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Neutralizing Access to Justice: Criminal Defendants' Access to Justice in a Net Neutrality Information World

Ashley Krenelka Chase

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Neutralizing Access to Justice: Criminal Defendants' Access to Justice in a Net Neutrality Information World

*Ashley Krenelka Chase**

ABSTRACT

This Article examines net neutrality and its impact on criminal defendants' ability to access the courts – and justice – through access to legal information. Research in the American legal system has moved largely online, and print resources are becoming increasingly expensive and, therefore, scarcer. The move to online legal research presents difficult issues in light of the recent demise of net neutrality: If meaningful and speedy access to the Internet becomes dependent upon being able to afford an Internet “fast lane,” users will be divided into the haves and the have-nots. Criminal defendants will surely fall into the latter category, rendering their access to justice completely non-existent.

This Article will examine the legislation, regulations, and cases that brought net neutrality to the attention of the American public. It will examine how net neutrality and access to information are related, particularly in the criminal justice system. It will discuss the United States Supreme Court decisions that have impacted criminal defendants and the methods that defendants use to seek the justice and access to the courts. In detailing how the demise of net neutrality will directly harm the millions of Americans who are currently impacted by the criminal justice system – either as a defendant or as a family member or friend of one – suggestions will be made to ensure that criminal defendants retain access to justice.

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TABLE OF CONTENTS

ABSTRACT	323
INTRODUCTION	325
I. NET NEUTRALITY	329
<i>A. Background</i>	329
<i>B. The Court Battle: Verizon v. FCC</i>	332
<i>C. The FCC Takes a Stand: New Open Internet Protections</i>	335
<i>D. Raising the Red Flag: ISPs Revolt Against the “New” Open Internet</i>	337
<i>E. Today’s FCC and the Restoring Internet Freedom Order</i>	338
<i>F. The Reality of Internet “Deregulation”</i>	340
<i>G. The Future of the Internet in the United States</i>	342
II. ACCESS TO JUSTICE AND LIBRARY HIERARCHIES.....	344
<i>A. A History of Access Issues: How Bounds and Casey Impacted the Right to Information for Prisoners</i>	345
1. <i>Bounds v. Smith</i>	346
2. <i>Lewis v. Casey</i>	346
<i>B. Today’s Criminal Defendants’ Access to Legal Information</i>	348
1. Meaningful Access to Information and the Law Library Hierarchy.....	350
a. Academic Law Libraries.....	352
b. Government Law Libraries.....	355
c. Appointed Counsel, Law Firms, and Law Firm Libraries	356
d. Public Libraries	357
e. Prison Libraries.....	358
III. IMPACT OF NET NEUTRALITY ON ACCESS TO JUSTICE	361
<i>A. Libraries’ Ability to Afford Access to Materials at Useful Speeds</i>	361
<i>B. Effect on the Practicing Bar</i>	363
1. Public Defenders.....	363
2. Private Counsel.....	364
<i>C. Costs to Society</i>	366
CONCLUSION	367

INTRODUCTION

The regulation of the Internet – in particular, net neutrality¹ – and access to justice for criminal defendants are increasingly intertwined.² Where ten years ago those two phrases would not have been used in the same sentence, it has become nearly impossible to talk about access to justice today without considering net neutrality. Net neutrality is, simply put, the idea that no information on the Internet is more or less important than any other information on the Internet and that users should be able to access all information the same way and at the same speeds.³ The debate surrounding net neutrality “arose in response to fears that Internet service providers would begin to restrict and/or tier access, which was perceived as a threat both to the free and open Internet and to equal access to information.”⁴ The current net neutrality debate remains largely centralized around two issues: monopolization and tiering (or Internet

1. Net neutrality is an increasingly discussed and well-researched area of the law, both in general terms and as related to economics and public policy. *See generally* Daniel A. Lyons, *Net Neutrality and Nondiscrimination Norms in Telecommunications*, 54 ARIZ. L. REV. 1029 (2012) (discussing the extreme obligations imposed on broadband providers in order to provide a neutral Internet to consumers and the need for more nuanced restrictions to spearhead innovation by ISPs); Tim Wu & Christopher S. Yoo, *Keeping the Internet Neutral?: Tim Wu and Christopher Yoo Debate*, 59 FED. COMM. L. J. 575 (2007) (debating the merits of net neutrality from both a pro- and anti-regulation perspective); Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141 (2003) (discussing the concept of net neutrality as related to telecommunications policy and how it is related to innovation); Robert Faris et al., *Score Another One for the Internet? The Role of the Networked Public Sphere in the U.S. Net Neutrality Debate*, BERKMAN CTR. RES. PUBLICATION NO. 2015-4 (Feb. 10, 2015) (compiling and analyzing the public debate of net neutrality on social media and in the popular media in the United States from January through November 2014).

2. While intertwined, net neutrality and access to justice are often seen as separate issues. Scholars in both fields speak authoritatively about access to information and the need for a neutral Internet to do so. This Article seeks to fill a gap in the literature where these two topics intersect. It further seeks to aid in the understanding of the nuances of net neutrality and the impact Internet deregulation will have on access to important legal resources, including, mainly, legal research platforms. This Article will focus solely on the need for a neutral Internet so attorneys, criminal litigants, and members of the public can perform meaningful legal research and have meaningful access to the courts. It will not discuss e-filing and the role of net neutrality on access to justice through the ability to e-file.

3. *See Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014); Mike Snider et al., *What Is Net Neutrality and What Does It Mean for Me?*, USA TODAY (Feb. 24, 2015), <https://www.usatoday.com/story/tech/2015/02/24/net-neutrality-what-is-it-guide/23237737/>; *see also* Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738, 19,738 (Apr. 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8, & 20).

4. An-Shou Cheng et al., *The Role of Innovation and Wealth in the Net Neutrality Debate: A Content Analysis of Human Values in Congressional and FCC Hearings*, 63 J. AM. SOC'Y INFO. SCI. TECH. 1360, 1360 (2012).

“fast lanes”). These issues are typically discussed in terms of large-scale, commercial websites, such as Netflix, Google, and Amazon, and not in terms of justice.

Because of years of heated discussions about net neutrality in the public sector, the Federal Communications Commission (“FCC”) has been bombarded with comments on these issues.⁵ Not since Janet Jackson’s nipple appeared at the Super Bowl has the FCC received so many comments on an issue that relates to the public.⁶ In *Verizon v. FCC*, the U.S. Court of Appeals for the D.C. Circuit held that the FCC’s regulatory power over common carriers does not apply to Internet service providers (“ISPs”).⁷ This opinion effectively handed control of the Internet over to major nationwide ISPs, such as Verizon, AT&T, and Comcast, thereby eviscerating the commitment to a free and open Internet once claimed by the FCC.⁸ Professor Tim Wu said that this decision “takes the Internet into completely uncharted territory.”⁹ Since then, new rules have been promulgated by the FCC, upheld by the courts, then subsequently retracted by the FCC, leaving net neutrality mired in uncertainty. This uncertainty may spell certain disaster for the general public, for whom Internet use is a daily part of life. Not only could Internet services require users to pay separately for messaging, social media, or other features, but consumers could also find themselves using an Internet with a fast lane that is “occupied by big internet and media companies, as well as affluent households,” while the rest of the world navigates the Internet with a slow connection or no access to certain websites.¹⁰ For those navigating the intricacies of the criminal justice system – who need access to the Internet to perform meaningful legal research – this prioritization will impact access to the courts and access to justice.¹¹

5. See Gigi B. Sohn, *FCC Releases Open Internet Reply Comments to the Public*, FCC (Oct. 24, 2014), <https://www.fcc.gov/news-events/blog/2014/10/22/fcc-releases-open-internet-reply-comments-public>.

6. Zach Miners, *FCC Extends Net Neutrality Comment Period to Sept. 15*, PCWORLD (Aug. 16, 2014), <http://www.pcworld.com/article/2466100/fcc-extends-net-neutrality-comment-period-to-sept-15.html>.

7. *Verizon*, 740 F.3d at 650.

8. Edward Wyatt, *Rebuffing F.C.C. in ‘Net Neutrality’ Case, Court Allows Streaming Deals*, N.Y. TIMES (Jan. 14, 2014), <https://www.nytimes.com/2014/01/15/technology/appeals-court-rejects-fcc-rules-on-internet-service-providers.html>.

9. Gautham Nagesh & Amol Sharma, *Court Tosses Rules of Road for Internet*, WALL ST. J., Jan. 15, 2014, at A1.

10. Keith Collins, *Why Net Neutrality Was Repealed and How It Affects You*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/technology/net-neutrality-rules.html>.

11. See *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 561 (D.C. Cir. 2004). See generally DEBORAH L. RHODE, *ACCESS TO JUSTICE* (2004) (examining equal protection, effective legal assistance in both civil and criminal systems, and access to justice in the American legal system); Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531 (2013) (highlighting the compounding failures in access to justice initiatives and the need for additional research

But when we discuss the impact of a non-neutral Internet on the criminal justice system, who is being impacted most? Indigent defense is a significant problem, with rising costs,¹² increased caseloads,¹³ and government failure to meet the increased needs.¹⁴ According to statistics kept on the number of individuals in American prisons, over 2.3 million people are currently incarcerated in the United States,¹⁵ and many more are currently being prosecuted in state and federal courts. Accused individuals around the country are subjected to three scenarios: overworked and underpaid public defenders, private attorneys who – if they can afford them at all – might charge exorbitant fees, or self-representation – the worst fate of all.¹⁶ Coupled with these growing demands is the need for each criminal defendant to have solid research to support his or

and education about access to justice and the justice gap); Martha F. Davis, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases*, 25 *TOURO L. REV.* 147, 151 (2009) (discussing the United States' "patchwork approach" to the provision of civil counsel and the need to ensure fairness in civil cases); Gary Blasi, *How Much Access? How Much Justice?*, 73 *FORDHAM L. REV.* 865 (2004) (illustrating the need for metrics to determine whether the legal profession is actually aiding in providing access to justice and, if so, how much).

12. While the costs associated with indigent defense are on the rise, the spending for indigent defense has decreased – compounding the problem. In 2012, state governments spent nearly \$2.3 billion, which was a decrease of nearly six percent from 2010. Stephen D. Owens et al., *Indigent Defense Services in the United States, FY 2008–2012 – Updated*, U.S. DOJ (Apr. 21, 2015), <https://www.bjs.gov/content/pub/pdf/id-sus0812.pdf>.

13. Around six million indigent defense cases were sent to 957 public defender offices nationwide. BUREAU OF JUSTICE STATISTICS, *State Public Defender Programs, 2007* (2010), <https://www.bjs.gov/content/pub/pdf/spdp07.pdf>.

14. In the United States, criminal defendants are being represented by thousands of attorneys throughout the country; in 2007, the United States had 957 public defender offices with over 15,000 full time litigating attorneys. *Id.* There are also hundreds of thousands of attorneys in the United States who purportedly perform some criminal defense work. *Criminal Law Attorneys*, MARTINDALE (last visited May 28, 2019), <https://www.martindale.com/search/attorneys/?term=criminal%20law> (finding 146,271 attorneys who handle criminal defense work).

15. Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POL'Y INITIATIVE (Mar 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html>.

16. Legal representation is intended to be both efficient and effective, and the problem with representing oneself is that "it is *ineffective* for the self-represented litigant, and it is *inefficient* for the courts, which have to deal with litigants who do not know procedure, violate rules, and waste time with pointless and sometimes incoherent arguments." David Luban, *Self-Representation, Access to Justice, and the Quality of Counsel: A Comment on Rabeea Assy's Injustice in Person: The Right of Self-Representation*, 17 *JERUSALEM REV. LEGAL STUD.* 46, 47 (2018) (alterations in original) (citing RABEEA ASSY, *INJUSTICE IN PERSON: THE RIGHT TO SELF-REPRESENTATION* (2015)). Scholar Rabeea Assy critiques of self-representation include that it is bad – even "suicidal" – for litigants and that it damages the legal system. *Id.* He provides support for his assertions with cases from United States and European courts. *Id.*

her defense. This research is most efficiently completed using online legal resources in attorneys' offices, libraries, or the comfort of one's home.¹⁷

The lack of hard data on the number of people currently represented by public defenders, private attorneys, or pro se makes it impossible to address just how broadly these new net neutrality rules may affect millions of Americans.¹⁸ One thing is for certain: In an age where more people than ever before are plodding through the criminal justice system and need easily accessible legal information, the demise of net neutrality threatens to interfere with access to justice and diminishes the ability of those operating within the system to provide well-researched advice.

In Part I, this Article will examine the legislation, regulations, and cases that brought net neutrality to the attention of the American public. Next, it will consider how net neutrality and access to information are related, particularly in the criminal justice system. Part II will discuss methods of access to justice and legal information by those in the criminal system. It will detail United States Supreme Court decisions that have impacted criminal defendants, the hierarchy of libraries criminal defendants and their attorneys use to seek justice and access to the courts, and the cost of legal resources for those attorneys who represent criminal defendants in the United States. Part III will analyze how the demise of net neutrality will directly harm the millions of Americans who are currently impacted by the criminal justice system – either as a defendant or as a family member or friend of one – and what can be done to ensure that their access to justice remains intact.

17. What constitutes legal information – and information, generally – is an interesting and unique research area. The study of legal information and the need for reliable access dates back to 1897 when Oliver Wendell Holmes delivered the speech “The Path of the Law” at the Boston University School of Law – which was later published in the *Harvard Law Review*. He stated, “For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.” Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 1001 (1997). See generally Kevin P. Lee, *A Preface to the Philosophy of Legal Information*, 20 SMU SCI. & TECH. L. REV. 277 (2017) (exploring the changing nature of information and the potential to change the practice of law and access to legal information); Mireille Hildebrandt, *Law as Information in the Era of Data-Driven Agency*, 79 MOD. L. REV. 1 (2016) (arguing that lawyers should collaborate with computer scientists to engineer and inform the computer systems lawyers use to access legal information).

18. Criminal representation in the United States – particularly by public defenders – is an area highly devoid of solid data which has been described as “a black box of discretionary decisions disconnected from any systemic analysis about the relationship between defender practices and case outcomes.” Pamela Metzger & Andrew Guthrie Ferguson, *Defending Data*, 88 S. CAL. L. REV. 1057, 1059 (2015).

I. NET NEUTRALITY

A. Background

A neutral network – what people mean when they refer to “net neutrality” – is a network in which no single application is favored over another.¹⁹ A non-neutral Internet, for example, would allow Yahoo! to pay for priority over Google or for Netflix to pay for faster service than an email provider. Net neutrality has various definitions, ranging from absolute nondiscrimination²⁰ to limited discrimination without tiering based on quality of service.²¹ When the general population of the United States thinks of net neutrality and the need to regulate the Internet, the images that come to their minds range from the “Great Firewall of China” to an Internet “dark web” crawling with pedophiles, free from any sense of order or decency.²² Regardless of the public’s vision of what net neutrality means, most agree that a neutral Internet would require that “owners of the networks that compose and provide access to the Internet should not control how consumers lawfully use that network[] . . . and should not be able to discriminate against content provider access to that network.”²³ With a neutral Internet, users pay a single fee to access the Internet; without net neutrality, the network owners are free to “slice and dice the Internet ecology,” so Internet users in poor communities may experience connections similar to dial-up speeds of the past, while millionaires in large cities may access the Internet at lightning-fast speeds to which we have all become accustomed.²⁴ Essentially, a non-neutral Internet could be split between the haves and the have-nots.

In the United States, issues related to net neutrality and Internet access are hashed out in many arenas – on the floor of Congress, at the FCC, and in courtrooms all over the country. Initially, a series of orders adopted by the FCC in the 1970s were all that was available to deal with telecommunications in the United States.²⁵ These orders, known collectively as “The Computer

19. See Wu, *supra* note 1, at 145.

20. See *id.* at 165.

21. See *id.* at 154.

22. Elizabeth C. Economy, *The Great Firewall of China: Xi Jinping’s Internet Shutdown*, GUARDIAN (June 29, 2018), <https://www.theguardian.com/news/2018/jun/29/the-great-firewall-of-china-xi-jinpings-internet-shutdown>; David Glance, *Explainer: What is the Dark Web?*, CONVERSATION (Aug. 13, 2015), <http://theconversation.com/explainer-what-is-the-dark-web-46070>.

23. ANGELE A. GILROY, CONG. RESEARCH SERV., NET NEUTRALITY: BACKGROUND AND ISSUES 1 (2008), <http://www.fas.org/sgp/crs/misc/RS22444.pdf>.

24. Andrew Leonard, *What the Net Neutrality Repeal Means for Us*, ROLLING STONE (Dec. 14, 2017), <https://www.rollingstone.com/culture/culture-features/what-the-net-neutrality-repeal-means-for-us-124577/>.

25. JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSSROADS: TELECOMMUNICATIONS LAW AND POLICY IN THE INTERNET AGE 188 (2013).

Inquiries,”²⁶ sought to govern the relationships between the “common carriers,” who were traditionally regulated by the FCC and the emerging computer and data processing industries.²⁷ These decisions separated network infrastructure from the market for information services and imposed a set of broad non-discrimination rules for network access that prevented anti-competitive behavior.²⁸

Congress granted the FCC the power to regulate interstate and international communications by radio, television, satellite, wire, and cable in all fifty states, the District of Columbia, and the U.S. territories.²⁹ The Communications Act of 1934 (“the 1934 Act”) allows the FCC to regulate under two broad areas: Title I governs telecommunications services under the Commerce Clause, while Title II applies more stringent regulations to broadcast services, including radio and television.³⁰ Thirty-four years later, Congress passed the Telecommunications Act of 1996 (“the 1996 Act”) in which it defined two classes of services.³¹ First, the 1996 Act defined “information services,” which offer the “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and include[] electronic publishing[] but do[] not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”³² Second, it defined “telecommunications services,” which offer “telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”³³

In 2002, using the updated definitions from the 1996 Act, the FCC determined that provision of broadband Internet and cable television services should be subjected to the less strict Title I standards of the 1934 Act.³⁴ In 2005, the United States Supreme Court upheld this ruling in *National Cable & Telecommunications Association v. Brand X Internet Services*.³⁵ In its decision, the

26. *Id.*

27. *Id.*

28. Robert Cannon, *The Legacy of the Federal Communications Commission’s Computer Inquiries*, 55 FED. COMM. L. J. 167, 174–75.

29. 47 U.S.C. § 151 (2018).

30. Pub. L. 73-416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. ch. 5 (2018)).

31. Pub. L. 104-104, 110 Stat. 56 (1996) (codified as amended at 47 U.S.C. ch. 5 (2018)).

32. 47 U.S.C. § 153(24) (2018).

33. *Id.* § 153(53).

34. Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002), *aff’d in part, vacated in part by* Brand X Internet Services v. FCC, 345 F.3d 1120 (9th Cir. 2003), *rev’d and remanded sub nom.* Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Serv., 545 U.S. 967 (2005).

35. 545 U.S. 967 (determining that, under *Chevron v. Natural Resources Defense Counsel*, 467 U.S. 837 (1984), the FCC was lawful and acted within its discretion in not defining cable broadband providers as “telecommunications services”).

Supreme Court agreed with the FCC that the provision of cable modem service, such as the Internet, is an interstate information service and cannot fall under the broadcast services umbrella of the stricter Title II.³⁶ Later in 2005, the FCC extended the same *Brand X* regulatory relief to telephone company Internet access services – for example, digital subscriber line (“DSL”) services – in what became known as the Advanced Services Order.³⁷ The Advanced Services Order put telephone company Internet access services under the ambit of telecommunications services subject to regulation under Title I.³⁸ The justification for doing so was simple; according to the FCC, telephone company Internet services were purely transmission technologies.³⁹ As a result of the Supreme Court’s decision in *Brand X* and the FCC’s Advanced Services Order, “neither telephone companies nor cable companies, when providing broadband services, are required to adhere to the more stringent regulatory regime for telecommunications services found under Title II (common carrier) of the 1934 Act.”⁴⁰

Classifying both cable modem service and telephone Internet access service as information and telecommunications services under Title I (instead of broadcast services under Title II) allowed the FCC to apply less stringent regulations to both.⁴¹ It also permitted the FCC to maintain its regulatory authority over those services under ancillary jurisdiction granted by Title I.⁴² When the ruling in *Brand X* and the Advanced Services Order were released, the FCC adopted a set of policies that outlined four principles “to encourage broadband deployment and preserve and promote the open and interconnected nature of [the] public Internet”:

1. Consumers are entitled to access the lawful internet content of their choice.
2. Consumers are entitled to run applications and services of their choice (subject to the needs of law enforcement).
3. Consumers are entitled to connect their choice of legal devices that do not harm the network.
4. Consumers are entitled to competition among network providers, application and service providers, and content providers.⁴³

36. *Id.* at 975–76.

37. *See* Policy Statement, 20 FCC Rcd. 14986 (2005).

38. *Id.* at 14987–88.

39. *See id.*

40. *Net Neutrality Overview*, 86 CONGRESSIONAL DIGEST 39, 39 (2007).

41. *Id.*

42. *Id.* (alterations in original).

43. *Id.*

While the FCC's statement of principles did not itself have the force of law,⁴⁴ it showed that the FCC, through the authority granted to it by Congress, considered itself a major stakeholder in the debate over net neutrality.

In 2010, the FCC published a Consumer Guide to the Open Internet, known as the Open Internet Order.⁴⁵ The Open Internet Order contained three basic goals for the maintenance of net neutrality.⁴⁶ First, the FCC dictated transparency; ISPs should disclose to their users any and all relevant information about the policies that govern their networks.⁴⁷ Second, the FCC listed the goal of "no blocking."⁴⁸ Simply put, this goal requested that ISPs not block any content that can legally be put online. Third, the FCC requested that ISPs not act in a "commercially unreasonable manner to harm the Internet, including favoring traffic from an affiliated entity."⁴⁹ The elimination of the third goal – "no unreasonable discrimination"⁵⁰ – is what threatens daily use of the Internet for all users. The FCC acknowledged this fact when it stated that paid prioritization could threaten non-commercial end users, such as schools, libraries, advocacy organizations, individual speakers, and other individual users.⁵¹

B. The Court Battle: Verizon v. FCC

In 2014, the D.C. Circuit decided *Verizon v. FCC* and struck down the FCC's Open Internet Order,⁵² rendering it almost entirely ineffective. The court noted that it was well within the scope of broadband Internet providers' technical abilities to "distinguish between and discriminate against certain types of Internet traffic" and that these providers' "position in the market gives them the economic power to restrict edge-provider traffic and charge for the services they furnish edge providers."⁵³ In response to the court, "Verizon argue[d] that the Open Internet Order rules will necessarily have the opposite of

44. *Id.* at 39–40.

45. FCC, *Consumer Guide*, <https://transition.fcc.gov/cgb/consumerfacts/> (last visited May 28, 2019).

46. Report and Order, 25 FCC Rcd. 17905, 1706 (2010), *vacated and remanded* by *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

47. *Id.*

48. *Id.*

49. Tom Wheeler, *Setting the Record Straight on the FCC's Open Internet Rules*, FCC: BLOG (Apr. 24, 2014), <https://www.fcc.gov/news-events/blog/2014/04/24/setting-record-straight-fccs-open-internet-rules>.

50. *Report and Order*, 25 FCC Rcd. at 17906.

51. Protecting and Promoting the Open Internet, *supra* note 3, at 19,745.

52. 740 F.3d 623 (2014).

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

their intended effect because they will ‘harm innovation and deter investment by increasing costs, foreclosing potential revenue streams, and restricting providers’ ability to meet consumers’ evolving needs.’”⁵⁴ While this argument by Verizon may have been valid, Verizon told the court at oral argument that, but for the Open Internet Order, it would certainly explore agreements to provide priority service to content providers that are willing to pay for it.⁵⁵

The court noted that, while section 706 of the 1996 Act granted the FCC authority to regulate how broadband Internet providers treat edge providers, it did not permit the FCC to “utilize that power in a manner that contravenes any specific prohibition contained in the Communications Act.”⁵⁶ In fact, the court found it “obvious that the [FCC] would violate the [1996] Communications Act” if it were given the authority to regulate broadband providers as common carriers as the FCC believed it was entitled to do.⁵⁷ The court pointed out that broadband providers can be many things – providers of Internet services to end users as well as carriers to edge providers – and, because of that dual role, broadband providers may be common carriers in some instances but not in others.⁵⁸ Were it not for the Open Internet Order, the court found, “broadband providers could freely impose conditions on the nature and quality of the service they furnish edge providers, potentially turning certain edge providers – currently able to ‘hire’ their service for free – into paying customers.”⁵⁹

The court indicated that it had only slight hesitation reaching the conclusion that the FCC’s anti-discrimination obligations imposed by the Open Internet Order against broadband providers relegated them to the status of common carriers.⁶⁰ “In requiring that all edge providers receive [a] minimum level of access for free, [the requirements of the Open Internet Order] would appear on their face to impose per se common carrier obligations with respect to that minimum level of service.”⁶¹ The public outcry in response to the court’s decision was widespread and immediate. Harvey Anderson, Senior Vice President of Legal Affairs for Mozilla⁶² stated,

The D.C. Circuit’s decision is alarming for all Internet users. Thanks to a legal technicality, essential protections for user choice and online innovation are gone. Giving Internet service providers the legal ability to block any service they choose from reaching end users will undermine a once free and unbiased Internet. In order to promote openness,

54. *Verizon*, 740 F.3d at 649.

55. Transcript of Oral Argument at 89–90, *Verizon*, 740 F.3d 623 (No. 11-1355).

56. *Verizon*, 740 F.3d at 649.

57. *Id.* at 650.

58. *Id.* at 653.

59. *Id.* at 654.

60. *Id.* at 655–66.

61. *Id.* at 658 (italics omitted).

62. Mozilla is an important edge provider responsible for, among other things, the Firefox browser. MOZILLA, <https://www.mozilla.org/en-US/> (last visited May 28, 2019).

innovation, and opportunity on the Internet, Mozilla strongly encourages the FCC and Congress to act in all haste to correct this error.⁶³

A similar announcement on behalf of the American Library Association stated, “[The *Verizon v. FCC*] ruling, if it stands, will adversely affect the daily lives of Americans and fundamentally change the open nature of the Internet, where uncensored access to information has been a hallmark of the communication medium since its inception.”⁶⁴ The public outcry from both edge providers and end users led to a barrage of comments on the FCC’s online forum – the number of comments was so voluminous that the website crashed under the weight of the traffic.⁶⁵

The D.C. Circuit’s decision, and the resulting backlash, was broadly covered by national and international media. From John Oliver’s commentary on his show *Last Week Tonight*⁶⁶ to the daily newspaper cartoon *Foxtrot*, net neutrality was thrust into the spotlight in a way it never had been before.⁶⁷ The public attention prompted then-President Barack Obama to call for the FCC to quickly pass regulations on ISPs that would require an open and neutral Internet.⁶⁸ FCC Chairman Tom Wheeler was quick to point out that the President’s request was exactly what everyone else was requesting: “an open Internet that doesn’t affect your business.”⁶⁹ A frustrated Wheeler went on to say that what the FCC needed to do was balance those interests, to “figure out . . . how to split the baby” between an open Internet and one that does not impact businesses.⁷⁰ The issues faced by the FCC in approaching net neutrality were apparent in every press conference held by Wheeler and in every statement on

63. Nancy K. Herther, *FCC Confronts Issues of Net Neutrality, Future of the Internet at Stake*, INFO. TODAY, INC. (Feb. 4, 2014), <http://newsbreaks.infoday.com/nbreader.asp?ArticleId=94602>.

64. *Id.*; see also Jazzy Wright, *ALA Troubled by Court’s Net Neutrality Decision*, AM. LIBRARY ASS’N (Jan. 14, 2014), <http://www.ala.org/news/press-releases/2014/01/ala-troubled-court-s-net-neutrality-decision>.

65. Grant Gross, *Swamped with Last-Minute Comments on Net Neutrality, FCC Extends Deadline*, PCWORLD (July 15, 2014), <http://www.pcworld.com/article/2454300/fcc-swamped-with-lastminute-comments-on-net-neutrality.html>.

66. LastWeekTonight, *Net Neutrality: Last Week Tonight with John Oliver* (HBO), YOUTUBE (June 1, 2014), <https://www.youtube.com/watch?v=fpbOEoR-rHyU/>. For those interested in net neutrality, John Oliver’s take on the topic is entertaining and accessible and nonetheless touches on the more challenging concepts.

67. Bill Amend, *Foxtrot by Bill Amend for June 01, 2014*, GOCOMICS (June 1, 2014), www.gocomics.com/foxtrot/2014/06/01.

68. See Brian Fung & Nancy Scola, *Obama’s Call for an Open Internet Puts Him at Odds with Regulators*, WASH. POST (Nov. 11, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/11/11/the-fcc-weighs-breaking-with-obama-over-the-future-of-the-internet/>.

69. *Id.*

70. *Id.*

the topic issued by the FCC.⁷¹ It was clear something had to be done and, in a time when regulating (as opposed to legislating) was the norm, it had to come in the form Americans had come to expect: regulation from the FCC.

C. The FCC Takes a Stand: New Open Internet Protections

On February 26, 2015, the FCC appeared to take a hardline stance in response to the *Verizon v. FCC* decision when it published a new set of open Internet protections.⁷² The “bright line rules” outlined by the FCC on its website included:

- **No Blocking:** broadband providers may not block access to legal content, applications, services, or non-harmful devices.
- **No Throttling:** broadband providers may not impair or degrade lawful Internet traffic on the basis of content, applications, services, or non-harmful devices.
- **No Paid Prioritization:** broadband providers may not favor some lawful Internet traffic over other lawful traffic in exchange for consideration [of any kind] – in other words, no “fast lanes.” This rule

71. See, e.g., Jon Brodtkin, *Tom Wheeler Defeats the Broadband Industry: Net Neutrality Wins in Court*, ARSTECHNICA (June 14, 2016), <https://arstechnica.com/tech-policy/2016/06/net-neutrality-and-title-ii-win-in-court-as-isps-lose-case-against-fcc/> (quoting Wheeler as saying, “Today’s ruling is a victory for consumers and innovators who deserve unfettered access to the entire Web”); Reuters, *Here’s What the Outgoing FCC Chair Says About the Future of Net Neutrality*, FORTUNE (Jan. 20, 2017), <http://fortune.com/2017/01/20/fcc-tom-wheeler-net-neutrality-2/> (quoting Wheeler as saying, “People have made business decisions based on the expectation of an open internet and to take that away in order to favor half a dozen companies just seems to be a shocking decision.”); Brett Molina, *Net Neutrality Ally Wheeler to Quit FCC*, USA TODAY (Dec. 15, 2016), <https://www.usatoday.com/story/tech/news/2016/12/15/fcc-chief-wheeler-step-down/95464232/> (discussing Wheeler’s departure from the FCC and the impact on net neutrality in light of the change in administration of the agency); Press Release, Chairman Wheeler Statement on Petitions to Rehear Open Internet Case (July 29, 2016), <https://www.fcc.gov/document/chairman-wheeler-statement-petitions-rehear-open-internet-case> (detailing Wheeler’s official statement that the FCC is “confident that the full court will agree with the panel’s affirmation of the FCC’s clear authority to enact its strong Open Internet rules”); Press Release, Statement of FCC Chairman Tom Wheeler Regarding DC Circuit Decision to Uphold FCC’s Open Internet Rules (June 14, 2016), <https://www.fcc.gov/document/chairman-wheeler-statement-open-internet-court-decision> (“[A] victory for consumers and innovators who deserve unfettered access to the entire web”).

72. See Protecting and Promoting the Open Internet, *supra* note 3.

also bans ISPs from prioritizing content and services of their affiliates.⁷³

In a statement regarding these protections, FCC Chairman Wheeler stated that the challenge in passing the rules was

[t]o achieve two equally important goals: ensure incentives for private investment in broadband infrastructure so the U[nited] S[tates] has world-leading networks and ensure that those networks are fast, fair, and open for all Americans. The Open Internet Order achieves those goals, giving consumers, innovators, and entrepreneurs the protections they deserve, while providing certainty for broadband providers and the online marketplace.⁷⁴

While Wheeler and the FCC seemed to have a clear vision for regulation of the Internet, others began to question these bright line rules and to demand changes to the way the Internet was regulated.

The FCC's desire to protect consumers and edge users remained consistent between the original Open Internet Order and its February 2015 Open Internet Rules. On April 13, 2015, the FCC published its final rule, Protecting and Promoting the Open Internet ("PPOI").⁷⁵ PPOI served as an official regulation in place of the Open Internet Rules and previous open Internet protections. In the PPOI's Executive Summary, the FCC restated that threats to the open Internet remained rampant and that, in its opinion, "broadband providers hold all the tools necessary to . . . degrade content[] or disfavor the content they don't like."⁷⁶ The FCC went on to state that a "ban on throttling [was] necessary . . . to avoid gamesmanship designed to avoid the no-blocking rule by, for example, rendering an application effectively, but not technically, unusable. [The PPOI] prohibit[ed] the degrading of Internet traffic based on source, destination, or content."⁷⁷ By enacting these additional bright line rules in the PPOI – rules that worked around the *Verizon* court's prohibitions on the FCC's regulation of ISPs – the FCC thrilled fans of "true" net neutrality but simultaneously infuriated ISPs.

73. FCC, FACT SHEET: CHAIRMAN WHEELER PROPOSES NEW RULES FOR PROTECTING THE OPEN INTERNET 2 (2015) (alterations in original), <https://www.fcc.gov/document/chairman-wheeler-proposes-new-rules-protecting-open-internet>.

74. *In re* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5914 (Mar. 12, 2015), *abrogated by* *In re* Restraining Internet Freedom, 33 FCC Rcd. 311 (Jan. 4, 2018).

75. Protecting and Promoting the Open Internet, *supra* note 3, at 19,739.

76. *Id.*

77. *Id.* at 19,740.

D. Raising the Red Flag: ISPs Revolt Against the “New” Open Internet

A mere four days after the PPOI was published in the Federal Register, a slew of new lawsuits were filed in the D.C. Circuit.⁷⁸ These suits, later consolidated by the court,⁷⁹ demanded review of the PPOI on the basis that it was “arbitrary, capricious, an abuse of discretion, beyond the scope of the FCC’s statutory authority, in violation of the United States Constitution, incompatible with the notice and comment rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553, and otherwise contrary to law.”⁸⁰ Twelve petitioners, all arguing that the PPOI placed unlawful regulations on ISPs, were the first among a group of petitioners that seemed to grow larger each day.⁸¹ In addition to the petitioners, amici briefs piled up in favor of both the petitioners and the respondents.⁸²

The case, which came to be known as *United States Telecom Association v. FCC*, sought to rehash many of the same details discussed by the court in *Verizon* within the context of the PPOI.⁸³ Amici briefs in favor of the respondents argued that the PPOI should be upheld to sustain a thriving Internet economy, to regulate ISPs as conduits for free speech, and to keep ISPs from “disadvantaging non-profit or public interest entities” through paid prioritization schemes.⁸⁴ The arguments against paid prioritization made by the United States’ largest library organizations are the most relevant to the impact of net neutrality on access to justice in the criminal justice system.⁸⁵ As “forums for

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

79. See *United States Telecom Ass’n v. FCC*, 825 F.3d 674, 675 (D.C. Cir. 2016) (noting consolidation of docket numbers 15-1063, 15-1078, 15-1086, 15-1090, 15-1091, 15-1092, 15-1095, 15-1099, 15-1117, 15-1128, 15-1151, 15-1164).

80. Petition for Review, *supra* note 78, at 2.

81. See *United States Telecom Ass’n*, 825 F.3d at 675, 696.

82. See *id.* at 696 (discussing entities that intervened in the case).

83. *Id.*

84. Amicus Brief for Am. Library Ass’n, Ass’n of Coll. & Research Libraries, Ass’n of Research Libraries & Chief Officers of State Library Agencies in Support of Respondents at 3–4, 10, *United States Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2015) (No. 15-1063), <https://docs.fcc.gov/public/attachments/DOC-335408A1.pdf>; see also Brief of Amici Curiae Elec. Frontier Found., ACLU, & the Am. Civil Liberties Union of the Nation’s Capital in Support of the Respondents, *United States Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2015) (No. 15-1063), <https://docs.fcc.gov/public/attachments/DOC-335407A1.pdf>; Brief Amici Curiae of Comput. & Commc’ns Indus. Ass’n & Mozilla in Support of Respondents, *United States Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2015) (No. 15-1063), <https://docs.fcc.gov/public/attachments/DOC-335411A1.pdf>.

85. The American Library Association, the Association of College and Research Libraries, the Association of Research Libraries, and the Chief Officers of State Library Agencies issued a joint amicus on the issue of net neutrality. Amicus Brief for Am. Library Ass’n, Ass’n of Coll. & Research Libraries, Ass’n of Research Libraries &

information and ideas,” libraries provide the sole point of access to the Internet for many individuals and communities.⁸⁶ Likewise, access to legal information – online or otherwise – is an essential component to access to the courts and justice.⁸⁷ On May 1, 2017, the D.C. Circuit denied the petitions, upheld the FCC’s 2015 Open Internet Order, and refused to involve itself in the then-on-going debate over the PPOI,⁸⁸ confirming that the rules were lawful and within the FCC’s statutory authority – leaving groups like the American Library Association breathing a temporary sigh of relief.

E. Today’s FCC and the Restoring Internet Freedom Order

With the election of President Donald Trump came an appointment of a new FCC Chairman, Ajit Pai.⁸⁹ Just months after his appointment, Pai announced a notice of proposed rulemaking that would reverse the FCC’s Title II classification of broadband service and that threatened to undo nearly all of the existing net neutrality rules.⁹⁰ Then, on May 18, 2017, the FCC voted 2-1 to move forward with these proposed rules and encouraged “voluntary”⁹¹ adherence to net neutrality principles from ISPs.⁹²

On December 14, 2017, the FCC acted again, this time voting “to restore the longstanding, bipartisan light-touch regulatory framework that . . . fostered rapid Internet growth, openness, and freedom for nearly 20 years.”⁹³ A “light-touch regulatory framework” was exactly what proponents of net neutrality

Chief Officers of State Library Agencies in Support of Respondents, *supra* note 84, at v.

86. *Net Neutrality: An Intellectual Freedom Issue*, AM. LIBRARY ASS’N (Feb. 13, 2018), <http://www.ala.org/advocacy/intfreedom/netneutrality>.

87. See discussion *infra* Section II.A.

88. *United States Telecom Ass’n v. FCC*, 855 F.3d 381, 382 (D.C. Cir. 2017).

89. Seth Fiegerman, *Trump Names New FCC Chairman*, CNN BUS. (Jan. 24, 2017), <https://money.cnn.com/2017/01/23/technology/trump-fcc-chairman/index.html>.

90. FCC, REMARKS OF FCC CHAIRMAN AJIT PAI AT THE NEWSEUM: “THE FUTURE OF INTERNET FREEDOM” 3–4 (Apr. 26, 2017), <https://docs.fcc.gov/public/attachments/DOC-344590A1.pdf> (discussing the Notice of Proposed Rulemaking filed the next day); see also FCC, FACT SHEET: RESTORING INTERNET FREEDOM (2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344614A1.pdf.

91. Voluntary net neutrality is, essentially, a fallacy in which ISPs promise to follow net neutrality principles. Jon Brodtkin, “Unenforceable”: *How Voluntary Net Neutrality Lets ISPs Call the Shots*, ARSTECHNICA (Apr. 11, 2017), <https://arstechnica.com/tech-policy/2017/04/unenforceable-how-voluntary-net-neutrality-lets-isps-call-the-shots/>.

92. Monica Hunter-Hart, *It’s Official: The FCC Begins Process of Killing Net Neutrality*, INVERSE (May 18, 2017), <https://www.inverse.com/article/31818-fcc-net-neutrality> (voting along party lines to remove the Obama-era regulations put in place by the FCC when Tom Wheeler was chair).

93. Press Release, FCC Acts to Restore Internet Freedom (Dec. 14, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-348261A1.pdf.

were afraid of. By “abdicating . . . authority over internet service providers,” the FCC “clear[ed] the way for blocking, throttling[,] and discrimination by the nation’s largest phone and cable companies.”⁹⁴ The order allowed ISPs to legally offer tiered access to the Internet, favoring some websites and increasing fees for some types of content based upon their discretion alone.⁹⁵ In his statement about the FCC’s action, dubbed the Restoring Internet Freedom Order, Pai stated that the “light-touch” is good for consumers and the private sector alike and that consumers are *not* bothered by ISPs blocking content but rather by the fact that there is not enough market competition, leaving “more Americans . . . on the wrong side of the digital divide.”⁹⁶

Pai’s statements about the Restoring Internet Freedom Order may have accurately described the issue for some Americans, but it is clear his primary focus was on the negative economic effects of net neutrality on ISPs. As of the time this Article was written, his focus remains on ISPs, how huge companies are being wronged by the FCC’s desire to regulate and maintain an open Internet, and how the FCC hopes to bolster the economy by taking a hands-off approach to the Internet.⁹⁷ He celebrated the demise of net neutrality in a January 2, 2019, statement in which he applauded the U.S. House of Representatives for declining “to reinstate heavy-handed Internet regulation,” claiming their inability to do so had positive results for American consumers.⁹⁸ Pai said “the FCC’s light-touch approach is working. In 2019, we’ll continue to pursue our forward-looking agenda to bring digital opportunity to all Americans.”⁹⁹ Despite Pai’s assertions that a light-touch approach to net neutrality is the best way to proceed, it is clear that even a hands-on approach to net neutrality is not enough in some cases, as ISPs will find ways to circumvent any scheme that falls short of clear and total regulation. Light-touch schemes can be circumvented and ISPs can find ways to offer tiered content while still operating within existing net neutrality schemes.

94. Timothy Karr, *Free Press: Today’s FCC Ruling Will Not Stand*, FREE PRESS (Dec. 14, 2017), <https://www.freepress.net/press-release/108533/free-press-todays-fcc-ruling-will-not-stand> (discussing the dismantling of the Restoring Internet Freedom Order; Free Press Policy Director Matt Wood stated, “Net Neutrality is the nondiscrimination law of the internet. It’ll be just as necessary tomorrow as it is today. That’s why open-internet advocates and millions of internet users and activists will do everything to restore it in the near term and over the long haul.”).

95. Brian Fung, *The FCC Just Voted to Repeal Its Net Neutrality Rules, in a Sweeping Act of Deregulation*, WASH. POST. (Dec. 14, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/12/14/the-fcc-is-expected-to-repeal-its-net-neutrality-rules-today-in-a-sweeping-act-of-deregulation/>.

96. FCC, ORAL STATEMENT OF CHAIRMAN AJIT PAI 1 (Dec. 14, 2017), <https://docs.fcc.gov/public/attachments/DOC-348261A2.pdf>.

97. *See id.* at 1–2.

98. Press Release, Chairman Pai Statement on Failure of CRA Attempting to Overturn FCC’s Restoring Internet Freedom Order (Jan. 2, 2019), <https://docs.fcc.gov/public/attachments/DOC-355824A1.pdf>.

99. *Id.*

*F. The Reality of Internet “Deregulation”*¹⁰⁰

Net neutrality policy in the United States needs to do more than merely pay lip service to the term “neutrality,” which is what happened in the execution of the European Union’s (“EU”) net neutrality guidelines in Portugal. American net neutrality policy must, at minimum, guarantee a network free from blocked content, where websites are all accessible at similar speeds without zero-rating¹⁰¹ and all devices used to access the Internet are treated equally. Without hardline rules holding ISPs accountable for the way they provide Internet access to all consumers, ISPs will be able to skirt net neutrality principles and lead the United States down a dangerous path towards complete Internet deregulation.

It has been argued that deregulation of the Internet is a boon to the economy and that the tiering of Internet access is as a way to maintain competitive and free markets online.¹⁰² Countries like Portugal, however, have shown how a light-touch approach to net neutrality regulation plays out for Internet users.¹⁰³ As with all countries in the EU, Portugal is subject to the Body of European Regulators for Electronic Communications’ (“BEREC”) net neutrality guidelines.¹⁰⁴ These guidelines were drafted as a way “to safeguard equal and non-discriminatory treatment of traffic in the provision of internet access services”¹⁰⁵ Portugal, however, found a way to enforce those regulations

100. This is not deregulation in the strictest sense of the word. This deregulation is merely a hyperbolic way to describe Internet regulations that are put in place – as is the case in the EU – but then left largely unenforced so that ISPs can operate as if they are not under the purview of any regulatory authority.

101. Zero-rating allows customers to access certain types of content while effectively cutting off other content. See Samantha Bates, Christopher Bavitz & Kira Hessekiel, *Zero Rating & Internet Adoption: The Role of Telcos, ISPs, & Technology Companies in Expanding Global Internet Access: Workshop Paper & Research Agenda 1* (Berkman Klein Ctr. for Internet & Soc’y Research Publ’n, 2017), <http://nrs.harvard.edu/urn-3:HUL.InstRepos:33982356>.

102. Harper Neidig, *Free Market Meets Net Neutrality*, HILL (June 13, 2017), <http://thehill.com/policy/technology/337477-free-market-meets-net-neutrality>.

103. See Grace Donnelly, *FCC Vote: What Losing Net Neutrality Could Mean for Your Internet Experience*, FORTUNE (Dec. 14, 2017), <http://fortune.com/2017/11/21/what-net-neutrality-means-for-you/>. The following additional countries currently operate without net neutrality rules, regulations, or laws: “Argentina, Belgium, Brazil, Canada, Chile, China, France, Israel, Italy, Japan, Netherlands, Russia, South Korea, and Slovenia.” *Id.*

104. See *All You Need to Know About Net Neutrality Rules in the EU*, BODY OF EUROPEAN REGULATORS FOR ELEC. COMMC’NS, <https://berec.europa.eu/eng/netneutrality/> (last visited Feb. 23, 2019).

105. BODY OF EUROPEAN REGULATORS FOR ELEC. COMMC’NS, BEREC GUIDELINES ON THE IMPLEMENTATION BY NATIONAL REGULATORS OF EUROPEAN NET NEUTRALITY RULES 3 (2016), http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/6160-berec-guidelines-on-the-implementation-b_0.pdf.

while still allowing ISPs to tier content.¹⁰⁶ While Portuguese ISPs do not go so far as to block content, they do enforce usage restrictions and require users to pay more to use social media websites, video and music applications, and messaging applications.¹⁰⁷ The ISPs convince users that this “additional data” is being sold at a discount or that the increased fees are being paid to keep certain kinds of sites from being clogged by excessive use, but that simply isn’t true.¹⁰⁸ Nor is it true, as some have suggested, that this type of tiered service is akin to “banning e-commerce [web]sites from purchasing faster delivery from FedEx or UPS, or from offering free shipping.”¹⁰⁹ In practice, these “providers are allowed to use their position as gatekeepers to favor certain services, which is detrimental to consumers, competition, and innovation as far as new, smaller players are concerned.”¹¹⁰

Portuguese ISPs’ tiering schemes eventually became public. On February 28, 2018, the Portuguese telecommunications regulator, ANACOM, issued a decision notice, giving three major Portuguese mobile ISPs forty days to change their service offerings that were in breach of EU net neutrality rules.¹¹¹ In March 2018, ANACOM determined that the ISPs offering tiered services should be allowed to continue and, in response, “13 civil society organi[z]ations (NGOs) . . . wr[ote] a joint submission to urge [ANACOM] to change its position.”¹¹² In response to this and other net neutrality violations

106. Karl Bode, *Portugal Shows the Internet Why Net Neutrality Is Important*, TECHDIRT (Oct. 31, 2017), <https://www.techdirt.com/articles/20171030/12364538513/portugal-shows-internet-why-net-neutrality-is-important.shtml>.

107. *Id.*

108. John F. Stephens, *Do Zero-Rating Programs Violate Net Neutrality?*, LAW360 (July 7, 2016, 11:54 AM), <https://www.law360.com/articles/814678>. This behavior, called zero-rating, allows customer to access certain types of content while effectively cutting off other content. *Id.* While the FCC has investigated these practices, nothing concrete has come from their investigations. *Id.*

109. Michael L. Katz, *Wither U.S. Net Neutrality Regulation?*, 50 REV. OF INDUSTRIAL ORG. 441, 454 (2017) (examining the lack of economic logic underlying the FCC’s latest net neutrality regulation; exploring the regulation’s potential consequences; and identifying market developments that could neutralize the regulations unless expanded further).

110. Andrei Khalip & Agnieszka Flak, *False Paradise? EU is No Haven of Net Neutrality, Say Critics*, REUTERS TECH. NEWS (Dec. 15, 2017), <https://www.reuters.com/article/us-usa-internet-eu-analysis/false-paradise-eu-is-no-haven-of-net-neutrality-say-critics-idUSKBN1E92SC> (quoting Eduardo Santos, Director of the D3 Association for the Defense of Digital Rights).

111. *Portuguese ISPs Given 40 Days to Comply with EU Net Neutrality Rules*, EDRI (Mar. 7, 2018), <https://edri.org/portuguese-isps-given-40-days-to-comply-with-eu-net-neutrality-rules/>.

112. *Civil Society Urges Portuguese Telecom Regulator to Uphold Net Neutrality*, EDRI (Apr. 23, 2018), <https://edri.org/civil-society-urges-portuguese-telecom-regulator-uphold-net-neutrality/>.

in the EU, BEREC began the process of revising the net neutrality regulations to require better conformance from EU member states.¹¹³

G. The Future of the Internet in the United States

In each of these discussions about net neutrality and the impact it has on economics and society, the “little guys” being impacted – including those navigating the criminal justice system in the United States – are largely left unconsidered and unheard. Shortly after the *Verizon* opinion was issued, Tim Wu stated that doing away with net neutrality “threatens to make the Internet just like everything else in American society: unequal in a way that deeply threatens our long-term prosperity.”¹¹⁴ Pai, however, continued to make economic arguments for Internet deregulation, stating,

Money that could have expanded networks was now being siphoned off to pay lawyers and consultants to make sense of the new rules. Resources were spent developing plans to minimize the risk of enforcement actions. Some [members of the American Cable Association] even started setting money aside for litigation reserves. We’re talking about time, money, and lawyers that your companies can’t easily afford.

On top of that, [members of the American Cable Association] faced the possibility of after-the-fact rate regulation that could reduce returns on investments and prevent you from raising further capital.¹¹⁵

Many others disagree with Pai’s assessment of the economics related to Internet regulation. In fact, the highest levels of investment in broadband services happened during the late 1990s and early 2000s – when net neutrality regulations were firmly in place.¹¹⁶ Many companies increased their investment in broadband services during that time to meet consumer demands for things like streaming services.¹¹⁷ The FCC, however, continued with its plan

113. *Id.*

114. Megan O’Neil, *Worried by FCC Plan, Net-Neutrality Advocates at Colleges Gauge Next Steps*, CHRONICLE OF HIGHER EDUC. (May 1, 2014), <http://chronicle.com/article/Worried-by-FCC-Plan/146293/>.

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

116. Aliya Sternstein & Joe Yerardi, *The Basis for Killing Network Neutrality Rules Is Bogus*, *Studies Say*, CTR. PUB. INTEGRITY (June 12, 2018), <https://www.publicintegrity.org/2018/06/12/21849/basis-killing-network-neutrality-rules-bogus-studies-say>.

117. *Id.*

to revoke net neutrality, citing a fear that a regulated Internet would cause economic harm to ISPs despite the harm that Internet deregulation may have on consumers.¹¹⁸

Congress attempted to respond to this threat. On May 16, 2018, the U.S. Senate voted to pass a measure that would repeal the Restoring Internet Freedom Order.¹¹⁹ In a vote by forty-nine Democratic and three Republican Senators,¹²⁰ the Senate passed a joint resolution expressing congressional disapproval of the Restoring Internet Freedom Order under the authority granted to them in chapter 8 of title 5 of the United States Code, which provides for congressional review of agency rulemaking.¹²¹ Many political commentators believed the resolution would be dead in the water, as President Donald Trump's administration was unlikely to support it, but its passage in the Senate demonstrated the urgency of the threat of Internet deregulation for people all over the United States.¹²² The commentators were right; the House of Representatives did not have the votes and the deadline for Congress to exercise its oversight in this matter passed at the end of 2018.¹²³ This threat to equality and human welfare – values that are inherently involved in the availability of, and access to, the Internet – are strikingly apparent in the impact that a lack of net neutrality could have on access to justice in the United States criminal justice system.

118. See *How Will Rolling Back Net Neutrality Affect Consumers? You'll Have to Read the Fine Print*, PBS (Nov. 21, 2017), <https://www.pbs.org/newshour/show/how-will-rolling-back-net-neutrality-affect-consumers-youll-have-to-read-the-fine-print>.

The burden on consumers will be both economic – requiring them to pay more for meaningful and speedy access to the Internet – and intellectual. *Id.* If consumers are required to have a deeper understanding of what content they will be able to access and at what speeds, as well as negotiate with ISPs to ensure they receive the content they want at the speeds they desire, a lot more intellectual, human property will have to be invested in Internet use. See *id.*

119. Ted Barrett & Daniella Diaz, *Senate Passes Measure Repealing Changes to Net Neutrality Rules*, CNN (May 16, 2018), <https://www.cnn.com/2018/05/16/politics/net-neutrality-vote-senate-democrats/index.html>.

120. *Id.*

121. A Joint Resolution Providing for Congressional Disapproval Under Chapter 8 of Title 5, United States Code, of the Rule Submitted by the Federal Communications Commission Relating to “Restoring Internet Freedom,” S.J. Res. 52, 115th Cong. (2018).

122. Barrett & Diaz, *supra* note 119. There is an additional threat to net neutrality: Judge Brett Kavanaugh. Kavanaugh's confirmation to the United States Supreme Court on October 6, 2018, may be the biggest threat to net neutrality yet. Kavanaugh believes that regulation of the Internet “infringes on the Internet service providers' editorial discretion.” *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 418 (2017) (Kavanaugh, J., dissenting). If, under Kavanaugh's view, ISPs are entitled to exercise editorial control under the First Amendment, it could be significantly more difficult to enact further regulations in the net neutrality space.

123. Rhett Jones, *Ajit Pai's Gloating Statement About the Death of Net Neutrality, Translated*, GIZMODO (Jan. 2, 2019), <https://gizmodo.com/ajit-pais-gloating-statement-about-the-death-of-net-neu-1831437921>.

II. ACCESS TO JUSTICE AND LIBRARY HIERARCHIES

Access to justice is a topic that is not readily addressed outside of the legal community, particularly when dealing with the United States criminal justice system.¹²⁴ Within the legal community, access to justice issues are frequently addressed by a variety of stakeholders.¹²⁵ In 2010, the United States Department of Justice (“DOJ”) established the Access to Justice Initiative (“ATJ”), which seeks to address access to justice issues in both the civil and criminal legal systems.¹²⁶

ATJ is guided by three principles.¹²⁷ The first is to promote accessibility by eliminating any and all barriers that may prevent litigants from understanding and exercising their rights in the American legal system.¹²⁸ The second principle strives to ensure fairness in the legal process.¹²⁹ The goals of a fair legal process are to deliver just outcomes for all parties to litigation, including those who find themselves unable to afford counsel or facing other financial or logistical disadvantages.¹³⁰ Finally, the third principle aims for efficiency in the courts, with a goal of “delivering fair and just outcomes effectively, without

124. In fact, much of the literature surrounding Access to Justice – also referred to as A2J or ATJ – deals with access to the civil court system for low or modest income individuals or access to the civil court system by indigent criminal defendants. See *Access to Justice*, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/archives/atj> (last visited May 28, 2019); *Resource Center for Access to Justice Initiatives*, ABA, https://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice.html (last visited May 28, 2019); NAT’L CTR. FOR ACCESS TO JUSTICE AT FORDHAM LAW SCH., <http://ncforaj.org/> (last visited May 28, 2019).

125. While Access to Justice initiatives have certainly taken off in the legal community, as a whole, it seems as if the large-scale efforts put in place by the DOJ under Eric Holder may soon be rolled back. Former Attorney General Jeff Sessions did not close the Office for Access to Justice, but reports indicated that, under his supervision, resources were removed from the division and offices are now dark. Katie Benner, *Justice Dept. Office to Make Legal Aid More Accessible Is Quietly Closed*, N.Y. TIMES (Feb. 1, 2018), <https://www.nytimes.com/2018/02/01/us/politics/office-of-access-to-justice-department-closed.html>. As of April 1, 2019, the Department of Justice’s Access to Justice website is an “archived” site, indicating “This is archived content from the U.S. Department of Justice website. The information here may be outdated and links may no longer function.” *Access to Justice*, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/archives/atj> (last visited May 28, 2019).

126. *Access to Justice*, *supra* note 125.

127. *Id.* As stated explicitly by the DOJ, the principles are: (1) “Promoting Accessibility – eliminating barriers that prevent people from understanding and exercising their rights”; (2) “Ensuring Fairness – delivering fair and just outcomes for all parties, including those facing financial and other disadvantages”; and (3) “Increasing Efficiency – delivering fair and just outcomes effectively, without waste or duplication.” *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

waste or duplication.”¹³¹ An Internet without the guarantee of neutrality stands in direct opposition to each of these three principles.

One of the biggest barriers to accessibility in the criminal justice system is the vast amount of legal knowledge required to adequately defend a case. This expertise is why criminal defendants typically rely on private defense attorneys or public defenders to shepherd them through the system. While many criminal cases do not require extensive research in the early phases, the best legal defenses are mounted with ample research performed by experienced attorneys. For those who choose the bleaker path of self-representation, the need for these three principles is even more obvious: Without accessibility (to courts and legal information), fairness (in the treatment of websites offering legal resources online), or efficiency (in the amount of time needed to access the resources), the fate of these criminal defendants could include months or years in state or federal prisons.¹³²

Because access to legal information is critical to success in any case, access to justice can easily be tied to the need for ready access to this legal information, which is increasingly available only online. Often, the availability of online information is dependent upon academic, government, public, or prison libraries, which are subject to hierarchies that impact whether and how legal information is available and accessible.

A. A History of Access Issues: How Bounds and Casey Impacted the Right to Information for Prisoners

Two pivotal cases have impacted access to legal information – and, therefore, access to justice in the criminal justice system – for the United States prison population: *Bounds v. Smith*¹³³ and *Lewis v. Casey*.¹³⁴ Both *Bounds* and *Casey* addressed access to the courts and the impact that prison libraries have on effective and meaningful access to the criminal justice system. While both *Bounds* and *Casey* discussed the need for access to legal information in order to gain meaningful access to the courts, neither case contemplated the current

131. *Id.*

132. Setting aside the difficulty in performing legal research as a pro se defendant in a criminal case, the path of self-representation in the criminal justice system is particularly bleak. See generally Martin Sabelli & Stacey Leyton, *Train Wrecks and Free-way Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161 (2000) (discussing the problem of defendants' abusing the right of self-representation to eliminate legitimate defenses, such as mental illness); Steven A. Brick, Comment, *Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant*, 59 CAL. L. REV. 1479 (1971) (analyzing the right to an attorney under federal and state law and the reasons why defendants choose to represent themselves pro se and arguing that legal professionals should offer legal assistance to pro se defendants in the criminal justice system).

133. 430 U.S. 817 (1977), *overruled in part by* *Lewis v. Casey*, 518 U.S. 343 (1996).

134. 518 U.S. 343.

state of legal resource publication – namely, that the current norm is to license online legal resources instead of purchasing print versions to perform legal research. While neither case considered the possibility that legal research would someday be performed largely online, both cases are pivotal to ensuring that today’s criminal defendants, their attorneys, and their families have a meaningful method to access legal resources.

1. *Bounds v. Smith*

Bounds v. Smith was the first Supreme Court case to address whether a failure to provide legal research facilities in prisons is akin to barring inmates’ access to the courts.¹³⁵ In making its determination that “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law,”¹³⁶ the Supreme Court evaluated whether the need for legal research in new cases versus petitions for discretionary review had any impact on prisoners’ ability to access the courts.¹³⁷ The Supreme Court established that it is “beyond doubt that prisoners have a constitutional right of access to the courts,” regardless of the type of action being pursued by the prisoner.¹³⁸

The Supreme Court went on to say that “access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.”¹³⁹ It noted that a lawyer would be deemed incompetent if he filed an initial pleading without performing research and that research tasks are no less important for a pro se prisoner navigating the criminal justice system.¹⁴⁰ The Supreme Court did state that economic factors may be considered when determining the methods used to provide the required access to law libraries or assistance from those trained in the law.¹⁴¹ The decision in *Bounds* paved the way for thousands of cases in federal and state courts discussing the constitutional right to access the courts via use of legal information, but after *Lewis v. Casey*, the holding of *Bounds* became much more limited.

2. *Lewis v. Casey*

Decades after *Bounds*, the Supreme Court noted in *Lewis v. Casey* that access to legal information is vital to prisoners who frequently must represent

135. *Bounds*, 430 U.S. at 817–18.

136. *Id.* at 828.

137. *Id.* at 827–28.

138. *Id.* at 821–22.

139. *Id.* at 828.

140. *Id.* at 825–26.

141. *Id.* at 825.

themselves pro se.¹⁴² It went on, however, to limit its holding in *Bounds* by emphasizing that what was actually guaranteed was the right of access to the courts – not libraries – and it determined that prisoners cannot simply launch a theoretical argument that the prison’s law library is inadequate to satisfy a claim of denial of access to the courts more broadly.¹⁴³ The Supreme Court found that prisoners are entitled only to “minimal access” to legal information and established strict standing requirements for prisoners suing about obstacles they encounter in their quest to access legal information.¹⁴⁴

In explaining its decision, the Supreme Court stated that “[t]o demand the conferral of . . . sophisticated legal capabilities upon a mostly uneducated . . . population is effectively to demand permanent provision of counsel, which [the Supreme Court] d[id] not believe the Constitution require[d].”¹⁴⁵ In *Casey*, rather than helping to give meaning to the right of access to the courts through access to information, the majority used a problem caused largely by the socio-economic inequity of prisoners who would be impacted by their decision to justify denying court access.¹⁴⁶ In *Casey*, the Supreme Court rejected the caution issued in *Bounds* that “[t]he cost of protecting a constitutional right cannot justify its total denial.”¹⁴⁷ The *Casey* decision further stated that

Bounds does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.¹⁴⁸

This line between what criminal defendants should and should not be able to do while in prison has been explored in other contexts. In her article entitled *Creative Prison Lawyering*, Jessica Feierman argued that, “[i]n the context of cuts in funding for educational programs for prisoners, *Casey* contribute[d] to the deepening gap between those with access to legal knowledge and those entirely dependent on others, further silencing prisoners who might otherwise attempt to participate in public discourse through litigation.”¹⁴⁹ Feierman’s

142. 518 U.S. 343, 355 (1996).

143. *Id.* at 356–57.

144. *Id.* at 351–53.

145. *Id.* at 354.

146. *Id.*

147. *Bounds v. Smith*, 430 U.S. 817, 825 (1977), *overruled in part by Lewis*, 518 U.S. 343.

148. *Lewis*, 518 U.S. at 355 (alteration in original).

149. Jessica Feierman, *Creative Prison Lawyering: From Silence to Democracy*, 11 GEO. J. ON POVERTY L. & POL’Y 249, 269 (2004) (footnote omitted) (discussing barriers to prisoners’ speech and lack of access to the courts, as well as models for

argument is particularly salient when considering the impact of net neutrality on those in the criminal justice system. Internet deregulation and the lack of net neutrality that will arise as a natural consequence will not only impact the way people use the Internet to access legal information but will also deepen the gap between self-represented litigants who require access to legal information in libraries and those who have been assigned public defenders or who can afford to hire private attorneys. Defendants who can afford private attorneys are unlikely to notice a change, other than slightly higher attorneys' fees,¹⁵⁰ while defendants using public defenders may find themselves being represented by attorneys who are less-inclined to perform legal research to strengthen their cases because it will simply become too burdensome to do so. The pro se litigant has the worst fate of all, as she may be left unable to access legal information online due to prohibitive costs or lack of availability of meaningful resources.¹⁵¹ In a world without a neutral Internet, legal resources remain out of reach for criminal defendants.

B. Today's Criminal Defendants' Access to Legal Information

Where prison libraries (with or without Internet access) do not exist, many prisoners are turning to outside help to assist with legal research – whether by purchasing books themselves or asking for help from outsiders.¹⁵² Yet, even the ability to access materials with assistance from those outside of prisons stands in question. In early 2018, new Federal Bureau of Prisons (“BOP”) policies sought to restrict access to books and email for nearly 200,000 federal inmates.¹⁵³ Federal prisoners were faced with the possibility of being unable to purchase books themselves, at least without paying exorbitant fees and waiting an unreasonable amount of time to receive what they ordered.¹⁵⁴ Public outcry and journalists' inquiries on the issue, however, had an impact; the BOP abruptly reversed the new policy just days later.¹⁵⁵ Similar plans were put in

prison lawyering that empower prisoners to overcome issues with access to the courts, win legal victories, and enforce their rights in order to pursue long-term change for the prison communities in which they live).

150. See discussion *infra* Section III.B.2.

151. While there are many free legal research resources available today, such as Google Scholar and the Cornell Legal Information Institute, most are incomplete or lack the breadth of information that can be retrieved through traditional, paid legal research platforms.

152. See, e.g., *What We Do*, PRISON BOOK PROGRAM, <https://prisonbookprogram.org/about-us/what-does-prison-book-program-do/> (last visited May 28, 2019).

153. Lauren Gill, *New Federal Prison Policies May Put Books and Email on Ice*, APPEAL (Apr. 27, 2018), <https://injusticetoday.com/new-federal-prison-policies-may-put-books-and-email-on-ice-5464b6156f83>.

154. *Id.*

155. Ann E. Marimow, *Federal Prisons Abruptly Cancel Policy That Made It Harder, Costlier for Inmates to Get Books*, WASH. POST (May 3, 2018), <https://www.washingtonpost.com/local/public-safety/federal-prisons-abruptly-cancel->

place in states like New York, but they were similarly walked back after public outcry.¹⁵⁶ The quick issuance and subsequent recanting of these new policies sheds light on the tenuous nature of prisoners' access to information and, regardless of whether research is being performed in prison by criminal defendants or through outside help, a neutral Internet is essential to success. If net neutrality principles are abandoned with the same sweeping and rapid policy changes as those affecting prisoners' ability to buy books, then access to legal resources could disappear at a moment's notice, rendering both defendants and attorneys unable to access the Internet in a meaningful way.

Because *Casey* limited the scope of *Bounds* in such a profound way, today's criminal defendants do not have the same meaningful access to information – and therefore access to the courts – as they once did. Incarcerated criminal defendants who, after *Bounds*, would have found themselves in prison law libraries with relatively useful collections now find themselves, after *Casey*, in prisons with limited materials, either in print or online – if those prison libraries exist at all. *Casey* states that requiring prison libraries to be filled with books for legal research “demand[s] the conferral of . . . sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate prison population” and essentially gives the prison population the “permanent provision of counsel.”¹⁵⁷ That assertion, while already ridiculous to nearly anyone advocating for criminal defendants' rights, is even more absurd in the current age.

The sophistication required of a library user referred to in *Casey* has changed drastically in the digital age. Today, accessing primary case law is as simple as using the Internet to access Google Scholar; even a user with no education and a very limited vocabulary would certainly be able to find *some* relevant information related to his or her case without ever needing to crack open a book.¹⁵⁸ With a basic level of understanding of how computers work,¹⁵⁹

policy-that-made-it-harder-costlier-for-inmates-to-get-books/2018/05/03/1b3efcde-4ed8-11e8-b725-92c89fe3ca4c_story.html?.

156. See, e.g., Daniel A. Gross, *New York Makes It Harder for Inmates to Get Books*, NEW YORKER (Jan. 9, 2018), <https://www.newyorker.com/books/pageturner/new-york-makes-it-harder-for-inmates-to-get-books>; Michael Schaub, *Prisons Are Making New Moves to Control What Books Inmates Can Read*, L.A. TIMES (Jan. 9, 2018), <http://www.latimes.com/books/jacketcopy/la-et-jc-prison-books-20180109-story.html>.

157. *Lewis v. Casey*, 518 U.S. 343, 354 (1996).

158. For an earlier assessment of the legal research potential of Google Scholar, see Clifton Barnes, *Google Scholar: How Will It Change the Legal Research Landscape?*, B. LEADER, Mar.–Apr. 2010, at 6, 6–7. https://www.americanbar.org/groups/bar_services/publications/bar_leader/2009_10/march_april/google/ (discussing Google Scholar's expansion into the business of providing case law for information purposes and the impact on legal research, as a whole).

159. Admittedly, many inmates are lacking basic computer skills that would be beneficial in accessing legal information. In 2004, only 37% of inmates had high school diplomas, but information gathered by the Brookings Institute suggests that an increase in focus on digital literacy in prison programming – whether through the library or other educational programs – may reduce recidivism in the long term. Hillary

even the library users who would have been deemed the most unsophisticated under *Casey* can perform legal research using online resources.

Underlying the access to online resources, however, is a necessary requirement that these online resources will be accessible at meaningful speeds without preferential treatment. If ISPs are handed too much control of the Internet, they could, conceivably, give preferential treatment to streaming services or social media websites that generate revenue through advertisements while placing legal resources on the backburner. Even websites like Google Scholar could see content throttled by ISPs because the nature of the use does not generate revenue for ISPs the way more popular websites do.¹⁶⁰ Internet users need to have meaningful, equal access to *all* information, and that means users should be entitled to an Internet free from tiering, throttling, and blocking of services.

1. Meaningful Access to Information and the Law Library Hierarchy

Because *Casey* diluted the notion that prison or government library access is the appropriate means to provide meaningful access to the courts, many criminal defendants turn to outside libraries to gain access to legal information. Not all libraries are created equal, especially when it comes to funding. Those that provide access to legal information run the gamut from academic law libraries to government law libraries, law firm libraries to public libraries, and, of course, prison libraries. Criminal defendants who are unable to access a law library while incarcerated, or who try to perform research while out on bail, often rely on outside assistance to perform their research from librarians, family, friends, or attorneys. With the rise of online platforms and the decrease in print publications in libraries (including prison libraries), prisoners' access to legal information is certain to be impacted by the end of net neutrality and its effect on the speed and reliability with which legal resources and information can be accessed. Researchers outside of prison also count on reliable access to the Internet to provide information to this underserved population.

Libraries around the country – including government law libraries, academic law libraries, law firm libraries, and even public and prison libraries – stand to be deeply impacted by the demise of net neutrality. It is no secret that

Schaub & Darrell M. West, *Digital Literacy Will Reduce Recidivism in the Long Term*, BROOKINGS (Oct. 6, 2015), <https://www.brookings.edu/blog/techtank/2015/10/06/digital-literacy-will-reduce-recidivism-in-the-long-term/>. Further studies on the need for digital literacy education in prisons and the impact those educational programs will have on the ability to perform legal research are certainly needed, but this issue is beyond the scope of this Article.

160. It has been suggested that websites, such as Google Scholar, would suffer with the wrong people heading the ISPs (or even Google, itself) simply because they do not generate revenue. Alexis C. Madrigal, *20 Services Google Thinks Are More Important Than Google Scholar*, ATLANTIC (Apr. 3, 2012), <https://www.theatlantic.com/technology/archive/2012/04/20-services-google-thinks-are-more-important-than-google-scholar/255420/>.

libraries are changing; walk into any library and you will see less print material and more computers. Gone are the quiet reading rooms of the past; they have been replaced by classrooms where patrons can learn to use their iPhones or 3D printers meant to help school children create projects or toys.¹⁶¹ While changes in law libraries' physical spaces are much less obvious, they are observable in the collections. Many law schools are eschewing print materials in favor of online legal resources, and most law firms have done away with in-house libraries altogether.¹⁶² This change is happening not only because people are becoming more accustomed to digital research but also because some print legal resources have become prohibitively expensive.¹⁶³ In an era where many library budgets are staying flat or being cut, the cost of legal materials has gone up each year by an average of 9.86% since 2009.¹⁶⁴

Libraries across the country are constantly struggling to keep up with the changes in access to information, particularly in light of rapidly shrinking budgets and changes to the way patrons use the collections on a day-to-day basis.¹⁶⁵ While academic, government, firm, public, or prison libraries have unique budgets that range from hundreds to millions of dollars and all face challenges that are unique to their users and collections, there is one universal challenge: budget cuts. Legal practice is moving away from books; it follows that "the millions of dollars per year that the typical law school expends on maintaining a comprehensive law library could be reduced to a more rational level of expenditure."¹⁶⁶ This argument has been used to slash academic law library budgets all over the country, and similar arguments are made with regard to cutting budgets at all libraries, regardless of the need to offer print materials.¹⁶⁷ The most significant impact from the decrease of library budgets is the reduced acquisition of print materials, regardless of library type.

161. See, e.g., Rachel Campbell, *Clearing the Dust: How Libraries Are Changing in the 21st Century*, UNIV. OF S.C. (Jan. 3, 2017), https://www.sc.edu/study/colleges_schools/cic/library_and_information_science/news/2017/clearing_the_dust.php#.XGcWMHdFxpZ.

162. See Cynthia Brown, *Old Skills, New Tricks: Opportunities for Law Librarians*, LAW 360 (Sept. 6, 2016), <https://www.law360.com/articles/834463/old-skills-new-tricks-opportunities-for-law-librarians>.

163. See Narda Tafuri, *Prices of U.S. and Foreign Published Materials*, in THE LIBRARY AND BOOK TRADE ALMANAC 2017, at 352 (2017), <https://alair.ala.org/bitstream/handle/11213/8099/LMPTI%20Article%202017.pdf?sequence=1&isAllowed=y>.

164. *Id.*

165. See Amanda Watson, *Don't Burn the Books, Read Them!*, 46 INT'L J. LEGAL INFO. 79, 85 (2018).

166. Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J. L. REFORM 177, 217 (2012).

167. See Taylor Fitchett et al., *Law Library Budgets in Hard Times*, 103 L. LIBR. J. 91, 95 (2011).

a. Academic Law Libraries

It is no secret that law schools have changed. The days of record enrollment at law schools are long gone. Between 2011 and 2016, law schools saw a 22% decrease in matriculation and there was only a 1% increase in first year students between 2016 and 2017.¹⁶⁸ This decrease in law students has led to an understandable decrease in library operating budgets.¹⁶⁹ Between 2009 and 2018, American Bar Association (“ABA”)-approved academic law libraries saw an average budgetary decrease of 13%.¹⁷⁰

Because of steadily-shrinking budgets and changes to library collections, the ABA went so far as to amend their Standards for Approval of Law Schools. Where Standard 606(a) once read that “[t]he law library shall provide a core collection of essential materials accessible in the library,” it now states that a “law library shall provide a core collection of essential materials through ownership or reliable access.”¹⁷¹ Because of this change in language, many law schools have done away with an expansive traditional print collection.¹⁷² These reductions occurred, in part, because print collections take up a vast amount of space and are often seen as “wasteful and unnecessary since nobody uses books anymore.”¹⁷³

168. *2011-2016 Annual Questionnaire: Total Matriculants for ABA Approved Law Schools*, ABA: SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2011_2016_matriculants.xlsx (last visited May 28, 2019).

169. Professor James G. Milles, former director of the law library at the State University of New York, Buffalo, even went so far as to say that the crisis in legal education means that “law school libraries are doomed.” James G. Milles, *Legal Education in Crisis, and Why Law Libraries are Doomed*, 106 L. LIBR. J. 507, 508–09 (2014). To date, Professor Milles’ theories about the demise of academic law libraries have proven largely unfounded. See Jootaek Lee, *Frontiers of Legal Information: The U.S. Law Librarians of the Future*, 43 INT’L J. LEGAL INFO. 411, 424–25 (2015).

170. This data is widely available to only those individuals who submit data to U.S. News. Please contact the author with any further inquiries.

171. *Compare* SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, ABA, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS: 2013–2014, at 47 (2013), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and_rules_of_procedure_for_approval_of_law_schools_body.authcheckdam.pdf, with SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, ABA, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS: 2017–2018, at 41 (2017), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABASStandardsforApprovalofLawSchools/2017_2018_aba_standards_rules_approval_law_schools_final.authcheckdam.pdf.

172. See Michael Whiteman, *Book Burning in the Twenty-First Century: ABA Standard 606 and the Future of Academic Law Libraries as the Smoke Clears*, 106 L. LIBR. J. 11, 31–33 (2014).

173. Kimberly Mattioli, *Access to Print, Access to Justice*, 110 L. LIBR. J. 31, 36–41 (2018) (examining the relationship between pro se litigants and digital literacy and

Additionally, because “[u]ser emphasis is on access[,] few faculty and even fewer students are interested in whether the information that they use is licensed rather than owned by the library . . . [, and] few of our users, including deans and faculties,” feel the nostalgic pull towards print that many librarians feel.¹⁷⁴ Print collections are being eschewed in favor of the more dynamic access available through vendors such as Lexis and Westlaw, which, while expensive, are much less expensive to law schools than to those in practice.¹⁷⁵ This change is reflected in the allocation of library budgets from print to online materials. Where, in 2009, academic law libraries spent 77% of their total budget on print materials, they now spend only 56%.¹⁷⁶ The opposite is true of online materials. Where law schools in 2009 spent 23% of their library budgets on electronic materials, they now spend 44%.¹⁷⁷ While the materials required by the ABA are, right now, still available in law schools through a medium of reliable access, the demise of net neutrality could place even the reliability of that access at risk.

These changes to the format of resources in law school libraries impact not only the students and faculty but also the communities that rely on those libraries for legal information. Of the 206 ABA-approved law schools in the United States, 126 are open to members of the public seeking to perform legal research,¹⁷⁸ and more than 90% of them offer online legal research help to members of the public who use the library.¹⁷⁹ Where legal resources would have been easily accessible in print ten years ago, many of these law schools have reduced their print collection in favor of providing access exclusively

how the decline in print resources available in libraries will harm this vulnerable patron group).

174. Fitchett et al., *supra* note 167, at 93–95 (looking at the environment of academic law libraries in the twenty-first century and analyzing the economic climate and how it stands to impact academic law libraries).

175. See Watson, *supra* note 165, at 85.

176. AM. ASS'N OF LAW LIBR., AALL BIENNIAL SALARY SURVEY & ORGANIZATIONAL CHARACTERISTICS: 2017, at 19 (2017). The AALL gathers organizational data, including library budgets and collections information, as well as salary information, from the individual and institutional members of the organization. *Id.* This information is provided to the AALL membership biannually and is the most accurate source in the industry for salary and organizational information. *Id.*

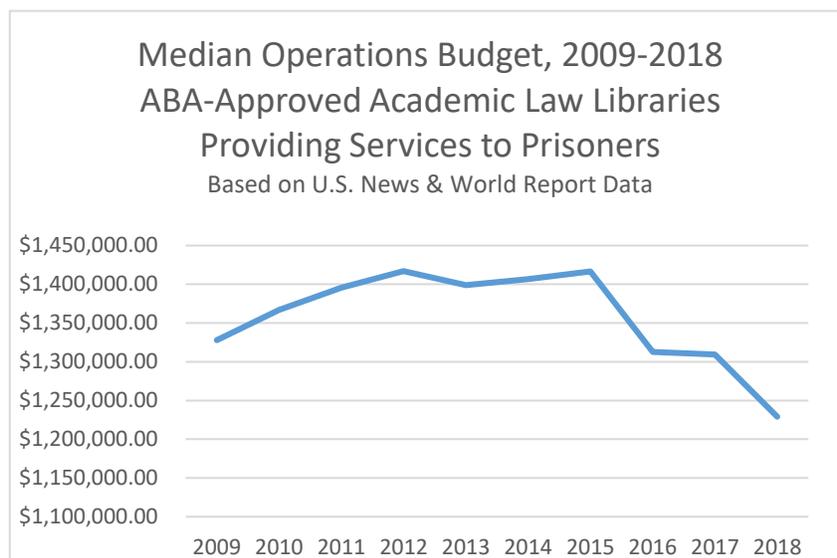
177. *Id.* at 20.

178. The author evaluated the ABA-approved law school library's websites to determine whether the libraries are open to the public. Libraries that only provide access exclusively to Federal Depository Library Program materials but not the rest of the library collection are not considered “completely open to members of the public” for the purposes of this Article.

179. LAW LIBRARIANS' WORKING GRP. OF THE SELF-REPRESENTED LITIG. NETWORK, A SURVEY OF LAW LIBRARY PROGRAMS FOR SELF-REPRESENTED LITIGANTS, INCLUDING SELF-HELP CENTERS 2 (2013), <http://www.srln.org/node/551/survey-srln-library-working-group-national-self-help-libraries-survey-srln-2013>.

online through a method of reliable access such as Lexis, Westlaw, or Bloomberg. Online access, while excellent for law school students, faculty, and staff, is a poor replacement for members of the public. Typically, online access to these legal resources is limited to those employed by or attending the law schools. While there are some law schools with adequate funding to provide separate, public access terminals for online services, the expense of operating those terminals limits the number of libraries willing to provide access to members of the general public.¹⁸⁰

In addition to providing library access to members of the general public who may be assisting those who are incarcerated or otherwise navigating the criminal justice system, there are seventy-one non-prison libraries that offer formal and organized research support specifically to prisoners.¹⁸¹ Twenty-one of those are academic law libraries, and the research they provide, as well as the costs to prisoners seeking research services, vary widely between institutions.¹⁸²



180. See, e.g., Tom Gaylord, *Not Online and Free? Try the Library*, 104 ILL. B. J. 52 (2016) (discussing the expense of the online legal databases and potential access to terminals at libraries).

181. *List of Law Libraries Serving Prisoners*, AM. ASS'N OF LAW LIBRARIES, https://docs.google.com/spreadsheets/d/1r9IRBPSYikRrvNbCTwpWGH-WMBP_xKJyHEFqG9-ApHOo/edit#gid=1 (last visited May 29, 2019).

182. *Id.*

As evidenced by the above budget figure,¹⁸³ the impact of budget cuts on academic law libraries has run the range from staggering (for schools without large endowments or generous administrations) to minimal (for law schools which pride themselves on research collections suitable to aid in the highest quality scholarship from their users). While a significant number of these schools seek to provide access to members of the public, it is not their primary focus – unlike government law libraries.

b. Government Law Libraries

Government law libraries (such as county, federal, and state law libraries) allocate a significant portion of legal and human resources to assist members of the public.¹⁸⁴ Many have adopted standards for providing services to members of the public and believe that they are “an integral . . . part of the legal community and of citizens’ access to a just legal system.”¹⁸⁵ These libraries offer programs for attorneys and members of the public seeking to educate them and provide resources related to a variety of issues ranging from access to justice to technology.

As with academic law libraries, government libraries are experiencing significant shifts in how they allocate collection costs. In 2009, government law libraries spent 83% of their total budget on print materials, yet they now spend only 65%.¹⁸⁶ Similarly, in 2009, government law libraries spent 17% of their library budgets on electronic materials, where they now spend 35%.¹⁸⁷ This shift in collections means that those with a need to perform legal research in government-funded libraries are, increasingly, turning away from books and towards online resources. The good news for these libraries is that they have seen a significant budget *increase* in recent years. Between 2015 and 2017, government libraries responding to the American Association of Law Libraries (“AALL”) Biennial Salary Survey reported a 30.9% average increase to their information budgets.¹⁸⁸ If, however, those budgets are being allocated primarily to online resources, the ability of the public to access those resources – resources which are often more difficult to use than similar resources in print – may be significantly impacted by a deregulated Internet.¹⁸⁹

183. This data is widely available to only those individuals who submit data to U.S. News. Please contact the author with any further inquiries.

184. See *Types of Law Libraries*, AM. ASS’N OF LAW LIBRARIES, <https://www.aallnet.org/careers/about-the-profession/types-of-law-libraries/> (last visited May 28, 2019).

185. *County Public Law Library Standards*, AM. ASS’N OF LAW LIBRARIES (Apr. 2015), <https://www.aallnet.org/about-us/what-we-do/policies/public-policies/county-public-law-library-standards/>.

186. AM. ASS’N OF LAW LIBR., *supra* note 176, at 19.

187. *Id.* at 20.

188. *Id.*

189. See discussion *infra* Section III.A.

c. Appointed Counsel, Law Firms, and Law Firm Libraries

In addition to attempting to perform legal research themselves through libraries, many prisoners turn to counsel to assist with their legal research needs. Whether counsel is appointed through the public defender system or hired privately, they all turn to the same batch of legal resources to perform research for their clients. In its annual nationwide survey of attorneys, the ABA reported that 61% of attorneys regularly use free Internet or online services for research and that 54% of attorneys regularly use fee-based Internet services for research.¹⁹⁰ In addition, 41% use print resources when performing legal research.¹⁹¹ These attorneys often find themselves performing legal research online but doing so away from their offices or firm libraries. Forty-three percent (43%) of attorneys report regularly performing legal research in locations that are neither their firm library nor their personal office (33% report regularly performing legal research from home).¹⁹² While away from the office, 63% of responding attorneys routinely connect to the Internet through a third-party website, and 36% connect through a firm network, intranet, or extranet.¹⁹³ Connecting to the Internet through a firm network, intranet, or extranet makes Internet access that is free from throttling or tiering even more essential. Users in these situations are required to connect to their networks through an initial Internet connection from home, usually using a Virtual Private Network (“VPN”), before connecting to the Internet through the firm’s ISP on the intranet.¹⁹⁴

With these changes in how attorneys perform research has come an inevitable shift in how firm libraries allocate funds in their in-house libraries. In 2009, law firm libraries spent 35% of their total information budget on print materials; today only 25% of the budget is allocated to print resources.¹⁹⁵ As with all other libraries, the opposite is true for electronic materials: Law firm libraries currently spend 75% of their budgets on electronic materials – up from 64% in 2009.¹⁹⁶ As with public and government law libraries, firm libraries

190. ABA, 2017 LEGAL TECHNOLOGY SURVEY REPORT, VOLUME V: ONLINE RESEARCH v–x (2017).

191. *Id.*

192. *Id.* at v–ix.

193. *Id.* at v–xxviii.

194. Extranets and virtual private networks (“VPNs”) allow users to connect directly to computers in their offices through home computers (in the case of an extranet, third parties are also sometimes given permissions to access information via the secure connection). For a general explanation of how VPNs work for both intranets and extranets, see *Difference Between Intranet VPN and Extranet VPN*, RF WIRELESS WORLD, <http://www.rfwireless-world.com/Terminology/Intranet-VPN-vs-Extranet-VPN.html> (last visited May 29, 2019).

195. AM. ASS’N OF LAW LIBR., *supra* note 176, at 18–20.

196. *Id.*

are fortunate in that they are actually seeing overall increases to their total information budgets. Since 2015, law firm information budgets are up 26.3%.¹⁹⁷

d. Public Libraries

Public libraries, while under no obligation to collect legal materials or make them available, often aid patrons performing legal research.¹⁹⁸ But, public library budgets are not what they used to be. The outlook for public libraries is not nearly as grim as it once was – in fact, independent library districts anticipate an operating budget increase of 0.7% and locally-funded libraries anticipate an operating budget increase of 1.9% for 2018.¹⁹⁹ Yet, the priority for those budgets is not on legal materials in any format and certainly not on legal materials in print.²⁰⁰ Where public libraries may offer access to legal information online, only 4% of independent library budgets and 5% of locally-funded library budgets are allocated to technology.²⁰¹ These technology budgets are not specific to legal materials and are typically allocated to resources, such as computers, that can be used by members of the public to use the Internet, to teach patrons how to develop their own applications, or to even supply 3D printers for children and teen “makerspaces.”²⁰²

It is idealistic to think that each individual plodding through the United States criminal justice system is taking advantage of these types of libraries. When it comes to legal research and accessibility to justice through the court systems, prisoners are stuck between a proverbial rock and a hard place; they are unable to access the excellent resources available to them outside of the prison system, and, if they can access those libraries, the print materials on which they previously relied are largely being replaced by less accessible online materials.²⁰³ What these defendants are left with are prison libraries that

197. *Id.* at 18.

198. See generally Beth Bilson, Brea Lowenberger & Graham Sharp, *Reducing the “Justice Gap” Through Access to Legal Information: Establishing Access to Justice Entry Points at Public Libraries*, 34 WINDSOR Y.B. ACCESS JUST. 99 (2017) (exploring how public libraries and librarians can assist with access to justice initiatives by providing access to information).

199. Lisa Peet, *Holding Pattern*, LIBRARY J. (Feb. 16, 2018), <https://lj.libraryjournal.com/2018/02/budgets-funding/holding-pattern-budgets-funding/> (showing that public library budgets are slowly increasing despite federal funding issues and the change in tax laws).

200. See *id.*

201. See *id.*

202. Makerspaces are, essentially, places where library patrons can gather to bring creations to life using technology, tactile craft supplies, or their imaginations. Jim Lynch, *Library Tech Trends for 2018*, TECHSOUP FOR LIBR. (Jan. 3, 2018), <http://www.techsoupforlibraries.org/blog/library-tech-trends-for-2018>; Alison Marcotte, *Top Library Tech Trends*, AM. LIBR. (May 1, 2017), <https://americanlibrariesmagazine.org/2017/05/01/top-library-tech-trends/>.

203. See Mattioli, *supra* note 173.

are woefully understaffed and under-resourced with limited access to print materials let alone online legal resources.

e. Prison Libraries

Prison libraries have been the most deeply affected by *Bounds* and *Casey*, and their budgets and collections reflect that impact.²⁰⁴ Since *Casey*, states with shrinking budgets or convoluted corrections guidelines have drastically reduced the availability of law libraries.²⁰⁵ “In institutions with limited prisoner access to libraries, prisoners with high literacy levels cannot advocate for themselves as well as they would have before, and prisoners with lower literacy levels cannot obtain as much help from jailhouse lawyers.”²⁰⁶

The level of access for criminal defendants to both computers and the Internet has been discussed and debated since 1997. In the late 1990s, minimal use of computers by inmates with insignificant computer skills was allowed by the BOP.²⁰⁷ In 2000, Larry Sullivan, Associate Dean and Chief Librarian of the Library at the John Jay College of Criminal Justice, noted,

Politicians have recognized that online access is primary, essential, and paramount to effect a literate world that will help bring people out of poverty. As most convicts are poor and social deprivation is a primary

204. The discussion centers around permanent prison libraries and not “traveling” libraries, such as the standing library provided to inmates at Rikers Island by the New York Public Library. See Corey Kilgannon, *CITY ROOM; At Rikers, a Library for Those with Plenty of Time*, N.Y. TIMES (June 26, 2010), <https://archive.nytimes.com/query.nytimes.com/gst/fullpage-9405E5DB113BF935A15755C0A9669D8B63.html>.

205. The statistics on law libraries available in state prison systems are deceptive. In 1991, the Directory of State Prison Libraries indicated that there were 703 adult and juvenile institutions in the state prison systems operating with libraries. See MD. CORR. EDUC. LIBRARIES, DIRECTORY OF STATE PRISON LIBRARIANS (1991), <https://www.ncjrs.gov/pdffiles1/Digitization/133209NCJRS.pdf>. These are libraries that are run by the states themselves and that do not outsource the provision of materials or the staff to an outside party, such as a local public or academic library. *Id.* In 2010, one estimate put the total number of prison libraries at 950. Vibeke Lehmann, *Challenges and Accomplishments in U.S. Prison Libraries*, 59 LIBR. TRENDS 490, 491 (2011). For a project that attempts to keep track of all prison libraries, see *Directory of State Prison Libraries*, WASH. STATE LIBRARY, <https://wiki.sos.wa.gov/ils/Main-Page.ashx> (last visited May 29, 2019).

206. Feerman, *supra* note 149, at 268 (citing John Matosky, *Illiterate Inmates and the Right of Meaningful Access to the Courts*, 7 B.U. PUB. INT. L. J. 295, 307 (1998)).

207. David E. Rovella, *Manson on the Internet? No Way, Say His Keepers; Most Inmates Are Banned from Access to Computers*, NAT’L L. J., Apr. 14, 1997, at 12.

correlate of criminal behavior, does it follow that the poor in prison should be connected to the Internet?²⁰⁸

Unfortunately, it is not that simple, and access to the Internet has not been perceived as a reasonable solution to issues with access to justice, access to information, or assistance to the indigent while in prison. As print publication costs increase (or, for other reasons, prison law libraries stop purchasing print materials altogether),²⁰⁹ it becomes more essential for the pro se litigant in prison to have access to legal information in electronic format. According to the Supreme Court in *Bounds*, like lawyers, these pro se litigants “must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action.”²¹⁰ They need access to legal information in order to respond to defendants’ arguments, to alert judges to relevant case precedent, and to overcome the many procedural obstacles to court.²¹¹

This access to legal information needs to be reasonable not only in content but also in access points. In addition to a neutral Internet, prisoners need to be given an adequate number of computers with meaningful access to truly make electronic resources a reasonable means for performing legal research. While the BOP and forty-five state prison systems do provide access to electronic legal resources, not all of those electronic resources require the Internet for access.²¹² In Florida, inmates report that they are typically allowed under three hours in the library every week and, during that time, they are vying for use of electronic resources against upwards of twenty other inmates.²¹³ Prisoners need to be given access to electronic resources in a meaningful way – with enough computer terminals to ensure equal access while also being provided the training needed to access materials online.

There are nine forward-thinking states and prison libraries that have considered this access and have begun providing inmates with access to legal information over the Internet.²¹⁴ In Alaska, librarians and inmates have access to the Internet but may only access websites provided by LexisNexis.²¹⁵ In

208. Larry E. Sullivan, *The Least of Our Brethren: Library Service to Prisoners*, AM. LIBR., May 2000, at 56, 58 (discussing the possible approaches to providing access to information to prisoners in the digital age).

209. See *supra* note 162–64 and accompanying text.

210. *Bounds v. Smith*, 430 U.S. 817, 825 (1977), *overruled in part by Lewis v. Casey*, 518 U.S. 343 (1996).

211. *Id.* at 825–26.

212. Adam Wisnieski, *Access Denied: The Digital Crisis in Prisons*, CRIME REP. (Aug. 6, 2018), <https://thecrimereport.org/2018/08/06/access-denied-the-digital-crisis-in-prisons/#>.

213. *Id.*

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

215. Email from Michael Matthews to Jessica Newton (Oct. 27, 2015) (on file with author).

Colorado, librarians also use an outside Internet provider, not hooked up to the state library system, to access legal information for inmates.²¹⁶ Wisconsin has also allowed inmates access to legal databases online through an external modem.²¹⁷ Any connection to the Internet, and to the resources available online, needs to operate fast enough to make the time spent retrieving the material reasonable. In order for access to be meaningful, each of these methods of performing legal research requires a neutral Internet, free of any tiering or throttling that would inhibit quick access. Unfortunately, the forward-thinking access to research resources being employed by these states is the exception, not the rule.

In forty state prison systems, inmates have no access to legal information online and, instead, are left to deal with meager libraries and outdated print materials.²¹⁸ In these states where there is no access to legal information online, library budgets from prison bureaus and departments of corrections reflect the lack of resources being allocated to print materials in prison libraries. In Florida, the Florida Department of Corrections (“FLDOC”) has actually called for a reduction of librarians in the FLDOC system in order to save the state approximately \$500,000.²¹⁹ In 2000, the Illinois Department of Corrections spent roughly \$750,000 on reading materials for the educational programming in the state’s prisons.²²⁰ By 2017, that number had dropped to a staggering \$276.²²¹

None of these library statistics, when considered separately, are particularly shocking. Of course, libraries are purchasing fewer print materials. Of course, academic law library budgets are shrinking. Obviously public libraries are devoting little to no money to legal resources. And why should we fund prison libraries? But when taken together and looked at through the lens of access to justice for criminal defendants, the impact of the changes to budgets and collections cannot be denied: Less information is being paid for in print and fewer people are able to access the information online. While the Internet is currently free of any (obvious) tiering or biases in access, the reliable and speedy access we have all come to enjoy and use for access to our legal information stands to come to a screeching halt with a non-neutral Internet. If a non-neutral Internet can sideline the average Internet user, how will it impact criminal defendants seeking to access justice through the court system? Access

216. Sullivan, *supra* note 208, at 58.

217. Interview by Jessica Newton with Chief Legal Counsel from Wisconsin.

218. This conclusion was reached after reviewing a series of documents, all of which are on file with the author and available upon request.

219. *Florida Department of Corrections 2018 - 2019 Budget Overview*, FLA. DEP’T OF CORR., <https://www.politico.com/states/fl/?id=00000163-846c-d92c-a17f-edfcfd4b0001> (last visited May 28, 2019). This \$500,000 includes a reduction of chaplains and librarians in the field. *Id.*

220. Lee V. Gaines, *Illinois Prison System Spent Less Than \$300 on Books Last Year*, ILL. PUB. MEDIA NEWS (Apr. 16, 2018), <https://will.illinois.edu/news/story/illinois-prison-system-spent-less-than-300-on-books-last-year>.

221. *Id.*

to justice, as we know it and want it to be stands to be derailed by an Internet without neutrality.

III. IMPACT OF NET NEUTRALITY ON ACCESS TO JUSTICE

What will happen to access to justice initiatives if the FCC does away with net neutrality? If we live in a world without a neutral Internet, how will those navigating the criminal justice system, desperately in need of legal information, find what they need? Wheeler's stance on net neutrality would have kept access to justice and legal information out of harm's way: "Let me be clear, . . . [i]f someone acts to divide the Internet between 'haves' and 'have-nots,' we will use every power at our disposal to stop it."²²² Unfortunately, Wheeler is gone, and Pai is setting up the FCC to bring down net neutrality once and for all, which will have long-lasting implications on all access to justice initiatives by both potentially eliminating access to materials in libraries and driving up the costs related to representation by attorneys.

A. Libraries' Ability to Afford Access to Materials at Useful Speeds

If net neutrality is completely done away with, one great risk is that any meaningful access to the Internet will vanish right along with it because it will simply be too burdensome and costly to get it. Currently, Internet users in the United States pay one fee for their bandwidth, which allows them to use any services or websites they desire.²²³ Without regulations to enforce net neutrality, however, ISPs will have the ability to determine which websites, applications, or services are "worthy" of the fastest speeds and will require users to pay more money to ensure that access speeds and reliability stay consistent across resources. "[B]roadband providers are willing to engage in behaviors that anger their own customers,"²²⁴ so it is hardly a jump to believe that an ISP such as Verizon would contract with certain companies to ensure their websites and services operate more quickly while limiting the accessibility of other websites.

Some people believe that the elimination of net neutrality is a good thing and argue that net neutrality is bad for the economy. But countries like Portugal have shown how a hands-off approach to regulating neutrality on the Internet plays out for users.²²⁵ These economic arguments certainly do not hold up against the policy argument in *Bounds*, which guarantees constitutional access

222. O'Neil, *supra* note 114.

223. Aimee Picchi, *How a Net Neutrality Rollback Could Create a Tiered Internet*, CBS NEWS (Dec. 4, 2017), <https://www.cbsnews.com/news/net-neutrality-rollback-could-create-a-tiered-internet/>.

224. *Id.* (quoting media and strategy fellow at Stanford Law School's Center for Internet and Society Ryan Singel).

225. *See supra* Section I.F.

to the court system via access to legal information. In fact, a non-neutral Internet furthers the divide put in place by *Casey*, which makes indigent prisoners' ability to access the courts (and justice) significantly more difficult by not guaranteeing access to the legal materials they need. As seen in Portugal, an Internet that is deregulated, or weakly regulated, will ultimately lead to tiering, which will limit prison libraries' and public libraries' (legal or otherwise) ability to access materials at useful speeds.

The impact of Internet deregulation on libraries of all kinds is potentially staggering. Libraries, with rapidly shrinking budgets and drastic shifts in collections and programming may find themselves unable or unwilling to pay for prioritized access to the websites and applications that their patrons need most while also unable to purchase print materials. While prison libraries across the country do not consistently provide access to online legal resources, a non-neutral Internet poses a threat to those that do and to those that may do so in the future. In 2009, restricting or limiting Internet access was identified as a challenge to prison programming.²²⁶ In addition to prison libraries, public and academic libraries are also facing financial hardship. The White House budget proposal for the 2019 fiscal year proposed eliminating the Institute for Museum and Library Services, which distributes millions of dollars to American libraries through the Library Services and Technology Act.²²⁷ In addition to library budget cuts, the newest tax cuts will decimate the United States Government Publishing Office ("GPO"), which is responsible for publishing all of the country's federal government documents, including regulatory and statutory information.²²⁸

Without funding for the libraries or the GPO, libraries will have no choice but to turn to the Internet to retrieve and offer legal information to their patrons. If libraries – law, prison, or otherwise – cannot afford to pay for Internet access that makes online legal resources easily available and accessible to their patrons, they are essentially cutting off those individuals' access to the court system, as the Supreme Court did when it limited the scope of *Bounds* in *Casey*.

226. Carl Nink et al., *Expanding Distance Learning Access in Prisons: A Growing Need*, CORRECTIONS TODAY, Aug. 2009, at 40, 41 (discussing educational technologies and resources and the potential for their delivery in the corrections environment to have a long-standing, beneficial impact on those who are incarcerated).

227. *White House Budget Proposal Continues to Miscalculate the Value of Libraries*, AM. LIBRARY ASS'N (Feb. 12, 2018), <http://www.ala.org/news/press-releases/2018/02/white-house-budget-proposal-continues-miscalculate-value-libraries>; see 20 U.S.C. § 9121 (2018).

228. James R. Jacobs, *Tax Bill's Automatic Spending Cuts Would Decimate GPO Along w Many Critical Programs*, FREE GOV. INFO. (Nov. 29, 2017), <https://freegovinfo.info/node/12539>.

B. Effect on the Practicing Bar

The lack of availability of legal materials presents a significant roadblock to access to justice in the courts. But libraries are not the only source of information, and a deregulated Internet will have a dramatic impact on the way public defenders and private counsel represent their clients.

1. Public Defenders

It is no secret that public defenders are in an impossible position. Their assistance to indigent defendants is guaranteed by *Gideon v. Wainwright*,²²⁹ but with too many cases and office budgets on a steady decline, many argue that they cannot possibly mount a vigorous or extensively-planned defense for their clients.²³⁰ Their arguments are supported by numbers. In Kansas City, Missouri, most public defenders handle between eighty and 100 cases every week.²³¹ In New Orleans, sixty public defenders manage approximately 20,000 cases every year.²³² The statistics regarding public defender programs' budgets are not any better. Between 2008 and 2012, state-funded public defender offices in the United States were, on average, cut approximately 2.7% per year and a total of 10.2% over those five years.²³³

With budgets for public defenders' offices steadily decreasing, it stands to reason that the funds these offices spend on legal resources will also decrease. Many public defenders rely on government law libraries for access to print legal materials and, as discussed above, those collections are rapidly dwindling. As with most researchers, public defenders turn to online resources to conduct research needed to assist their clients. As the cost of online resources, such as Lexis and Westlaw, increases,²³⁴ public defender offices will

229. 372 U.S. 335 (1963).

230. See e.g., Teresa Wiltz, *Public Defenders Fight Back Against Budget Cuts, Growing Caseloads*, PEW TRUSTS STATELINE (Nov. 21, 2017), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/11/21/public-defenders-fight-back-against-budget-cuts-growing-caseloads> (detailing the increase in caseloads and dwindling budgets of public defender offices all over the United States, including New York, Louisiana, Missouri, and Texas).

231. *Id.*

232. *Id.*

233. ERINN HERBERMAN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUSTICE, STATE GOVERNMENT INDIGENT DEFENSE EXPENDITURES, FY 2008–2012 – UPDATED 1 (2015), <https://www.bjs.gov/content/pub/pdf/sgide0812.pdf>.

234. The striking annual increases in Lexis and Westlaw subscription costs have been noted as far back as 1992. See Cary Griffith, *Lexis and Westlaw Pricing and Subscription Options: What's Best for You?*, INFO. TODAY, Nov. 1992, at 40, 40 (detailing pricing increases to both Lexis and Westlaw as advertised to practicing attorneys and the government in 1992). The transparency in pricing detailed in Griffith's article is no longer the case; today, all of the major legal research platforms have so many pricing schemes that it is nearly impossible to obtain a simple quote for services.

become increasingly burdened. If these cash-strapped offices are required to pay for an Internet tier that will make these websites function at reasonable speeds, their ability to access information may be severely inhibited.

In all likelihood, public defender offices around the country will be unable or unwilling to allocate any of their meager budgets to ensure Internet access at meaningful speeds and instead will be left attempting to access online information at impossibly slow speeds. And with the inability to research meaningfully comes a significant risk: an increase in claims of ineffective assistance of counsel.

Increasingly, ineffective assistance of counsel claims are treated as second direct appeals by the criminal defendants pursuing them.²³⁵ In order to prove counsel was ineffective, a criminal defendant must show that the performance fell below an objective standard of reasonableness and that, had counsel performed adequately, the result of the case would have been different.²³⁶ “An attorney’s ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.”²³⁷

Ineffective assistance of counsel claims are notoriously difficult to win; even in cases where counsel slept through the trial, courts still consider whether counsel was asleep for a substantial portion and, if so, how significant the portion of trial was during which counsel slept.²³⁸ But these claims will become more viable if attorneys are routinely foregoing research because it becomes too difficult, timely, or expensive. Particularly in firms or public defender offices with shrinking budgets and an overload of cases, the ability to do ample and appropriate research for each case may be the first thing to go.

2. Private Counsel

There are nearly 70,000 firms in the United States that claim criminal law as a practice area.²³⁹ These firms range in size from solo practitioners to large firms with offices spanning many states or even countries.²⁴⁰ While those in the criminal justice system are afforded the right to legal counsel, those who

235. Interview with Dane K. Chase (notes on file with author).

236. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that, in order for counsel to be ineffective, his or her performance must be deficient and that deficient performance must have prejudiced the defense in such a way that the defendant was deprived of a fair trial). The deficiency of performance must be below an “objective standard of reasonableness,” and the defendant must prove that there is a “reasonable probability” that, but for counsel’s deficient performance, the result of the trial would have been different. *Id.* at 688, 698.

237. *Hinton v. Alabama*, 571 U.S. 263, 270 (2014).

238. *See Muniz v. Smith*, 647 F.3d 619, 623 (6th Cir. 2011).

239. A search of “criminal law” on Martindale.com, a nationwide database of legal professionals, lists over 70,000 law firms in its criminal law category. MARTINDALE, <https://www.martindale.com> (last visited May 29, 2019).

240. *Id.*

can afford to do so may prefer to hire private counsel.²⁴¹ As discussed earlier in this Article, access to legal resources online is not cheap, and many attorneys pass those costs on to their clients because they see legal research as an essential part of representation and something that clients should be willing to pay for. Sixty-six percent (66%) of private firms responding to an ABA technology survey reported billing their clients – in some manner – for the costs associated with legal research.²⁴²

Unlike under-funded public defenders' offices, however, these firms have a way of recouping the costs of these platforms as well as any fees they would need to pay for access to the Internet at meaningful speeds. Because so many of these private firms bill clients directly for the costs associated with legal research, it follows that attorneys would push any increased costs associated with needing to perform legal research using a tier of Internet service directly to their clients.

But is that the right approach? Although some criminal defendants can afford their own legal fees, their assets may be tied up in separate or related legal proceedings and the entirety of their assets may not be available to pay the bills.²⁴³ But criminal defendants – and particularly defendants going through the appeals process – are rarely able to pay their full legal fees on their own; in many cases, privately-retained criminal defense attorneys are paid by third parties who are often family or friends of the defendant.²⁴⁴

241. See generally Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J. L. REFORM 323 (2009) (detailing recoupment and contribution in criminal cases, how they are treated as additional punishment, and how they violate the Sixth, Fifth, and Fourteenth Amendments); Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045 (2006) (discussing the economics involved in receiving application fees from indigent criminal defendants and the impact of those fees on the impact of the fees on defendants' waiver decisions); Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NPR (May 19, 2014), <https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>.

242. ABA, *supra* note 190, at v–xxiv.

243. See *Luis v. United States*, 136 S. Ct. 1083, 1093 (2016) (holding that a pretrial freeze of a criminal defendant's untainted, legitimate assets violates his or her Sixth Amendment right to counsel of his or her choosing).

244. Interview with Dane K. Chase, *supra* note 235. See generally David Orentlicher, *Fee Payments to Criminal Defense Lawyers from Third Parties: Revisiting United States v. Hodge and Zweig*, 69 FORDHAM L. REV. 1083 (2000) (discussing attorney client privilege and the duty to decline representation in cases where the attorney should have reasonably believed the payments received were related to the crimes committed by the client).

C. Costs to Society

Many – if not most – members of society simply do not care about the effect of incarceration on the families of those who are incarcerated.²⁴⁵ In a report from the Ella Baker Center, respondents reported that “the average debt incurred for court-related fines and fees alone was \$13,607, almost one year’s entire annual income for respondents who earn less than \$15,000 per year.”²⁴⁶ Significantly, 43% of the families responded that they found attorneys’ fees the most difficult to pay.²⁴⁷ Often, family members and friends of those in the criminal justice system take out loans to make the payments; “As of 2011, the total amount of criminal justice debt in the U[nited] S[tates] owed by individuals topped \$50 billion.”²⁴⁸

Attorneys’ fees and court costs account for much of the financial burden placed on families and friends of those in the criminal justice system. If representation becomes even more expensive – because attorneys are increasing fees to make up for increases in costs paid to ISPs for meaningful and speedy access to the Internet – more individuals may attempt to perform legal research for their loved ones either at home or in libraries. But performing legal research oneself is also a burden, both in the amount of time it takes to research in a meaningful way and in the costs associated with accessing the information (whether those costs involve paying for meaningful Internet access, paying for a legal research resource, or driving to and from the nearest library).

Even in cases where the family and friends of those in the criminal justice system are not doing the research themselves, they may still end up paying for increased Internet speeds so those who do seek access to legal information can get it. This increase in costs may come in the form of paying taxes, special

245. The societal costs of mass incarceration are often studied and discussed by social justice groups. According to researchers, “for every dollar in corrections costs, incarceration generates an additional \$10 in social costs Ultimately, the social cost of mass incarceration is 11 times higher than [the] total spent on the corrections system itself.” Carimah Townes, *The True Cost of Mass Incarceration Exceeds \$1 Trillion*, THINKPROGRESS (Sept. 12, 2016), <https://thinkprogress.org/the-true-cost-of-mass-incarceration-exceeds-1-trillion-60a6daa69f9d/>.

246. SANETA DE VUONO-POWELL ET AL., ELLA BAKER CTR. FOR HUMAN RIGHTS, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 9 (2015), <https://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf> (detailing the obvious and hidden costs associated with the incarceration of millions of people in the United States).

247. *Id.* at 14. In an open-ended question, respondents found the following costs to be most difficult to pay: 43% attorney’s fees; 38% court fees and fines; 20% bail/bond; and 20% restitution. *Id.*

248. *Id.* at 15 (citing DOUGLAS N. EVANS, THE DEBT PENALTY: EXPOSING THE FINANCIAL BARRIERS TO OFFENDER REINTEGRATION 7 (2014), <https://jjrec.files.wordpress.com/2014/08/debtpenalty.pdf>).

levies to help their local libraries, or in the application fee associated with representation by public defender offices.²⁴⁹ How much more can we expect family and friends of those involved in the criminal justice system to handle? Should they be expected to shoulder the financial burden of a society that needs access to legal information at meaningful speeds?

CONCLUSION

What is the appropriate solution to this problem? Advocates of light-touch regulation of the Internet would probably argue that Internet users should simply choose an ISP that is committed to un-tiered services. The problem, of course, is that approximately “three-quarters of the country’s developed census blocks lack any high-speed broadband choice.”²⁵⁰ And even if consumers are lucky enough to find an ISP that is transparent about not raising costs to the consumer, there is nothing that keeps other providers in the chain between the user and the content provider from raising rates – the cost of which will be paid by the consumer.²⁵¹

And a majority of the litigants and their families involved in the criminal justice system either are not members of socioeconomic classes that are particularly inclined to negotiate with their ISPs or do not have access to the Internet at all.²⁵² Framing net neutrality as nothing more than a negotiation issue minimizes the importance of online access to those who need to perform legal research to help themselves or loved ones navigate the criminal justice system.²⁵³

249. *Id.* at 1, 15–16.

250. Jon Brodtkin, *50 Million US Homes Have Only One 25Mbps Internet Provider or None at All*, ARSTECHNICA (June 30, 2017), <https://arstechnica.com/information-technology/2017/06/50-million-us-homes-have-only-one-25mbps-internet-provider-or-none-at-all/>.

251. See Helen R. Adams & Christopher Harris, *Net Neutrality: Why It Matters to School Librarians*, 45 TCHR. LIBR. 8, 10 (2018) (detailing the impact Internet deregulation will have on librarians working in primary and secondary schools in the United States).

252. See ADAM LOONEY & NICHOLAS TURNER, BROOKINGS INST., WORK AND OPPORTUNITY BEFORE AND AFTER INCARCERATION 1 (2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf (“Three years prior to incarceration, only 49 percent of prime-age men are employed, and, when employed, their median earnings were only \$6,250. Only 13 percent earned more than \$15,000.”).

253. Advocates of net neutrality and Internet access often go so far as to say that access to the Internet is a human right. Though the argument is typically made with regard to the need to access the Internet in the face of governments who are oppressing their citizens, whether or not Internet access is a human right is a hotly debated topic. See, e.g., Vinton G. Cerf, Opinion, *Internet Access is Not a Human Right*, N.Y. TIMES (Jan. 4, 2012), <https://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html>; Adam Clark Estes, *The Case for (and Against) Internet as a Human Right*, ATLANTIC (Jan. 5, 2012), <https://www.theatlantic.com/technology/archive/2012/01/case-for-and-against-internet-as-human-right/315164/>; Somini

Neither negotiating with ISPs nor providing criminal defendants with blanket Internet access without neutrality principles in place will solve the problem of access to legal information discussed in this Article. A strict framework for regulation of the Internet needs to be put back in place in the United States, and it is logical to model those regulations on the original Open Internet Order and the later PPOI.²⁵⁴ Given the current drive towards access to justice in the United States, it follows that any new net neutrality rules, regulations, or guidelines should tie in the DOJ's ATJ guiding principles.²⁵⁵

At a minimum, the FCC should ensure that Internet access is available free from tiering, throttling, paid prioritization, and zero-rating. This access should meet ATJ requirements for accessibility, fairness, and efficiency in access to the courts. A neutral Internet encourages accessibility because device limitations or restrictions are not imposed on users. It encourages fairness because no lawful websites, whether used for legal research or for viewing cartoons, will be treated as more important than another. It encourages efficiency because all content will be accessed at meaningful speeds, and Internet wait times will not cause undue delay in performing research essential to defending a criminal case.

In addition, as libraries continue to move from print to online resources, assurances must be made that libraries will continue to be able to provide access to online legal resources for all patrons, including litigants in the criminal justice system. Licenses must be negotiated to ensure equal access to all library patrons, and enough computers must be made available – especially in prison libraries – to ensure that every user has meaningful access to the resources.

Access to justice is essential in the American legal system and is particularly essential in the criminal justice system, where largely marginalized populations attempt to navigate a system that seems set up to ensure their incarceration. And access to justice is impossible without meaningful access to the courts. Access to the courts and to legal information, as guaranteed by *Bounds* and *Casey*,²⁵⁶ may not explicitly require access to online legal information, but as libraries and attorneys move away from print resources and perform research almost exclusively online, providing criminal litigants access to the same online legal information is a logical corollary.

But simply placing a computer in front of a criminal litigant or her friends or family is not enough to ensure meaningful access. The neutral Internet outlined above is essential to ensure fair and efficient accessibility of legal resources online. We cannot allow access to justice to be neutralized in favor of

Sengupta, *U.N. Affirms Internet Freedom as a Basic Right*, N.Y. TIMES: BITS (July 6, 2012), <https://bits.blogs.nytimes.com/2012/07/06/so-the-united-nations-affirms-internet-freedom-as-a-basic-right-now-what/>.

254. See Protecting and Promoting the Open Internet, *supra* note 3, at 19,739.

255. See *Access to Justice*, *supra* note 125.

256. See discussion *supra* Section II.A.

2019]

NEUTRALIZING ACCESS TO JUSTICE

369

ISPs or economic arguments that favor businesses. We must ensure meaningful access to legal information and the courts for criminal litigants; we must ensure access to justice.

