitor because they provide a

²⁴⁴ Total War: Warhammer (Creative Assembly 2016).

²⁴⁵ Chase, *supra* note 35.

secondary source by a different name, if the access to public domain, primary source materials and explanatory materials are substantially similar. The alternative, of course, is to resurrect actual prison libraries, begin to repurchase and update print materials, and make those available to incarcerated people so they can experience true access to justice.²⁴⁶ In the digital era, one in which people in the legal field who aren't incarcerated have embraced technology like generative AI to perform legal research,²⁴⁷ taking steps to return to print seems unlikely whether inside prisons or outside. Incarcerated people don't need access to the fanciest technology or the brightest, shiniest resource being created and shilled by one of the duopoly competitors. They need access to primary public domain legal materials and secondary materials that help them understand those primary materials, in a technological shell that is intuitive and uniquely tailored to the prison market. Nascent competitors provide all of those things and more and should be embraced.

CONCLUSION

We cannot allow the legal research duopoly or the prison monopsony to remain in control of access to information and, by extension,

²⁴⁶ A related topic which is often raised when discussing prisoners' rights to information is that of understanding, that is the idea that prisoners don't need access to legal resources like Lexis, Westlaw, or even Fastcase because they don't understand what they're reading in the first place. Thus, by giving them access to additional information they don't understand, the courts will be further bogged down by superfluous pro se filings. Unfortunately (or maybe fortunately), before a discussion can be had about whether or how well incarcerated people understand legal information, they must first be *provided* legal information; today that is not the case in all corrections facilities.

²⁴⁷ This is by no means an article about generative AI (and generative AI may or may not be something that should be introduced in prisons to help incarcerated litigants), but there are benefits and detriments to the use of AI that have been well-documented by others and need not be discussed in terms of the legal research duopoly and the prison monopsony. For a wonderful overview, see generally Margie Alsbrook, *Untangling Unreliable Citations*, 37 GEO. J. LEGAL ETHICS 415 (2024) (discussing the dangers inherent in relying upon another person's paraphrased language); Mike Ananny, *Seeing like an Algorithmic Error: What Are Algorithmic Mistakes, Why Do They Matter, How Might They Be Public Problems?*, 24 YALE J. L. & TECH. 342 (2022) (defining algorithmic mistakes and the assumptions that drive system designers); Chase, *supra* note 8, at 525 (discussing the history of access to legal information and the need for advocacy to expand access to justice facilitated by access to legal information); Michaela Calhoun, *No Sword, No Shield, No Problem: AI in Pro Se Section 1983 Suits*, 95 U. COLO. L. REV. F. 1 (2024) (confronting the intersection of civil rights litigation and AI, recognizing that they are compatible partners capable of creating change in Section 1983 litigation for incarcerated pro se litigants).

access to justice for incarcerated litigants. By doing so, a moat is created around legal information that grows deeper and wider as the law becomes less accessible. In order to overcome this violation of incarcerated litigants' constitutional right of access to the courts via access to information, people in correctional facilities need a knight in shining nascency—a legal information provider who considers the needs of not only the incarcerated person but the security concerns of the correctional facilities, too—in order to truly navigate the criminal legal system and facilitate access to justice, potentially changing their lives forever.