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The Writ-Writers: Jailhouse Lawyers Right of Meaningful Access to the Courts

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"It is not unusual ... in a subculture created by the criminal law, wherein prisoners exist as creatures of the law, that they should use the law to try to reclaim their previously enjoyed status in society.""}

It is firmly established in our system of justice that prisoners have a constitutional right of meaningful access to the courts which a state may not abridge, impair, or impermissibly burden.2 There has developed within the prison system of the United States a special breed of prisoners who fill a role vital to the exercise of the right of access to the courts. These prisoners are referred to as writ-writers, jailhouse lawyers, counsel substitutes and inmate paralegals.3 The Supreme Court4 has acknowledged a writ-writer’s5 right to assist fellow inmates in their pursuit of legal claims.

Since the Supreme Court has held that in order to ensure a prisoner’s right of access to the courts, states must provide adequate law libraries or alternative means of acquiring legal knowledge.6 However, there are within the prisons “a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, whose intelligence is limited.”7 In addition there are persons of foreign extraction who speak little or no English.8 Without the assistance of a jailhouse lawyer these inmates may never be able to assert their constitutional claims in a court of law.9

Actions brought by writ-writers are generally civil rights claims filed pursuant to 42 U.S.C. § 1983.10 Many of these civil rights claims are not necessari-

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1Larsen, A Prisoner Looks at Writ-Writing, 56 Calif. L. Rev. 343, 347 (1968) [hereinafter cited as Larsen].
5Larsen, supra note 1, at 344 (1968), sets forth the following definitions of a writ-writer:
   (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 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.
In Watts v. Brewer, 588 F.2d 646, 647-48 (8th Cir. 1978) the court defined an inmate writ-writer as a convict who possessed or claimed to possess some knowledge of law and procedure in fields of interest to convicts and held himself out as being ready, willing and able to write writs to the courts on his own behalf.
6Bounds, 430 U.S. 817.
7Johnson, 393 U.S. at 487.
9Johnson, 393 U.S. at 487.
10Rubin, Section 1983: A Limited Access Highway, 52 Am. L. Rev. 977 (1983); Claims under 42 U.S.C. § 1983 consume an excessive amount of judicial time and are filed frequently for reasons unrelated to those asserted and with few exceptions are meritless.
ly filed for purpose of obtaining relief, but are seen as a "no lose" situation for prison inmates, generally filed automatically and *pro se.* As a result the courts are faced with many frivolous and inarticulate claims. Another body of claims which flood the courts are federal habeas corpus actions. These actions are brought to challenge the fact or duration of confinement. Although these *pro se* actions burden the courts, it has been suggested that there is currently a slower rate of increase in the number of such suits. This may be due to the use of trained inmate law clerks in prison law libraries who discourage fellow inmates from filing frivolous law suits. This is probably also due to the action of writ-writers who aid and guide fellow inmates in the pursuit of their legal rights.

Thus, writ-writers may serve to filter out frivolous suits which fellow inmates wish to file. While *pro se* pleadings are judged by less stringent standards, it is still necessary that a prisoner's complaint set forth a nonfrivolous claim meeting all the procedural requirements. An inmate who can assist another with a legal action should be recognized as an asset, rather than hindrance, to the prison administration and to the courts.

Several other factors weigh in favor of permitting inmates to assist one another. Jailhouse lawyers do not have the travel difficulties that outside counsel may have; they are compatible with the prison population and the types of problems that exist in the prison; they are inexpensive; they are able to screen the frivolous claims even more quickly than attorneys.

This comment will focus on the evolution of jailhouse lawyers, the rights they possess and the problems they face in a system that continually seeks to limit their activities.

In 1940 the United States Supreme Court held that a state prison rule abridging or impairing a prisoner's right to apply to the federal courts for a writ of habeas corpus was invalid. This was the first time that the Court recognized that prisoners have a constitutional right of access to the courts. The

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11Id. at 978.
14Id. at 11, col. 2.
16A.B.A. COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES, PROVIDING LEGAL SERVICES TO PRISONERS, 21 (1973) [hereinafter cited as A.B.A. COMMISSION].
17The terms "jailhouse lawyer" and "writ-writer" will be used interchangeably.
18Ex parte Hull, 312 U.S. 546, 549 (1940).
19In the years following *Hull* the Supreme Court has struck down a number of barriers in order to insure meaningful access to the courts: Bruins v. Ohio, 360 U.S. 252 (1959) (indigent prisoners must be allowed to file appeals and habeas corpus petitions without payment of docket fees); Griffin v. Illinois, 351 U.S. 12 (1956) (States must provide indigents with trial transcripts); Douglas v. California, 372 U.S. 353 (1963) (indigent inmate entitled to counsel on appeal from conviction).
Court has since expanded this right.

In *Johnson v. Avery*, the Court struck down a state prison’s regulation which prohibited inmates from assisting each other in preparation of habeas corpus petitions. The Court recognized that without the assistance of jailhouse lawyers, many prisoners would never be able to bring their claims. While the Court noted it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed, prisons may place limitations on the time and location of a prisoner’s activities in preparing for his access to the courts. The prisons “may impose reasonable restrictions and restraints upon the acknowledged propensity of prisoners to abuse both the giving and the seeking of assistance in the preparation of applications for relief.” The Court set forth a standard of reasonableness which prison authorities must follow in decisions that may affect the prisoner’s right of access.

*Johnson* does not assure a jailhouse lawyer the opportunity to assist other inmates. The state must provide some reasonable alternative to assist inmates with their legal concerns, and only then may prison officials suppress the activities of a jailhouse lawyer. While *Johnson* specifically recognizes the right of inmates to associate in the preparation of legal actions, there is no recognized constitutional right for the jailhouse lawyer to provide the services.

In *Wolff v. McDonnell*, the Supreme Court extended the right to assist fellow inmates in the preparation of civil rights actions. The Court expressly recognized that where an illiterate inmate is involved, or “where the complexity of the issue makes it unlikely that the inmate will be able to collect and present evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate,” or be provided with an adequate substitute. Unless the state can demonstrate that its legal assistance program is capable of serving all inmates seeking assistance, it may not foreclose an inmate’s right to obtain that assistance from other prisoners. This is in accord with *Johnson*. The Court also found that the constitutional right of access

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20 *Johnson*, 393 U.S. at 490.
21 *Id.* at 487.
22 *Id.* at 485.
23 *Id.* at 490.
24 *Id.* The Court recognized that some states use public defenders, law students, and volunteers from a local bar association. *Id.* at 489.
27 *Id.* at 570. The substitute would come from the staff or from a sufficiently competent inmate designated by the staff.
28 *Id.* at 580.
29 *Johnson*, 393 U.S. at 490.
has its origin in the due process clause of the fourteenth amendment. This marked an advance in prisoners' rights. By finding the right of access in the fourteenth amendment, the Court strengthened the position of the jailhouse lawyer by providing a constitutional basis to support inmates assisting each other in the pursuit of their claims.

Since the Wolff decision the Supreme Court has stated in Bounds that "[i]t is now established beyond a doubt that prisoners have a constitutional right of access to the courts . . . and this access must be adequate, effective and meaningful." Specifically the Court held that the fundamental constitutional right of access to courts requires prison authorities to assist in preparation and filing of meaningful legal papers. The prison may provide prisoners with adequate law libraries or adequate assistance from persons trained in the law.

The most appealing aspect of Bounds is that the Court did not formulate any rigid rule requiring specific legal access programs. Rather, the Court encouraged local experimentation. However, local experiments are subject to evaluation to determine whether they are in compliance with the set constitutional standards. Law libraries are simply not, in and of themselves, sufficient to provide the right of access to the courts. Since not all prisoners are literate, or literate in English, law libraries and the right to correspond with the courts do not provide meaningful access. Bounds therefore enhances Wolff on the fourteenth amendment issue. Prison authorities must take affirmative steps to assure meaningful access to the courts. While the decision does not actually make a jailhouse lawyer's struggle less burdensome, it allows jailhouse lawyers to function within the prison system.

While it is apparent that an inmate may represent himself in an action brought on his own behalf, the Supreme Court has not addressed the issue of whether jailhouse lawyers have a right to represent other inmates. Johnson and its progeny do recognize that jailhouse lawyers may assist other inmates with their petitions, but the Court did not find an express right to assist. Moreover, Johnson does permit states to provide reasonable alternatives for in-

\[Wolff, 418 U.S. at 579.\]
\[Bounds, 430 U.S. 817, 821-22 (1977).\]
\[Id. at 828.\]
\[Id. at 832.\]
\[Id. at 831. The Court suggested a number of alternatives: \]
\[1. Training inmates as paralegal assistants to work under lawyer's supervision. \]
\[2. Use of paraprofessionals (paralegals) and law students as volunteers or informal clinical programs. \]
\[3. The organization of volunteer attorneys through bar associations or other groups. \]
\[4. The hiring of lawyers on a part-time consultant basis. \]
\[5. The use of full-time staff attorneys. \]
\[Id. at 831.\]
\[G. Alpert, Legal Rights of Prisoners 13 (1978).\]
\[Id.\]
\[Bounds, 430 U.S. at 821.\]
mate legal assistance. In light of *Bounds*, if these reasonable alternatives provide adequate, effective and meaningful access to the courts, *Johnson* provides that restrictions may be placed on a jailhouse lawyer's right to assist others or may be taken away altogether.

One circuit has indirectly addressed the issue of whether jailhouse lawyers have a right to function. It was contended by the prison officials that an inmate who does not have other access to legal assistance has a constitutional right to the assistance of a jailhouse lawyer, but the jailhouse lawyer "has no reciprocal constitutional right to provide service." The court concluded that the contention had "adequate validity," but refused to address the issue. By not providing the reciprocal right of jailhouse lawyers to aid fellow inmates courts would be undermining the decision of *Johnson*. Prison authorities could then restrict the function of jailhouse lawyers, who in turn would have no recourse as they would have no basis to assert their right to assist fellow inmates.

In *Buise v. Hudkins*, an inmate was transferred to another prison. One of his claims was that he had a right to render legal assistance. The court held that although he may have had first amendment associational rights in writing, the prison authorities could show that the writing curb was validly imposed as furthering an objective of prison administration. Therefore, it seems that some courts may be willing to balance the interests of a jailhouse lawyer in providing his service with the interests of the prison in imposing the restrictions.

Even though the Supreme Court has assured prisoners adequate, effective and meaningful access to the courts and has assured jailhouse lawyers a privilege to assist other inmates, the decisions have afforded the lower courts an opportunity to develop a plethora of restrictions inhibiting the effectiveness of jailhouse lawyers. In determining whether many of the restrictions imposed on jailhouse lawyers are valid, it is imperative to establish whether jailhouse lawyers warrant any constitutional protections.

*Gilmore v. Lynch* invalidated a prison regulation limiting the type of law books in the prison libraries. In *Gilmore* the prisoners challenged the regulation on the basis that it denied indigent prisoners access to the courts and

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*a* *Johnson*, 393 U.S. at 490.

*Id.*


*Id.* at 649.

*Id.* The court decided the case on other grounds. See *Fleming*, *supra* note 25, at 44.

*584 F.2d 223* (7th Cir. 1978).

*Id.* at 227.

*Id.* at 231. (The case was remanded to the district court to justify the need for restriction).

*See infra* notes 47 and 48.

denied them equal protection of the law. The court recognized that reasonable access to the courts is a "constitutional imperative." The Supreme Court in Wolff v. McDonnell determined that this right of access to the courts was found in the due process clause of the fourteenth amendment. However, the Court offered no explanation. The court in Gilmore also recognized that under the equal protection clause an indigent and uneducated prisoner has the right to receive an adequate hearing in the courts. Therefore, a jailhouse lawyer may be able, in some circumstances, to assert on due process or equal protection grounds a right to represent a fellow inmate. Such a claim would however have to address the Johnson issue of whether the inmates being assisted had other reasonable means to gain legal aid.

The associational rights provided for in the first amendment have been protected outside the prison's context. The Supreme Court has held that an inmate retains only those first amendment rights which are not "inconsistent with his status as a prisoner or with the legitimate penological objectives of the prison's system."

The first amendment right which is necessarily the most obviously curtailed by imprisonment, is the right of association. "An argument for special restrictions on prisoner's rights must include premises expressing special features of the prison setting." When a prison's regulation restricts first amendment rights, a state's correctional officials must explain the purpose of the policy and must show that it is a necessary restriction. At best the lower courts are willing to balance a jailhouse lawyer's associational rights in writ-writing against legitimate penological objectives.

While some states still find it necessary to limit the associational rights of jailhouse lawyers, other states leave secured their rights to associate. One
such state is Ohio. The Ohio Department of Rehabilitation and Corrections has specifically recognized the right of inmates to assist each other in the preparation of legal documents.\(^\text{58}\)

One district court\(^\text{59}\) has expressed disapproval with a Florida legal assistance plan which incorporated an inadequate law library plan with a trained inmate law clerk program.\(^\text{60}\) The court observed that most prisoners "are totally unequipped, both in terms of their education and their mental capacity, to effectively prepare and file their own meaningful legal papers."\(^\text{61}\)

The Supreme Court has left much room for the states to exercise their own discretion in fashioning legal assistance plans and in restricting jailhouse lawyers. The following sections will trace a number of restrictions which either directly or indirectly inhibit jailhouse lawyers.

A. Reasonable Expectations of Privacy

In *Hudson v. Palmer*, the Supreme Court held that an inmate has no reasonable expectation of privacy in his prison cell which would entitle him to fourth amendment protection against unreasonable searches and seizures.\(^\text{62}\) The Court reasoned that while a prisoner may enjoy many protections of the Constitution, "constraints on inmates, and in some cases the complete withdrawal of certain rights, are justified by considerations underlying our penal system . . . and necessary as a practical matter, to accommodate a myriad of institutional needs and objectives."\(^\text{63}\) Furthermore, a prisoner's expectation of privacy in his cell is not the type of expectation that society is prepared to recognize as reasonable.\(^\text{64}\)

Justice Stevens pointed out a frailty in the majority opinion.\(^\text{65}\) The majority noted that the prison guard "maliciously took and destroyed a quantity of Palmer's property, including legal materials . . . ."\(^\text{66}\) Stevens recognized that

\(\text{documents, but shall not receive any form of compensation; MICH. ADMIN. CODE R. 7966.17 (1977). Residents may obtain legal assistance from other residents if an agreement for that assistance is in writing; N.J. ADMIN. CODE tit. 10A § 31-3.18 (1979). Volunteers may be used for the library staff; N.Y. ADMIN. CODE tit. 9 § 7031.3 (1977). Prisoners shall be permitted to meet for the purpose of discussing and preparing legal matters at times not unduly disruptive of facility routine.}\)

\(\text{\textsuperscript{58}OHIO ADMIN. CODE § 5120-9-48 (1974) Inmates shall be permitted to assist each other in the preparation of legal documents.}\)

\(\text{\textsuperscript{59}Hooks v. Wainwright, 536 F. Supp. 1330 (M.D. Fla. 1982).}\)

\(\text{\textsuperscript{60}Id. at 1346. The Florida Department of Corrections set a policy whereby inmate law clerks were permitted to assist other inmates and at least two inmate clerks were assigned to each new library. FLA. DEPT. OF CORRECTIONS, POLICY AND PROCEDURE DIRECTION ON LAW LIBRARIES NO. 4.10.51 (1979).}\)

\(\text{\textsuperscript{61}Id.}\)

\(\text{\textsuperscript{62}104 S. Ct. 3194, 3198-99 (1984).}\)

\(\text{\textsuperscript{63}Id. at 3199.}\)

\(\text{\textsuperscript{64}Id. at 3199-3200.}\)

\(\text{\textsuperscript{65}Id. at 3207-08 (Stevens, J. concurring in part and dissenting in part).}\)

\(\text{\textsuperscript{66}Id.}\)
Palmer has a possessory interest in the materials seized. This possessory interest coupled with the fact that the fourteenth amendment entitles "a prisoner to reasonable access to legal materials as a corollary of the constitutional right of access to the courts" should entitle Palmer to fourth amendment protections.

In light of the Court's denial of fourth amendment protection to an inmate, a jailhouse lawyer who has in his possession legal materials of another inmate, may be subject to a search of his cell, coupled with a seizure of the legal documents. This would ultimately affect the right of a jailhouse lawyer to assist a fellow inmate.

This decision could ultimately undermine the policies of some states which allow inmates to exchange personal legal materials. Additionally, this ruling could hinder the rights of all inmates to pursue legal actions on their own behalf, while giving prison officials unlimited discretion in searching and seizing materials from an inmate's cell. The Court is clearly infringing upon an inmate's constitutional right of access to the courts and the right of jailhouse lawyers' attempts to assist other inmates in preparation of legal materials.

B. Time, Place and Manner Restrictions

Johnson v. Avery held that a State may impose reasonable restrictions and restraints on prisoners who give or seek assistance in the preparation of legal documents. One such restriction may place "limitations on the time and location of such activities."

Sostre v. McGinnis dealt with a challenge to a number of prison regulations, two of which involved the manner in which legal assistance was to be given. The first regulation required prisoners to apply to the warden for permission to help each other with legal matters. This regulation was held to be within the Supreme Court's ruling in Johnson. This regulation was held to be a reasonable way to regulate the prisoner's rights. If the warden refused to grant the rights or placed unreasonable restrictions on the rights, this action.

4Id. at 3209-11. (Stevens recognized that while prison authorities may have the authority to search a prisoner's cell, seizure of an inmate's property implicates the inmate's possessory interest in that property. He felt that this possessory interest implicated Palmer's fourth amendment rights.)

5Id. at 3211.

6The following states have by administrative regulations afforded inmates the right to exchange and possess a fellow inmate's legal materials: Cal. Admin. Code tit. 15 § 3163 (1982) (Legal papers, books, opinions and forms being used by one inmate to assist another may be in the possession of either inmate with the permission of the owner); N.Y. Admin. Code tit. 9 § 7031.3 (1977) (Consenting prisoners shall be allowed to exchange personal legal materials).

7393 U.S. at 490.

8Id. Cf. Hatfield v. Bailleaux, 290 F.2d 632 (9th Cir. 1961).

9442 F.2d 178 (2nd Cir. 1971).

10Id. at 201.
would constitute a violation of *Johnson.*

The second regulation challenged prohibited prisoners from sharing their personal law books with one another. The court noted that the regulation would not prohibit an inmate from recommending legal source material to other inmates. The prison officials provided reasonable alternatives which allowed inmates to acquire law books. The prison officials justified the restrictions stressing their concern that "strong-willed inmates might exact bidders and perhaps non-monetary fees in return for nominally free privileges at the inmate's private lending library."

*Buise v. Hudkins* established that it would be possible to develop justifications for restricting at least certain types of inmate lawyering under certain circumstances: "an inmate has no right to be a writ writer during times when he is assigned to do other work." There is support for restricting the time when a jailhouse lawyer may operate. These regulations would most probably be based on the maintenance of prison security.

C. Restrictions on Prisoners in Segregation Units

Prisoners may be denied the giving or receiving of legal assistance when they have been placed in a segregation unit due to violations of prison regulations. In *Simmons v. Russel* plaintiffs claimed that, while in segregation, they were entitled to confer and obtain legal assistance from a fellow inmate, a jailhouse lawyer. The court found this position untenable; "an inmate by his misconduct may forfeit his role as jailhouse lawyer."

When an inmate in solitary confinement seeks to invoke his right to obtain legal assistance from other inmates, "[u]nless and until the State provides some reasonable alternative to assist inmates" in solitary confinement, the prison "may not enforce a regulation . . . barring inmates from furnishing such assistance." In *Rudolph v. Locke* the prison attempted to base the regulation on the bare assertion that even though the regulation infringed on constitutionally protected rights, it was necessary to maintain security in the segregation units. The court held that the prison officials must show that the regula-

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"Id." at 202.

"Id. at 202.

"Id. at 202.

\[584 F.2d 223, 231 (7th Cir. 1978)\], (citing Beathan v. Manson, 369 F. Supp. 783 (D. Conn. 1973)).

\[352 F. Supp. 572, 579 n. 7 (M.D. Pa. 1972)\].

"Id. The court noted that this position was not dispositive in this case because the inmates were denied all legal assistance. The prison did, however, change its policy in segregation units to allow unlimited access to legal materials. *But cf.: In re Marcel*, 2 Cal. 3d 675, 470 P.2d 640, 87 Cal. Rptr. 504 (1970), Prison’s policy, which did not permit an inmate to assist those in isolated confinement, hampered the legal assistance to those special status inmates, but underlying security and disciplinary reasons sustained the policy.

"Rudolph v. Locke, 594 F.2d 1076, 1078 (5th Cir. 1979) (citing Johnson v. Avery 393 U.S. 483 (1969)).

"Id."
tions further legitimate penological objectives. 82

In *Nadeau v. Helgemoe* 83 the First Circuit held that a state’s power to make a distinction between prisoners in protective custody and those in the general population must be based on rational rather than arbitrary and capricious reasons. The court rejected a penological purposes test as being counterproductive, 84 and simply adopted a common sense approach. Library access of the inmates in protective custody was severely limited. Recognizing that the cost to the state would be negligible, an expanded library schedule was mandated to ensure the inmates’ constitutional rights. 85

Thus, while a prisoner in a segregation unit may not be given the full rights of a prisoner in the general population, he is still to be afforded his constitutional right of access to the courts. Additionally, he may retain his right to assistance from a jailhouse lawyer where the prison does not provide adequate alternative means of legal assistance. The exercise of these rights, however, must still be balanced with the prison’s interest in maintaining security and discipline.

D. Restrictions on Interinstitutional Communications

Prisoners have a constitutionally protected right to communicate with persons outside the prison through reasonable correspondence. 86 Correspondence to the courts and attorneys from a prisoner may not be read or censored; 87 however, a prison may set regulations which permit the opening of mail from the courts or attorneys in the inmate’s presence to check for authenticity or contraband. 88 Correspondence between inmates at different penal institutions may be denied or limited. 89

In *Heft v. Carlson* 90 an inmate brought an action against officials of another prison for alleged interference with his mail. The correspondence was found to be hostile in nature and was largely concerned with seeking legal advice on how to sue prison officials. 91 The Fifth Circuit noted that “it is firmly

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82 Id. The court noted that specific evidence is necessary to support the assertion.
83 561 F.2d 411 (1st Cir. 1977).
84 Id. at 417. The state could meet the test’s requirements by abolishing the privileges of the general population and thus not having to afford those privileges to inmates in protective custody.
85 Id. at 418.
87 See Heft v. Carlson, 489 F.2d 268, 269 (5th Cir. 1973).
88 See Wolff v. McDonnell, 418 U.S. 539, 576-77 (1974); Jones v. Diamond, 594 F.2d 997, 1014 (5th Cir. 1974). Mail from prisoner to courts or attorney may not be opened; mail addressed to prisoner may be opened in prisoner’s presence to determine authenticity and to inspect for contraband.
89 See Heft v. Carlson, 489 F.2d 268.
90 Id. Heft challenged the guidelines set by the prison officials claiming that the interference with his mail denied him the opportunity to share religious views, experiences and ideas with inmates in another prison.
91 Id.
established that prison authorities have the right and responsibility to regulate correspondence of inmates.\textsuperscript{92} The court seems to allow prison officials to limit an inmate's access to the courts by condoning regulations which limit his right to interprison correspondence. The court did not enunciate any firm security or disciplinary reasons for limiting this correspondence. This ruling could ultimately affect a jailhouse attorney's right to seek advice from and aid inmates in other penal institutions.

It has been recognized that \textit{Johnson v. Avery} does not sanction interprison legal aid among prisoners.\textsuperscript{93} The Second Circuit noted that some "slight incremental value might be discerned were the right of access to courts extended" so that a jailhouse lawyer had a right to represent inmates wherever they are incarcerated.\textsuperscript{94} This right, however, must be weighed with the added interference with prison security and discipline which could result if this right existed.\textsuperscript{95} In this instance the interests of prison administration would outweigh the rights of the jailhouse lawyers. However, this does not mean that in some circumstances such a right could be afforded a jailhouse lawyer.\textsuperscript{96}

E. Restrictions Prohibiting the Practice of Jailhouse Law For Profit

\textit{Johnson v. Avery} suggested that states may impose reasonable restrictions and restraints and may even punish jailhouse lawyers who give or receive consideration in connection with their activities.\textsuperscript{97} Some states have enacted administrative regulations which expressly preclude a jailhouse lawyer from receiving any type of fee for his services.\textsuperscript{98} The purpose of these regulations is an attempt to restrain certain jailhouse lawyers who practice favoritism, bribery and physical abuse upon illiterate and ignorant prisoners desiring legal assistance.\textsuperscript{99} Charging fees could result in serious security and disciplinary problems.

While jailhouse lawyers are not supposed to receive any consideration for their services, it is well documented that they actually do.\textsuperscript{100} From a jailhouse
lawyer's standpoint, the "practice of law" inside a prison can be a quite lucrative venture. One jailhouse lawyer in a state prison in Michigan boasts four-figure salaries and outside bank accounts with five-figure balances. 101

A major problem with this type of representation is that it is "unclear... where the legal assistance of one inmate to another ends and the unauthorized practices of law begins."102 It may be that the work of a jailhouse lawyer is "an exception to the strictures prohibiting the unauthorized practice of law because the service is not available to the prisoners."103 However, the acceptance of fees by jailhouse lawyers would violate statutes in many states.104 While the jailhouse lawyer serves an important function within the legal system, the acceptance of consideration for his services not only places undue disciplinary and security risks on the prison administration, but also creates severe ethical problems with which the legislature, the judiciary and the bar will ultimately have to come to terms.

F. Restrictions on Representation by Non-party Jailhouse Lawyers

The federal courts generally deny requests for third-party lay representation.105 A person may appear in federal court pro se or through legal counsel.106 Thus, an inmate has the option of proceeding pro se or seeking the aid of an attorney.

In Herrera-Venegas v. Sanchez-Rivera a non-lawyer prisoner (jailhouse lawyer) asked that he be permitted to appear as "Para-legal Counsel" in an appeal brought by two fellow inmates.107 The First Circuit drew a distinction between the right to "in house" assistance and "in house" representation in court.108 A party may be bound or have rights waived by a legal representative. If the legal representative is not an attorney, the court would have no grounds on which to base a determination that the representative possessed the requisite character, knowledge and training essential for undertaking such responsibility.109 The non-lawyer prisoner was not permitted to appear on behalf of his...
companions; however the court made it clear that its decision in no way affected the right to give legal advice or assistance. 110

It has been recognized that "with one narrow exception only licensed lawyers may represent others in court." 111 The exception is supported by Johnson v. Avery. A jailhouse lawyer may help fellow prisoners file initial papers in a habeas corpus or civil action. This is premised on the fact that the state has not provided reasonable alternative legal assistance. 112 The court in Thomas v. Estelle held that it was without jurisdiction to consider the assertions made on behalf of a prisoner who was represented by a jailhouse lawyer who was not licensed to practice law. 113 However, this is not a hard and fast rule. Some jailhouse lawyers have been permitted to argue their own cases and those of their "clients" before federal and state supreme courts. 114

G. Retaliation Against Jailhouse Lawyers By Prison Administrations

Since prisoners have a constitutional right of access to the courts and jailhouse lawyers are permitted to assist fellow inmates, 115 they should not be subject to punishment for exercising that right. 116 Johnson v. Avery held that even in the absence of reasonable alternatives of legal assistance, a state may impose reasonable restrictions and restraints upon prisoners seeking to give and receive legal assistance. 117 However, this must be balanced with a prisoner's right to petition the Government for redress of grievances.

Jailhouse lawyers have standing to challenge official action that prevents them from assisting the prisoners. 118 If a prisoner is subject to punishment or threats of punishment for filing complaints to the court, his first amendment right to voice legitimate complaints is actually being chilled which ultimately results in a form of deterrent censorship. 119

110 Id. The court further opined that the individual inmates bringing the action must take legal responsibility for and must seize all papers filed relative to their case.
111 Thomas v. Estelle, 603 F.2d 488, 489 (5th Cir. 1979).
112 Id.
113 Id.
117 393 U.S. at 490.
118 Rhodes v. Robinson, 612 F.2d 766, 769 (3d Cir. 1979). Prisoner who worked in prison law library had standing to object to restrictions on his duties prohibiting him from assisting other prisoners in the preparation of their legal documents; Wilson v. Iowa, 636 F.2d 1166, 1167 (8th Cir. 1981) Prisoner alleged he was illegally punished for disobeying warden's order prohibiting him from assisting other inmates in preparing legal documents — stated a cause of action; Milhouse v. Carlson, 652 F.2d 371 (3rd Cir. 1981). Prisoner stated claim for relief on theory that he was subject to conspiratorily planned series of disciplinary actions as retaliation for initiating a civil rights suit against prison officials.
Claims of retaliation are generally precipitated where a jailhouse lawyer is reassigned to work in a different capacity within a prison or where he is transferred to another prison.

In *Bryan v. Werner* an inmate claimed that he was constitutionally entitled a hearing before he could be reassigned from the Resident Law Clinic to Inside Lawn Duty. His claim was based on the proposition that an inmate's expectation of keeping a particular job is either a property or liberty interest entitled to protection under the due process clause. The court held that since his transfer neither affected his period of confinement nor resulted in a more restricted confinement, his liberty interests were not impaired.

If an inmate asserts that his transfer to another prison was in retaliation for his practice of jailhouse law, he faces a substantial burden of proof. Generally a prisoner has no right to remain at any particular prison. Additionally, a prisoner is not entitled to any procedural protections if his transfer is classified as purely administrative.

*McDonald v. Hall* held that a prisoner may state a claim if he can show that the decision to transfer him was made by reason of his exercise of constitutionally protected first amendment freedoms. This places a substantial burden of proof on the jailhouse lawyer. He must prove that the motivation for his transfer was his exercise of first amendment rights and that he would not have been transferred "but for" the alleged reason. While a jailhouse lawyer may have first amendment associational rights in assisting other inmates and speech rights in challenging prison conditions, the prison administrators may make a showing that the transfer or other alleged retaliatory actions were validly imposed as an objective of prison administration. Thus a jailhouse lawyer who attempts to challenge alleged retaliatory actions of prison administrators.

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120 Bryan v. Werner, 516 F.2d 233 (3d Cir. 1975).
121 See, eg., McDonald v. Hall, 610 F.2d 16 (1st Cir. 1979).
122 516 F.2d 233, 240 (3rd Cir. 1975).
123 Citing Board of Regents v. Roth, 408 U.S. 564 (1972).
124 Id. (In this case it seems clear that the inmates transfer was based in part on his functioning as a jailhouse lawyer).
126 Id.
127 610 F.2d 16, 18 (1st Cir. 1979).
128 Id.
129 Id. The United States Supreme Court has set a special burden of proof in retaliation cases. Once a showing of unconstitutional motivation has been made, the burden shifts to the defendant to show that the court would have reached the same conclusions based on other legitimate considerations. Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1979); See also Fleming supra note 25, at 50-52.
130 See 393 U.S. 483.
132 584 F.2d at 231.
administrators is faced with difficult problems of proof.

In certain circumstances the courts may step in and take action against a jailhouse lawyer. One infamous jailhouse lawyer, who has filed upwards of seven hundred actions, has caused a number of circuit courts and one district court to take extraordinary steps to halt the jailhouse lawyer's abuse of the legal system. The court noted that the right of access to the courts has never been held to be absolute or unconditional. The touchstone is meaningful access, not unlimited access. Where a jailhouse lawyer abuses the judicial process a court may fashion necessary restrictions to assure that the docket is not overburdened by frivolous claims.

**CONCLUSION**

Jailhouse lawyers have become an integral part of the prison legal system. While *Johnson v. Avery* provided that inmates may give legal assistance to fellow inmates, the Court also held that, if a prison provides reasonable alternative means of legal assistance, the activities of jailhouse lawyers may be limited or prohibited. The *Bounds* decision stressed that a prisoner's constitutional right of access to the courts "must be adequate, effective and meaningful." The Court estimated that as few as five hundred full-time lawyers could meet the needs of the entire national prison system. This seems to be a rather unreasonable figure. The large number of prisoners in the system, coupled with the fact that many are indigent, illiterate, uneducated and of foreign extraction with limited command of the English language, indicate that attorneys alone could not meet the demands for legal assistance. Additionally, since the Supreme Court has not recognized a constitutional right to appointed counsel for discretionary appeals, the demands on staff legal counsel at a prison would be tremendous.

While *Bounds* encouraged local experimentation in providing legal assistance to inmates, a recent survey reflects that local experimentation is not an effective approach. There are a number of alternatives which prison authorities may utilize in complying with the mandates of *Bounds*. These alternatives include full-time staff attorneys, part-time attorneys, volunteer pro-

134Id. at 370, citing 393 U.S. at 490.
135Id.
136Id. at 821-822.
grams, public defender or legal groups, paralegal assistance, law students, law school clinical programs and jailhouse lawyers. The survey, however, reflects wide variations in levels of compliance with Bounds. Some institutions provide minimal library services with no trained personnel, other supply full-time staff to provide assistance. Institutions tend to interpret meaningful access to the courts in a manner which provides the path of least resistance.

The area of prisoners' rights has expanded to a point where there are a number of publications which provide inmates with source material to help them define their legal claims and to secure an adequate means of filing the necessary documents. An inmate should be able to bring claims to challenge the constitutionality of the procedures used to convict him and to challenge the conditions of his imprisonment.

One of the best resources to tap would be inmates willing to assist other inmates with their legal actions. Also, inmates are in the best position to bring actions challenging prison conditions and treatment of prisoners since they have first-hand knowledge of the situation.

A program of legal assistance which incorporates jailhouse lawyers could eliminate many of the problems associated with present jailhouse practice. Such a program would have to provide adequate legal education and supervision from outside attorneys.

The main problem with the practice of jailhouse lawyering is that it has the appearance of the practice of law without a license. Permitting a non-lawyer inmate to appear on behalf of his "client" inmate poses a serious dilemma. If an inmate is in a situation where he has a valid claim, but he cannot articulate that claim and cannot obtain legal counsel to represent him, he should not be precluded from bringing that action.

A vital part of an inmate's adequate, effective and meaningful access to the courts is the adequate, effective and meaningful presentation of the claim. If that inmate must resort to a jailhouse lawyer for legal assistance, he should be permitted to have that jailhouse lawyer present his claim before the courts. While this is a controversial position, until our legal system can devise an adequate system of protecting the constitutional rights of prisoners, jailhouse lawyers should be permitted to assist or represent "client" inmates.

144 Ducey, supra note 3, at 100-103, app. B.
145 Id.
146 ROBBINS, PRISONERS' RIGHTS SOURCEBOOK (1980); MANVILLE, PRISONER'S SELF-HELP LITIGATION MANUAL (1983).
147 See Johnson, 393 U.S. at 488.
In reaching this conclusion, one must balance certain factors. The mere fact that a person has been sentenced to serve a term of years in prison does not subject him to the loss of all his constitutional rights. The constitutional rights of an individual should be zealously protected. If it takes the representation of a jailhouse lawyer to vindicate the constitutional rights of a prisoner, then the judiciary should be receptive to such a proposal. If such a position is untenable, then it should be the duty of the legislature and the judiciary to fashion a system that provides for protection of the constitutional rights of all.

There have been numerous proposals for minimum standards which would lead to an accreditation procedure for prisons. By setting minimum standards, prisoners' right of access to the courts could be monitored by federal or state agencies. Since local experimentation as suggested in Bounds has lead to varied and in many instances inadequate or nonexistent legal assistance to inmates, federal or state standards should be adopted and applied to the prison system. Until such a system can be put in place, it must be emphasized that jailhouse lawyers play a vital role in providing adequate, effective and meaningful access to the courts, not only for themselves but also for the large number of inmates who do not possess the capabilities to articulate their own claims. Jailhouse lawyers also serve as watchdogs overseeing the living conditions of prisons and alert to abuses by prison administrations. It is imperative that jailhouse lawyers continue in their role to assure that the constitutional rights of prisoners in this country are safeguarded.

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149 Ducey, supra at 57, n. 44, 57-60.
150 Id.