

2006

# Fahrenheit 451 on Cell Block D: A Bar Examination to Safeguard America's Jailhouse Lawyers from the Post-Lewis Blaze Consuming Their Law Libraries

Evan R. Seamone

*Mississippi College School of Law*, [erseamone@mc.edu](mailto:erseamone@mc.edu)

Follow this and additional works at: <http://dc.law.mc.edu/faculty-journals>



Part of the [Legal Writing and Research Commons](#)

---

## Recommended Citation

24 Yale L. & Pol'y Rev. 91 (2006).

This Article is brought to you for free and open access by the Faculty Publications at MC Law Digital Commons. It has been accepted for inclusion in Journal Articles by an authorized administrator of MC Law Digital Commons. For more information, please contact [walter@mc.edu](mailto:walter@mc.edu).

# ***Fahrenheit 451*\* on Cell Block D: A Bar Examination to Safeguard America's Jailhouse Lawyers from the Post-Lewis Blaze Consuming Their Law Libraries**

Evan R. Seamone<sup>†</sup>

## I. INTRODUCTION

For years, Iowa's Fort Madison State Penitentiary maintained an expansive collection of legal holdings that rivaled libraries in many small law firms. Prison staff updated older editions of treatises and hornbooks, and an individual who had experience in legal research aided prisoners in selecting materials from the collection. In the late 1990s, however, this legal assistance promptly halted when guards stripped bare the shelves of the law section and dumped hundreds of law books into the prison courtyard.<sup>1</sup>

The Fort Madison State Penitentiary in Iowa is hardly an exceptional case. In a number of jurisdictions, prison administrators have donated to charity or simply thrown away their institutions' law collections in order to create storage space on the bookshelves.<sup>2</sup> In Arizona, for example, officials disbanded thirty-

---

\* "The temperature at which book[s] . . . burn," according to author Ray Bradbury. RAY BRADBURY, *FAHRENHEIT 451 . . . THE TEMPERATURE AT WHICH BOOKS BURN: THE NOVEL OF THE FIREMEN WHO ARE PAID TO SET BOOKS ABLAZE* (Del Rey 1991) (1953) [hereinafter *FAHRENHEIT 451*].

† Trial Counsel, First Brigade Combat Team, Fourth Infantry Division (Mechanized), Fort Hood, Texas; J.D., University of Iowa College of Law; M.P.P., University of California, Los Angeles, School of Public Policy and Social Research; B.A., University of California, Los Angeles. The opinions presented in this Article are solely attributable to the author and do not represent the official positions of any government agency. The author would like to thank Brenda Vogel and numerous correctional administrators who were kind enough to provide uncommon insight into their chosen profession.

1. Interview with John Whiston, Clinical Law Professor, Univ. of Iowa, in Iowa City, Iowa (Jan. 20, 2002).

2. *DOCs Change Inmate Legal Access Policies, But Do Legal Problems Linger? Idaho DOC Closes Law Library Doors*, CORRECTIONS PROF., June 5, 1998, at 1 [hereinafter *Idaho DOC*] (describing various benefits noted by prison administrators, such as "profit from the sale of . . . [law] books," "gain[ing] space from the law library closures, or for programming," and "cost savings since fewer books will be purchased"); Larry E. Sullivan, *The Least of Our Brethren: Library Service to Prisoners*, AM. LIBR., May 1, 2000, at 56 ("State prisons declared open season on law library collections.").

four prison law libraries.<sup>3</sup> In Idaho, the department of corrections sold multiple law libraries for the price of one hundred dollars plus the cost of shipping over the eBay auction website.<sup>4</sup> These sudden and widespread actions were in many ways a response to the Supreme Court's decision in *Lewis v. Casey*,<sup>5</sup> which held that the Constitution does not grant inmates the right to access legal research materials.<sup>6</sup> Furthermore, the alternatives introduced in lieu of law libraries have motivated a number of institutions with law collections to reconsider their policies, especially since a significant number spend several hundred thousand dollars per year to maintain updated collections of law materials.<sup>7</sup>

The actions of prison administrators to eliminate law libraries are reminiscent of author Ray Bradbury's epic novel *Fahrenheit 451*,<sup>8</sup> which introduced readers to a society where the government has outlawed reading materials. Firemen in this fictional era no longer exist to extinguish fires; it is their job to locate people who maintain personal libraries and destroy their collections in an effort to curb independent thought.<sup>9</sup> Far from fiction, in America's state-run prisons, where access to a volume of the *Federal Supplement* or an updated copy of *Shepard's Citations* arguably affects prisoners' liberty interests more than access to an edition of Steinbeck or Hemingway, the obliteration of law libraries poses a significant threat to inmates, prison administrators, and society at large.<sup>10</sup>

There is a legal basis for the destruction of prison law libraries. In line with a number of recent court cases limiting the rights of prisoners, the Supreme Court's 1996 *Lewis* decision authorized prison administrators to eliminate their law collections as long as they provided some means for prisoners to file written motions<sup>11</sup> to "attack their sentences, directly or collaterally, and . . . to challenge the conditions of their confinement."<sup>12</sup> The *Lewis* case arose from the complaints of twenty-two Arizona inmates who argued that they had been deprived of "meaningful access" to legal materials because their institutions

---

3. Sullivan, *supra* note 2, at 56.

4. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1633 n.268 (2003).

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

6. *See infra* Part IV.

7. *E.g.*, Jill Schachner Chanen, *Banned in the Bighouse: With Elimination of Prison Law Libraries in Arizona, Inmates Must Rely on Paralegals To Prepare Petitions*, A.B.A. J., Mar. 1998, at 26 (estimating the cost of maintaining Arizona's thirty-five prison law libraries at "in excess of \$650,000 a year").

8. *See generally* FAHRENHEIT 451, *supra* note \*.

9. *See id.* at 37-40.

10. *See infra* Part III.

11. *Lewis v. Casey*, 518 U.S. 343, 356 (1996) (explaining that the constitutional guarantee only applies to "the capability of bringing contemplated challenges . . . before the courts," not to the research necessary to support the claim or the quality of the document presented to the court).

12. *Id.* at 355.

failed to shelve and update legal materials and provide knowledgeable staff assistance.<sup>13</sup>

On reviewing the case, the Supreme Court rejected the argument that judges should micromanage such minute aspects of prison administration.<sup>14</sup> The Court's solution was the reversal of the portion of its 1977 *Bounds v. Smith*<sup>15</sup> opinion that placed an affirmative obligation on prisons to provide law libraries as a constitutionally sufficient alternative for providing "adequate, effective, and meaningful" access to the courts.<sup>16</sup> *Lewis* introduced a strict, if not insurmountable, standard for the level of injury necessary to maintain a suit against a prison for lack of law materials.<sup>17</sup> It also excluded civil matters from the category of claims protected under the constitutional guarantee of "meaningful access to the courts."<sup>18</sup> Moreover, the Supreme Court explicitly held that "there is no freestanding right to a law library."<sup>19</sup> On this view, a state prison may have a law library in shambles or no law library at all, as long as the prison provides paralegal support or an alternative way for an inmate to file a criminal appeal or challenge to conditions of confinement.<sup>20</sup>

While the *Lewis* majority relied on statistics reporting the small number of inmates who possess the level of education or language proficiency to understand legal materials,<sup>21</sup> the opinion failed to address the nation's jailhouse lawyers—a substantial group of inmates renowned for their established expertise in legal research and advocacy.<sup>22</sup> As defined in this Article, a

---

13. *Id.* at 346-47 (describing the basis for the prisoners' claims).

14. In various parts of the opinion, members of the Court criticized the special master's order to provide specific services to prisoners as "minute," *id.* at 347, "excruciatingly minute," *id.* at 364 (Thomas, J., concurring), "microscopically detailed," *id.* at 390 (Thomas, J., concurring), and "inordinately—indeed, wildly—intrusive," *id.* at 362.

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

16. *Id.* at 822.

17. CHRISTOPHER E. SMITH, *THE REHNQUIST COURT AND CRIMINAL PUNISHMENT* 69, 106 (1997) (describing a "'catch-22' situation" because the new standing requirement "requires knowledge of the law and legal procedures in order to prove that [inmates] need legal assistance").

18. *Lewis v. Casey*, 518 U.S. 343, 355 (1996) (explaining that the state does not have the responsibility of "guarantee[ing] inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims").

19. *Id.* at 353 n.4, 351.

20. *Id.* at 353 n.4, 360 n.7. For a detailed discussion, see *infra* Part IV.

21. *Id.* at 354 (explaining that prisoners are "mostly uneducated and indeed largely illiterate," and that they are incapable of "discover[ing] grievances" and "litigat[ing] effectively").

22. See *infra* Part II. In fact, the Court only mentioned jailhouse lawyers on one occasion, alluding to the fact that they are alternatives to prison law libraries for other inmates. But the Court failed to describe how jailhouse lawyers could offer meaningful assistance without access to materials themselves. *Lewis*, 518 U.S. at 360, 361 n.7 ("[V]arious prisons may have other means [besides inadequate law libraries] (active assistance from 'jailhouse lawyers,' complaint forms, etc.) that suffice to prevent the legal harm of denial of access to the courts . . ."). *Id.* This oversight of the critical role of the jailhouse lawyer is not surprising. See, e.g., Krista M. Ralston & Richard D. Ralston, *The Jailhouse Advocacy of Martin Sostre: Legal and Mental Implications of Pro Se Prisoner Litigation* 3-4 (Inst. for Legal Stud., Working Paper ILS 5-6, 1995) ("[I]n prison and legal reform and prisoner rehabilitation discussions, there is unjustifiably scarce focus on the relevance of institutionalized persons as actors in

jailhouse lawyer is an inmate who has the skills to assess another inmate's legal problems, find valid legal authority, provide accurate and informed legal advice, and, when possible, present legal arguments to judges or other decision-making authorities.<sup>23</sup> With this serious oversight, the Court failed to address the fact that everyone, including illiterate prisoners and non-English-speakers, can reasonably access legal resources if qualified jailhouse lawyers are permitted to assist them in the use of resources.<sup>24</sup> Law materials are essential to the jailhouse lawyer.<sup>25</sup> He must rely on more than persuasion to make arguments to the courts. Without access to law libraries or legal materials, his ability and influence are nullified.

This is an Article that explains the necessity to recognize and certify more jailhouse lawyers in state prisons at a time when many jurisdictions have set out specifically to eliminate them.<sup>26</sup> While few courts have recognized an inmate's right to practice jailhouse law,<sup>27</sup> jailhouse lawyering is a unique activity that cannot be considered part-in-parcel with the common "privileges" of inmates criticized by skeptics, such as using gym facilities, watching television, or even earning a degree while incarcerated.<sup>28</sup> Unlike these other activities, jailhouse lawyering benefits more than the practicing inmate.<sup>29</sup> The value of the jailhouse lawyer extends far beyond the remote chance that the writ-writer will win a case.<sup>30</sup> In many instances, the services of the jailhouse lawyer are so vital to the proper functioning of the penal system that they outweigh the supposed benefits of removing prison law libraries.<sup>31</sup>

This Article is arranged in six Parts. Part II examines the characteristics of an effective jailhouse lawyer. While any prisoner can represent himself as a qualified practitioner of jailhouse law, extensive research reveals that true

---

these reforms and in their own rehabilitation, especially the role played in this process by so-called 'jailhouse lawyers.'").

23. See *infra* Part II.

24. See *infra* Part II and Part III.

25. See *infra* Section IV.A.

26. See, e.g., Joan Dayan, *Held in the Body of the State: Prisons and the Law*, in HISTORY, MEMORY, AND THE LAW 183, 245 (Austin Sarat & Thomas R. Kearns eds., 1999) (describing Arizona's ban on jailhouse lawyers and "all formal use of Inmate Legal Assistants and Law Clerks"); N.M. Corr. Dep't., Inmate Request for Legal Access, Form No. CD-121001.

27. See, e.g., *Vaughn v. Trotter*, 516 F. Supp. 886, 893 (M.D. Tenn. 1980) ("In guaranteeing the right of mutual inmate assistance in order to assure access to the courts, the Supreme Court has created a derivative right, vested in jailhouse lawyers, to provide legal assistance to others."); *but cf.* *Tuggle v. Barksdale*, 641 F. Supp. 34, 36 (W.D. Tenn. 1985) (refusing to recognize a constitutional right to be a jailhouse lawyer).

28. See, e.g., Robert James Bidinotto, *Prisons Should Not Coddle Inmates*, in AMERICA'S PRISONS: OPPOSING VIEWPOINTS 77, 77-84 (Charles P. Cozic ed., 1997) (attacking various prisons for developing programs that benefit inmates, including law libraries, on the grounds that prisons should not be "resorts").

29. See *infra* Part III.

30. See *id.*

31. See *id.*

## Jailhouse Lawyer Bar Examination

jailhouse lawyers share common attributes.<sup>32</sup> This Part explores various definitions of a jailhouse lawyer, and settles on a standard that identifies the type of inmate worthy of protection as an endangered species in America's prisons.

Part III builds on the former analyses by describing a number of essential functions performed by the jailhouse lawyer. Although critics cite statistics that only one percent of writ-writers win their clients' cases,<sup>33</sup> studies reveal that inmates raise meritorious claims in as many as twenty percent of the cases they initiate.<sup>34</sup> Even among the majority of writ-writers who lose cases, all true jailhouse lawyers contribute to the penal system by providing other inmates with a means of dispute resolution other than violence.<sup>35</sup> They develop marketable skills to contribute to the community upon their release into the civilian population.<sup>36</sup> They even encourage respect for the system of law that confined them within the walls of a correctional facility.<sup>37</sup> Most of all, they provide prisoners with a source of hope.<sup>38</sup> This Part will explore these and other roles of the jailhouse lawyer that contribute directly to maintaining order and discipline among inmates.

Part IV discusses the influence of the *Lewis* decision on jailhouse lawyers across the nation. It considers the effectiveness of the alternatives offered by prisons, such as paralegal assistance and assistance from contract attorneys. In addition to examining theoretical problems posed by these alternatives, this Part discusses cases in which courts found alternatives lacking on the grounds that the legal assistants provided faulty advice to prisoners or mishandled their claims.

Part V balances the prior considerations and recommends the implementation of a standardized Jailhouse Lawyer Bar Examination to preserve the occupation for qualified and prospective inmates. This Part touches upon the nature of the examination, the organizations that might administer it, and the privileges that should be accorded to inmates who pass it. By comparing existing tests used to qualify inmate law clerks in a number of institutions, this Part offers an institutionally sanctioned and realistic approach to the development of a reliable examination.

Part VI concludes the Article with various recommendations for

---

32. See *infra* Part II.

33. Transcript of Oral Argument at \*44, *Lewis v. Casey*, 518 U.S. 343 (1996) (No. 94-1511), available at 1995 U.S. TRANS LEXIS 130 (noting the federal success rate: “[O]nly 1 percent of prisoner petitioners are successful anyway.”).

34. John Strahinich, *Business Boom for Jailhouse Barristers*, BOSTON HERALD, Jan. 23, 1994, at 011 (estimation of Nancy White, General Counsel, Massachusetts Department of Corrections).

35. See *infra* Section III.G.

36. See *infra* Section III.F.

37. See *infra* Section III.C.

38. See *id.*

implementing the Jailhouse Lawyer Bar Examination. Although there always exists the potential for the holders of any license to abuse their privilege, under the proposed regime, prisons and courts can use tested methods to ensure the professionalism of jailhouse lawyers. Ultimately, the proposed Jailhouse Lawyer Bar Examination will ensure that the essential functions of the jailhouse lawyer are accomplished within the penal system, regardless of popular sentiment supporting or challenging prisoners' rights. Equally important, the preservation of law libraries or other legal research materials in penal institutions will continue to ensure that inmates provide competent counsel reflective of current legal developments, thereby directly supporting jailhouse lawyers as a class worthy of heightened legal protection.

Even though the average citizen does not know, or want to know, about the realities of prison life,<sup>39</sup> the Jailhouse Lawyer Bar will ensure a constant check on the level of justice dispensed within prisons. The examination is not only an insurance policy for the public while inmates serve their sentences; it will further provide insurance when another inmate is released every fourteen minutes,<sup>40</sup> as the examination can protect qualified individuals who promote respect for the law, alternative means of dispute resolution, and continued hope.<sup>41</sup> Unlike the officials who sought to eliminate novels in *Fahrenheit 451*, the Jailhouse Lawyer Bar will provide a method to preserve an essential institution in America's prisons *before* "it's too late." Otherwise, the many benefits of prison law libraries will be forgotten, just like the great literary works of Bradbury's imagined society.

## II. CHARACTERISTICS OF AN EFFECTIVE JAILHOUSE LAWYER

Once a month, more than two thousand of the nation's 2.1 million prison inmates<sup>42</sup> eagerly await the newest edition of the *Prison Legal News*.<sup>43</sup> The periodical is published by inmates in the State of Washington and provides

---

39. ROBERT ELLIS GORDON, *THE FUNHOUSE MIRROR: REFLECTIONS ON PRISON*, at xv (2000) ("[A]s a society, we've been in no hurry to lay claim to the prisoners in our midst. And perhaps this reluctance . . . explains our apparent inability to address the problems we are doing our best not to see.").

40. Nat'l Criminal Justice Comm'n, *Imprisonment is Not Beneficial*, in *AMERICA'S PRISONS: OPPOSING VIEWPOINTS* 36, 36 (Charles P. Cozic ed., 1997) (citing Dave Kelly's statistics from November/December of 1995). Given the fact that "[m]ore than nine out of ten inmates currently in prison will be released at some point," *id.*, even the strongest opponents of prisoners inevitably agree that "it does not serve public safety to so frustrate inmates that they return to the streets embittered and angry." *Id.* at 35-36.

41. See *infra* Part III (explaining the functions of jailhouse lawyers).

42. Editorial, *More Online*, OTTAWA CITIZEN, May 29, 2004, at A2 ("The inmate population of the U.S. grew by 2.9 percent last year, to almost 2.1 million people, with one of every 75 men living in prison or jail.").

43. See generally *Prison Legal News*, <http://prisonlegalnews.org> (last visited Nov. 11, 2005) (describing many features of the printed edition) [hereinafter PLN Website]. As of 2002, inmates are recipients of sixty-five percent of the 3500 copies published each month. Mike Belt, *Kansas Prison System Sued by Legal Magazine*, CHATTANOOGA TIMES FREE PRESS (Tenn.), Apr. 6, 2002, at C5.

## Jailhouse Lawyer Bar Examination

updates on recent cases and other legal commentary.<sup>44</sup> Many of these prisoners belong to an informal network of inmates who pride themselves on ascribing to a high standard of professionalism comparable to that of licensed attorneys.

Commentators have often used the term “jailhouse bar” as a metaphor to describe the disciplined organizational structure in which inmate legal advocates operate.<sup>45</sup> Researchers and judges who have met these inmates comment that some are indistinguishable from, if not more skilled in certain areas than, experienced attorneys.<sup>46</sup> They partner with one another and divide work much like members of law firms,<sup>47</sup> operate according to rules of conduct similar to rules of professional responsibility, and generally hold themselves to standards as members of a “jailhouse bar.”<sup>48</sup> Some have won cases and set legal precedents during their practice.<sup>49</sup> By accomplishing these feats these inmates have rightfully earned the title “jailhouse lawyer.”

Their history dates back to the 1969 case of *Johnson v. Avery*,<sup>50</sup> which prohibited the outlawing of jailhouse lawyers unless the prison could provide

---

44. See San Francisco Bay Area Progressive Directory, Prison Legal News, <http://www.bapd.org/gprews-1.html> (last visited Nov. 11, 2005).

45. Although there is no standardized jailhouse lawyer bar examination, the observation that certain inmates belong to a bar arises based on their demonstrated professionalism. See, e.g., David B. Wexler, *The Jailhouse Lawyer as a Paraprofessional: Problems and Prospects*, 7 CRIM. L. BULL. 139, 153 (1971) (“[T]he official disbarment of jailhouse lawyers would at present be legally dubious under *Johnson*, for the heavy caseloads and manpower shortages that typify virtually all existing legal assistance programs . . . hardly permit those clinics to qualify . . . as fully viable alternatives to inmate-provided assistance.”).

46. See, e.g., *Bounds v. Smith*, 430 U.S. 817, 826-27 (1977) (“[T]his Court’s experience indicates that *pro se* petitioners are capable of using lawbooks to file cases raising claims that are serious and legitimate . . .”); *DeMallory v. Cullen*, 855 F.2d 442, 451 (7th Cir. 1988) (Easterbrook, J., dissenting) (“DeMallory is literate, and the record is filled with his lucid prose, including many legal citations. The documents he filed are better than some we see from members of our bar.”); Wexler, *supra* note 45, at 143 (“[T]he available empirical evidence, though sparse, indicates that a substantial number of jailhouse lawyers are quite clearly well versed in limited but important areas of the law, and are rather proficient in analytic and communicative legal skills.”).

47. In prisons where inmates are permitted to associate, it is often the case that “jailhouse lawyers will sometimes join together as ‘partners’ or ‘law associates’ to handle a case.” Wexler, *supra* note 45, at 143. For example, a group of inmates practicing law in the New York Wallkill Correctional Facility constituted the “third largest minority-controlled law firm” in that state in the *New York Law Journal’s* 1999 *Annual Report on the Legal Profession*. Cruz Diaz et al., Letter to the Editor, *Claim To Be Third Largest Minority Firm*, N.Y. L.J., Dec. 28, 1999, at 2 (expanding upon the *Journal’s* earlier report of Dec. 13, 1999).

48. JIM THOMAS, PRISONER LITIGATION: THE PARADOX OF THE JAILHOUSE LAWYER 221 (1988) (“Jailhouse Lawyers adhere to strict unwritten professional standards by which they judge their own work and that of their colleagues.”).

49. E.g., Steven Fromm, *Jailhouse Lawyers: A Growth Industry*, N.J. LAW., Oct. 17, 1994, at 1 (describing the successes of inmate Ronald Long, who has written over one hundred legal briefs and had seven or eight cases overturned in post-conviction proceedings). New York’s most notorious jailhouse lawyer, Jerry Rosenberg, who earned both an LL.B. degree and a doctorate while incarcerated, successfully represented over 300 prisoners while serving his own sentence. Max Haines, *Doing Life Behind Bars: Between Them, Jerry Rosenberg and William Hierens Have Spent 88 Years in Jail*, TORONTO SUN, May 24, 1998, at 6.

50. *Johnson v. Avery*, 393 U.S. 483 (1969).



some reasonable alternative to assist prisoners in accessing the courts.<sup>51</sup> Before this, inmates offering others assistance were “incapacitated and punished.”<sup>52</sup> By implication, *Johnson* affirmed the importance of available legal research materials in prisons. *Johnson* welcomed law materials, which had been absent from longstanding book collections as early as 1790 when the Philadelphia Prison Society provided books to inmates of the Walnut Street Jail with the aim of rehabilitating them.<sup>53</sup>

Legislation designed to curb frivolous inmate lawsuits, such as the Prison Litigation Reform Act,<sup>54</sup> reveals the fact that not all prisoners professing to be jailhouse lawyers actually meet the impressive qualifications addressed above.<sup>55</sup> Ironically, the term “jailhouse lawyer” also extends to incompetent, predatory inmates who possess no more than a “gift of gab” because there exists no common standard.<sup>56</sup> Consequently, courts, scholars, and prison administrators have confused the term with positions in prisons that reflect a limited and inconsistent range of responsibilities. A bona fide “jailhouse lawyer” might be called a “writ-writer,” “paralegal,” “inmate counselor,” “library aide,” “law clerk,” “substitute aide,” or “legal assistant.”<sup>57</sup>

Because various terms used to describe a jailhouse lawyer are deceptive, we must, at the outset, adopt a comprehensive definition for inmates who are worthy of the title. The major distinction between jailhouse lawyers and legal assistants, paralegals, or inmates anointed with other monikers is the jailhouse

51. *Id.* at 490 (“Unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly . . . bar[] inmates from furnishing such assistance to other prisoners.”).

52. R. Joyce Rubin, U.S. PRISON LIBRARY SERVICES AND THEIR THEORETICAL BASES 11 (Univ. of Ill. Graduate Sch. of Library Sci., Occasional Paper No. 110, 1973).

53. HARRY ELMER BARNES & NEGLEY K. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 544 (1943) (“We do not know just when the first prison library was instituted [in the United States] but the Philadelphia Prison Society furnished books to the prisoners in the renovated Walnut Street Jail in 1790.”).

54. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801-810, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 18, 28, and 42 U.S.C. (2000)).

55. *E.g.*, Paula McMahon & Ardy Friedberg, *The Inmate Who Conquered the System*, *SUN-SENTINEL* (Fort Lauderdale, Fla.), Aug. 18, 2002, at 1A (citing “a stereotypical jailhouse lawyer who clogs the legal system with poorly written briefs”).

56. Julie B. Nobel, Note, *Ensuring Meaningful Jailhouse Legal Assistance: The Need for a Jailhouse Lawyer-Inmate Privilege*, 18 *CARDOZO L. REV.* 1569, 1573, 1603 (1997) (“There is no clear definition of a jailhouse lawyer,” and hence “no definitive meaning.”). Even an official definition proposed by a practicing jailhouse lawyer contained conflicting and circular elements:

WRIT-WRITER (rīt· rīt er) n. (1) an indigent person confined in a prison or jail under judgment of a court of law who prepares and files with a court those pleadings he believes will void such judgment. (2) a person who acts as his own lawyer while in prison. (3) *Colloq.* a person who repeatedly files frivolous legal actions in a court of law to harass his jailers. (4) a “jailhouse lawyer” is a writ-writer who does legal work for other prisoners for a fee.

Charles Larsen, *A Prisoner Looks at Writ-Writing*, 56 *CAL. L. REV.* 343, 344 (1968).

57. *E.g.*, Fromm, *supra* note 49, at 1 (“[W]hat used to be called a ‘jailhouse lawyer’ . . . in modern parlance is known as a paralegal. Some are officially certified, others are amateurs who passionately study the law.”).

lawyer's participation in activities that are strictly prohibited in the other contexts. Bona fide jailhouse lawyers provide legal advice to other inmates and craft legal arguments that are submitted to the courts.<sup>58</sup> As one practicing inmate put it, "[L]et there be no mistake made, we in essence practice law by formulating legal papers for prisoner-litigants, e.g., petitions, briefs, advising them on important matters and just about everything else a bona fide lawyer does, except, with rare exception, go to court for a client."<sup>59</sup>

Unlike legal assistants or paralegals, jailhouse lawyers do not receive the benefits of supervision or legal review by licensed attorneys.<sup>60</sup> While legal assistants and paralegals may complete "substantive work" in certain areas that are coextensive with the attorney's objectives,<sup>61</sup> they cannot ever "render legal advice," "directly counsel a client," or "appear in court in any formal judicial proceeding."<sup>62</sup> The jailhouse lawyer must engage in practically all of these prohibited activities. In fact, courts will, on occasion, permit highly proficient inmates to argue cases orally at trial or on appeal.<sup>63</sup>

The single defining characteristic of the jailhouse lawyer is legal competence, which permits him to perform these duties skillfully and meaningfully.<sup>64</sup> Not even those prisoners who are capable of reading, writing, and speaking eloquently qualify as jailhouse lawyers.<sup>65</sup> As one appellate court

---

58. The case of *Pargo v. Elliot*, 894 F. Supp. 1243 (S.D. Iowa 1995), emphasized the importance of the jailhouse lawyers' role in providing legal "advice," as opposed to the trained law library aide's function of assisting with legal "research." *Id.* at 1266, 1269.

59. Diaz et al., *supra* note 47.

60. For the legal assistant or paralegal, the legitimacy of their work exists only to the extent that a person licensed in the law reviews it.

61. THOMAS W. BRUNNER ET AL., *THE LEGAL ASSISTANT'S HANDBOOK* 171 (2d ed. 1988).

62. *Id.* (discussing A.B.A. Formal Op. 316 (Jan. 18, 1967)).

63. Strahinich, *supra* note 34 (describing how Massachusetts inmate Benjamin Laguer argued a motion for another inmate). See, e.g., Joyce Wadler, *The Trials of Jailhouse Jerry: The Con Who's a Pro at Criminal Law*, WASH. POST, May 25, 1982, at B1:

In November [1972], [Jerry Rosenberg] represented a fellow inmate at Sing Sing, believed to be the first time a nonlicensed lawyer appeared in a New York court on behalf of a defendant. Two years later, he made legal history again as the first jail-house lawyer to represent a client on the outside—one John Rizzo, whom Jerry had known at Sing Sing. Arguing that his client had not received proper medical treatment after a fall, Rosenberg won \$8,000 in damages before being led back to prison. "Verdict for Client, Cuffs for Counsel," the headline in the New York Post read . . .

*Id.*

64. E.g., Dragan Milovanovic, *Jailhouse Lawyers and Jailhouse Lawyering*, 16 INT'L J. SOC. L. 455, 458 (1988) (expressing a broad definition but requiring that a bona fide jailhouse lawyer "render[] some legal service to fellow inmates with some degree of competence"); Julian Stone, *Jailhouse Lawyers Educating Fellow Prisoners*, in *SCHOOLING IN A "TOTAL INSTITUTION": CRITICAL PERSPECTIVES ON PRISON EDUCATION* 193, 193 (Howard S. Davidson ed., 1995) [hereinafter *CRITICAL PERSPECTIVES*] ("A jailhouse lawyer is a prisoner who has learned how the law operates and who advises other prisoners about their legal rights and options.").

65. E.g., *Gluth v. Kangas*, 951 F.2d 1504, 1508 (9th Cir. 1991) (finding an inmate's ability to read and write insufficient to qualify him to assist others in legal matters); *Hooks v. Wainwright*, 536 F. Supp. 1330, 1333 (M.D. Fla. 1982) (explaining that intelligence and insight alone fail to meet the Court's established requirements).

observed, “the appearance of minimal capacity to assist other inmates alone plainly does not suffice [for adequate ‘training’].”<sup>66</sup> Bona fide jailhouse lawyers must have the ability to research legal issues, which presupposes some training and experience with legal research materials.<sup>67</sup>

Considering the qualifications of true jailhouse lawyers, it is evident why they are “the most firmly entrenched source of legal aid to other prisoners.”<sup>68</sup> While jailhouse lawyers often conduct research for themselves,<sup>69</sup> a greater number use their skills to assist other prisoners as well, often after abandoning their own causes.

As courts began to recognize the constitutional necessity of jailhouse lawyers, they also realized that these inmates required access to legal materials.<sup>70</sup> In *Kaiser v. County of Sacramento*,<sup>71</sup> for example, the court criticized a system that permitted inmates to request law books without receiving further informed guidance on their selections.<sup>72</sup> Even though librarians were present to assist inmates, the court suggested that inmates required even more assistance.<sup>73</sup> Other courts found that jailhouse lawyers required certain titles in law collections<sup>74</sup> and the ability to browse research materials to locate precedent in order to provide effective legal services to other

66. *Gluth*, 951 F.2d at 1508.

67. *Bounds* noted that jailhouse lawyers must be “trained” in the law in order to qualify as providers of a legitimate alternative for assisting other inmates. *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

68. Geoffrey P. Alpert & C. Ronald Huff, *Prisoners, the Law, and Public Policy: Planning for Legal Aid*, 7 NEW ENG. J. PRISON L. 307, 326 (1981).

69. Jailhouse lawyering arises in three different circumstances: “where an inmate seeks to act as his own jailhouse lawyer; where an inmate seeks to obtain assistance from a jailhouse lawyer; and where a jailhouse lawyer seeks to provide assistance to other inmates.” Terrence J. Fleming, *An Alternative Approach To Protecting Jailhouse Lawyers*, 8 NEW ENG. J. PRISON L. 39, 44 (1982).

70. *E.g.*, *Kaiser v. County of Sacramento*, 780 F. Supp. 1309, 1317 (E.D. Cal. 1991) (associating how a jailhouse lawyer assistance program should be initiated with how access to the prison law library should be established).

71. *Id.*

72. *See id.* at 1316.

73. *Id.* (“Defendants cannot alleviate the problems of a paging system merely by providing assistance in locating citations. In addition, although defendants attempt to characterize the assistance of the law librarians as ‘legal assistance,’ it is unclear whether this type of assistance will satisfy *Bounds*.”).

74. Because *Bounds v. Smith* failed to provide any clear guidance on specifically which legal titles constituted an adequate section, the case invited a number of problems that still face prisons with law libraries. *E.g.*, *Lindquist v. Idaho State Bd. of Corr.*, 776 F.2d 851, 853 (9th Cir. 1985) (“The status of prison law libraries is frequently changing due to new ideas pertaining to what law books should be provided, due to general efforts by prison officials to improve the libraries, and due to court orders.”). As one law librarian noted, “[t]he answers . . . varied from court to court, and only by reading dozens of cases annually were law librarians able to get an overall sense of the type of law library service that would meet the *Bounds* standard for meaningful access to the courts.” Karen Westwood, “*Meaningful Access to the Courts*” and *Law Libraries: Where Are We Now?*, 90 LAW LIBR. J. 193, 195 (1998) [hereinafter Westwood, *Meaningful Access*]. While states codified requirements in their statutes, courts specified different sets of minimal requirements, and associations recommended selected core collections. All of the interventions relayed the common sentiment that a minimal set of legal holdings are necessary to meet the needs of jailhouse lawyers.

inmates.<sup>75</sup>

The obligation to provide research materials dramatically altered prison policy, which had treated law books virtually no differently than pornography or escape manuals since 1790 when prisons permitted inmates to read no materials other than the Bible.<sup>76</sup> With the advent of *Johnson*, some prisons developed programs that institutionalized the use of jailhouse lawyers and provided standardized training to inmates. Prison administrators also realized the necessity of training and research materials. As the supervisor of one program explained, “We don’t simply toss some inmates and law books in a room . . . and yell ‘Good luck!’ over our shoulders. In stark contrast to the disposition of *Bounds*, some federal court opinions have held—however briefly—that inmates be provided with *both* law libraries *and* instruction in their use.”<sup>77</sup>

Even in the wake of *Lewis*, it cannot be questioned that jailhouse lawyers need research materials to use any of these skills. Although *Lewis* explained that law libraries serve no purpose to prisoners who cannot use them, this was no revelation. Before *Lewis*, this reality led to many of the most memorable quotes in the corpus of prison law: “Giving an illiterate the run of the stacks is like giving an anorexic a free meal at a three-star restaurant,”<sup>78</sup> one court quipped. “Access to full law libraries makes about as much sense as furnishing medical services through books like: ‘Brain Surgery Self-Taught’, or ‘How to Remove Your Own Appendix’, along with scalpels, drills, hemostats, sponges and sutures,” wrote another.<sup>79</sup> Aside from stating this obvious point, *Lewis* failed to cite another: Jailhouse lawyers have long been available to assist non-

---

75. *Williams v. Leeke*, 584 F.2d 1336, 1339 (4th Cir. 1978) (“Simply providing a prisoner with books in his cell, if he requests them, gives the prisoner no meaningful chance to explore the legal remedies he might have. . . . It is unrealistic to expect a prisoner to know in advance exactly what materials he needs to consult.” In line with *Williams* and its progeny, it is a fact that prisoners often find obscure cases that have direct relevance to pending cases. See Kevin Iole, “I’m a Fighter . . . Not a Murderer,” LAS VEGAS REV., Mar. 24, 2002, at 33A (explaining an inmate’s “amazing” story after dozens of attorneys refused to assist him in an appeal: “Torres painstakingly read law texts, hour after hour . . . . Finally, one day, lying on his bed in his cell, . . . Torres read of something called a *writ of error coram nobis*. It would allow Torres to vacate his guilty plea, because the punishment he thought he would get was not what he got.”); Kim Martineau, *Inmate Makes a Case for Himself: Schenectady Shrockie Kirk Won a New Trial When He Uncovered Mistakes That Had Been Made by His Attorney*, TIMES UNION (Albany, N.Y.), Feb. 19, 2002, at B1 (“Seven hours a day over several months, [an inmate with an eleventh grade education] pored over books in the prison law library researching his case. He soon discovered that his trial lawyer had allowed him to waive key hearings to suppress evidence against him. . . . Kirk appealed the jury’s verdict last month and won a new trial.”); Michelle Roberts, *Teen Wins Measure 11 Freedom Fight: A Judge Rules That Raashan F. Coley Was 7 Hours Too Young To Receive a Mandatory Sentence*, OREGONIAN, Aug. 30, 2000, at E01 (“Coley discovered the technicality that would set him free while poring over legal books in the prison law library.”).

76. Rubin, *supra* note 52, at 6 (describing the banning of “books with explicit sexual matter, inflammatory political matter, legal references, or how-to-escape suggestions”).

77. William D. Mongelli, *De-Mystifying Legal Research for Prisoners*, 86 LAW LIBR. J. 277, 278-79 (1994).

78. *Demallory v. Cullen*, 855 F.2d 442, 451 (7th Cir. 1988) (Easterbrook, J., dissenting).

79. *Falzerano v. Collier*, 535 F. Supp. 800, 803 (D.N.J. 1982).

English-speaking, blind, or illiterate inmates.<sup>80</sup>

Even though many prisoners are in fact illiterate, this is not true of all inmates, and certainly not all jailhouse lawyers. Not only was the *Lewis* Court unaware that America's federal and state prisons have hosted over 200 prisoner-written and -edited periodicals for over a generation,<sup>81</sup> the Court similarly neglected several publications geared specifically to the Nation's jailhouse lawyers. Some of these titles include *Prison Legal News*,<sup>82</sup> The National Lawyers Guild's *Jailhouse Lawyer's Handbook*,<sup>83</sup> the *Columbia Human Rights Law Review's* publication *A Jailhouse Lawyer's Manual*,<sup>84</sup> PSI Publishing's *The Prisoner's Guide to Survival*,<sup>85</sup> Oceana Publishing's *The Prisoner's Self-Help Litigation Manual*,<sup>86</sup> a number of manuals for litigation in specific courts,<sup>87</sup> and other non-institutional publications, such as the *United States Jailhouse Lawyer's Manual*.<sup>88</sup> Even if the Court proceeded on a faulty assumption about prisoners' literary capabilities to substantiate the elimination of law libraries, prison administrators must complete the analysis. They must consider the potential for jailhouse lawyers to assist effectively other inmates and the fact that these lawyers depend on legal reference materials.

Although there are many qualified jailhouse lawyers in America's prisons, the supply is hardly endless or adequate to meet the needs of every inmate in the nation. Jailhouse lawyers are drawn from a limited "special universe" of inmates who face many obstacles.<sup>89</sup> They are almost always self-taught or

---

80. *E.g.*, *Cruz v. Hauck*, 627 F.2d 710, 721 (5th Cir. 1980) ("Library books, even if 'adequate' in number cannot provide access to the courts for those persons who do not speak English or who are illiterate. . . . Perhaps, instead, the need might be met by writ-writers in jail, if sufficient in number, to aid those unable to use the library themselves.").

81. RUSSELL N. BAIRD, *THE PENAL PRESS 17-22 & app. A* at 176-98 (1967); RUDOLF ENGELBARTS, *BOOKS IN STIR: A BIBLIOGRAPHIC ESSAY ABOUT PRISON LIBRARIES AND ABOUT BOOKS WRITTEN BY PRISONERS AND PRISON EMPLOYEES* 72 (1972).

82. *See generally* PLN Website, *supra* note 43.

83. CENTER FOR CONSTITUTIONAL RIGHTS & NATIONAL LAWYERS GUILD, *THE JAILHOUSE LAWYER'S HANDBOOK: HOW TO BRING A FEDERAL LAWSUIT TO CHALLENGE VIOLATIONS OF YOUR RIGHTS IN PRISON 1* (4th rev. ed. 2003), available at <http://www.nlg.org/resources/JLHFinal.pdf> (describing specific approaches for inmates to deal with "the problem of conditions inside prison and the way [they] are treated by prison staff").

84. COLUMBIA HUMAN RIGHTS LAW REVIEW, *A JAILHOUSE LAWYER'S MANUAL* (6th ed. 2005). *See also* <http://www.columbia.edu/cu/hrlr/index.html> (last visited Nov. 11, 2005) (describing how the manual, a 1007-page book currently in its sixth edition of printing, is designed for prisoners "whose rights are most threatened in our system yet who often have no access to legal assistance").

85. L. POWELL BELANGER, *THE PRISONER'S GUIDE TO SURVIVAL* (2001). For a more detailed description of the book and its contents, see <http://www.prisonerlaw.com> (last visited Nov. 11, 2005).

86. DANIEL MANVILLE & JOHN BOSTON, *THE PRISONER'S SELF-HELP LITIGATION MANUAL* (3d ed. 1995).

87. *E.g.*, ELIZABETH ANN ETKIND & LOIS BLOOM, *A MANUAL FOR PRO SE LITIGANTS APPEARING BEFORE THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK* (1993).

88. ESTEBAN ROGELIO GARCIA, *THE UNITED STATES JAILHOUSE LAWYER'S MANUAL* (Texas Writ-Writer's Ass'n rev. ltd. ed. 2004).

89. Ralston & Ralston, *supra* note 22, at 37.

trained by experienced jailhouse lawyers while in prison.<sup>90</sup> After all, most inmates have no appreciation of the law when they begin their term of confinement.<sup>91</sup> For an inmate learning the law, legal acumen takes years to develop.<sup>92</sup> Inmates' legal proficiency is often limited by an obvious, often understandable, lack of support by prison officials.<sup>93</sup> These factors eliminate all but the most resilient inmates from the pool of qualified jailhouse lawyers.<sup>94</sup> Although they lack a standard understanding of, or level of exposure to, the law, the truly capable jailhouse lawyers consistently meet the same high threshold for competence, whether they have formal programs or no programs at all. The Jailhouse Lawyer Bar Examination proposed in this Article applies only to this comparatively small but extremely capable pool of inmates nationwide. Regardless of the source of an inmate's legal expertise, each qualified jailhouse lawyer should be permitted to exercise that skill set.

The next Part describes seven distinct and meaningful functions performed

---

90. See, e.g., Milovanovic, *supra* note 64, at 459 (describing how prisoners develop into jailhouse lawyers through "a succession of steps, where, with each, the inmate becomes more involved and usually more competent" with the law); Strahinich, *supra* note 34 (quoting the "dean" of jailhouse lawyers, William Gilday, Jr., "[i]t's a self-taught profession. What you find is if [inmates are] halfway smart, after a year or two, their suits aren't frivolous anymore.").

91. Dragan Milovanovic & Jim Thomas, *Overcoming the Absurd: Prisoner Litigation as Primitive Rebellion*, 36 SOC. PROBS. 48, 50 (1989) (noting that the "tendency to litigate seems to emerge independent of previous experiences or behaviors on the streets"); *id.* at 51 ("[L]egal expertise or enthusiasm for the law are simply not traits imported from the outside [of prisons].").

92. See generally Stone, *supra* note 64 (describing his own experience and the experience of other jailhouse lawyers).

93. E.g., DEP'T OF JUSTICE & NAT'L INST. OF CORR., ALTERNATIVE DISPUTE RESOLUTION MECHANISMS FOR PRISONER GRIEVANCES: A REFERENCE MANUAL FOR AVERTING LITIGATION 47 (1984) [hereinafter ADR MANUAL] ("At first glance, legal assistance might seem to be counterproductive if the goal of correctional administrators is to avoid §1983 cases."); CHADWICK L. SHOOK & ROBERT T. SIGLER, CONSTITUTIONAL ISSUES IN CORRECTIONAL ADMINISTRATION 28 (2000) ("They are hesitant to do anything that would increase the ability of inmates to control the institution . . . . As a result, correctional managers seek standards and procedures that minimally comply with constitutional requirements."). As one researcher put it, "[p]risoners are expected to accept their guilt and to look to their jailers for help. They are not supposed to upset themselves or the authorities—especially not by voicing complaints about their rights or by composing writs." Rubin, *supra* note 52, at 11.

94. Two major characteristics noted by researchers are "an aggressive intellectual capacity, and a desire to 'fight back.'" Milovanovic & Thomas, *supra* note 91, at 51. Some jailhouse lawyers are paid for their services and obviously their motivation may be extrinsic. John Roll, *Cases Range from Significant to Silly: Jail-House Lawyers Take Complaints to Court*, L.A. TIMES, June 15, 1986, at 3 (reporting a warden's observations that while charging for legal services is prohibited, "the practice of law clerks charging for their services will continue [as] a matter of supply and demand"); Strahinich, *supra* note 34 ("Though regulations forbid prisoners from charging for legal services, inmates say a jailhouse lawyer can earn anywhere from a few cartons of cigarettes to \$5,000 per case."). However, most jailhouse lawyers operate on the basis of intrinsic motivation. The reward may be in knowing that the inmate has assisted a needy person. See Hugh MacMillan, *Trial Court and Prison Perspectives on the Collateral Post Conviction Relief Process in Florida*, 21 U. FLA. L. REV. 503, 507 (1969) (noting the observation that "most jailhouse lawyers are motivated by a desire to 'help out a buddy' rather than by the wish to make a profit or deliberately abuse the legal system"); Martineau, *supra* note 75 (explaining why a successful jailhouse lawyer now wants to be an attorney); Stone, *supra* note 64, at 194 ("After studying law [with another inmate] for some time, I realized that I wanted to share this knowledge with anyone who was interested.").

by bona fide jailhouse lawyers. When reviewing these many benefits, it is crucial to recognize that only those inmates who are capable of conducting meaningful research and representation make the types of contributions that are described. Preservation of the jailhouse lawyer is essential specifically because many of these benefits cannot be attained through alternative means.

### III. ESSENTIAL FUNCTIONS PERFORMED BY THE JAILHOUSE LAWYER

Many critics, especially politicians and media figures, have argued that jailhouse lawyers exist simply to take advantage of the corrections system by deluging courts with frivolous lawsuits.<sup>95</sup> They often cite statistics to prove the point, highlighting the small number of cases won by prisoners or instances of inmates suing because they were provided with only one type of peanut butter.<sup>96</sup> All too often, while most of these statistics have turned out to be inaccurate, the misrepresentations have distorted the essential truth from the public, lawmakers, and prison officials themselves.<sup>97</sup> To fully appreciate the existence of jailhouse lawyers, we must concentrate on seven functions that they fulfill. Only by recognizing the numerous services they provide to the penal system and society at large can we earnestly address their access to legal

---

95. See Howard S. Davidson, *Introduction to CRITICAL PERSPECTIVES*, *supra* note 64, at xv (“[T]he critics are . . . those who think schooling prisoners is ‘coddling inmates’ or, even worse, rewarding them with educational opportunities that are increasingly unavailable to law-abiding citizens.”).

96. For example, in an early effort to spur legislation against prisoners’ “recreational litigation,” attorneys general from twenty-four states “released a list of the most frivolous claims filed in their jurisdictions.” Brad Daisley, *Recreational Prison Litigators Clogging U.S. Courts*, LAW. WKLY., Sept. 29, 1995 (LEXIS). The complaint noted prisoner lawsuits over crunchy peanut butter, failure to invite a prisoner to a guard’s going-away party, and opposition to a neighboring inmate who played dominoes loudly. *Id.*

97. Some judges have actually examined the classic cases cited as abuses of justice, only to realize that many of the claims actually had legitimate bases. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 521 (1996) (“In the ‘chunky peanut butter’ case, the prisoner did not sue because he received the wrong kind of peanut butter. He sued because the prison had incorrectly debited his prison account . . .”). In some cases, researchers familiar with prisoners’ filing estimate that “less than 5 percent of the . . . lawsuits filed by state prisoners against Department of Corrections were for such petty concerns.” Eric L. Wesson, *Prisoners’ Lawsuits Aren’t Frivolous*, ST. LOUIS POST-DISPATCH, July 7, 1995, at 7B. One may ask what became of the other statistics from early studies of the American Bar Association, which estimated that, of the different types of disputes prisoners normally raise, “75 [to] 80 percent of these problems will be meritorious, or will involve more than simple advice.” Alpert & Huff, *supra* note 68, at 319. In fact, there is good reason to distrust any statistic presented regarding the merits of prisoner litigation:

Difficult measurement problems are encountered in any study which attempts to ascertain the nature and extent of prisoners’ legal problems. First, the researchers must ask a relatively unsophisticated and poorly educated population to articulate a personal problem. Second, those problems must be classified into artificial categories of response. And third, some determination must be made as to which of these articulated problems appear to be meritorious. . . . To complicate matters even further, many problems articulated by prisoners appear to be simple on the surface only to become quite complex and time consuming as the case develops.

*Id.*

research materials.

A. *Jailhouse Lawyers Provide Quality Legal Services to Needy Inmates*

The realities of prison life make it extremely difficult to deliver legal services to all of the prisoners who need them. In many cases, jailhouse lawyers must pick up the pieces where licensed attorneys will not venture, due to their external or self-imposed constraints.<sup>98</sup> For example, aside from the discomfort of ideological differences or disdain for the types of offenses committed by various inmates, attorneys representing prisoners must submit to searches and sometimes unwelcome responses from other inmates or guards. They must travel longer distances to meet with clients who are unexpectedly transferred to different institutions. Attorneys also wait for prolonged periods when their clients are sent to isolation units or placed in lock-down status. Some counsel will find themselves compared to disfavored predecessors by skeptical and jaded clientele. Furthermore, female attorneys, especially, may be subject to various forms of sexual harassment from other sexually repressed inmates as well as their own clients. For these and other reasons, the jailhouse lawyer's turf is considered by many to be "[a] nexus in a system where professional counsel does not usually reach."<sup>99</sup>

Jailhouse lawyers can often provide quality services simply by virtue of the fact that they have ample time on their hands, and they are willing to devote it to the representation of a fellow inmate's cause. Just like many pro se inmates who have won their appeals after licensed attorneys abandoned or entirely failed to investigate the case, jailhouse lawyers have discovered otherwise obscure winning legal authority simply by virtue of time spent researching.<sup>100</sup> Faced with shrinking budgets and concurrent mandates to serve an increasing number of inmates, penal institutions often lack the funding necessary to compensate contract attorneys or even lawyers who are willing to work at reduced rates for services that rise to an adequate level.

It is indisputable that the poor funding available to attorneys has limited their ability to defend indigent inmates: "In all too many jurisdictions, the total compensation paid to court-appointed counsel does not even meet their regular hourly overhead costs."<sup>101</sup> In its harsh criticism of the low wages paid to

---

98. See Stone, *supra* note 64, at 193 (explaining the common experience of having counsel appointed too late who refuse to file necessary forms or return prisoners' calls); Strahinich, *supra* note 34 (sharing the observation of jailhouse lawyer William Gilday, Jr. about the population of inmates served by the jailhouse lawyer: "There are a lot of people that fall through the cracks . . . . The jailhouse lawyers are the only ones who pick them up.").

99. Ralston & Ralston, *supra* note 22, at 39.

100. See *supra* Part II (surveying various cases in which inmates won, although originally labeled as losers by attorneys).

101. RICHARD KLIEN & ROBERT SPANGENBERG, *THE INDIGENT DEFENSE CRISIS* 5 (1993).



appointed defenders in Texas, the Fifth Circuit noted that in one case, “[t]he state paid defense counsel \$11.84 per hour. Unfortunately, the justice system got only what it paid for.”<sup>102</sup> Such lack of funding has curtailed the amount of time that attorneys can devote to a single case and perpetuated a system that is often described as “slaughterhouse justice,” which requires fast-moving client consultations where essential facts are often missed.<sup>103</sup>

Aside from having the time to research, jailhouse lawyers often serve inmates better than appointed legal counsel because these knowledgeable inmates can relate to their peers.<sup>104</sup> Not only are inmates more willing to accept advice from someone who has lived in a similar position, they can express themselves naturally without having to “put on a show” in an attempt to communicate with an outsider, which can misrepresent the actual claim.<sup>105</sup>

Quality legal assistance is especially important to aid wrongfully convicted inmates, who can exist in any American penal institution due to the fallibility of the justice system.<sup>106</sup> Innocence can take many forms, including actual, factual, or legal.<sup>107</sup> Convictions of the innocent may result from prosecutorial or police misconduct, faulty recollections of eyewitnesses, or lack of scientific testing.<sup>108</sup> Furthermore, those who follow the occurrence of exonerations estimate as many as one every three weeks based on recent statistics.<sup>109</sup> The success of programs such as the Innocence Project at Cardozo Law School has motivated even prosecutors to implement their own programs to determine whether convicted inmates are innocent despite convictions at trial.<sup>110</sup> The statistics

102. *Martinez-Macias v. Collins*, 979 F.2d 1067, 1067 (5th Cir. 1992).

103. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1850 (1994).

104. See Nobel, *supra* note 56, at 1579-80.

105. Milovanovic & Thomas, *supra* note 91, at 50 (noting that a jailhouse lawyer “is a prisoner knowledgeable in law who helps other prisoners shape or translate the personal troubles and problems of prison life into legal issues and claims”); Henry P. Ziegler, Jr., *Paralegals Not Necessarily the Solution to Lewis v. Casey: Objective Third-Party Involvement Could Improve Paralegal System*, CORRECTIONS PROF., Sept. 5, 1997, at 10 (“There are too many inmates who have become so absolutely mistrustful of DOC officials nationwide, and anyone even remotely associated with those DOC officials they often want their legal advice to come from their peers, other inmates.”).

106. See generally JEROME FRANK & BARBARA FRANK, *NOT GUILTY* (1957) (exploring how innocence can be obscured by the American criminal justice system).

107. Cathleen Burnett, *Constructions of Innocence*, 70 UMKC L. REV. 971 (2002). In a case of actual innocence, an accused has not been involved with the charged crime or even at the scene of the crime. *Id.* at 975. Factual innocence involves a situation where the accused had some connection with the assailant but was not the one who actually committed the offense. *Id.* at 977-78. Legal innocence exists when the accused admits to the offense but provides an excuse or justification for its commission. *Id.* at 979-80.

108. Howard S. Master, Note, *Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted*, 60 N.Y.U. ANN. SURV. AM. L. 97, 100-02 (2004) (describing the frequency of wrongful conviction and its causes).

109. Peter Neufeld, *Legal and Ethical Implications of Post-Conviction DNA Exonerations*, 35 NEW ENG. L. REV. 639, 641 (2001).

110. *Id.* (“Increasingly, progressive-minded prosecutors around the country are setting up their own ‘innocence projects.’”).

## Jailhouse Lawyer Bar Examination

continue to reveal innocent inmates who, without legal assistance, suffered for years behind bars.<sup>111</sup>

### B. *Jailhouse Lawyers Assist Courts by Identifying Truly Meritorious Claims*

When jailhouse lawyers are competent, they serve as “gatekeepers between prisoners and the federal courts by weeding out suits that do not possess legal merit from those that do.”<sup>112</sup> They can substantially reduce the amount of information presented to the court simply by “assisting prisoners in writing their complaints in terms that are understandable by the clerk and judges.”<sup>113</sup>

In part, this benefit is tied to the skill of artful pleading. Simply by recrafting the claim, a jailhouse lawyer can get the court to address important issues that would have otherwise been missed. “What needs to be done is to transpose ‘what happened’ as codified in the street to what will be seen as believable in a courtroom setting.”<sup>114</sup> This simple task is extremely important: “If a prisoner is beaten half to death by a guard, being beaten can be considered ‘frivolous.’ If a word is omitted or incorrectly added, the entire matter can be dismissed as ‘frivolous.’”<sup>115</sup>

When inmates assist peers by transforming claims into legally acceptable arguments, their service is extremely beneficial to the justice system. The benefit is no different from the one motivating many states to invest heavily in measures that will assist unincarcerated pro se litigants. While self-representation is certainly more common in civil rather than criminal courts, observers have noted an “increase in both arenas in courtrooms across the United States.”<sup>116</sup> For example, the American Judicature Society recently “found that about 19 states including Florida, Hawaii, Pennsylvania, Indiana and Illinois, have statewide programs to assist those who wish to represent themselves.”<sup>117</sup> These states provide necessary guidance through forms, telephone assistance, websites, do-it-yourself books, and support personnel.<sup>118</sup> Part of this movement obviously stems from a desire to make litigation more

---

111. For a representative sample, see The Innocence Project, <http://www.innocenceproject.org> (last visited Nov. 11, 2005).

112. Milovanovic & Thomas, *supra* note 91, at 50. See ADR MANUAL, *supra* note 93, at 47 (explaining that effective jailhouse lawyers avoid frivolous litigation by advising prisoners about the legal merits of their complaints); Nobel, *supra* note 56, at 1580 (same).

113. ADR MANUAL, *supra* note 93, at 50.

114. Milovanovic, *supra* note 64, at 461.

115. Pilgrim v. Littlefield, 92 F.3d 413, 416 (6th Cir. 1996) (“[T]he lenient treatment generally accorded to pro se litigants has limits” (citing Jordan v. Jabe, 951 F.2d 108, 110 (6th Cir. 1991))); Wesson, *supra* note 97, at 7B.

116. Marie McCain, *More Defendants Face Judges and Juries Alone*, CINCINNATI ENQUIRER, Aug. 26, 2002, at 1A.

117. *Id.* (“[T]he influx of pro se . . . litigants has grown so much over the past five years that some states have set up programs offering help and information to those who want to represent themselves.”).

118. *Id.*

efficient. What makes inmate legal assistance more effective than a do-it-yourself manual or staff member without legal training is the jailhouse lawyer's exposure to a large number of prisoners, his experience with legal claims, his knowledge of the law, and his personal involvement.

C. *Jailhouse Lawyers Develop an Appreciation for the Law and Structures of Authority in Themselves and Other Inmates*

Serving as a jailhouse lawyer is a true test to determine "whether law [is] ultimately a social good."<sup>119</sup> To both the inmate who becomes conversant in the law and to the clients he represents, "[t]he legal form itself is not challenged; rather, it is seen as a neutral instrument in resolving problems."<sup>120</sup> In fact, the experience of using the law productively to help others can often be "therapeutic" and helpful to the jailhouse lawyer.<sup>121</sup> Just as some wardens have recognized a form of "bibliotherapy" occurring among inmates who read novels from the library's core collection, jailhouse lawyers experience a genuine sense of accomplishment when their research permits them to stumble on an essential case or argument.<sup>122</sup>

The clients of jailhouse lawyers realize many benefits, even when they lose the underlying legal action.<sup>123</sup> Former jailhouse lawyer Roland Acevedo observed that the representation permits inmates to learn how to exist in the system that imprisoned them: "To truly rehabilitate, we must teach individuals that our justice system is fair and just and that every litigant, rich or poor, incarcerated or free, is treated equally."<sup>124</sup> By using a jailhouse lawyer to resolve disputes, inmates can "begin to . . . put their faith and trust in the courts."<sup>125</sup>

119. Dante Germanotta, *Prison Education: A Contextual Analysis*, in CRITICAL PERSPECTIVES, *supra* note 64, at 104, 114 (describing the realization of Massachusetts inmate Richard Cepulonis that he was "testing the notion as to whether law was ultimately a social good. At the least, he was finding in the law a means to advocate and advance the civil rights of prisoner-citizens.").

120. Milovanovic, *supra* note 64, at 462.

121. Andrea Ball, *Texas Flooded with Prisoner Lawsuits*, Cox News Service, July 31, 2001 ("There's an almost therapeutic aspect to prison lawsuits. It's empowering."). As one former jailhouse lawyer explained (after gaining admission to the New York State Bar and clerking for a federal judge after his release), "[E]ver so gradually, my bitterness towards the criminal justice system began to dissipate as I began to realize that the individuals I was assisting were getting their 'so called' day in court." Roland Acevedo, *Thoughts of an Ex-Jailhouse Lawyer*, N.Y. L.J., Aug. 5, 1998, at 2. Some suggest that there are evident mental health benefits to prisoners who experience such therapy. Ralston & Ralston, *supra* note 22, at 5.

122. *Cf.* Rubin, *supra* note 52, at 5 ("Wardens commented that, in addition to raising morale, books helped to lessen escape plots through preventing boredom, releasing strain, and creating gratitude (for the libraries).").

123. Acevedo, *supra* note 121, at 2 ("It is difficult for an inmate to lose in court, especially when losing can mean additional years in prison, but in my experience inmates are able to handle their defeats readily when they receive well-reasoned, balanced decisions.").

124. *Id.*

125. *Id.* As Nebraska jail house lawyer Bruce Caton explained, "If the department had unlimited

D. *Jailhouse Lawyers Guarantee Adequate Living Conditions for Prisoners in Accordance with Legal Requirements*

Observers note that many jailhouse lawyers accept cases they hope will motivate sweeping reform throughout the prison.<sup>126</sup> When one of these cases succeeds, the benefits can extend throughout an entire state. In Texas, for example, the noted case of *Ruiz v. Estelle*<sup>127</sup> ultimately resulted in the overhaul of several essential prison services after federal officials joined in the inmates' suit.<sup>128</sup> Similar cases throughout the nation have addressed important issues, such as inmate health care, practice of religion, overcrowding, and forms of punishment.<sup>129</sup> For example, of the four Eighth Amendment cases heard by the Supreme Court in the early 1990s, "[e]very one of those cases was filed initially by a pro se prisoner. Two of the cases, *Farmer* and *Hudson*, got to the Supreme Court solely on the basis of prisoner handwritten or prisoner-typed petitions."<sup>130</sup> Vital concerns like these would not be addressed without the efforts of jailhouse lawyers.<sup>131</sup>

Most jailhouse lawyers also represent inmates at disciplinary hearings that never extend beyond the walls of the prison. In many cases, jailhouse lawyers assist inmates who face "restriction to their cells, less time in the gym, loss of phone and visitation privileges, and the loss of 'good time.'"<sup>132</sup> Such representation is often codified as a right of due process.<sup>133</sup> At both the global

---

authority over us and there wasn't a way to check it . . . the inmates would revert to violence." Robynn Tysver, *Due Process Doesn't End Behind Bars: Prison Disciplinary Hearings Include Rights Such as Representation and Appeals*, OMAHA WORLD HERALD, Sept. 15, 2002, at 1A. See also Nobel, *supra* note 56, at 1580 ("Lawsuits initiated by jailhouse lawyers may reduce prison violence by providing inmates an alternative means of expressing their anger at the prison system.").

126. Milovanovic & Thomas, *supra* note 91, at 50 ("The most talented [jailhouse lawyers] attempt to link a particular issue that affects only a single inmate to one that may ultimately affect broader prison policies.").

127. *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980), *aff'd in part*, 679 F.2d 1115 (5th Cir. 1982), *and modified*, 688 F.2d 266 (5th Cir. 1982).

128. Ball, *supra* note 121 (discussing Allen Breed's comment that attributed *Ruiz*'s far-reaching impact to jailhouse lawyers whose efforts ultimately eliminated the unconstitutional conditions of which complained); Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 649 n.34 (1993) (observing how "[t]he court found constitutional violations in the areas of population, security and inmate supervision, health care, discipline, access to legal services, and sanitation and safety conditions.").

129. Cf. WILLIAM G. ARCHAMBEAULT & BETTY J. ARCHAMBEAULT, *CORRECTIONAL SUPERVISORY MANAGEMENT: PRINCIPLES OF ORGANIZATION, POLICY, AND LAW* 198 (1982) (describing the inmate class action suit as a starting point in correctional law making).

130. Audrey J. Bomse, *Prison Abuse: Prison Staff Relations*, in *DISCRETION, COMMUNITY, AND CORRECTIONAL ETHICS* 79, 80 (John Kleinig & Margaret Leland Smith eds., 2001).

131. Howard S. Davidson, *Possibilities for Critical Pedagogy in a "Total Institution": An Introduction to Critical Perspectives on Prison Education*, in *CRITICAL PERSPECTIVES*, *supra* note 64, at 1, 21-22 ("[J]ailhouse lawyers have been more successful at halting the worst that prison conditions have to offer than the initiatives of many outsiders."); Ralston & Ralston, *supra* note 22, at 3 (Prisoners sometimes "have catalyzed administrative changes and compelling legal reform.").

132. Tysver, *supra* note 125.

133. *Id.* In fact, when these procedures fail, jailhouse lawyers provide inmates with an independent

and individual levels, then, the jailhouse lawyer improves living conditions for inmates.

E. *Jailhouse Lawyers Signal to the Public When Policy Changes are Necessary*

Various obstacles distance the public from prisons, making it extremely difficult for people to gain a true appreciation of prison conditions. Aside from the fact that most citizens do not easily relate to prisoners' problems,<sup>134</sup> many of those who desire involvement or awareness can unknowingly become caught in a power play between prisoners and prison staff.<sup>135</sup> Because few outsiders can appreciate the everyday conditions within prisons, an important role of the jailhouse lawyer is to provide a constant check on the prison system through his sustained efforts.<sup>136</sup> To this end, some scholars suggest that the litigation serves as a form of "consumer feedback on the impact of the prison experience."<sup>137</sup> Whether or not the litigation is ultimately successful, court documents and media attention provide the public with a detailed record of the events occurring within the walls of America's penal institutions.

F. *Jailhouse Lawyers Provide Prisoners with Alternative Means of Dispute Resolution, Even if Inmates Do Not Pursue Redress from the Courts*

For good reason, researchers have explicitly labeled the practice of jailhouse law as a method of "conflict resolution" on the basis of its "potential for channeling prisoners' grievances and hostility in a responsible, socially acceptable, legal, and nonviolent direction."<sup>138</sup> When inmates translate their complaints into words, they must "abandon their destructive ways of dealing with their problems and tensions."<sup>139</sup> No longer can they resort to the traditional outlets, such as "fighting, predatory behavior, drug use, gang activity, withdrawal to fantasy or incessant television viewing, [and] obsessive confrontation with guards . . ."<sup>140</sup> Many prison officials recognize that inmate

---

way to resolve complaints by offering advice regarding the possibility of remaining litigation alternatives. Ball, *supra* note 121 (discussing Texas ACLU Executive Director Will Harrell's general comments that "inmates have to file lawsuits because the prison grievance system . . . does not work.").

134. GORDON, *supra* note 39, at xv ([M]any of our . . . most influential citizens are fundamentally clueless when it comes to the matter of our prisons.").

135. Jim Thomas, *The Ironies of Prison Education*, in *CRITICAL PERSPECTIVES*, *supra* note 64, at 25, 30 (explaining how outsiders are often forced to "participate in a game of status and control").

136. Davidson, *supra* note 131, at 22 ("If the state cannot deliver based on its own rules, [jailhouse] lawyers acting in their own collective interest will make sure that the contradictions are not expressed without considerable cost to state legitimacy."); Wesson, *supra* note 97 ("The prison system is very complex, and prison officials basically police themselves.").

137. Ralston & Ralston, *supra* note 22, at 5.

138. Alpert & Huff, *supra* note 68, at 307-08.

139. Acevedo, *supra* note 121, at 2.

140. Milovanovic & Thomas, *supra* note 91, at 51.

## Jailhouse Lawyer Bar Examination

litigation actually increases respect for wardens and guards.<sup>141</sup> They often cite the longstanding motto, “[W]ardens should prefer writs to riots.”<sup>142</sup> In this way, the mere existence of jailhouse lawyers provides a constant reminder to inmates that they have the option of venting their anger and consulting with a peer who does not represent the system that has imprisoned him.

### G. *Jailhouse Lawyers Develop Marketable Skills for Their Eventual Release and Return to the Public*

Seasoned jailhouse lawyers are, no doubt, equipped with desirable skills in the civilian paralegal profession: Their experience has taught them how to find the right cases, distinguish holdings, Shepardize cited authority, draft legal pleadings, and engage in other essential legal tasks.<sup>143</sup> As one former inmate commented,

Once you get out, you have to use whatever skills you learned in prison to make a living. If you were a welder, you look for a job welding. If you were a cook, you look for a job in a restaurant. I knew the law, so I started working for different attorneys.<sup>144</sup>

Some jailhouse lawyers, such as former New York inmate Roland Acevedo, have moved on to pursue careers as licensed attorneys.<sup>145</sup> Others have earned positions as clerks of court<sup>146</sup> and paralegals at law firms.<sup>147</sup> In both New York and Pennsylvania, prisons have offered paralegal training to prisoners specifically because the skills prepare them for legal jobs “upon release.”<sup>148</sup>

Although a released or paroled jailhouse lawyer will likely face a stigma in competing for paralegal jobs as a convict,<sup>149</sup> many effective jailhouse lawyers

---

141. Ralston & Ralston, *supra* note 22, at 35 (“[B]oth the legal and polemical writings of prisoners reveal paradoxical and simultaneous traces of respect and trust for the criminal justice system and toward authorities such as wardens and guards.”).

142. *Id.* at 43. True to form, during the riots in Attica, the resident jailhouse lawyer, Jerry Rosenberg, played a direct role on the negotiating team in an effort to diffuse tensions. Haines, *supra* note 49, at 6.

143. See, e.g., Mongelli, *supra* note 77, at 287 (describing some of these requirements); Stone, *supra* note 64, at 195 (describing minimal requirements for capable jailhouse lawyers).

144. Michael Perlstein, *Embracing the System*, TIMES-PICAYUNE (New Orleans, La.), June 11, 2000, at A1 (quoting Arthur Mitchell, who currently “serves subpoenas for 1st City Court in New Orleans.”).

145. Acevedo, *supra* note 121, at 2.

146. Perlstein, *supra* note 144 (“[Lynell] Desdunes, 42, is the law clerk for Orleans Parish Criminal District Judge Charles Elloie and stands among the most highly paid clerks at criminal court.”). Judge Elloie described Desdunes as “one of the most skilled clerks in the courthouse.” *Id.*

147. *Id.* (describing how Kenneth Johnston, a convicted murderer, now works as a paralegal in a local attorney’s office). Johnston’s employer, attorney David Band, explained, “If I had to pay a fancy downtown paralegal, I’d have to pay \$30,000 or \$40,000 a year. And, he’s just as good as any of them.” *Id.*

148. ADR MANUAL, *supra* note 93, at 50.

149. Perlstein, *supra* note 144 (“[O]nly the elite jailhouse lawyers find jobs in the field after their release. In the New Orleans area, there are fewer than a dozen ex-con paralegals working at any one time.”).

develop positive relationships with practicing attorneys that can assist them when they seek employment:<sup>150</sup> “[J]ailhouse lawyers can, during and after their stint behind bars, be incorporated beneficially into the legal system . . . .”<sup>151</sup>

Even if jailhouse lawyers do not pursue jobs in the legal field upon their release, their experience prepares them with skills that are suitable for any number of administrative professions.<sup>152</sup> In autobiographical writing, for example, it is not unheard of for inmates to “graduate from working for the penal papers and magazines to writing for general [outside] journals or to entire books.”<sup>153</sup> In a similar way, jailhouse lawyers can pursue a large number of positions with genuine confidence that they will be competitive candidates.

Given these seven distinct contributions of the jailhouse lawyer, the *Lewis* opinion forces us to consider whether any of the alternatives proposed in their place can meet the same ends. The following Part of this Article explores the impact of *Lewis* on jailhouse lawyers and the quality of the legal assistance dispensed from other sources, such as civilian paralegals, contract attorneys, or law student clinical programs.

#### IV. THE INFLUENCE OF *LEWIS V. CASEY*

While *Lewis* transformed the question courts ask when determining the sufficiency of inmates’ access to the courts, the Court, of course, did not explicitly require states to eliminate law libraries.<sup>154</sup> As a result, state responses to *Lewis* have varied. Some states, such as Arizona,<sup>155</sup> New Mexico,<sup>156</sup>

150. Stone, *supra* note 64, at 201 n.9 (“Without question, a student’s criminal record would be a substantial obstacle to employment as a paralegal after release. Still, a jailhouse lawyer has the opportunity to build a reputation with individual lawyers and law firms as a skilled researcher through his work on behalf of other prisoners.”).

151. Wexler, *supra* note 45, at 156.

152. Cf. Michael Collins, *Shades of the Prison House: Adult Literacy and the Correctional Ethos*, in CRITICAL PERSPECTIVES, *supra* note 64, at 49-50 (discussing the value of prison programs that “provides prisoners with another chance to learn to read, write, work with numbers, and converse with a reasonable degree of assurance”).

153. ENGELBARTS, *supra* note 81, at 85-86.

154. See Westwood, *Meaningful Access*, *supra* note 74, at 196 (“In reviewing cases that have been decided since *Lewis*, it seems the question has changed from ‘Is the law library service good enough to meet the *Bounds* standard?’ to ‘Is any law library service so bad as to not meet the *Lewis* standard?’”).

155. See Dayan, *supra* note 26, at 245 (describing the effects of *Lewis* in Arizona):

In addition to eliminating law libraries, Department Order 902 establishes 226 new rules governing court access. Paralegals provide assistance for filling out “forms” for the initial filing of “qualified legal claims.” Only direct appeals from current conviction, habeas and section 1983 cases, determined to be “non-frivolous,” are considered “qualified legal claims.” But without access to research cases cited in opposition motions and briefs, how can prisoner-plaintiffs defend their claims? The request for a paralegal is given to designated staff, who may be defendants named in the claims. Department Order 902 also targets jailhouse lawyers and bans “all formal use of Inmate Legal Assistants and Law Clerks.”

*Id.*

156. See Steve Terrell, *Inmates Do Harder Time*, SANTA FE NEW MEXICAN, July 22, 2001, at A-1 (citing a Santa Fe lawyer’s comment that eliminating inmates’ access to law libraries is one of the worst

## Jailhouse Lawyer Bar Examination

Idaho,<sup>157</sup> and Iowa<sup>158</sup> have accepted the decision's invitation to declare "open season"<sup>159</sup> on their law libraries, and eliminated several law collections. Other states, such as Florida<sup>160</sup> and California,<sup>161</sup> severely cut back expenditures on law materials. Many other states' prisons with libraries have adopted a "wait-and-see" approach, while considering whether to take similar measures.<sup>162</sup> Still other states have determined to keep their libraries in place.<sup>163</sup> Reflective of this position, the Federal Bureau of Prisons and the American Correctional Association still require institutions to maintain a core collection of legal materials.<sup>164</sup>

Practically all of the advocates who support the elimination of prison law libraries believe that *Lewis* offers prisoners better alternatives for legal assistance. For example, legal scholars who ignore the existence of highly capable jailhouse lawyers argue that *Lewis* enhances legal services to prisoners by requiring assistance from professionals with standardized legal education.<sup>165</sup> To them, the decision prevents correctional officials from satisfying their

---

actions the administration has taken).

157. See Sullivan, *supra* note 2, at 58 (describing how the state "gutted prison libraries of law books").

158. Editorial, *Iowa May Close Prison Law Libraries*, AM. L. LIBR., Apr. 1999, at 18 (describing Corrections Director W.L. "Kip" Kautzky's proposal to close all of the state's eight prison law libraries over two years).

159. Sullivan, *supra* note 2, at 58.

160. See Editorial, *Where To Draw the Line with Inmate Legal Access*, CORRECTIONS PROF., Aug. 22, 1997 (LEXIS) [hereinafter Editorial, *Where To Draw the Line*] (repeating comments by Florida Department of Corrections Library Coordinator Allen Overstreet, describing reductions from ninety-eight to forty-five titles and elimination of "second[ary] source materials for claims outside the boundaries of *Lewis v. Casey*"); Dana Peck, *Florida Inmates To Do Less Law-Book Reading*, TIMES-UNION (Jacksonville, Fla.), July 27, 1996, at B-4.

161. Editorial, *California Proposes New Access Policy*, CORRECTIONS PROF., June 5, 1998, at 6 (describing the effect of *Lewis* as dramatic reductions in funding, as opposed to total elimination of law libraries); Cf. Editorial, *Court: Review Calif. Prison Cuts*, AM. LIBR., Sept. 1, 2000, at 23 (describing a 1997 effort by Governor Pete Wilson to cut law library collections in California prisons).

162. LYNN S. BRANHAM, LIMITING THE BURDENS OF PRO SE INMATE LITIGATION: A TECHNICAL ASSISTANCE MANUAL FOR COURTS, CORRECTIONAL OFFICIALS, AND ATTORNEYS GENERAL 99; Editorial, *DOCs Change Inmate Legal Access Policies, But Do Legal Problems Linger?*, CORRECTIONS PROF., June 5, 1998, at 1 ("[O]ther states such as Nevada, are considering [closing prison law libraries]"); David Neiwert, *Prison Shell Game*, SEATTLE WKLY., Feb. 15, 2001, at 14 (describing Washington State Governor Gary Locke's plans to eliminate state prison law libraries and librarians); Sullivan, *supra* note 2, at 58 ("Other states are considering abolishing or limiting law library services for prisoners.").

163. *E.g.*, Editorial, *Where To Draw the Line*, *supra* note 160 ("Thea Chesley, coordinator of library services for the Illinois Department of Corrections, said eliminating law libraries in Illinois' prisons is not an option.").

164. See 28 C.F.R. § 543.11 (2005) (requiring the provision of a law library for federal inmates and measures to provide them with unavailable legal research materials); Editorial, *Accreditation: Does it Protect You? What Should You Know?, Process Criticized, ACA Changing Format*, CORRECTIONS PROF., May 22, 1998, at 1 ("Since *Lewis*, the Supreme Court ruled there is no requirement for law libraries, but ACA's standard hasn't changed.").

165. In this way, they argue, *Lewis* "more expansively interpreted the scope of the right to access to the courts." BRANHAM, *supra* note 162, at 98-99.



constitutional requirements “by simply installing a law library in a prison.”<sup>166</sup> Rather than being “held hostage to a mandated list of books,”<sup>167</sup> inmates can now benefit from the services of pro bono attorneys, public defenders, paralegals, or even supervised law students in support of *Lewis*’s recommendation to “experiment” with alternatives besides law libraries.<sup>168</sup>

But, as established cases demonstrate, “experimentation” has its limits.<sup>169</sup> The greatest problem with the proposed alternatives is the danger that an experiment will fail after the elimination of a law library, leaving no meaningful access to the courts whatsoever.<sup>170</sup> In many cases, law libraries are the best alternative for prisoners, despite the fact that they are far from perfect. As a member of Washington State’s Access to Justice Board observed of most prisoners:

You’re in prison, and you don’t have any money. And there’s very few advocates out there who are going to do *pro bono* work for people in prison, and there’s very limited legal services. If you don’t have access to at least a law library, then you have officially been completely cut off.<sup>171</sup>

In these instances, the effect of excluding jailhouse lawyers will be highly detrimental to the prison population since they are the inmates’ only source of effective legal assistance.<sup>172</sup> Even after *Lewis*, it remains the case that “inmates in most correctional facilities must currently turn to other inmates for legal assistance and advice.”<sup>173</sup>

Several realities of prison administration actually make it more likely that promptly implemented alternatives will fail to yield the same benefits as a small but qualified cadre of jailhouse lawyers. One common factor is the power play between prisoners and correctional administrators, which few employees

166. *Id.* See also Christopher E. Smith, *Examining the Boundaries of Bounds: Prison Law Libraries and Access to the Courts*, 30 HOW. L.J. 27, 42-43 (1987) (“Ironically, the *Bounds* case, which established that prison law libraries alone can ensure prisoners’ right to meaningful access to the courts, has resurfaced to refute the very notion that it originally established.”).

167. Brenda Vogel, *Supreme Court Decision Offers Relief to Prison Librarians*, CORRECTIONS PROF., July 22, 1996 (LEXIS).

168. See generally BRANHAM, *supra* note 162 (describing a number of alternatives to law libraries); Alpert & Huff, *supra* note 68, at 324-35 (same). While there may be many alternatives, none apply uniformly to all situations. “*Bounds* can be read to suggest that there is no one universal solution. That is, different conditions in different states might require different solutions to provide effective access.” SHOOK & SIGLER, *supra* note 93, at 33.

169. See *infra* Sections IV.A-C.

170. Ziegler, *supra* note 105 (recognizing the danger if “prior to or after hiring paralegals, [the] DOC disposes of its sizable, costly investment in law libraries, inclusive of books and storage furniture, and then the DOC or the courts find the paralegal option unacceptable”).

171. Neiwert, *supra* note 162, at 14 (comments of Joan Fairbanks)

172. Fleming, *supra* note 69, at 64 (“Most inmates have a choice between no legal assistance and the assistance of a jailhouse lawyer.”); Note, *Constitutional Law: Prison “No-Assistance” Regulations and the Jailhouse Lawyer*, 1968 DUKE L.J. 343, 349 (observing that “in many jurisdictions the inmate lawyer provides the *only* means of assistance for the illiterate or semi-literate prisoner who wishes to petition for habeas corpus”) (emphasis added).

173. BRANHAM, *supra* note 162, at 114.

of the prison system desire to challenge.<sup>174</sup> Often, employees feel torn between their employers' objectives to maintain security and inmates who seek fewer constraints on their limited freedoms. Additionally, the problem of declining prison budgets limits the number of resources prisons can offer, even if they are in favor of improving prisoners' access through alternative means.<sup>175</sup> In many cases, for example, librarians are responsible for maintaining law collections. Time spent tending to legal resources can be viewed by administrators as willful neglect of the core collection, which includes educational materials or fictional works. Just as limiting, the threat of repercussions for the unauthorized practice of law indirectly pressures non-lawyers to avoid potential embarrassment or penalties by dissuading prisoners from pursuing action.<sup>176</sup> Further, we cannot ignore the lack of qualified attorneys who are able or willing to volunteer time to aid prisoners.<sup>177</sup>

Some, if not all, of these limitations have resulted in court cases that reveal the inadequacies of prison experimentation. The short period of time in which these negative results have materialized should caution prison administrators to fully explore proposed courses of action before implementation. The sections below address the common alternatives recommended to replace the jailhouse lawyer and his library.

### A. *Problems Encountered with Contract Attorneys*

Many attorneys have encountered lucrative employment contracts in the advent of *Lewis*.<sup>178</sup> At a fraction of the cost of updating libraries, prisons can hire lawyers with tested competence to practice law who could theoretically meet the requirements of *Bounds* by visiting inmates at different institutions on occasion. Although the language in these contracts normally must provide for an opportunity to discuss the merits of cases with inmates,<sup>179</sup> many departments

---

174. See *infra* Sections IV.A-B. (discussing the conflicts of interest between contract attorneys, paralegals, and their employers).

175. For example, consider the budgeting requirements in Florida, which caused the Florida Department of Corrections to eliminate services at more than half of its prison libraries. Editorial, *Florida Prison Librarians Reassigned as Teachers*, CORRECTIONS PROF., Feb. 25, 2000, at 2. In the midst of such constraints on the general services available to inmates, specialized services must necessarily occupy a lower level of priority.

176. See discussion *infra* Section IV.B.

177. E.g., Ronald Smothers, *A Shortage of Lawyers To Help the Condemned*, N.Y. TIMES, June 4, 1993, at A21 (describing a lack of attorneys who are able to sacrifice the time and money required, especially in death penalty cases: "The pro bono well is running dry because you can't go back to a firm and ask them to continue to eat these kinds of losses.").

178. Ann Woolner, *Court Shifts Oversight of Ga. Inmates' Legal Help*, FULTON COUNTY DAILY REP. (Ga.), Nov. 12, 1998 (LEXIS) (describing the terms of one contract that paid three recent graduates of the University of Georgia's law school \$897,000 per year for their services).

179. The provisions at issue in *White v. Kautzky*, 269 F. Supp. 2d 1054 (N.D. Iowa 2003), required attorneys to "assist offenders in the correctional facility . . . who seek legal advice or wish to file pleadings [for] petitions for post-conviction relief" and "confer with individual offenders about the legal

of correction have attempted to limit these sessions by requiring that prisoners describe their problems on a concise form, often omitting any reference to the law and instead requiring plain language descriptions.<sup>180</sup>

Such was the case at Iowa's Anamosa State Penitentiary. After the state contracted with attorneys in lieu of providing law libraries, an inmate named Duane White requested time with the contract attorney to help him determine the merits of a post-conviction relief claim he had been contemplating. For White, this was especially important since the conditions of his plea arrangement would impose strict penalties for any non-meritorious claim filed by him.<sup>181</sup> The attorney, occupied with other pressing matters, handed White the standard form and instructed him to file it when completed "without making any assessment of the merits of White's . . . claim or the consequences of filing such a claim."<sup>182</sup> White delayed filing the claim beyond the statute of limitations in an effort to research it meaningfully, which he was unable to do given the absence of a library or jailhouse lawyer's assistance.<sup>183</sup>

Upon reviewing White's case, the district court concerned itself with the issue of whether the contract attorneys provided White with "meaningful access" to the courts under the *Bounds* standard. Considering the attorneys' failure to meet contractual provisions for consultation of inmates and the absence of a law library, the court found material issues of fact regarding White's denial of access to the courts, even under the stringent *Lewis* standard:

[W]hat White has done is generate genuine issues of material fact as to whether the conduct of the contract attorneys in this case, which White avers consisted of simply handing him an application for post-conviction relief without even attempting to provide him with any advice concerning the merits of his claim, *when he had no other source of information to assess the merits of his claim*, constituted providing a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts. Because the "touchstone" of White's "access to the courts" claim is whether he was provided with meaningful access to the courts, not just some access to the courts, handing an inmate an application for post-conviction relief, standing alone, does not appear to be nearly enough.<sup>184</sup>

The Iowa Supreme Court's 2004 *Walters* decision addressed many of the

matters . . . and advise the offender about the merits of any proposed litigation and the proper parties thereto." *Id.* at 1062 (citing contract). The entire contract is reprinted in *Walters v. Kautzky*, 680 N.W.2d 1, 2-4 (Iowa 2004).

180. *E.g.*, Chanen, *supra* note 7, at 26 (describing various concerns about the forms).

181. *White*, 269 F. Supp. 2d at 1057 ("[T]he consequence of filing such an application, pursuant to the terms of his plea agreement, might be reinstatement of charges carrying the potential of an additional sentence of one hundred and twenty-five years.").

182. *Id.* at 1062 n.2.

183. *Id.* at 1063 ("White has pointed to evidence in the record that he had no source of information other than the contract attorneys to assess the merits of his potential claim for post-conviction relief, because the law library was no longer kept up to date, such that he could not research the question on his own, nor did the ASP allow him to consult with any 'jailhouse lawyers.'").

184. *Id.* at 1062 (quotation marks and citations omitted).

same contractual provisions addressed in *White*.<sup>185</sup> Prisoners attacked the service provided by a contract attorney named Peter Hansen on the grounds that his refusals to provide them with advice on certain matters constituted a violation of the contract as well as inadequate legal assistance. Specifically, Hansen refused, on the basis of the contract, to assist inmates with requests to prepare a writ of certiorari to the Supreme Court, research cases in relation to the appeal of a federal magistrate's "proposed adverse decision" on a pending habeas corpus claim, and assist in the filing of an access to the courts claim against the Department of Correction and himself.<sup>186</sup>

Although the court applied the standards of *Lewis* and dismissed most of these matters on the basis that the inmates failed to show resulting injury, it nonetheless noted important problems with Iowa's contractual arrangement. The court remanded the claim for further determination regarding the issue of whether one of the named inmates "was unable to discover the requirements for filing a petition for certiorari to the Supreme Court from other sources" at the prison.<sup>187</sup> In addition, on a theory that the § 1983 action against the department and the contract attorney addressed conditions of confinement, the court found that the circumstances did "not relieve IDOC, as the alter ego of the State of Iowa, from any obligation it may have to allow Walters court access."<sup>188</sup> While the court refused to address allegations that conflicts of interest prevented adequate legal services to the inmates, both the claims raised and the prisoners' lack of recourse revealed the legitimacy of such considerations.

In the state of Georgia, similar contracts presented enough problems that a magistrate froze plans that had been set in place to eliminate law libraries.<sup>189</sup> Shortly after the *Lewis* decision, the Department of Corrections hired the Center for Prisoners Legal Assistance (CPLA), a contract agency, to replace the University of Georgia's longstanding Prisoners Legal Counseling Project.<sup>190</sup> In a matter of months, prisoner complaints about the quality of assistance they received led to a formal investigation, which concluded that the agency "g[ave] bad advice, decline[d] to file appeals where there [was] a basis for challenge and seem[ed] more concerned with pleasing the Department of Corrections than with helping prisoners."<sup>191</sup> The contract attorneys purportedly rejected

---

185. *Walters*, 680 N.W.2d at 1.

186. *Id.* at 3-4.

187. *Id.* at 7.

188. *Id.* at 7.

189. Editorial, *Georgia To Monitor Inmate Lawyers*, CHATTANOOGA TIMES, Nov. 12, 1998, at B2 [hereinafter Editorial, *Georgia To Monitor*].

190. Woolner, *supra* note 163 (describing the long established twelve-attorney project).

191. Editorial, *Georgia To Monitor*, *supra* note 189. In fact, class counsel "found scores of examples—they say hundreds—where inmates were given disastrously bad advice." Editorial, *Behind Ga. Case: '96 Cut in Inmates' Right to Legal Help*, FULTON COUNTY DAILY REP. (Ga.), Nov. 23, 1998 (LEXIS) [hereinafter Editorial, *Behind Ga. Case*].

meritorious claims on the untrue basis that “the inmate does not have a sufficiently viable claim.”<sup>192</sup> As one inmate explained, “If I had listened to CPLA and if the law library had not been available, I would have spent 2 1/2 years more in prison.”<sup>193</sup>

After the publication of these appalling findings, CPLA and representatives of the Georgia inmates reached an agreement in district court that required, among other things, independent audits of the attorneys’ performance, the continued operation of prison law libraries for an additional five years, and the condition that law libraries could only be closed if the Department of Corrections would provide inmates with copies of case law whenever requested.<sup>194</sup> In light of these difficulties, the Department of Corrections terminated its contract with CPLA and adopted an innovative program that now provides inmates with access to Internet research on legal databases.<sup>195</sup> Regardless of these newer interventions, the situations that emerged in Iowa and Georgia demonstrate a harsh reality of prison law that works against many circuit riding contract attorneys: “Workloads are so great that a few hours spent with one client would mean less adequate legal services for others.”<sup>196</sup>

Although CPLA and other contract attorneys offer promise because they provide a guaranteed source of licensed legal assistance, credentials alone cannot eliminate the intense scrutiny from prison officials who must inevitably vote to renew or terminate their contract. The harsh reality of these arrangements is the looming threat that success will be judged by the volume of clients seen rather than the quality of assistance rendered.<sup>197</sup> In this environment, prison administrators would face a conflict of interest if they made it an objective to increase the number of lawsuits won or rights violations identified, even though this might be the strongest indication of effective representation. Consequently, contract attorneys will often be limited in their ability to offer a full spectrum of legal services, solely by virtue of their role as servants to the correctional system.

## B. *Problems Encountered with Paralegals and Forms*

Unlike Iowa and Georgia, states such as Arizona, Idaho, and New Mexico enlisted the services of paralegals rather than licensed attorneys to deliver legal

---

192. Rhonda Cook, *Inmates’ Attorneys Criticized: State-Approved Group Gives Prisoners Bad Advice, Legal Expert Says*, ATLANTA J. & CONST., Nov. 11, 1998, at 01C.

193. *Id.* In fact, it was the claim of class counsel that “with bad advice from lawyers, a fully stocked law library becomes critical.” Editorial, *Behind Ga. Case*, *supra* note 191.

194. Cook, *supra* note 192 (describing Judge Anthony Alimo’s order).

195. See *infra* Subsection V.D.1 (describing the terms of the new program and others like it).

196. Milovanovic, *supra* note 64, at 463.

197. See *supra* text accompanying note 103 (describing the problem with many such contracts).

services to prisoners in place of law libraries and jailhouse lawyers.<sup>198</sup> In these cases, especially, standardized complaint forms have saturated assistance programs, perhaps in an effort to facilitate a paralegal's decision-making absent a thorough understanding of legal principles. In New Mexico, for example, the one-page form provides inmates with eight lines on which to "[b]riefly describe [the] complaint" and then provides three boxes for designated staff to check:

Approved. A meeting will be scheduled with designated staff.

Disapproved. Your complaint does not involve a qualified legal claim.

Unclear. A meeting will be scheduled with designated staff to determine if assistance can be provided.<sup>199</sup>

The existence of such paralegal programs, though indirectly acknowledged by the Court in *Lewis*,<sup>200</sup> has caused some attorneys and prison administrators to question how effective paralegal assistance will be for an inmate with a pressing legal issue.

One major concern relates to the fact that paralegals, being unlicensed in the practice of law, are not permitted to provide inmates with legal advice.<sup>201</sup> This common concern voiced by unlicensed individuals in different legal settings has been addressed most comprehensively in the context of law librarians.<sup>202</sup> If not for the assistance provided by prison librarians, many inmates would not succeed in their efforts to represent themselves or develop their legal skills. However, many librarians who work with prisoners recognize how easily they could unintentionally violate the law. As prison law librarian Karen Westwood explains:

All law librarians, and many public and academic librarians, run into this problem [of illegally providing legal advice] . . . at one time or another. I encounter it nearly every day.

I have more ways to play off requests for legal advice than I can count. . . . I've often convinced myself that I know, without a doubt, where the line is drawn on legal advice, only to have an inmate phrase his/her request in such a way as to blur it again; inmates frequently have limited or no access to attorneys and are anxious

---

198. *E.g.*, Scott Sirota, *Arizona DOCs' Paralegal Contractor Defends Inmate Legal Access*, CORRECTIONS PROF., Oct. 24, 1997, at 7 (explaining the ramifications of the paralegal assistance program); *Idaho DOC*, *supra* note 2 (observing that the state "eliminated the use of inmate law clerks, and assigned state-hired paralegals (who originally oversaw the libraries) to provide inmates with forms to file limited types of claims"); N.M. Corr. Dep't, *supra* note 26.

199. N.M. Corr. Dep't, *supra* note 26.

200. *Lewis v. Casey*, 518 U.S. 343, 352 (1996) ("One such experiment, for example, might replace libraries with some minimal access to legal advice and a system of court-provided forms . . . that aske[d] the inmates to provide only the facts and not to attempt any legal analysis.").

201. *E.g.*, *Idaho DOC*, *supra* note 2 (explaining the nature of the prohibition in Idaho).

202. *E.g.*, Gerome Leone, *Malpractice Liability of a Law Librarian?*, 73 LAW LIBR. J. 44, 50 (1980) ("How far a reference librarian can assist a patron without practicing law, without violating the canons, has been of constant concern to members of the profession, as has been the question of unauthorized practice generally to the legal profession and to the Courts."). *See generally* Paul D. Healey, *Pro Se Users, Reference Liability, and the Unauthorized Practice of Law: Twenty-Five Selected Readings*, 94 LAW LIBR. J. 133 (2002) (surveying dozens of studies on the topic).

to find someone who will confirm their interpretation of the law.<sup>203</sup>

The temptation to provide legal advice may be overwhelming, especially if inmates have grown accustomed to the detailed guidance characteristic of many accomplished jailhouse lawyers.

Another concern rests with the simple fact that paralegals are not expected to have an exhaustive knowledge of the law. As one researcher put it, “[P]aralegals are considered essentially inferior to attorneys, aren’t they? Paralegals can’t ‘practice law’ because that turf is reserved for the attorneys.”<sup>204</sup> For example, when inmates are limited to stating their claims on short forms in simple terms, it is uncertain “[w]hat . . . the inmate [should] do to respond to a brief that recites case law.”<sup>205</sup> Without extensive legal training, one cannot expect the paralegal to research the law and present a valid response.<sup>206</sup>

While paralegal skills center on preparing papers and developing initial drafts of documents for further modification by an attorney, the jailhouse lawyer’s role requires him to carry these tasks to completion, interact with judges, and develop his knowledge of the law by negotiating with attorneys during the course of his representation. Unlike the jailhouse lawyer, the paralegal does not participate in the process of arguing motions and responding to them at a level of full immersion and critical decision-making. Such insight and experience are essential factors that permit jailhouse lawyers to advise an inmate on potential courses of action or the likelihood of success in a given matter.

Although paralegals in existing programs may not have the sophistication to understand the intricacies of an inmate’s legal argument, many may still be required to determine whether a prisoner’s claim lacks merit. Aside from the fact that such an evaluation may “effectively vest[] the paralegals with Article 3 judicial powers,”<sup>207</sup> skeptics worry that the practices will lead to mishandling of prisoners’ complaints to their detriment.<sup>208</sup> Undeniably, the same problems that faced Iowa and Georgia contract attorneys will face paralegals on a greater scale given their inability to render legal advice and lack of legal training and expertise. Faced with similar time constraints and conflicts of interest,<sup>209</sup>

203. Karen Westwood, *Prison Law Librarianship: A Lesson in Service for All Librarians*, 25 AM. LIBR. 152, 152 (1994).

204. Ziegler, *supra* note 105.

205. Chanen, *supra* note 7, at 26 (comments of Marjorie Rifkin, Staff Attorney for the ACLU’s National Prison Project).

206. See Ziegler, *supra* note 105 (addressing the need for continued access to legal resources).

207. Chanen, *supra* note 7, at 26.

208. E.g., Editorial, *Arizona DOC Closes 34 Inmate Law Libraries; Officials Say High Court’s Decision Protects Department*, CORRECTIONS PROF., Aug. 8, 1997 (LEXIS) (relating concerns that the provision of only a few paralegals to handle the legal matters of entire prison systems “seems retaliatory toward the inmates who filed *Lewis v. Casey*” and “smacks of vindictiveness”).

209. Ziegler, *supra* note 105 (questioning the possibility that paralegals can conduct their business

paralegals clearly cannot provide the same quality of services as bona fide jailhouse lawyers.

Ultimately, jailhouse lawyers are distinguishable from paralegals by their demonstrable capacity to advise inmates on legal matters. Jailhouse lawyers act on their own initiative, while paralegals, under all conceptions of the occupation, depend on the decisions of licensed attorneys. Unlike the skills that must be mastered before a paralegal gains certification, jailhouse lawyers move beyond mere preparation of documents. While the paralegal exists to support a legal advocate, the jailhouse lawyer exists to be that advocate. This is the essential difference that favors the jailhouse lawyer over the paralegal for the representation of prisoners' legal interests.

### *C. Problems Encountered with Law Clinics and Law Students*

Ambitious law students will often rush to support inmates' cases with unmatched vigor and relentlessness. Unfortunately, these traits may harm their clients if students push potential claims forward in court in order to gain experience despite other viable means of resolving the claim.<sup>210</sup> Inmates often "resent being represented by students" for a number of reasons.<sup>211</sup> In many cases, students may push for litigation over matters that should be handled at a lower level. As one group of researchers observed, "[T]he student's educational needs may be inconsistent with the goal of averting litigation. Because law students seek experience, they may encourage a solution through the courts, thus neglecting existing alternative mechanisms."<sup>212</sup> Other problems stem from a lack of supervisory personnel to monitor interactions between inmates and law students and an overall "lack of effective preliminary screening" of claims and of students by program administrators.<sup>213</sup>

The primary shortfall of student assistance programs, however, is the inevitability of interruptions in representation caused by educational mandates of the American Bar Association. Law students inevitably must progress through semesters of education in different subjects, which cannot rely exclusively on placements in prisons. Additionally, law students are generally expected to work in clerkships and internships with potential employers during intersessions. Inevitably, law students relocate for semesters abroad, change their educational focus as the years pass, and graduate from law school. The realities of these varied situations have led to legitimate criticisms of law student representation. Researchers note the "inability to respond promptly to

---

"absolutely free from any interference . . . from the DOC as they go about their appointed tasks").

210. ADR MANUAL, *supra* note 93, at 50.

211. *Id.*

212. *Id.*

213. Alpert & Huff, *supra* note 68, at 325.



requests for legal assistance,” the “inability to follow through to the litigation stage,” and a “lack of continuity in case management.”<sup>214</sup> Unless the varied assistance programs require students to commit their time during vacations and intersessions, as some do, the realities of legal education can limit the effective representation of inmates.

Another complication relates to the high risk that students will dispense unsupervised and faulty legal advice. Perhaps more than unlicensed paralegals or law librarians, law students, especially, face the temptation to counsel prisoners. In *Morrow v. Harwell*, for example, the Fifth Circuit noted that law students succumbed to this overpowering pressure even though they were prohibited by the state from such activities: “[A]lthough the law students employed by the County are not supposed to give legal advice, they interpreted some legal authorities and occasionally helped the inmates to complete legal forms.”<sup>215</sup> Inmates will often require the benefit of an experienced legal practitioner rather than a student who is still learning what is acceptable in the unique and unfamiliar correctional setting.

On balance, the damage stemming from the elimination of prison law libraries and jailhouse lawyers can paradoxically cost prison systems much more money than they intend to save by implementing such reductions. Judge James Murphy, a Washington State jurist, has explained the risk of complaints premised solely upon forms without extensive legal analysis:

If it’s a case that can be handled by summary judgment and a person has an opportunity to research the issue, state their opinion in their own brief, and argue it perhaps over a phone conference, we can dispose of the matter in a timely and effective manner, if it’s a well-taken motion. If they don’t have access to law libraries, it’s probably going to cost a lot more.

Judges wouldn’t have much choice, really, than to just set the matter for trial and let the person come in and defend themselves at trial. You’re going to have to transport the prisoners and have security during the entire trial and probably make available the local library for a person to research, anyway.<sup>216</sup>

Concerns such as these have led to a “consensus” that Arizona and other states that have entirely eliminated law collections “are going too far, too quickly.”<sup>217</sup>

This is not to say that *all* alternatives to prison law libraries will fail or that prisoners will *always* be better served through only the option of jailhouse lawyers. To the contrary, many jailhouse lawyers who criticize amateurs feel that assistance from qualified persons with formalized legal training is far better and far more necessary than requiring prisoners to search far and wide

---

214. *Id.*

215. *Morrow v. Harwell*, 768 F.2d 619, 622 (5th Cir. 1985).

216. Neiwert, *supra* note 162, at 14 (quoting Judge James Murphy of Spokane, Wash.).

217. Editorial, *Where To Draw the Line With Inmate Legal Access*, CORRECTIONS PROF., Aug. 22, 1997 (LEXIS) (quoting Thea Chesley, Coordinator of Library Services for the Illinois Department of Corrections).

for a capable peer.<sup>218</sup> Similarly, the above criticisms hardly suggest that all existing inmate assistance programs are ineffective. Nevertheless, the major drawback of using existing successful programs to predict the probability of successful implementation of library alternatives is the wide variation in prison environments in different states.<sup>219</sup>

Another problem with successful inmate legal assistance programs is that most eclipse the option of the jailhouse lawyer, supporting an all-or-nothing approach to prison experimentation. From the many studies that compare different options for providing prisoners with meaningful access to the courts, few have suggested mixing alternatives.<sup>220</sup> Furthermore, many researchers have overlooked the need to retain jailhouse lawyers and libraries for a probationary period while prisons test experimental options.<sup>221</sup> If the competence of a jailhouse lawyer could be demonstrated in a fair way, such as using a bar examination as this Article suggests, the wisest decision for those prisons considering the implementation of alternatives to libraries would be to retain capable inmates as insurance against failed experiments.<sup>222</sup>

In many ways, the Court could have used the same arguments cited in *Lewis* as a basis for institutionalizing the role of the jailhouse lawyer.<sup>223</sup> After all, the guarantee of competent inmates to assist illiterate, blind, and non-English-speaking inmates with legal matters would surely enhance the value of preexisting law libraries. Consequently, a central recommendation of this Article is that prisons *always* offer inmates the option of qualified jailhouse lawyers, due to the many functions they serve and incidental benefits they

---

218. *E.g.*, Larsen, *supra* note 56, at 361-64 (prioritizing the assistance of legally trained counsel over jailhouse lawyers).

219. *E.g.*, Justin Brooks, *How Can We Sleep While the Beds Are Burning? The Tumultuous Prison Culture of Attica Flourishes in American Prisons Twenty-Five Years Later*, 47 SYRACUSE L. REV. 159, 164 (1996):

Inmates adapt to the culture which is shaped by the individual characteristics of the inmates, the guards' treatment of the inmates, and the management philosophy of the administration. Even within a particular prison, there may be several subcultures based upon the treatment and philosophy of the various participants within the prison culture.

*Id.*

220. *Compare* BRANHAM, *supra* note 162, at 114-15 (arguing that there are significant drawbacks to using jailhouse lawyers), *with* Alpert & Huff, *supra* note 68, at 337 (proposing that the "optimal" legal assistance program for inmates will involve the combination of jailhouse lawyers, paralegals, and law students).

221. *See supra* discussion accompanying notes 189-196 (describing the Georgia magistrate's insistence on the preservation of law libraries for five years while the state implemented new forms of contracted legal assistance).

222. In this respect, institutions will still provide a service that preserves rights that inmates would not have recognized without the help of legal resources. *See* *Adams v. Carlson*, 488 F.2d 619, 630 (7th Cir. 1973) (addressing the right of access to the courts: "All other rights of an inmate are illusory without it . . .").

223. *Cf.* Ralston & Ralston, *supra* note 22, at 40 (citing attorney Herman Schwartz for the suggestion that "the jailhouse lawyer be brought out into the open, formalized as a regular prison service, and expanded to include representation at hearings and the like.").

produce in correctional settings, and that prisons preserve law libraries or make legal research materials available through alternative means.<sup>224</sup> The next Part of this Article proposes a method to identify capable jailhouse lawyers in all prison settings and a minimal regulatory structure that will permit them to aid other prisoners to the benefit of correctional institutions and society.

#### V. PROPOSAL FOR A JAILHOUSE LAWYER BAR EXAMINATION

Passage of a state's bar examination puts the courts and the public on notice that an attorney possesses the qualifications to effectively practice law.<sup>225</sup> Regardless of a person's mastery of the law or training in the legal field, even an unlicensed law school professor, responsible for the training of future lawyers, violates the law if he gives legal advice without first having demonstrated his legal expertise on the jurisdiction's standardized bar examination.<sup>226</sup> Despite this premium on the demonstration of legal ability in the civil sector, most courts and state bar associations have willfully ignored these same requirements when addressing the activities of jailhouse lawyers.<sup>227</sup> Because the Court has authorized the practice of jailhouse law as a matter of constitutional entitlement, it is not "unauthorized practice" per se for one inmate to counsel or represent another.<sup>228</sup> However, the lack of a standardized mechanism to identify the capabilities of inmates offering legal assistance will often result in irreparable harm.<sup>229</sup>

Like any profession requiring the use of certain measurable skills, jailhouse lawyering is long overdue for a standardized measure of competence: "[O]fficially recognizing and legitimating the work of certain jailhouse lawyers may incidentally curtail the power, respectability and the illegal activities of the less-qualified, 'unlicensed' breed of inmate practitioner."<sup>230</sup> While the issue has

224. See *supra* Part III.

225. E.g., Malcolm Getz et al., *Competition at the Bar: The Correlation Between the Bar Examination Pass Rate and the Profitability of Practice*, 67 VA. L. REV. 863, 880-81 (1981).

226. Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696, 1706 (2002) ("The sole means of initial entry to the [legal] profession in forty-nine states and most territories is a two-day pencil and paper examination, written and graded by persons who are, or are supervised by, bar examiners."). In fact, the diploma privilege, which automatically licensed graduating law students, now only exists in Wisconsin. Daniel R. Hansen, Note, *Do We Need The Bar Examination?: A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1192 (1995) (explaining that the few states that instituted the diploma privilege eliminated it under pressure from the American Bar Association).

227. While jailhouse lawyers "provide attorney-like services to their inmate clients," they are "not subject to strict professional standards, are not licensed by the state, and do not have to prove their competency prior to providing legal advice." Nobel, *supra* note 56, at 1591.

228. See *supra* Part II.

229. E.g., Wexler, *supra* note 45, at 140-41 (reproducing the written appraisal of the merits of an inmate's case by a self-proclaimed jailhouse lawyer, which contained no legal analysis but projections of great success).

230. *Id.* at 154.

## Jailhouse Lawyer Bar Examination

already been broached in the small percentage of prisons that offer inmates formal legal training or certification,<sup>231</sup> a nationwide standard would improve upon a vital part of the American penal system, specifically in those institutions where qualified prisoners now receive no institutional recognition or support. In states where qualified jailhouse lawyers exist but libraries have been removed, a uniform Jailhouse Lawyer Bar Examination would ensure that these inmates realize their constitutional entitlements.

### A. Officially Sanctioned Inmate Law Clerk Programs

At times, different states have experimented with programs to certify inmates as legal assistants. Some were terminated long ago as a result of budget cuts, modifications in legal decrees, or political shifts.<sup>232</sup> However, among these programs, at least six, in New York,<sup>233</sup> New Jersey,<sup>234</sup> Massachusetts,<sup>235</sup> Pennsylvania,<sup>236</sup> Louisiana,<sup>237</sup> and Florida,<sup>238</sup> have evolved over the years into established and consistently well-respected operations. Despite differences in examination formats, testing eligibility requirements, and attorney supervision requirements, these programs offer the framework for an examination to assess whether specific inmates can effectively use legal resources. Although no single program could reasonably be duplicated in other states due to variations in prison systems, the continued success of these programs when taken together suggests that there *is* potential for inmates to succeed in providing necessary legal services to their peers.

Historically, the prisons that opted for law libraries to meet inmates' constitutional requirements for court access realized the value and necessity of using law clerks to assist in operating the libraries.<sup>239</sup> While early on, the title

---

231. See *infra* Section IV.A.

232. Cf., e.g., Alpert & Huff, *supra* note 68, at 327-28 ("An analysis of 'jailhouse lawyer' programs reveals that some . . . have proved to be successful, while others have failed and have been disbanded.").

233. Telephone Interview with Jean C. Botta, Supervising Librarian and Law Library Coordinator, New York Department of Correctional Services (Oct. 7, 2004) [hereinafter Botta Interview].

234. E.g., Letter from Catherine A. Placenti, Principal Procedures Analyst, Government Records Unit, to Evan R. Seamone (Aug. 25, 2004) (on file with author); Memorandum from Warren D. Crawford, Jr., Legal Services Coordinator, Office of Educational Services, to Roberta Parachini, Program Assistant, Division of Parole and Community Programs (July 28, 2004) (on file with author). See also Fromm, *supra* note 49.

235. MASS. DEP'T OF CORR. PROGRAM SERVS. DIV., TRAINING MANUAL FOR INMATE LAW LIBRARY CLERKS (1999) [hereinafter MASS. TRAINING MANUAL].

236. Telephone Interview with Laura Neal, Counsel, Pennsylvania Department of Corrections (July 1, 2004).

237. Telephone Interview with Dora Rabalais, Director, Legal Assistance Programs, Louisiana State Penitentiary (June 11, 2004); see also Perlstein, *supra* note 144.

238. Telephone Interview with Barry Z. Rhodes, Program Director, Florida Department of Corrections (June 4, 2004).

239. E.g., Panel Discussion, *Prison Law Library Service: Questions and Models*, 66 L. LIBR. J. 598, 608 (1973) ("[N]o matter how good a library's collection is, it will be totally useless if there is no middleman to help provide a link between the prisoner's need for legal information and the information

of “law clerk” may have been no different than other inmate occupations, such as “cook” or “machine operator,” after *Bounds* and other cases involving inmate rights to legal assistance prison administrators and courts realized the substantial differences among the inmates who worked in law libraries. One group helped patrons by locating titles of works, retrieving books from a closed stack, or generally keeping the library area in order. The other group evaluated the problems of their peers and interpreted courses of action to address particular legal issues.<sup>240</sup> The latter inmate was more than a “clerk”; he had a higher degree of skill in legal research and interpretation.<sup>241</sup> The Louisiana State Penitentiary notes eight functions of an “inmate counsel substitute,” which range from educating other inmates about the law to “researching and preparing pleadings” and representing inmates before decision-making bodies.<sup>242</sup> Many of these qualified inmates petitioned their wardens and superintendents for greater levels of access to legal resources and to their

itself.”).

240. *E.g.*, *United States ex rel. Para-Professional Law Clinic v. Kane*, 656 F. Supp. 1099, 1102 (E.D. Pa. 1987) (distinguishing library clerks from clinic members):

Clinic members represent inmates in Post-Conviction Hearing Act cases, motions for new trial, direct appeals, motions in arrest of judgment, habeas corpus petitions, civil rights actions, misconduct hearings and other actions affecting inmates’ welfare. Clinic members also help inmates prepare letters to courts and outside counsel, and explain communications to inmates from courts and outside counsel.

*Id.* Importantly, since the recent disbanding of the clinic, inmates who served in the clinic still meet similar needs through certification based on examinations. Neal, *supra* note 236. *See also* New York Dep’t of Corr. Servs. Directive 4483, *reprinted in Law Libraries & Inmate Legal Assistance and Notary Public Services* (Mar. 28, 2002), at § III.F (distinguishing between job descriptions for inmate law library workers, including “Paralegal Assistant,” and “Administrative Clerk” or “Legal General Clerk”).

241. Inmate Law Clerk Agreement, *reprinted in* N.Y. DEP’T OF CORR. SERVS., HANDBOOK FOR ADMINISTRATION OF CORRECTIONAL FACILITY LAW LIBRARIES § 3.5 (2004) [hereinafter *Law Clerk Agreement and CORRECTIONAL HANDBOOK*]. For a more detailed discussion of the contractual obligations, see *infra* Section V.E (discussing ethical obligations of certified New York inmate law clerks).

242. Letter from L. Bruce Dodd, Attorney, Louisiana State Penitentiary, to Evan R. Seamone (Nov. 22, 2004) (detailing the Official Job Description for an Inmate Counsel Substitute) (on file with author). In its entirety, the job description reads:

Inmate counsel substitutes at LSP performs a variety of duties. Each inmate counsel is assigned a specific area/task. The total tasks performed by the inmate counsels are a [sic] as follows: (1) Assist inmates who need legal assistance in criminal and civil litigation, including post-conviction application, writs of habeas corpus, civil lawsuits, judicial review in the Nineteenth Judicial District Court, divorce, business transactions, and other personal legal activities. This assistance includes researching and preparing pleadings as necessary. (2) Represent inmates before the Disciplinary Board and file disciplinary appeals as necessary. (3) Assist inmates in preparing requests for Administrative Remedy. (4) Make rounds on the different tiers and dormitories of the institution and provide those inmates who do not have direct access to the law library with law books and legal reference materials. (5) Maintain law books and legal reference materials required to operate the legal aid program for the inmate population of LSP, including preparation of annual inventories of law books. (6) Participate in training organized by the Legal Programs Department in accordance with training requirements of the Department of Public Safety and Corrections. (7) Provide inmates with instructions as to preparation of litigation if the inmate desires to perform his own legal work. (8) Provide inmates within LSP, with legal assistance as necessary.

clientele.<sup>243</sup> Consequently, it was they who gained additional protections and entitlements when it came to the use of legal materials and dispensation of legal advice.

In New York's correctional system, administrators quickly recognized that legal assistants occupied one of the most highly skilled categories of prison employment.<sup>244</sup> To accommodate this difference, not only was it necessary to implement strict requirements for the position (such as the completion of a G.E.D.), it was also necessary to train the inmates, and to test inmates' skills with an examination.<sup>245</sup> Today, in the handful of states where prisoners are able to gain certification as law clerks, all of the prison systems (with the exception of Louisiana) use a pen and paper examination to test the inmates' knowledge. Louisiana relies on feedback from inmate instructors during required training and related homework results to determine which inmates possess the necessary skills.<sup>246</sup> Without exception, however, inmates who are selected to serve as legal assistants must complete several hours of standardized instruction,<sup>247</sup> usually involving the structure of the state's court system, statutory research, aspects of constitutional and criminal law, and procedural matters unique to the

---

243. In Pennsylvania's State Correctional Institute at Graterford, for example, a team of inmates created the Para-Professional Law Clinic specifically to achieve those purposes. *Para-Professional Law Clinic*, 656 F. Supp. at 1100 (describing the history and organization of the program); see also Perlstein, *supra* note 144:

Eventually, inmates teamed up with the prison administration to create an in-house legal system. Applicants for law library jobs were carefully screened. Outdated legal tomes were replaced with new ones. The position of "inmate counsel" was born, letting jailhouse paralegals represent other prisoners at disciplinary hearings.

*Id.* (describing the program at the Louisiana State Penitentiary).

244. Jean Clancy Botta, *Inmate Access to the Courts and More Through New York State's Prison Law Libraries*, in BOOKMARK 296, 298 (1990) ("Law clerks are paid top inmate wages to work in the law libraries . . .").

245. E.g., Editorial, *Inmates Trained To Assist Peers with Legal Proceedings*, DOCS TODAY June 2002, at 21 [hereinafter Editorial, *Inmates Trained*] ("Inmates must possess at least a GED or high school diploma and have a good disciplinary record in order to be eligible. . .").

246. Rabalais, *supra* note 237. Such inmates are subject to a lengthy probationary period following their selection. La. State Penitentiary Directive No. 14.001, *Access to Courts/Legal Aid Services/Access to Law Libraries*, June 22, 2004, at B.5 ("Individuals selected for the position of inmate counsel substitute will serve a six-month probationary period.").

247. Most states require more than twenty hours of training. In New York, inmates must complete "36-40 hours of time in the classroom and an equivalent amount of homework." Editorial, *Inmates Trained*, *supra* note 245, at 21. In New Jersey, "the course is comprised of twenty-five hours of instruction, and usually divided into four or five hour class day sessions and may run up to six to seven weeks." Crawford, *supra* note 234. See also Dep't of Pub. Safety & Corr., State of La., Dep't Reg. No. B-05-004, *Inmate Classification, Sentencing, and Service Functions: Administrative Remedy Procedure/Disciplinary Process, Counsel Substitutes* (Dec. 18, 2000), at 2 § 8:

TRAINING: Each counsel substitute shall be provided with or have participated in training appropriate to his assignment prior to assuming his duties. The scope of such training will be determined by the Warden. During the first year, counsel substitutes must receive 24 hours of training, including initial orientation, and 12 hours of training thereafter.

*Id.* In Massachusetts, the number of hours required for certification as a law clerk is dictated by the librarian who teaches the course, but the instruction must cover specified areas in an official manual. MASS. TRAINING MANUAL, *supra* note 235, at 27.

specific institution or prison system.<sup>248</sup> While the examinations often reflect the substantive areas covered in the training, some focus on hypothetical situations and require inmates to apply the law to a given set of facts.

### B. *Existing Examination Formats*

A cursory review of legal assistance examinations in different states leads to the conclusion that none of the tests is easy, and that a passing inmate will have spent many hours studying different aspects of the legal system to achieve a passing score. As Jean Botta, the supervising librarian and law library coordinator at the New York Department of Correctional Services, explained, "This is not the type of exam you can study for and pass over a night or even a week."<sup>249</sup> New York's three-hour examination has approximately ten sections with matching, fill-in-the-blank, short-answer, and long-essay questions.<sup>250</sup> Like many actual bar examinations, some of the questions on the New York test present inmates with ethical dilemmas and require them to rely on rules of professional conduct adopted by the Department of Correctional Services.<sup>251</sup>

In some respects, New Jersey's three-part examination is comparable to New York's. The first part consists of a combination of one hundred multiple-choice and true-false questions.<sup>252</sup> The second part presents inmates with a case that they must analyze by answering approximately ten open-ended questions.<sup>253</sup> In an example resembling the format described above, certain questions touched on identifying crimes an appellant was charged with committing at the trial level,<sup>254</sup> the requirements to prove prosecutorial misconduct or a governmental error complained of in the reported case,<sup>255</sup> evaluation of the appellant's tactical decisions in the reported case,<sup>256</sup> the

248. Most of the time, experienced inmates carry the brunt of responsibility for making the programs successful by sharing their experiences with other inmates during in-class instruction. Botta, *supra* note 244, at 298 ("More experienced clerks give individual and group instruction in legal research . . ."). See generally Stone, *supra* note 64; Rabalais, *supra* note 237. Sometimes attorneys also participate in the instructional programs. Botta, *supra* note 244, at 296; Perlstein, *supra* note 144. Separate from the in-class hours, and well after the initial training, most prison administrators expect that inmates will learn far more first-hand during their service as legal assistants. MASS. TRAINING MANUAL, *supra* note 235, at 27 ("Certainly, on the job training and experience will improve the inmate law clerk's knowledge and expertise.").

249. Botta Interview, *supra* note 233.

250. *Id.*

251. *Id.*

252. See Placenti, *supra* note 234, at 1 (sharing the answers of the legal services coordinator Warren D. Crawford regarding specific questions about the nature of the examination).

253. *Id.*

254. Assignment, *State v. Jang*, 359 N.J. Super. 85 (2003), in Letter from Roberta Parachini, OPRA Liaison, N.J. Dep't of Corr., to Evan R. Seamone (Aug. 17, 2004) (on file with author).

255. *Id.*

256. See *id.* at 2 ("Why do you think Jang's claim that New Jersey violated VCCR would have helped him get his case overturned?").

## Jailhouse Lawyer Bar Examination

meaning of an acronym in the case,<sup>257</sup> and examples of specific claims appellants must state in types of appeals.<sup>258</sup> In the third and final section of New Jersey's examination, inmates must answer a set of twenty questions about the process of Shepardizing a particular case.<sup>259</sup>

As in the case of actual bar examinations, test questions regularly change to prevent inmates from memorizing specific answers in anticipation of passing.<sup>260</sup> In Massachusetts, for example, law clerk examination standards provide librarians with great flexibility in modifying examination formats to reflect specific training objectives covered during classes. At a minimum, the standards state that:

Each exam should:

- consist of a minimum of fifteen questions
- cover federal and state materials
- include research questions
- require answers which explain how the information was found as well as the correct answer
- demonstrate ability to use CDROM and/or microform materials if necessary.<sup>261</sup>

Massachusetts examinations have asked inmates to explain how statutes have changed in given years, to dissect components of an opinion, to Shepardize several cases in their entirety, to define legal terms such as a case "on all fours" or "stare decisis," and to discuss various matters related to inmates' rights to legal materials.<sup>262</sup>

Because the examinations touch on numerous aspects of the legal process, most correctional systems use staff attorneys to grade law clerk examinations.<sup>263</sup> Even when librarians are responsible for grading the exams, as in the case of Massachusetts, all states with examinations have developed strict numerical cutoffs.<sup>264</sup> For example, in New Jersey, "[t]o qualify for the paralegal certification, the inmate paralegal must have a minimum score of seventy

---

257. *Id.* at 4.

258. For example, factors that would make a prosecutor's conduct "egregious." *Id.*

259. Placenti, *supra* note 234, at 1.

260. In states such as New York, in fact, highly experienced inmates often have the opportunity to contribute questions or testing suggestions when modifications are implemented. Botta Interview, *supra* note 233.

261. MASS. TRAINING MANUAL, *supra* note 235, at 27.

262. SBCC Law Library Clerk Test (Dec. 2003) & Legal Research Examination for Inmate Library Clerks (undated), in Letter from David J. Rentsch, Counsel, Mass. Dep't of Corr., to Evan R. Seamone (May 24, 2004) (on file with author).

263. Usually, as is the case in New York, New Jersey, and Florida, the duties of grading fall upon a single attorney. See Botta Interview, *supra* note 233; Placenti, *supra* note 234, at 2 (quoting Warren Crawford, Legal Services: "I am an attorney and totally responsible for scoring the inmate paralegal examinations."); Rhodes, *supra* note 238. In this sense, grading becomes substantially different than with actual bar examinations, which involve numerous attorney recruits. See *infra* Subsection V.D.2.

264. See MASS. TRAINING MANUAL, *supra* note 235, at 27 (describing an eighty percent requirement for a passing score). Botta Interview, *supra* note 233.



points. This is achieved by obtaining ten points for homework or classwork assignments, and sixty or more points on the final examination."<sup>265</sup> When an inmate fails an examination, he must usually retake the entire course of instruction before a retest.<sup>266</sup> The training requirement is so important that test administrators recognize few exceptions. Although New York may permit a disbarred attorney to waive the testing requirement, examiners inevitably turn away even those inmates who produce diplomas from correspondence programs offering paralegal studies in lieu of the training offered by the institution.<sup>267</sup>

Following passage of the law clerk examination, many inmates will wait until prisons recognize the need to fill an opening.<sup>268</sup> In all cases, program operators expect that the experienced legal assistants will guide, train, and sharpen the skills of their newly admitted peers at a level of intensity far beyond the training provided prior to the examinations.<sup>269</sup> During a probationary period, correctional administrators afford the new admittees far greater freedoms to practice jailhouse law. In some cases, this means providing office-like environments to consult with inmates, increasing access to the stacks, and ensuring a greater degree of privacy in communications.<sup>270</sup> Along with these privileges, the inmates shoulder comparatively greater responsibility to uphold specific ethical standards.<sup>271</sup> In New York, for example, inmate law clerks are guided by a written contract requiring adherence to professional standards that are comparable to the professional rules guiding licensed attorneys.<sup>272</sup> Aside from these formal requirements, inmate legal assistants must also meet many informal standards adopted by their experienced peers.<sup>273</sup> Indeed, it is the veteran jailhouse lawyers who have every reason to take pride

265. Crawford, *supra* note 234, at 2.

266. Botta, *supra* note 233.

267. *Id.*

268. Often, there are a limited number of spots available, which places practical constraints on how many training programs will be offered in a given year. In New York, for example, facilitators hold approximately two training sessions per year. However, modifications will be made in smaller facilities with a limited supply of capable inmates wishing to serve as legal assistants. Editorial, *Inmates Trained*, *supra* note 245, at 21.

269. See *supra* notes 227, 229.

270. In New York, while the inmates are still supervised, they may communicate in areas that provide less interference from other inmates. Botta Interview, *supra* note 233.

271. *E.g.*, Tighe v. Wall, 100 F.3d 41, 42 (5th Cir. 1996) (describing how Louisiana inmate counsel Thomas Tighe was "removed . . . for what officials called 'unsatisfactory job performance'" when he "had improperly called the family of an inmate about allegations of physical abuse within the prison."); LA. DEP'T OF PUB. SAFETY & CORR., DISCIPLINARY RULES AND PROCEDURES FOR ADULT INMATES 6 (2000) [hereinafter LA. DISCIPLINARY RULES] ("Behavior of counsel substitutes and Legal Aid office workers must be above reproach. A job change is mandatory following conviction of a serious offense. . . . They may be removed from their positions if the Warden or his designee believes it appropriate.").

272. See *infra* Section V.E.

273. THOMAS, *supra* note 48, at 222 (describing standards by which jailhouse lawyers judge the work of their peers).

in their work and the incentive to uphold the standards of excellence that keep the program in high regard among prison administrators. The creation of a uniform set of standards governing jailhouse lawyers would also assist those inmates who are transferred to different institutions without consistent guidance. For these reasons, the programs have sustained through years of modification, court reform, and political transformation.

### C. *Proposed Format of the Jailhouse Lawyer Bar Examination*

The value of inmate certification is undeniable. As Massachusetts jailhouse lawyer Julian Stone observed, the primary purpose of certifying capable inmates is to provide tangible “proof of their legal knowledge” and “assurance to prisoners seeking legal assistance that their needs w[ill] be met competently.”<sup>274</sup> In an important way, examinations like the ones explored above demonstrate that clients of jailhouse lawyers will, in fact, have “a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.”<sup>275</sup> Beyond mere preparation, certified jailhouse lawyers ensure that “prisoner legal claims [will] be nonfrivolous, that they [will] meet procedural prerequisites, that they [will] be presented fairly to the courts, [and] that the applicable law [will] be researched before legal documents are filed”—criteria that experts have long recognized as necessary to uphold prisoners’ rights to meaningful access.<sup>276</sup>

Similar to the law clerk tests surveyed above, the proposed Jailhouse Lawyer Bar Examination would identify prisoners who possess the requisite skills to deliver quality legal services to their peers. As is the case with law clerk certification measures, a national examination cannot operate as the equivalent of a complete state bar examination. While state bar examinations focus on the nuances of dozens of legal subjects, jailhouse lawyers need to master only a few specific areas of constitutional, administrative, and correctional law. Inmates are “concerned primarily with criminal law and especially . . . spot[ting] situations that warrant new trials.”<sup>277</sup> Yet in the limited areas of overlap between inmate and lawyer licensing, the Jailhouse Lawyer Bar Examination must be as rigorous, if not more so, than existing law clerk examinations. After all, it is within these disciplines that the jailhouse lawyer will be competing against licensed attorneys, addressing the same courts, and responding to purely legal challenges.<sup>278</sup>

---

274. Stone, *supra* note 64, at 197; *cf.* BRANHAM, *supra* note 162, at 116 (“[E]ven if the paralegals are qualified to perform their assigned tasks, but are not perceived by inmates to be qualified to perform them, then the costs of *pro se* inmate litigation will not be curtailed . . .”).

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

276. Panel Discussion, *supra* note 239, at 600.

277. Stone, *supra* note 64, at 200.

278. *Cf.* Milovanovic, *supra* note 64, at 469.

In contemplating any jailhouse lawyer examination, the test must require the inmate to use “specific reference texts”; determine whether cases have been overturned, limited, or upheld in subsequent decisions; distinguish between dicta and holding in complex cases; and synthesize a prior case with later-decided cases.<sup>279</sup> Each of the surveyed examinations has met these core requirements and, moreover, revealed alternative formatting considerations for the achievement of additional prison-specific objectives. Although the Jailhouse Lawyer Bar Examination must initially cover similar ground, it must also adopt a distinctive format to meet separate and specific needs given the lack of institutional support in many prisons.

### 1. *Satisfying the Unique Purpose of the Examination*

The Jailhouse Lawyer Bar Examination must be substantially different from established state examinations because it will be offered to prisoners who have limited or no access to legal research materials in their facilities. It should neither depend on the use of a specific statutory system or publisher nor on the structure of state-specific court systems. Similar to the strategy adopted by the National Conference of Bar Examiners to test law graduates in multiple states, much of the examination, by necessity, will be generic.<sup>280</sup> The state at issue in the test will be a fictional one, with fictitious courts and statutes modeled from realistic governance mechanisms. Consequently, much of the testing material will be provided in a closed-universe format. A benefit of this testing format, besides the elimination of barriers to inmates who could not otherwise demonstrate their ability to use research materials, is the fact that the national examination could never substitute for existing state-specific examinations in jurisdictions with established law clerk testing programs. To reiterate, the examination is not intended to replace successful programs where inmates have access to numerous legal resources. It is for capable prisoners who lack such resources.

The practical examination component will follow a proven examination format, in which “each student received a set of facts and was allowed one week to identify the issues and pertinent laws and to write a formal brief, in

---

279. Larsen, *supra* note 56, at 352.

280. Currently, twenty-eight states administer the Multistate Performance Test (MPT) examination in conjunction with the National Conference of Bar Examiners. National Conference of Bar Examiners, *The MPT*, <http://www.ncbex.org/tests.htm> [hereinafter NCBE] (last visited Nov. 11, 2005). California also has a lengthier version of the performance test. See State Bar of California (2004), *California Bar Examination Performance Test and Selected Answers*, [http://www.calbar.ca.gov/calbar/pdfs/admissions/sf\\_0402\\_PT-Selected\\_Answers.pdf](http://www.calbar.ca.gov/calbar/pdfs/admissions/sf_0402_PT-Selected_Answers.pdf) (reproducing the 2004 performance test). With the objective of testing “fundamental lawyering skills in a realistic situation,” these examinations provide a file and a library, requiring the applicant to develop a legal document based on relevant aspects of the case. NCBE, *supra*. For examples of prior MPT examinations, see *id.*

accordance with the Rules of Appellate Procedure.”<sup>281</sup> Additionally, the examination will feature a section with numerous open-ended questions. Where possible, the questions could adopt a realistic context, familiar to the ones faced by practicing jailhouse lawyers. Consider the example below from Massachusetts:<sup>282</sup>

*Using Primary Sources*

You are a law clerk on a busy afternoon in the law library, and people are asking you questions and need to know how to get started. For each legal issue below, you need to ask yourself:

- Is this issue covered by an administrative regulation?
- Are there constitutional issues involved here?
- Does any case law exist in interpreting this problem?
- Are there any statutes which control this area of law?

“I was lugged here from Concord 3 weeks ago, and they still haven’t given me my property. I wrote the property officer at Concord twice, but he ignores my letters.”

“They keep closing down the law library; my appeal has to be in by the end of the week.”

“I was transferred here from Walpole without a classification hearing.”

“They won’t let me wear a necklace; it’s part of my religious beliefs.”

“I wrapped up months ago. I’m being held illegally.”

2. *Specific Proposed Examination Format*

On the basis of these established precedents, the Jailhouse Lawyer Bar Examination ought to consist of a two-week closed-universe examination containing three parts. The first part would require the applicant to write an appellate brief challenging an inmate’s conviction based on fictitious materials included in a packet, such as key portions of the prior case’s transcript, copies of relevant and irrelevant statutes and cases,<sup>283</sup> summaries of interviews with witnesses, rules governing the format of documents submitted to courts, and other secondary materials commonly used in practical examinations.<sup>284</sup> Because *Lewis* limited the scope of meaningful access to specified issues, the second part of the examination could require the applicant to draft a motion regarding conditions of confinement.<sup>285</sup> Inmates will be free to compose the documents with pen and paper since most lack access to typewriters or computers.

---

281. Stone, *supra* note 64, at 199-200.

282. Mongelli, *supra* note 77, at 296 fig.4.

283. Examinee’s dismissal of irrelevant materials can be as, if not more, useful in grading the examination because the rejection of inapplicable law is a key skill possessed by all competent lawyers.

284. See generally NCBE, *supra* note 280.

285. *Lewis v. Casey*, 518 U.S. 343 (1996). By addressing both types of claims that the Court still deems worthy of constitutional protection, the examination will have an unmistakable importance in prison systems throughout the nation.

While applicants will have roughly one week per practical exercise to complete the examination, they could also be required to complete the third and final portion at some point during their two weeks of ongoing research and writing. This third portion, a fifty-question open-ended, three-hour examination, could be sent to a prison administrator of the applicant's choosing or a certified jailhouse lawyer for completion under their supervision. Similar to Figure 1 above, the examination could present scenarios involving common issues legitimately litigated by prisoners. Where necessary, the questions may include additional information. For example, the applicant could be provided with pages from *Shepard's Citations* when required to Shepardize cases. The proctored examination would allow comparison of written products to ensure that the same inmate completed them, as well as determining the applicant's competence when responding to fundamental questions that afford little or no research time.

As described in further detail below in Subsection V.D.3,<sup>286</sup> graders of the examination could be licensed attorneys who would draw on their legal expertise when evaluating the examinations. Similar to the administration of state bar examinations, the Jailhouse Lawyer Bar Examination should vary during each administration. In short, grading of the examination should reflect the rigor of a test administered specifically for entry into a profession, and passing scores should be determined accordingly.

In great measure, an examination of this nature would resolve some of the most pressing dilemmas facing prison administrators, the courts, and inmates in need of legal services. Aside from meeting the Court's minimal concerns of demonstrating reading and writing ability, a passing score on the Jailhouse Lawyer Bar Examination would demonstrate a prisoner's ability to identify frivolous claims and assist inmates in presenting meritorious claims to a court, two longstanding objectives that current standards have failed to achieve.<sup>287</sup> The examination would also help to bring dignity to communications between qualified jailhouse lawyers and prison administrators by confirming that they are not wasting time in their pursuits.<sup>288</sup> In this respect, administrators without legal research programs will soon be able to "deal realistically with [inmate] complaints," rather than limiting interaction between inmates for fear of predatory uncertified barristers.<sup>289</sup>

---

286. See *infra* Subsection V.D.3.

287. BRANHAM, *supra* note 162, at 114-15.

288. See, e.g., Botta, *supra* note 244, at 296 (describing how the use of correction officers to supervise inmate legal services, though initially challenging, developed into a fruitful enterprise, specifically because the officers "established consistent and fair procedures for the management of the libraries, and they treated the inmate law clerks and law library users with respect.").

289. Howard Mintz, *Fighting Over Solutions: From Filing Fees to Mediation to Restricting Access to the Courts, Everyone Has a Plan for Scaling Back the Barrage of Prisoner Pro Se Petitions*, THE RECORDER, July 26, 1995, at 13 (comments of Amanda Wilson, Senior Attorney for San Jose's Public

D. *Practical Considerations*

An examination that accurately reflects the capabilities of a jailhouse lawyer would be useless without the resolution of various practical considerations. The sections below address concerns over the entitlements of qualified jailhouse lawyers, the eligibility of inmates to sit for the examination, the identification of bar examination graders, the responsibilities of graders, and obligations to accommodate various constraints on inmate testing. After reviewing these matters, Section IV.E proposes a Jailhouse Lawyer Code of Professional Responsibility modeled on the New York Department of Correctional Services' Law Clerk Agreement. With the implementation of core ethical standards, the proposed code would ensure a symbiotic relationship between prison officials and qualified jailhouse lawyers.

1. *Entitlements of Qualified Jailhouse Lawyers*

Passage of the Jailhouse Lawyer Bar Examination by qualified inmates will not obligate prisons to add legal research materials to barren bookshelves. Nor would it require prisons to purchase computer kiosks loaded with LexisNexis or Westlaw software. To the contrary, once a prisoner achieves a passing score, administrators should reasonably accommodate his or her access to legal resources to no greater extent than current prison law libraries. Because budgeting restrictions make it impossible to provide inmates with access to every legal case or statute, administrators of established prison legal research programs agree that their legal resources cannot match those offered by major law firms or universities.<sup>290</sup> Even under ideal circumstances, the best-stocked prison can only hope to "make the best of a difficult situation" when attempting to assist inmate legal researchers.<sup>291</sup>

Making the best of the situation would require some minimal accommodations, specifically including coordination with public libraries to permit visits. Administrators could provide inmates with time, transportation, and access to local law libraries in universities, public libraries, or public defenders' offices. These accommodations are a small price to pay in the handful of cases where capable inmates have proven their legal acumen. Protection of a qualified jailhouse lawyer's rights extends to all prisoners,<sup>292</sup> and each institution that invests in qualified inmates will enjoy a number of

---

Interest Law Firm).

290. Mongelli, *supra* note 77, at 286.

291. Christopher E. Smith, *Improving the Use of Prison Law Libraries: A Modest Proposal*, 79 LAW LIBR. J. 227, 229 (1987).

292. Fleming, *supra* note 69, at 61 ("Some protection for the jailhouse lawyer is necessary to protect all inmates' right of access to the courts. . . .").

incidental benefits.<sup>293</sup>

A common suggestion to the problem of inadequate access, hinted at even by the courts, has been to provide inmates with computerized research resources.<sup>294</sup> Although “every state bans inmates from direct access to the Internet to some extent,”<sup>295</sup> many prisoners have vested jailhouse lawyers with special Internet privileges.<sup>296</sup> Most notably, in Georgia, the Department of Correction replaced its ineffective contract attorney program with a computerized solution. As of 2004, the Department installed 170 Westlaw computers throughout its facilities and provided both librarians and paralegals to assist in the computer program’s administration.<sup>297</sup>

While computer terminals have been effective in some states, it is a mistake to see such innovations as a panacea. Inmates need the training necessary to master computerized research. They require tight security restrictions to enable appropriate access to the Internet. The prisons must possess enough terminals to meet the inmate demand. Above all, the institution must be able to afford the cost of installing the terminals. Only after each of the former concerns has been resolved will a computerized solution yield the greatest benefit to inmates.<sup>298</sup> These concerns make it unreasonable to assume that a prison without a library will be capable of or interested in funding an alternative involving computerized legal research.

It is a far more realistic solution to satisfy the research needs of qualified

293. See *supra* Part III.

294. Vogel, *supra* note 167 (discussing oral arguments for the *Casey* case: “I was elated when one Supreme Court justice asked why prison libraries weren’t using modern day technology . . .”). See also Falzerano v. Collier, 535 F. Supp. 800, 803 (D.N.J. 1982) (“The bulk and complexity [of legal materials] have grown to such an extent that even experienced lawyers cannot function efficiently today without the support of special tools, such as the computer research systems of FLITE, JURIS, LEXIS and WESTLAW.”).

295. Titia A. Holtz, Note, *Reaching Out From Behind Bars: The Constitutionality of Laws Barring Prisoners from the Internet*, 67 BROOK. L. REV. 855, 859 (2002).

296. For example, an existing program in Florida grants capable inmate law clerks access to computer-based research: “Inmates who have been trained as law clerks to help other inmates with their appeals still have access to Lexis-Nexis and many print materials.” Editorial, *Florida Prisons Lose Typewriters*, AM. LIBR., Aug. 1, 2001, at 24 (comments of Florida Department of Corrections Spokesperson Joellyn Rackleff). Furthermore, it is estimated that four state prisons in Hawaii and five in California are reviewing programs that provide inmates with access to LexisNexis research kiosks. Peter Boylan, *Four Prisons Install Legal Research Computers for Inmates*, HONOLULU ADVERTISER, Mar. 16, 2004, at 6B, available at <http://the.honoluluadvertiser.com/article/2004/Mar/16/ln/ln28a.html>. In Wisconsin, however, rather than purchasing kiosks, which cost as much as five thousand dollars per piece, the Department has explored the prospect of an “online law library,” which operates “through the use of an Internet appliance (about \$500) which takes the place of a PC and connects to a customized vendor URL with no links to any other Internet sites.” Vibeke Lehmann, *[Prodev] Online Access to Legal Information*, Jan. 9, 2003, <http://www.aallnet.org/prodev/prodev/Week-of-Mon-20030106/000734.html>.

297. Steve Seidenberg, *Prisoners’ Lawyers Replaced by Computers in Georgia*, NAT’L J. TECH. DAILY, Jan. 7, 2004.

298. *Id.* (citing a major concern that many inmates who wish to conduct legal research do not know how to operate computers).

jailhouse lawyers by transporting them to local facilities with law libraries where the inmates can be closely monitored by correctional officers with the permission of the host facility.<sup>299</sup> Even in prisons with established law clerk programs, most still permit inmates to seek assistance from peers who are not formally certified. Subject to certain limitations, these prisons have endowed all capable prisoners with the time and materials to provide legal counsel.<sup>300</sup> Prisons without any certification programs could turn to the guidelines for non-certified inmates in institutions that offer certification as a prototype for successful examinees of the Jailhouse Lawyer Bar Examination. It stands to reason that these independently administered programs reflect a basic level of assistance that facilitates legal assistance despite the lack of formal endorsement. In some locations, access to the proper legal research materials would require the resurrection of law libraries or at least a moratorium on their termination.

### 2. *Inmate Eligibility for the Examination*

As with an actual bar examination, at the time of their application, inmates could complete a series of forms requiring them to demonstrate that they can read and comprehend complex language. Just as prospective inmate law clerks in a number of sanctioned programs are screened for behavioral problems before administrators admit them for examination,<sup>301</sup> applicants for the Jailhouse Lawyer Bar Examination could be evaluated, in part, on the basis of their disciplinary history. As discussed above in Section III.C, jailhouse lawyers must have an appreciation for the rules of law that they practice. Although initially incarcerated for violating the law, inmates desiring certification must be able to demonstrate an appreciable level of adherence to prison policy and court rules.<sup>302</sup>

---

299. Aside from universities and other public libraries, this might also include trips to local jails with research materials.

300. *E.g.*, LA. DISCIPLINARY RULES, *supra* note 271, at 6 (permitting similar legal assistance with the permission of the warden or his or her designee); Botta Interview, *supra* note 233 (explaining how inmates can request the opportunity to assist their peers with legal matters even if they have not passed the course).

301. Botta Interview, *supra* note 233.

302. The required screening could be conducted with letters of recommendation that touch on aspects of the inmate's past performance. The letters should come from peers and members of the prison administration who come in contact with the inmate on a regular basis. Although not exhaustive, the list of letter-writers could include librarians, correctional officers, clergy, or other individuals with whom the inmate will be expected to cooperate during his tenure as a jailhouse lawyer. To eliminate a situation where an inmate will be unduly stigmatized based on his or her desire to serve as a certified jailhouse lawyer, upon a showing of sufficient need, volunteer attorneys from the area could arrange for an on-site interview with the inmate and prison officials to determine if the inmate has met the character requirements.



### 3. *Grading the Examination*

At first blush, it may seem difficult to identify individuals who are qualified and willing to grade jailhouse lawyer bar examinations. However, it must be remembered that few inmates will possess the desire or qualifications to take the examination. Much like the committees that grade actual bar exams, organizations devoted to prisoners' rights should recruit attorney volunteers to help design, revise, and grade the examinations. In any context, the grading of bar examinations necessarily takes on a spirit of public service.<sup>303</sup> While there are few attorneys who have the time to assist prisoners on a regular basis, there exist several groups of legal professionals who genuinely care about inmates in America's prisons and could perform such a function.

Organizations such as the American Civil Liberties Union and the National Lawyers Guild could provide an institutional home for the Jailhouse Lawyer Bar.<sup>304</sup> These organizations could draw graders from willing public defenders' offices, law school clinics, and judges' chambers. While there would be a constant turnover in graders, this is not necessarily a negative characteristic of the examination process. To the contrary, veteran bar examiners agree that "periodic turnover . . . on a rotating basis will ensure continuity while establishing the kind of fresh look at the bar exam that would be healthy for the process."<sup>305</sup>

### 4. *Inmate Testing Accommodations*

The existence of the Jailhouse Lawyer Bar Examination would not oblige prisons to train those inmates who seek certification. Nor would it require prison administrators to provide inmates with study materials. While inmates should be able to collect study materials and prepare independently, administrators would bear no burden other than permitting qualified inmates the time necessary to complete the actual examination. Rather than burdening prison officials, the closed-universe nature of the examination would provide inmates with all of the materials they would need to successfully demonstrate their skills, regardless of the facilities at a particular institution or their lack of research materials.

From one perspective, this policy would limit the number of qualified applicants because it would disadvantage inmates without access to training

---

303. Ellen Lieberman, *Reforming the Bar Exam: Demystifying the Test and Diversity of the Graders*, MANHATTAN LAW., June 1990, at 18 (quoting Erica Moeser, who stated that "[g]rading is mainly seen as pro bono work. It has an aspect of public service and in many jurisdictions is viewed as an honor.").

304. For example, the National Lawyers Guild currently sponsors two national jailhouse lawyer vice presidents, Mumia Abu-Jamal and Paul Wright. See National Lawyers Guild, *National Executive Committee*, <http://www.nlg.org/about/aboutus.htm> (last visited Nov. 12, 2005).

305. Lieberman, *supra* note 303, at 18.

programs who fail to obtain the necessary skills through no fault of their own.<sup>306</sup> But this argument ignores the reality that incapable inmates will fare far better by seeking the services of more capable ones. Even with a limit on the number of certified jailhouse lawyers, those who remain active will be more receptive to prisoners' legitimate legal needs.

E. *The Jailhouse Lawyer's Code of Professional Responsibility*

Although this Article has mentioned an unspoken code of ethics that applies to all legitimate jailhouse lawyers, it is important to codify this conduct.<sup>307</sup> In fact, the most important aspect of the national examination would be the examinee's certification that he will abide by a formalized Code of Professional Responsibility once he attains the certification. This Code could put to rest the longstanding concerns raised by scholars and courts alike that jailhouse lawyers lack "an ethical duty to act in another inmate's best interests," or any meaningful "attorney/client privilege."<sup>308</sup> Through its development of the standardized "Inmate Law Clerk Agreement," the New York State Department of Correctional Services has established a solid foundation upon which any jailhouse lawyer program can build.<sup>309</sup> Consequently, the proposed National Code of Jailhouse Lawyer Professional Responsibility adopts seven of the document's key provisions.

1. *Rule 1: Loyalty*

In many cases, inmates apply for law clerk positions with the hope that they will have extra time to work on their own legal actions. However, the New York Agreement requires selflessness on the part of the law clerk: "I understand that the purpose of my assignment to the Law Library Program is to provide assistance to other inmates, and [I] will not take advantage of this placement to perform personal legal work."<sup>310</sup> Although an inmate may desire to work only on his own case, he must be willing to assist others after gaining certification. While this means volunteering time and energy, the standard also recognizes limits to the scope of his representation; he need only conduct legal work that is required and necessary.<sup>311</sup> On the basis of these considerations,

---

306. Nobel, *supra* note 56, at 1591 ("[R]equiring strict qualifying standards for jailhouse lawyers would reduce the number of available jailhouse lawyers and, therefore, further restrict an inmate's right of access to the courts.").

307. *See supra* note 46.

308. BARNHAM, *supra* note 162, at 114.

309. *See* Law Clerk Agreement, *supra* note 241.

310. *Id.* § 3.5.

311. *Id.* § 3.6 ("I understand that in those situations where an inmate[] is seeking research assistance from me, and that inmate is capable of producing his/her own legal work with my guidance and assistance, I am not required to actually prepare work for him/her."); *cf.* Dep't of Pub. Safety & Corr., State of La., Dep't Reg. No. B-05-004, *supra* note 247, at 7A ("Counsel substitutes are not

Rule 1 of the proposed Code reads:

As a certified Jailhouse Lawyer, I will prioritize the legal matters of my peers above my own.<sup>312</sup> Before undertaking a legal project, I will agree with the client in writing as to the project's length, scope, and duration. However, in situations where an "inmate is capable of producing his . . . own legal work with my guidance and assistance, I am not required to actually prepare work for him . . . ."<sup>313</sup>

2. *Rule 2: Compensation*

A key aspect of the New York Agreement, like most other programs, is a prohibition of monetary compensation and special favors other than wages normally paid to all law clerks.<sup>314</sup> While it is unfortunate that the inmates who most need certification may receive no institutional remuneration for their services, this loss must be outweighed by the intrinsic value of certification.<sup>315</sup> Perhaps, with the advice and consent of the national headquarters, inmates could enter into moderated contractual arrangements that provide a fair value for services rendered. However, the general rule should remain a prohibition of payment in order to guard against coercive situations. The rule could read as follows: "I will not take advantage of my position as a law clerk to do special favors for anyone. I will not accept or request payment of any type from, or on behalf of, an inmate in exchange for my legal assistance."<sup>316</sup>

3. *Rule 3: Bias and Favoritism*

An important feature of New York's Agreement is the requirement to take all clients on a first-come, first-served basis to avoid prejudice and bias from interfering with the inmate's role as a law clerk. While certainly jailhouse lawyers, just like licensed attorneys, may have legitimate reasons for declining representation,<sup>317</sup> the national standard for jailhouse lawyers should embody the general rule embracing all inmates who need legal assistance: "I will show no prejudice or favoritism in the provision of services, and agree to provide them on a first come, first served basis."<sup>318</sup>

---

required to file appeals but should inform the inmate who wants to appeal of the proper way to file.").

312. See Law Clerk Agreement, *supra* note 241, § 3.5.

313. *Id.* § 3.6.

314. See *Id.* § 3.5.

315. Oftentimes, jailhouse lawyers desire to maintain their own personal libraries containing legal references. A potential form of remuneration could be vouchers to obtain donated legal materials from major publishers.

316. Law Clerk Agreement, *supra* note 241, § 3.5.

317. Cf. MODEL RULES OF PROF'L CONDUCT R. 1.16 (1983).

318. Law Clerk Agreement, *supra* note 241, § 3.5.

#### 4. *Rule 4: Safekeeping Records*

Just as an attorney must properly file and account for all papers and records entrusted to his care, inmates in New York's program must document all papers entrusted to their care by clients and file them accordingly.<sup>319</sup> In fact, the inmates must agree that they will return all papers before a transfer to another institution unless a special agreement has been reached through the program administrators before the time of transfer.<sup>320</sup> The national standard should adopt these two provisions from the New York Agreement:

If an inmate leaves legal papers with me to review, I will issue a receipt for the document and properly safeguard it in a safe and enclosed area. I will maintain awareness of the status of the inmate, and ensure that his papers are returned in the event of my or his/her transfer to another institution.<sup>321</sup>

#### 5. *Rule 5: Competence*

To avoid the situation where inmates and law clerks are constantly at odds over their expectations about the nature of legal assistance to be rendered, the New York Agreement requires that inmates document their expectations in the form of a service agreement before commencing any legal assistance. The contract permits the law clerk to provide an estimate for the time required to complete the task and to explain steps he will take to satisfy the client's objective.<sup>322</sup> Importantly, the existence of the contract also permits the clerk to specify objectives that are outside the scope of the representation or that would require legal assistance beyond the capabilities of the clerk. The adoption of a service contract at the national level would give jailhouse lawyers an avenue to clarify the expectations of their clients and disclaim guarantees of success for their legal actions, which have long provided grounds for criticism.<sup>323</sup> This rule could state:

Before I assist another inmate, I will write a service contract that explains the specific services I will provide and the steps I will take to complete the tasks. I will provide an estimate of how much time it will take to complete the tasks and I will identify any services that I am unable to provide. I will not make any guarantees about the outcomes of any legal services I provide. I will complete all projects in a timely manner in accordance with the service contract.<sup>324</sup>

---

319. *Id.* § 3.5 ("If an inmate leaves legal papers with me to review after s/he leaves the library, I will comply with law library receipting and filing procedures and I will document my legal assistance activities . . .").

320. *Id.* § 3.6 ("I understand that my assistance to any inmate will terminate upon his/her transfer to another facility, and will immediately return any legal document or paperwork in my possession to the inmate, or to the Law Library Supervisor if that inmate has already left the facility.").

321. *See id.* § 3.5.

322. Botta, *supra* note 233.

323. For a good example, see Wexler, *supra* note 45, at 140-41.

324. *See* Law Clerk Agreement, *supra* note 241, § 3.5.

## 6. *Rule 6: Confidentiality of Information*

An issue of chief concern among critics has been the lack of an attorney-client privilege between jailhouse lawyers and the inmates they represent.<sup>325</sup> Many fear that jailhouse lawyers have the incentive to barter otherwise privileged information gained from their clients in an attempt to extort favors.<sup>326</sup> For example, purported jailhouse lawyer Michael Horton Adams tried to reduce his own sentence with prosecutors by disclosing details gained from his legal research with “clients” who admitted details to him about various crimes.<sup>327</sup>

In a noteworthy publication, Julie B. Nobel presented a detailed description of the types of communications that should be protected under a “jailhouse lawyer-inmate privilege”:

1) confidential communications 2) between an inmate 3) and a jailhouse lawyer acting in his or her capacity as such 4) for the purpose of securing legal advice 5) are, at the insistence of the inmate, 6) permanently protected from disclosure by the inmate or the jailhouse lawyer 7) unless jailhouse law[yring] is legitimately banned in the state in which the inmate is incarcerated 8) or the inmate has already retained, or been appointed, an attorney to help him or her with the particular legal issue involved 9) or the protection has otherwise been waived.<sup>328</sup>

The New York Agreement apparently adopts a number of these protections while recognizing the need to preserve unique penological objectives, such as the security of inmates. The Agreement states: “I will maintain the confidences of inmate library users except in instances where such confidential information may compromise the safety and security of facility staff or inmates or constitutes rule violations.”<sup>329</sup>

In the instant case, inmates should be able to trust qualified jailhouse lawyers with information relating to their contemplated legal actions. As with the rule that applies to licensed attorneys, the national rule should protect all information relating to the representation of the inmate, unless waived or otherwise authorized.<sup>330</sup> Just as the ABA Model Rules of Professional Conduct permit an attorney to reveal information to “prevent reasonably certain death or substantial bodily harm,”<sup>331</sup> a similar rationale should apply to the proposed

325. *E.g.*, BRANHAM, *supra* note 162, at 114.

326. Alpert & Huff, *supra* note 68, at 337-38 (noting the suggestion that “jailhouse lawyers should not be permitted to have sensitive information about other inmates which could be used for blackmail and extortion”).

327. Andrew Z. Galameau & Craig Pittman, *Jailhouse “Lawyer” Works as Snitch*, ST. PETERSBURG TIMES, Aug. 14, 1995, at 6.

328. Nobel, *supra* note 56, at 1601-02.

329. Law Clerk Agreement, *supra* note 241, § 3.5.

330. *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1983) (“A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).”).

331. *Id.* R. 1.6(b)(1).

rule. Unlike the New York Agreement, the rule should extend to harm against any party, even those situated outside of prison. It should also protect against the jailhouse lawyer's unwilling involvement in prison riots or escape plots. Yet it should not extend to every conceivable rule violation for fear that it might chill the inmate's discussion of certain legal issues. The rule might state:

I will not disclose information relating to my representation of an inmate except in instances where I reasonably believe the disclosure is necessary to prevent the inmate from committing a criminal act that I believe is likely to result in imminent death or substantial bodily harm to facility staff, inmates, or other persons; a prison riot; or attempted escape from the institution.<sup>332</sup>

### 7. *Rule 7: Reporting Jailhouse Lawyer Misconduct*

An important driving force that secures the adherence of jailhouse lawyers to existing codes of professional responsibility is the knowledge that their peers are constantly observing their work. Just as in the legal profession, this oversight creates a form of self-regulation among uniquely qualified professionals. Similar to reporting requirements in bar associations, the New York Department of Correctional Services obligates law clerks to report the misconduct of their peers: "I will refer inmates with complaints about the quality of my (or other clerks') legal assistance to the Law Library Supervisor."<sup>333</sup> As recognized by the American Bar Association, the duty to report misconduct is a matter of maintaining the integrity of the profession, and extends beyond the individual involved.<sup>334</sup>

In the instant case, the national standard will impose a similar obligation upon qualified jailhouse lawyers. However, since the institution played no role in accrediting the inmate, the accrediting organization should have the obligation to promptly investigate claims of professional misconduct and act accordingly. Jailhouse lawyers, their clients, other inmates, or facility staff members should be entitled to submit complaints to the accrediting organization, and all qualified jailhouse lawyers must provide reporting information when asked. The information could be widely disseminated in all service contracts and through designated prison staff members. The rule might read:

In all service contracts, I will provide complete information about how to report jailhouse lawyer misconduct. When I have reason to believe that a jailhouse lawyer has violated any of these rules of professional responsibility or has violated a regulation that would reflect on eligibility to serve as a jailhouse lawyer, I will use

---

332. A threatened prison rape, for example, would constitute serious bodily harm under the rule.

333. Law Clerk Agreement, *supra* note 241, § 3.6. For peer reporting requirements, see, for example, MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (1983) ("A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.")

334. Contents, MODEL RULES OF PROF'L CONDUCT 3 (1983).

the standard reporting process to notify the institution and the certifying organization.

The seven rules explored above are merely starting points. They should be tested and expanded. The proposed standards are a set of ground rules that will be essential to the proper functioning of any program in which jailhouse lawyers assist other inmates with legal matters.

#### F. *Disciplining Certified Jailhouse Lawyers*

Because jailhouse lawyers are bound to a code of ethics, whether printed on the page or not, courts have recognized that they should be disciplined for violations of that code. In the case of *In re Green*, the Eight Circuit explained, “[i]f the courts possess power to discipline and disbar unethical lawyers in the civilian world, certainly they ought to be able to exercise the same power with respect to unethical and irresponsible inmates of prisons who purport to provide legal representation to other inmates.”<sup>335</sup> In accordance with *Green’s* rationale, prison systems and courts have developed various methods of discipline for inmates who engage in legal misconduct.

Many have found monetary fines to be useful tools in regulating the behavior of jailhouse lawyers; for example, the Massachusetts Department of Correction has “developed a disciplinary charge that can be levied against any inmate found to be charging other inmates for legal assistance.”<sup>336</sup> For more serious infractions, courts have seen fit to limit the number of motions filed by particular inmates or prohibit inmates from providing legal representation at all.<sup>337</sup>

In a case where rule violations are not as obvious to a court or governing body, disciplinary decisions will largely depend on complaints filed through standardized reporting procedures. Although briefly addressed above, any such report should be promptly transmitted to both the host facility as well as the certifying organization. Depending on the type of misconduct and the supporting evidence, the organization that certifies qualified jailhouse lawyers should make an effort to determine the utility of investigating the matter further, perhaps by conducting on-site visits with local volunteer attorneys.

Based on the seriousness of the allegation, complaints that could warrant the disbarment of the jailhouse lawyer should result in a hearing before a final determination is made. While in many cases law clerks who are members of

---

335. *In re Green*, 586 F.2d 1247, 1251 (8th Cir. 1978).

336. Mongelli, *supra* note 77, at 279 (citing 103 MASS. CODE REGS. 430.24 ¶ 30 (1991)).

337. *In re Green*, 586 F.2d at 1252 (recognizing the validity of a criminal contempt charge for violating an order that the inmate be “perpetually enjoined and restrained in the future from acting as a ‘writ-writer’ or ‘jailhouse lawyer’ for any other inmate . . . by preparing or assisting in any way, or acting in concert with any other inmate in the preparation of any writ, pleading, motion or other document for use in the United States District Court”).

formalized programs are employees who may be dismissed at the will of the facility, jailhouse lawyers who are certified through the proposed program should not be seen as mere employees. After all, not all positions will be compensated. Instead, the ability to practice jailhouse law under the proposed system is similar to a professional certification that demands a greater degree of protection. Under Terrence Fleming's important proposal, the following administrative safeguards would be necessary in recognition of the jailhouse lawyer's constitutional "right to operate":

advance written notice of the reasons for the proposed suspension or prohibition; an impartial hearing board; the right to call witnesses and present evidence in one's behalf; and a written statement by the hearing board as to the evidence relied upon and the reasons for the action taken.<sup>338</sup>

The organization responsible for the testing and certification of jailhouse lawyers should be responsible for conducting hearings similar to the ones described above. The use of temporary suspensions and local volunteer hearing boards would accommodate the difficulty of acting on complaints. However, it is not anticipated that persons meeting the criteria for certification would be so careless as to place their certification at risk so shortly after obtaining it.

## VI. CONCLUSION

Noted jailhouse lawyer Jerry Rosenberg once said, "[t]o become a lawyer, they oughtta make you do some time in jail."<sup>339</sup> While few licensed attorneys have lived the experience, incarcerated barristers across the nation have a genuine appreciation for the circumstances facing their peers. With adequate resources, qualified jailhouse lawyers often provide their peers with quality legal assistance that few organizations are able to provide because they lack the time, funding, or personnel to fully evaluate individual cases.<sup>340</sup>

In a very real way, these jailhouse lawyers are the only means that inmates have to access the courts in a meaningful manner. With the advent of *Lewis v. Casey*,<sup>341</sup> jailhouse lawyers in a number of states are on the verge of extinction. Stripped of most law materials, these barristers cannot apply their skills. Many have been forced to direct their clients to hurried contractors or paralegals who often demand only cursory descriptions of complex legal problems.<sup>342</sup> A byproduct of eliminating law libraries in prisons is the elimination of jailhouse lawyers. In those institutions where jailhouse lawyers were the only reliable form of inmate legal assistance, law library eliminations have eliminated

---

338. Fleming, *supra* note 69, at 59.

339. STEPHEN BELLO, DOING LIFE: THE EXTRAORDINARY SAGA OF AMERICA'S GREATEST JAILHOUSE LAWYER, at epigraph (1982).

340. Compare *supra* Section III.A, with *supra* Part IV.

341. 518 U.S. 343 (1996).

342. See *supra* Part IV.



adequate inmate access to the courts. When dealing with the fundamental rights of prisoners, it is simply too risky for departments of correction to implement test programs without knowing whether they will succeed. Experiences in Georgia should be telling of these dangers.<sup>343</sup> As the Supreme Court has noted in other contexts, “a right without a remedy is no right at all.”<sup>344</sup>

To accomplish the Court’s objective of providing adequate legal assistance to inmates, this Article has proposed a Jailhouse Lawyer Bar Examination. By its nature, the examination process would eliminate the chance that inmates who cannot reason or read will be certified as jailhouse lawyers. Rather, the closed universe examination would provide a method of identifying truly capable and gifted jailhouse lawyers. Through its compliance with basic standards of professional responsibility, the certification process could address many of the drawbacks that have traditionally dispelled the idea of official recognition. Ultimately, the examination would give prison administrators and inmates alike an independent standard to determine the reliability of a jailhouse lawyer’s legal assistance.

Although there may be a number of lingering questions about the feasibility of administering a national examination in prisons across the nation, the effectiveness of the program will only be as strong as the momentum provided by organizations and volunteers devoted to prisoners’ rights. While prisoners have few supporters, organizations such as the American Civil Liberties Union, the National Lawyers Guild, public defenders’ offices, and law schools offer the foundation for such an accreditation process. By adopting existing models of bar examination grading, it is possible to develop a volunteer program that will meet the small demand created by the inmate population in states where this program may benefit inmates. In this limited context, a very small investment will yield far greater benefits for the prison system as a whole.

At its core, this Article recognizes that there are undeniable benefits produced by the jailhouse lawyer. He is a staple of the American corrections system and offers a method for mediating disputes and building respect among inmates for the rule of law.<sup>345</sup> When reflecting on these numerous benefits provided by the jailhouse lawyer, the following becomes abundantly clear:

[N]ot to license, accredit, regularize, or recognize the inmate litigator seems certain to extend or perpetuate a disadvantage usually situated elsewhere in the criminal justice sequence—a lack of legal representation that helped put them (out of a universe of persons accused of law-breaking) behind bars in the first place.<sup>346</sup>

In state prisons that have eliminated law libraries, or considered taking such action, correctional administrators can implement testing safeguards that

---

343. See *supra* Section IV.A.

344. *Angel v. Burlington*, 330 U.S. 183, 209 (1947) (Rutledge, J., dissenting).

345. See *supra* Part III.

346. *Ralston & Ralston*, *supra* note 22, at 39.

## Jailhouse Lawyer Bar Examination

accurately assess inmates' legal abilities to prevent the extinction of America's jailhouse lawyers.