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**LEGAL ACCESS FOR PRISONERS: AN ASSESSMENT
OF THE LEGAL CONSTRUCTION OF REALITY BASED
ON CRITERIA MANDATED BY THE FEDERAL COURT
OF THE WESTERN DISTRICT OF MICHIGAN**

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DONALD KALL LOPER

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MICHIGAN.**

By

Donald Kall Loper

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ABSTRACT

LEGAL ACCESS FOR PRISONERS: AN ASSESSMENT OF THE LEGAL CONSTRUCTION OF REALITY BASED ON CRITERIA MANDATED BY THE FEDERAL COURT OF THE WESTERN DISTRICT OF MICHIGAN.

By

Donald Kall Loper

This thesis uses social construction theory to examine the issue of inmate access to the courts. Through an examination of relevant case law and statutes, this thesis establishes the current construction of prisoner access to the courts. Because the case law and thus the legal construction of reality vary from jurisdiction to jurisdiction, this thesis uses only mandatory authority and persuasive authority with direct relevance to a precedential case in the Western District of Michigan. This resulting statement of reality is compared to an examination of prisoners (N=1715) screened for impairments defined by the Western District. The resulting comparison shows that 468 prisoners have some form of impairment that could impair the inmate's ability to achieve meaning access to the courts. During the six months examined in this thesis, 38 of these impaired inmates presented a meritorious claim.

The methods used in this thesis include a combination of quantitative categorical data with a qualitative analysis. The screening for impairment was conducted by the Michigan Department of Corrections pursuant to an order from the Court of the Western District of Michigan. The screening combined interviews, review of records, educational assessment, and clinical evaluation.

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INTRODUCTION

Introduction to the Issue

Since the introduction of prisons in the United States, the courts have maintained a “hands off” policy toward corrections. The “hands off” doctrine essentially precluded intrusion into the realm of prison official’s expertise by the courts except in the most extreme cases (Cripe, 1997). During the 1960s and 1970s, the civil rights movement in free society entered the prisons. Prisoners began demanding basic Constitutional rights, and the courts began the gradual expansion of the rights of prisoners. The “hands off” doctrine rapidly evolved, through a series of progressively intrusive decisions, to a standard that required correctional officials to justify policies that restrict Constitutional rights. For example, prison officials can rightfully restrict an inmate’s Second Amendment right to bear arms. However, a prison official cannot restrict an inmate’s right to freedom of religion without demonstrating how the practice of that religion interferes with legitimate correctional goals such as security or rehabilitation. This evolving standard of treatment has caused considerable change in the prison environment, and this change has been the subject of research by social scientists. Much of the literature on prisoners’ rights notes these changes in a historical sense, but leaves analysis of cause at the strictly legal level (Palmer, 1991; Sullivan, 1975). By limiting the analysis to the abstract right of access to the courts, this thesis examines a specific legal fiction of corrections that illustrates the mechanism of the legal construction of reality in corrections. For the purposes of this thesis, ‘legal construction’ refers to the products of the judiciary rather than the legislative branch.

A review of the literature on prisoners' rights suggests that the study of the mechanism of change has been deferred to legal analysis rather than social scientific analysis (Barkin, 1968; Palmer, 1991; Pollock, 1997). Under conventional structural frameworks, legal analysis was sufficient. Given a structural framework, this seems most reasonable. For instance, a prisoner challenges a policy. If the courts uphold the challenge, an order is issued to remedy that policy. There is little opportunity for examination beyond understanding the law and how the agency implements the court's order. All of the issues involved are decided on their legal merits with no recourse to empirical study. This fact presents a considerable challenge to establishing an understanding of prisoners' rights outside of a strictly legal context. To meet this challenge, this work will use legal scholarship to define and establish the phenomena to be studied and borrow standards already established by the courts. However, this analysis departs from standard legal research in that it explicitly acknowledges the legal fictions that produce rights and the nature of those rights as socially constructed phenomena.

In the broadest terms, the construct of interest in this thesis is prisoners' rights. Rights can be granted by the Constitution, by statute, or case law (Palmer, 1991). Political theory describes the way in which these rights come into being (Tushnet, 1982). Legal theory describes the definition of rights in the court (Eastman, 1988). Social science usually reserves analysis for the effects of these rights (Alpert, 1982). In this work, social construction is used to explore the mechanism of the creation of a legal fiction and its evolution into legally mandated reality without attempting to artificially separate legal cause from empirical effect. Since it is beyond the scope of this thesis to

examine all of the rights granted to prisoners, the specific construct of interest must be restricted to a single right.

Along with several rights enjoyed by the free world population, prisoners have been granted rights that are unique to an incarcerated population. These rights are often meta-rights¹ that are required to make use of other rights. Other such unique rights serve to protect prisoners as a population that is particularly vulnerable to abuse by the government. Access to the courts is an example of such a “meta-right.” The right of access to the courts does not appear in the Constitution or in Federal statute; however, the courts have cited a loose interpretation of several amendments to justify it. Without access to the courts, the prisoner’s sole recourse to vindicate other rights is the benevolence of the institutional officials or help from an outside, *ex parte*, action. As such, all other rights of prisoners are subsequent to access to the courts.

Introduction to the Theory

This unique “priority” among rights makes access to the courts an excellent basis from which to explore the mechanism by which prisoners’ rights are created and defined and the legal fictions upon which they are based. Recent developments in the right of access to the courts actually emphasize this point by requiring the courts to look outside of the courtroom to assess the adequacy of rulings regarding the right. Briefly, the right of access requires that all prisoners be able to bring non-frivolous complaints to the courts in such a manner that they are recognizable and meet minimum standards of legal procedure. Formerly, the Supreme Court had ruled that access to a law library and non-interference on the part of prison officials assured adequate access to the courts. The

development of this meta-right illustrates the court's role in creating legal reality. Social science can expand understanding of this phenomena using Berger and Luckmann's (1966) formulation of social construction. In *Bounds v. Smith*², the Supreme Court mandated a particular construction of the reality of the right of access to the courts in stating that a law library and non-interference was sufficient to allow access to the courts. From the time of the ruling until it is expanded or overturned, it is reality for all cases involving access to the courts. For years *Bounds* produced subsequent reality in policy and mechanisms for challenging conditions of confinement. Recent developments in the debate surrounding access to the courts call into question the adequacy of the old standard in providing access for inmates unable to make use of the law library for reasons of policy or impairment on the part of the inmate. The construction of adequate access has been challenged with the empirically verifiable presence of impairment.

Social construction perspective seems ideally suited to any discussion of the legal system. Law is a construct of the society in which it exists. It has an existence and impact on the members of society regardless of their feelings or even their knowledge of the law. A review of the literature shows that there has been no specific development of the conceptualization of law as a social construct as defined by Berger and Luckmann (1966). It may seem almost self-evident that law is created by society, but theories regarding natural law and variations of religious law show that it may not necessarily be so. Natural law proposes a Platonic archetype of law and freedom which civil law approximates (Rousseau, 1954-1763; Locke, 1964-1698). These natural laws and rights associated with them simply exist. Man discovers these laws by applying reason to his native moral sense (Black, Nolan, & Nolan-Haley, 1990). Religious law is by definition

derived from a supernatural source or earthly agency of a supernatural force (Black, Nolan, & Nolan-Haley, 1990). While there has been no specific development of law as a social construct *per se*, many authors have used constructionism to model the workings of criminal courts (McConville & Mirsky, 1995; Jacobs & Fuller, 1986; Ryan & Alfini, 1979). Others have used constructionism to redefine legally recognized statuses into more meaningful descriptions. Gender and sexuality in the context of punishment and social control are explored as legally defining variables in corrections and punishment predating formal corrections (Brown, 1995; Eigenberg, 1992). Mental illness, another status with legal significance, has been reconceptualized or critiqued using a constructionist perspective (Pfohl, 1976; Scheid & Teresa, 1993; Warren, 1979). In all, the literature shows a rich method for the exploration of complicated social variables and their use in the legal process. The literature does not show a direct analysis of law as a social construct and the meaning attached to rights granted by law.

The law offers a well-defined and documented construction of reality. Using this feature of law, this work first defines the legal reality of access to the courts through a review of case law and law review articles. This analysis culminates in a statement of current law regarding access to the courts for prisoners. From this assertion of legal reality, the question of impairment among the inmate population is introduced and established as a challenge to the accepted legal realities of the issue. Rather than relying on the court to repair or reconstruct the reality of access through a ruling, this thesis develops an empirical assessment of the legal fiction of inmate access to the courts. The entire population of a close security prison is screened for impairments that preclude access to the courts under the standard of law libraries and non-interference. It is beyond

the scope of this work to provide an empirical validation of the standards of impairment; thus, the reality of impairment established by the courts will be used to define impairment. The findings of this screening are discussed in terms of constructionism and in terms of policy intervention based on an understanding of the construction of the issue. It is hoped that analysis based on an established social science theory rather than simply a legal analysis will yield a deeper understanding of the process by which this right and rights in general are created. Further, this new understanding should provide an innovative solution to old policy problems. Having established the proposed mechanisms by which this thesis will examine the issue of prisoner access to the courts, there remains only the setting or case that acts as a basis for this inquiry.

Introduction to the Research

In crafting a decision, the judge must act as if the available (and allowable) information is a sufficient basis for a rational decision. In the *Knop* case, as in many others, the court was forced to rely on two sources of conflicting information- the parties to the case. Although the court's decision is considered to be well crafted by appellant and appellee alike, it is hampered by the process that created it. The decision of the court is the authority on the legality of a question, but the court cannot reliably address the effect of a decision upon reality. In this case, the ultimate question, as defined in *Bounds* is "meaningful access" with the additional requirement of providing that meaningful access to all prisoners regardless of impairment or literacy. The true measure of this goal is not whether the parties are satisfied or whether the letter, or even the spirit, of the law is fulfilled; rather, it is whether prisoners have actually achieved meaningful access to the courts. Based on this understanding, it seems that social science research is the most

appropriate method to explore whether meaningful access is a reality or just a legally viable fiction.

It sometimes falls within the power of the judge deciding a civil case to order just such an examination. The research presented in this work represents the results of that examination. The interim decision of the *Knop* court required that the Michigan Department of Corrections conduct a six-month pilot program to determine the applicability of the proposed system of assistance to specific classes of prisoners. This pilot program allowed an unprecedented level of data collection. However, it must be stressed that the pilot program did not determine if effective assistance could be provided by the system created. That point was determined solely on legal merits. As the respondent to the actions brought by prisoners with access to the court, the Michigan Department of Corrections was not allowed to collect data about impending actions. Such actions are protected by law from mandatory disclosure to the Department of Corrections. In effect, such mandatory disclosure, necessary for proper research of the question of effective assistance, would have violated other, more concretely established rights of the claimant prisoner. Thus, the research could not directly measure the effectiveness of inmates seeking access to the courts because the state could only be aware of successful claims, not the ones that were dismissed or were never made.

Based on the needs of the Michigan Department of Corrections and the order of the *Knop* court, the pilot program evaluation³ addressed four basic questions. 1) How many prisoners in the plaintiff class are actually eligible for special assistance? 2) Under which categories are they eligible? 3) How many eligible claims will this group present during a six month period? 4) Can enough prisoners be trained to provide such assistance

in a manner acceptable to the *Knop* court and the Michigan Department of Corrections? To the Court, the pilot represented a chance for adversarial parties to make specific attacks and defenses based on the facts of the pilot rather than courtroom speculation. It was the avowed intention of the Court for the pilot to provide the basis for a compromise on details of the wholesale implementation of a program of assistance.

This thesis is intended to present the findings of the pilot to a wider audience in an attempt to begin to fill in the lack of information available in the social science literature base regarding prisoner access to the courts. Social construction perspective is best suited to examine the relationship between legally constructed reality (i.e., the law regarding access to the courts) and obdurate reality (i.e., the characteristics of prisoners which may render them unable to exercise legally constructed rights as understood by the courts). An added benefit of social construction perspective is its ability to define non-dichotomous concepts and explain the relationships between such variables without redefining the issue out of context or artificially impose crisp distinctions. Specifically, this thesis will use data on prisoner impairments collected in the natural setting to prove that there is significant disparity between the legally constructed right of access to the courts and the ability of impaired prisoners to achieve equal access.

Endnotes for Chapter 1, Introduction—————

¹ The term “meta-right” addresses the concept of a right that facilitates other rights with real world application. For instance, the right to due process applied only in conjunction with a separate violation. All persons are not at all times entitled to due process; rather, due process attaches to proceedings stemming from a real world cause.

² *Bounds v. Smith*, 430 U.S. 817 (1977).

³ It must be noted that the court ordered data collection and evaluation referred to as the “pilot program evaluation” does not conform to the usual social science notion of program evaluation. The goal of the program was the production of information for use in court, not the work product of the legal writers or a direct measure of access to the courts.

LITERATURE REVIEW

Applicability of the Theory

The law has often been explored by sociologists. Durkheim conceptualized law as a viable means to distinguish the nature of societies in *The Division of Labor in Society* (1893/1984). His first major work used the nature of laws, retributive or restorative, to distinguish the type of solidarity that binds the particular society in question. Durkheim's work is typical of the sociology of law in that it uses law as an indicator of reality rather than studying it as a reality in itself. As with the sociology of knowledge (the parent of social construction) fixating on ideology, the sociology of law studies the actors, roles, and even the effects of law rather than the process by which law creates reality¹. The actors involved in the process of law seek an outcome. It is understandable that their interest would lie at a very utilitarian level. Actors play the role of advocate for lay people with real world interests in outcomes rather than process, so long as the process is deemed "fair"². Given this nature of the legal process, the obvious direction for sociology of law tends toward either structural functional or structural inequality analysis of law. Not surprisingly, structural functionalists see the process as essentially workable and seek to understand its workings, and conflict scholars steeped in structural inequality examine the social control exerted by oppressive hegemonies upon vulnerable classes, genders, and other minority power groups. Both groups assume that law is reality.

The structural functional framework provides an incomplete or idiosyncratic understanding of law that may be internally consistent, but less than useful in understanding law as a social construct. A procedural framework describes such an understanding. Laws are created by courts or legislatures and enacted upon society by

the executive. This framework leads to questions of implementation at the expense of understanding. Research in this framework is the leading form published in the criminal justice literature base. Many works simply attempt to report the decisions of the courts and explain the implications of those decisions to practitioners (Call, 1995; Cripe, 1997; Palmer, 1991; Sullivan, 1975). The intent of these works is to facilitate the appropriate implementation of the law rather than understand it. There is little if any development of the effects that the given law will have upon society. Other sources take an instrumental approach to understanding law. Simply put, laws are not the subject of study. Social action produced by law is emphasized. An instrumental approach concentrates solely upon the observable effects of law. Silberman (1992; 1994) addresses the relationship between inmate violence and access to the courts as a means of dispute resolution. The law and the mechanism by which it effects prisoners are not at issue. Silberman focuses on the right of access to the courts as a means to redress grievances, which in turn reduces tension among prisoners.

Conflict ideology and Marxist perspective provide extensive critique of the power imbalance between keeper and kept. However, there is little material available for conflict in power differentials within the walls of prison. Conflict based analysis invariably turns to greater society as the breeding ground of power inequities which reach their ultimate conclusion within the walls of prison (Lynch & Groves, 1989). There is no specific treatment of prisoners' right of access in the Conflict literature base, but more general critiques of prisoners rights depict them as illusory and insufficient for social justice. Although each of the preceding frameworks has merits, they do not address the nature of law as a construct of society subject to the differing perceptions of opposing

stakeholders (Palumbo & Petersen, 1994). On the surface conflict theory offers a similar interpretation of the nature of law as social construct. However, Conflict ideology differs in that it presents a static version of law controlled by dominant power groups. Social construction unmodified by conflict ideology makes no static attribution of power. Thus, analysis guided by social construction perspective is able to better interpret dynamic power relationships such as those presented in the issue of access to the courts litigation. To address the operation of prisoners' rights and by extension the operation of the rights of all persons, these other frameworks will be dispensed with in favor of a constructionist framework.

Constructionist theory is based on the work of Berger and Luckmann in *The Social Construction of Reality: A Treatise on the Sociology of Knowledge* (1967). In *Social Construction*, Berger and Luckmann examine the "everyday knowledge" of our common sense world. Actors construct interpretations of our environments and use these to guide us through our everyday lives. This constructed reality goes unquestioned. These assumptions of reality, thus, have the force of reality. We only become aware of these assumptions when we are confronted with empirical inconsistency or opposing constructions of the same empirical event or phenomena. The courts demonstrate construction of reality on a grand scale. Courts produce legal fictions that are binding upon actors in the legal process. This happens with such regularity that we come to accept these legal fictions as reality. This reality may be so evident as to fall into Berger and Luckmann's "everyday reality." Since the assumption of legal fiction's reality goes unexamined in the above-mentioned frameworks, there is a gap in how the reality of law is constructed. This gap indicates the need for empirical examination of the legal

construction of reality. Social construction perspective also facilitates a direct examination of the empirical facts or obdurate reality underlying constructed reality. Inconsistencies between these two realities plague structural examinations. Conflict incorporates the inconsistencies but can only explain them as manifestations of power differentials, essentially, blame without explanation of the mechanism.

Berger and Luckmann's theory of the social construction of reality can be applied to the legal construction of reality to fill this gap in our theoretical understanding of law. Constructed realities have been a conscious part of the governance of society from the earliest times. There are tantalizing hints at this fact in Plato's *The Republic*. Although Plato and Socrates do not specifically address the question of "how do we know what we know," they make use of two specific arguments that indicate a deep understanding of the implications of the question. Specifically, "the allegory of the cave"³ and "the noble lie"⁴ (Plato, n.d./1987) both hint at an understanding of knowledge of reality as a derivative of experience, thus subject to manipulation. Whether constructions benefit a caste of priests, a philosopher king, or a Machiavellian prince, those in positions to create reality for their subjects have been aware of the possibility of manipulation and at least implicitly, the socially derived nature of reality. Modern law is no exception. This leads to the research question of this work. Under the framework of the social construction of reality, do the observable facts of selected court orders regarding the legal needs of prisoners (mandates of emergent reality) indicate a reality of need separate from that constructed by the judiciary? Having established the applicability of social construction theory to this topic, a review of prior works using this theory is informative to demonstrate the application of the theory in practice.

Prior Applications of Social Construction Perspective

A review of the literature reveals that social construction has been used to model the workings of criminal courts (Jacobs & Fuller, 1986; McConville & Mirsky, 1995; Ryan & Alfini, 1979). Unlike the prior research using social construction perspective, this thesis examines law itself as a social construct. The possible inquiries based on this application are virtually limitless. Social construction is free of political ideology; thus, it can be applied to any situation where law produces an impact on social reality. Other perspectives that come with political ideology tend to be self limiting by only addressing their niche. For instance, conflict theory could not properly address instances in which the law is used to protect the interests of the lower and working classes. Social construction could examine the use of law as a reality unto itself and be free to determine whichever result presents itself without undercutting its ideological base. Thus, political conflict through law can be examined without attribution of motives which consistently form the basis of debate in politically value laden works. Narrowing the scope of inquiry, other applications of prisoners' rights law as a social construct could deal with law as a final arena of conflict available to prisoners against corrections staff. Silberman, (1992; 1994) approaches this conflict atheoretically, but it is an obvious application for an examination of the social construction of reality. Two power groups (prisoners and correctional officials) are attempting to assert their construction of reality. The binding authority of the court will sanction one version and the other will become irrelevant. Unfortunately, all of these topics cannot be pursued in this thesis. This thesis uses the issue of prisoner access to the courts to provide a timely a meaningful application of the broader inquiry into law as social construct.

The existing work using social construction does not address law as social construction in itself. However, the implications of social construction perspective on specific legal issues are clearly developed and provide a concrete application of theory to fact.

McConville and Mirsky (1995) explore the social construction of legal processes that are not addressed by law. Their study combines statistical data for 1986-1993 and field observation (n=236) of court room procedures dealing with guilty pleas by felony defendants in New York. The authors posit that the court room “work group,” composed of prosecutor, defense attorney and judge (Walker, 1993) constructs a reality of case processing which legitimizes practices necessary to handle the flow of cases. Thus, within the social construction of legal reality which punishes members of society for their misdeeds in society (i.e., law) the authors identify another construction that punishes defendants for hampering case flow in the court, independent of their actions in society (i.e., sanctions for failure to plea). When stripped of the legitimacy of familiarity, the practice of plea bargaining can be evaluated under the law which it subverts. The authors fall short of analyzing law as a social construct but parallel their arguments about plea bargaining to the law.

Jacobs and Fuller (1986) illuminate the social construction of a legal concept. Their work explores legal versus extra-legal considerations in drunk driving cases (n=498) in Maryland. The authors explore guilt and innocence in these cases as a social construction. Guilt or innocence is determined by a courtroom social process, and the nature of that process was found to influence the outcome of the trial. The authors did not acknowledge law as a social construct but did deal with the introduction of empirical

facts (i.e., evidence) which parallels this work's in the introduction of an inmate's impairment to the construction of the right of access to the courts. The study concluded that extra-legal factors (e.g., gender, race, and income) influenced the determination of guilt. In agreement with McConville and Mirsky above, the authors conclude that the court provides its own construction of reality in dealing with guilt or innocence rather than relying on rational legal factors (e.g., prior convictions & the severity of the offense). Once guilt or innocence is determined (i.e., at sentencing), rational legal factors have a stronger predictive value of the outcome. Here, social construction perspective provides an avenue for analysis of facts that may be taken for granted in other perspectives.

Ryan and Alfini (1979) also use constructionist perspective to describe the trial judge's role in plea bargains. At the time of their study, the judge was not considered to play a prominent role in plea bargains. By using two national mail surveys (n=3775) augmented by observations and interviews with judges in fifteen states, the authors established that the rational-legal role of the judge and the generally held understanding of that role did not stand to empirical scrutiny. The authors describe a construction of reality apart from the general understanding of the law and common courtroom practice. As with the McConville and Mirsky (1995), the authors found that the courtroom work group⁵ constructed a reality that considered extra-legal factors. In Ryan and Alfini (1979) those were the judge's perception of his own skill as a negotiator and case law regarding judicial intervention in plea bargains⁶.

In all three of the works described above, the authors have used social construction perspective to illuminate some complex working of the court system that

does not follow a rational-legal or instrumental perspective. To instrumental perspectives, judges determine guilt or innocence under the law and extra-legal factors predict the outcome. This understates the complexity of the trial. It would seem that judges might just be flawed, prejudiced, or corrupt. By examining the outcome as a social construction, the authors see the judge as a player in the construction of reality. This perspective allows for examination of the processes by which the decision occurs, rather than quantifying a “decision maker” or “decision point.” The broader perspective of social construction allows consideration of complex intervention during the process of the decision rather than an overly simplified action (e.g., demanding less emphasis on extra-legal factors from the judge) to address an overly simplified model of the problem. The judge may not be aware of any single action that produces this effect. It can be frustrating for policy makers and activists alike when they cannot force the “proper” results. In this case, the empirical facts are accurate and reliable, but by examining the process as well, the authors make recommendations beyond the usual identification of a problem point and call for the self-evident solution,⁷ which never seems to work.

Aside from describing courtroom processes, social construction perspective has also been applied to explore the meaning of legally recognized statuses. Gender and sexuality in the context of punishment and social control are explored as legally defining variables in corrections and control mechanisms predating formal corrections. The authors pursuing the topic of the construction of gender and sexuality distinguish between biological reality and social reality as it is enforced by the criminal justice system. In an extreme example of a legally binding construction of reality, Brown (1995) describes the trial of Thomas Hall in 1629. Hall was biologically neither male nor female. He was a

hermaphrodite, a person having the sexual characteristics of both. He had been raised as a woman but changed his avowed gender to allow him to travel to the United States as a servant. In the American Colonies, order maintenance was a primary concern of the judiciary. In the interest of standards of community decency, Hall was assigned a gender by the court.⁸ In this article, the author examines a fundamental reality for an individual being constructed by the court out of necessity.

Eigenberg (1992) applies social construction perspective to the issue of homosexuality in prison. Although the author does not deal specifically with decisions of the courts, the article warns of essentialist errors when defining complex situations. Viewing the complex actions of humans in dichotomous categories can be misleading and cause needless complexity in return for illusory precision. The issue of homosexuality in prisons is obfuscated by an unnatural concentration of a single gender. Heterosexual prisoners may engage in homosexual activities while in prison. Science has been forced to account for this behavior with a complex and unreliable theory of situational homosexuality (Eigenberg, 1992). McNeill and Freiburger (1993) describe this dilemma of definition in their work on Fuzzy Logic. Virtually all empirical facts can be defined dichotomously. However, the meaning of that definition approaches meaninglessness in reality as the case in point approaches the border between the two categories. The 'fact' of homosexuality is really a socially constructed label (Eigenberg, 1995). The label is useful to the administration of prisons, and there is an official interest in being able to define homosexuals with crisp labels. McNeill and Freiburger (1993) assert that the border cases, like the situational homosexuality described in Eigenberg's work, represent a failing of dichotomous definitions. When judgement must be used to

force an arbitrary category onto empirical fact, crisp logic is much more inaccurate than fuzzy labels. Eigenberg suggests the use of social construction perspective to allow inmates to define their own sexuality in more accurate terms. The reality of prisoners' actions is more accurately modeled as a continuum of few homosexual experiences to predominantly homosexual activity. The fact that the administration uses an inaccurate crisp model of homosexuality enforces a construction of reality that labels a mostly heterosexual prisoner as a homosexual. This attributed definition can follow the prisoner and may even be internalized.

These articles (Eigenberg, 1995 and Brown, 1995) provide an illustration of the binding nature of legal reality over obdurate biological fact and fundamental psychological makeup. Social construction perspective is perfectly illustrated in the Brown (1995) article because there was no dichotomous reality of male or female prior to the decision of the court. Hall had been both male and female. He chose the gender that was to his best advantage. After the court imposed legal reality, Hall was effectively male to society. There is a similar, but less dramatic, parallel in the label of homosexuality. The Eigenberg (1992) article provides a more subtle but also more broadly applicable example in this day and time. Modern biology has crisp, if somewhat complex, categories for gender, but there is no easy definition for sexuality. Many people are unsure of their own sexuality. The power of the courts to impose reality on issues as fundamental as gender and sexuality easily allows for speculation as to its power over a judicially created right like access to the courts. Perhaps empirical realities are ignored in the need for crisp definitions to satisfy the legal process.

Another legal status with profound effects for prisoners and free citizens is mental

illness. Courts have the power to declare citizens mentally incompetent and forcibly commit them to psychiatric care. With this judgement, citizens can be forced to take psychotropic medication. Prisons cannot force inmates to take medication. If an inmate will not take medication, he or she must be under direct medical care to force it. Variation in diagnostic practices and technique make any diagnosis questionable (Adebimpe, 1981; Mendel & Rapport, 1969; Pfohl, 1976). Pfohl (1976) found that construction of illness was more related to the theoretical orientation of the clinician than any other factor, including the presenting problem. In this study, court-appointed diagnostic teams evaluated inmates for necessity placement in the state's maximum security psychiatric hospital. This action came pursuant to a federal court decision in a right to treatment case. Here the courts deferred to the expertise of psychiatric professionals in deciding the status of inmate mental health. The diagnostic teams were charged with constructing the legal reality of the inmate's mental health. Pfohl illuminates the process by which this reality is created and concludes that the legal status of inmates is better left to a system of advocacy rather than the demonstrably flawed diagnostic procedure. Diagnosis is the most obvious application of social construction perspective, but other junctions of the legal system and the mental health system have been examined with it.

Scheid and Teresa (1993) apply social construction perspective to an examination of the court mandated outpatient commitment. The primary focus of the research was a qualitative analysis of this alternative to commitment to a locked ward or psychiatric hospital. The authors found that the most pressing issue to clinicians and patients alike was the construction of a status vulnerable to more social control. Similarly, Warren

(1979) used social construction perspective to examine the legal construction of dangerousness in mentally ill patients. In the setting of Warren's study, involuntary commitment required 'dangerousness.' Warren examined cases (n=50) in which persons were committed. In only five cases was there any evidence or contention of actual assault. Warren found that the construction of dangerousness used by the courts had no empirical basis. In both studies, the authors found the construction of the patient's reality to be determined by legal processes. In both studies this legally mandated reality was found to have profound effects on the person thus constructed. The determination of mental illness illustrates another application of social construction perspective to the legal construction of reality, but beyond that, it has particular bearing on the issue of inmate access to the courts. Mental illness is one of the disorienting conditions thought to impair inmates from adequately vindicating their right without assistance. Thus, the mentally ill inmate is constructed as too dangerous or incapable of living in free society but under the prevalent construction of the right of access to the courts unable to access assistance in fighting that status or for other rights.

This literature base shows the applicability of social construction perspective to occasions in which the legal system defines reality. The research cited here also demonstrates a history of application in criminal justice and even correctional research. There is no evidence that social construction perspective has been used to explicitly examine abstract rights like access to the courts. This work intends to extend previous research by using social construction perspective to examine the right of access. By examining the right of access as a legal construction and applying empirical facts to the rational legal understanding of the right, this work parallels earlier work specifically

targeted at the courts (e.g., McConville & Mirsky, 1995; Jacobs & Fuller, 1986; Ryan & Alfini, 1979). This work also uses legally constructed definitions for which there is ample support in the literature. The works described in this section provide the method of application of theory to fact. The following section establishes the place of prisoner rights in the criminal justice literature base.

Substantive Sources

The literature base used in the substantive preparation of this work is primarily that presented in law reviews and case law surrounding the issue of prisoner access to the courts. The general social science literature base on prisoners' rights places emphasis on the context in which rights are granted, but until this work, does not specifically address the ability of prisoners, as a group, to make use of those rights. It is also hampered by a reliance on procedural definitions rather than subjective understanding of the issue. The spectrum of work on prisoners' rights in general tends to deal with the existence of rights and interpretations of those rights by the courts (Cripe, 1997; Palmer, 1991; Sullivan, 1975). The fundamental question posed by this research is; can prisoners exercise their rights? As previously noted, access to the courts is fundamental to the vindication of any right. The legal system of the United States is based on the ability of a plaintiff, prisoner or otherwise, to bring a valid issue before the courts. The courts can then rule according to the law. Obviously, inability to bring the claim to the proper venue precludes any action of the plaintiff's behalf. While the literature base covers the rights granted by the Constitution and the court's interpretation of those rights *vis-a-vis* successful challenges of prison policy, there is little systematic review of the ability of a given prisoner to vindicate a right already established. Without examining this issue, the reader must make

the assumption that an established right will be understood as the court intends and respected by correctional administration.

By restricting the research question to the right of access to the courts, this thesis can establish whether a minimal basis exists for prisoners to vindicate all subsequent rights. The issue of access is not a decisive test of the rights of prisoners, but if the opportunity for access is established, it provides justification of the assumption of other works related to prisoners' rights. The findings of such works are meaningful in a broader context, but fail to address specific questions about their assumption of access to the courts. While a review of the general literature base regarding prisoners' rights is informative, a comprehensive review would be beyond the scope of this thesis. The literature reviewed in this section has been restricted to that which facilitates a more direct understanding of the issue of access to the courts. Published articles that mention access to the courts tend to come in terms of moral imperatives (Forer & Menninger, 1980; McShane, 1987; Milovanovic, 1990), summation of case law (Call, 1995; Cripe, 1997; Palmer, 1991; Sullivan, 1975), the relationship between inmate violence and access to the courts as a means of dispute resolution (Silberman, 1992; Silberman, 1994) or as an underdeveloped section in a general work on prisoners' rights (Murphy, 1973; Gilman, 1979). The strength of these works, when taken as a whole, is that they place the issue of prisoner rights in a context other than a mechanistic analysis of law. Although these works contribute to the theoretical understanding of the issue, they do not provide methods of inquiry or suggestions for operational variables with which to analyze the issue. The criminal justice literature base provides broad indications of prisoner's rights, but fails to establish a sufficiently detailed picture of the problem. The framework

provided by social science in theory and direction of application is fleshed out with substantive legal literature in the following sections. First is an orientation to the three specific vehicles of prisoner litigation.

The Basics of Prisoner Litigation

The three primary actions filed by prisoners in Federal Courts are 1) *Habeas Corpus* petitions, 2) Section 1983 actions, and 3) Claims under the Federal Tort Claims Act. The *Habeas Corpus* and Section 1983 claims each have ‘facilitated’ mechanisms that allow prisoners to submit simplified forms to raise an action. The mechanism also includes broad discretion for the judge on which claims are meritorious. Typically, prisoners are expected to complete a simplified form (see Appendix A). The *Habeas Corpus* petition is most often used to challenge unlawful captivity or conditions that amount to punishment. It has also become the plea of last resort for many inmates in a variety of situations. Section 1983 and Federal Torts Claims Act actions both primarily allow prisoners to challenge conditions such as actions taken against them by prison officials or neglect of basic needs. The Federal Tort Claims Act allows for recovery of damages against prison officials. Section 1983 challenges illegal or abusive actions taken under color of law. These are the three basic vehicles for Federal Court action available to prisoners. State prisoners are now required to exhaust all state and administrative actions prior to bringing federal suit. Thus, there is an entirely separate set of procedures that must be accomplished before many federal actions can proceed.

The use of these vehicles has caused considerable attention to be directed at the topic of prisoner litigation. The following section explores the ramifications of prisoner litigation for the courts. While not directly related to the ability of prisoners to vindicate

their rights, the topic of prisoner access to the courts would be incomplete without a treatment of the burden to the courts caused by prisoner litigation. Prisoner access to the courts is indirectly effected by the perception of burden to the courts. This burden has forced reconstruction of the right of access through the intervention of the legislature.⁹ Finally the burden of prisoner litigation usually falls directly on the federal district level judges most directly responsible the enactment of legal reality.

Burden to the Courts

The Bureau of Justice Statistics reports that between 1966¹⁰ and 1992 the number of prisoner's rights cases has climbed from 218 to 26,824 (Hanson & Daly, 1995). This is evidence of the undeniable "up-surge" in prisoner instigated lawsuits. Turner (1979) observes that most of these lawsuits are filed *pro se*, by the litigant without counsel, and *in forma pauperis*, without filing fees due to the indigence of the litigant. This rapid proliferation of lawsuits from untrained prisoners has placed a substantial burden on the courts. Hanson and Daley (1995) note that 98% percent of the cases in their study of Federal *Habeas Corpus* Actions were dismissed or denied on merits. Reasons for such dismissals included: Failure to exhaust State remedies (57%), procedural default (12%), failure to meet court deadlines or court rules (7%), issues not cognizable (6%), and abuse of the writ (5%) (Hanson & Daly, 1995, p.17). All of these causes in some way reflect the ability of the prisoner/petitioner to properly file a petition. The volume of *Pro se* petitions has placed a burden on the courts that has caused delays in cases with merit (Eastman, 1988). Further, rejection on procedural grounds does little good for the inmate and may result in repeated resubmission of sub-standard work, thus further burdening the system. On the assumption that at least some of these petitioners have valid claims, the

courts are unable to vindicate the rights of prisoners unable to file procedurally correct petitions. The courts cannot draw cognizable claims from the flood of unintelligible or procedurally incorrect claims.

Although the affirmative duty of corrections does not extend to solving the docket problems of the courts, a program that assists prisoners in presenting valid claims would also serve to reduce the flood of improper petitions. This research is of benefit to the courts in that it provides a recommendation to departments of correction for programming needed by inmates to present procedurally appropriate petitions. The following sections are devoted to establishing the construction of the right of access in the cases giving rise to the research in this thesis.

Background of the Instant Cases

On September 18, 1980, the plaintiff class in *Hadix v. Johnson*, filed a complaint under 42 U.S.C. § 1983, alleging violation of their civil rights by the administration of the Michigan Department of Corrections. The plaintiff class comprised prisoners “who are now or who in the future will be housed” at the State Prison of Southern Michigan’s Central Complex (security level 4) in Jackson, MI.¹¹ *Hadix* deals with out of cell activity and access to the courts, but this work concerns itself with only the legal access portions of the case. *Hadix v. Johnson* is an active case as of March, 1998, but the legal access portion was remanded to the *Knop* court after a combined decision by the Sixth Circuit Court of Appeals.¹²

On April 16, 1985, the plaintiff class in *Knop v. Johnson*, brought suit against the administration of the Michigan Department of Corrections. The plaintiff class comprised prisoners “who are or will be imprisoned” at: the State Prison of Southern Michigan

(level 4) in Jackson, MI; Marquette Branch Prison (level 4) in Marquette, MI; the Michigan Reformatory (level 4) in Ionia, MI; and Riverside Correctional Facility (multi-level) also in Ionia, MI.¹³ Before a break up mandated in an unrelated federal law suit, SPSM and the Central Complex were united with two other prisons as the world's largest walled prison. They are now physically separate structures. *Knop* presented multiple issues, but this work concerns itself with only the legal access portions of the case. The legal access portions of *Knop*, as originally presented, concern the classification and search of legal mail and the adequacy of the various prisoner legal access programs via the institutional law library. *Knop v. Johnson* is an active case as of March 1998¹⁴.

On October 16, 1992, the Sixth Circuit Court of Appeals ruled on separate decisions in each of these cases. The Sixth Circuit combined these cases on remand to the *Knop* court. The decision of the Sixth Circuit affirmed the findings of both courts that law libraries alone did not fulfill the *Bounds* requirement of "meaningful access to the courts"¹⁵ for specific groups of prisoners unable to make adequate use of law libraries. These groups include: non-English speaking prisoners, functionally illiterate prisoners, prisoners with learning disabilities, physically impaired prisoners, mentally impaired prisoners, and otherwise unimpaired prisoners unable to use the law library because of segregated confinement. Judge David A. Nelson of the Sixth Circuit held that some form of assistance was necessary beyond the *Bounds* standard (access to adequate law libraries). However, the Court re-emphasized that the proper role of the courts is not an active one. Both lower courts mandated overly intrusive remedies to the prisoners' perceived lack of access to the courts and were reversed, in part. To assure a uniform decision, the legal access portions of both cases were remanded to Judge Enslen of the

Western District. Judge Enslen ordered the Michigan Department of Corrections to submit a plan for a pilot program to identify and assist eligible prisoners in achieving access to the courts. The Michigan Department of Corrections agreed to implement a pilot program that identified eligible prisoners based on criteria determined, in part, by the Court (with input by plaintiff attorneys) and, in part, by the Michigan Department of Corrections. The pilot program provided assistance through specially trained prisoner “legal writers.”

The federal courts have provided the following constructions of the issue of prisoner access to the courts. Such cases informed the *Knop* and *Hadix* Courts as legally binding precedent to their cases. The intention of these precedential cases is as important a consideration in the construction of legal reality as the facts of the instant cases.

Legal Issues

Prisoner access to the courts:

Access to courts: Right of person to require fair hearing from judiciary. From *Gilmore v. Lynch*, D.C.Cal., 319 F.Supp. 105 (Black, Nolan, & Nolan-Haley, 1990, p. 110). ‘Access’ [to the courts] which means getting the courthouse door opened in such a way that it will not automatically be slammed shut on them [prisoners].¹⁶

The Supreme Court affirmed access to the courts as a specific right in *Ex parte Hull*¹⁷. Congress is forbidden to suspend the *Writ of Habeas Corpus* in the body of the Constitution¹⁸, but no specific requirement is made of the Executive Branch to provide affirmative assistance to see that petitions are forwarded to the courts. In *Ex parte Hull*, the Court denied the state’s demand to review all legal petitions before forwarding them to the courts as undue interference with the operation of the *Writ of Habeas Corpus*. That simple protection became the first tangible right of access to the courts. Since that decision, a number of other decisions have expanded the state’s obligation to provide, not

just allow, access to the courts. The Supreme Court has cited the Due Process Clause¹⁹ of the Fourteenth Amendment, the Equal Protection Clause²⁰, and the Right to Petition for Redress of Grievances²¹ of the First Amendment as a constitutional basis for the right. Interestingly, the landmark decision in access to the courts for prisoners does not provide Constitutional authority for the mandate; the Court is silent as to legal reasoning in *Bounds*²². While there have been numerous sources cited as supporting the right of access to the courts, there are no direct statements in the Constitution that explicitly grant it; however, case law has been firmly established that grants some form of access to the courts for prisoners.²³ In these cases, disputes over access to the courts are most often fought over the implementation of the right as opposed to disputes of its existence.

In 1941, the Supreme Court created prisoners' right of access to the courts by interpreting Article One, Section Nine, of the United States Constitution to guarantee all prisoners the right to petition for a *writ of habeas corpus* without interference from prison officials. Hull, a prisoner at the State Prison of Southern Michigan, was unable to file a petition for a *writ of habeas corpus* because Michigan had a regulation requiring petitions from prisoners to be reviewed for accuracy and quality before forwarding them to the courts. After successive attempts to file for the *writ*, Hull's petition was filed *ex parte* by a relative and taken up by the Supreme Court. The Court ruled that the state could not block a prisoner's petition for the *Writ*. This decision marked the end of the "hands off" policy for prison cases in federal court. It also marked the beginning of a right.

Although the verbiage had existed since 1789, *Ex Parte Hull* established that the right of access to the courts applied to prisoners. This right was constructed by an action of the courts²⁴. To paraphrase Berger and Luckmann (1966), a social reality must be reaffirmed

in daily life until it achieves the status of common sense. Although *Hull* may not have been instantly embraced by prison officials at all levels, allowing prisoner to file petitions of *habeas corpus* soon became a matter of everyday life in prisons, if not an everyday occurrence. The reality of prisoner access to the courts, which had no existence before *Hull*, began to effect all prisons and prison official. It would be inappropriate to analyze this effect as if the right had always been there. Such an analysis quickly lends itself to a spurious conclusion of conspiracy on the part prison officials to deny prisoners their rights²⁵. The reality of the *Hull* decision and prisoners' right of access to the courts has been reaffirmed in subsequent cases.

In 1969, the Supreme Court extended the right of access beyond the decision in *Hull*, but for similar rational. *Johnson v. Avery*²⁶ continued the protection of the *Writ of Habeas Corpus*, but constructed a new right of access by prohibiting prison administrators from restricting legal assistance among inmates. Johnson, a prisoner in Tennessee, was accused of violating a prison rule prohibiting inmate assistance to other inmates in the preparation of legal materials. His challenge to this rule was upheld by the District Court, but denied by the Sixth Circuit. The Supreme Court found that in the absence of other methods for illiterate prisoners to file petitions for the *Writ of Habeas Corpus*, prison rules could not prohibit inmate legal agreements. This was one of the first substantial intrusions into prison official's authority. "Johnson v. Avery...can be noted as a leading part of the abandonment of the 'hands-off' doctrine in the 1960s" (Cripe, 1997, p. 87). *Johnson* has a prominent position in inmate litigation because of its role in weakening the "hands-off" doctrine, but it is relevant to this work because it is the first Supreme Court case that introduces a challenge to the construction of access. The "hand-

off' doctrine was defeated by challenging the construct the right of access with the fact that illiterate prisoners could not make use of it. This conflict forces the Court to reconstruct the right of access to include help from other inmates.

In 1971, the Supreme Court rendered a decision that first established the duty of the state²⁷ to take affirmative action to guarantee the right of access to the courts to prisoners.²⁸ In *Younger v. Gilmore*, the Court affirmed a California District Court's decision that granted prisoners access to all means which are required to get a fair hearing.²⁹ Three important conclusions can be drawn from this decision: 1) the Court envisioned a proactive responsibility borne by the state to support prisoners' right of access, 2) the Court did not intend a continuing obligation to render aid to the prisoner after his or her petition was accepted to the pleading stage, and 3) there was no specific operational requirement attached to guide departments of correction so there would necessarily be more such cases.

Numerous subsequent cases in the lower courts dealt directly with the issue of access to the courts, but it was not until 1977 that the Supreme Court finally attempted to address the issue concretely. *Bounds v. Smith*³⁰ firmly asserted the Court's desire to place the burden of affirmative measures on the state. In this case, the Court pushed beyond the minimum standard of prisoner legal assistance enunciated in *Johnson v. Avery*³¹ to satisfy the requirements of "meaningful access" to the courts. The Court rejected the petitioner's (North Carolina Department of Corrections) claim that their constitutional duty ends with keeping prisoner legal agreements free from unreasonable restriction. Interestingly, Justice Marshall asserted:

We reject the State's claim that inmates are ill equipped to use...the tools...of the legal profession, making libraries useless in assuring meaningful access. [T]his Court's

experience indicates that pro se petitioners are capable of using law books to file case raising claims that are serious and legitimate.³²

This statement is especially ironic given the assertion of contemporary prisoner rights advocates and some district court judges that even the most competent of jail house lawyers frequently produce sub-standard work that may harm their “client’s” case³³.

Bounds v. Smith clearly indicates that nothing short of law libraries will suffice to fulfill the constitutional requirement placed on prison officials; however, the Court also went to lengths to enumerate other more expansive options that met the standard. The application of these precedential cases to the facts of the instant cases is examined in the following section.

Access to the Courts in Michigan

With the clear and concrete minimum standard set forth in *Bounds v. Smith*, many states either assessed their legal access programs to be in compliance with the “meaningful access” standard or procured law library collections. Many more cases developed in the lower courts regarding compliance with the *Bounds* standard, but generally, the lower courts only had to make determinations of fact, not set new standards. It would be fruitless to examine all such cases; rather, now the analysis will switch to suits against the Michigan Department of Corrections which are active at the time of this writing. Such cases exemplify the variances applied to the *Bounds* standard by the lower courts. These cases are best summarized not as direct challenges to the overall standard set by the Court, but as exceptions based on circumstance.

One such exception to the *Bounds* standard lies in *Glover v. Johnson*³⁴. The *Glover* action was started in May of 1977 by female prisoners of the Michigan Department of Corrections and eventually came to include all convicted female felons in

Michigan as plaintiff class members. Although *Glover* covers numerous diverse areas within the women's prison system, all issues hinge on the notion of parity with the men's system. The *Glover* action draws on the Equal Protection Clause of the Fourteenth Amendment for authority. It is under this rationale that the *Glover* court set aside the *Bounds* standard. The *Glover* court reasoned that since women did not have the traditional experience with "self-help" law that men did, women required remedial measures to assure that parity with the men's system exists. Toward this end, the *Glover* court ordered the state of Michigan to provide attorneys from Prison Legal Services (PLS), a private non-profit law firm, and later Women's Legal Services³⁵ (WLS), paralegal training, and law libraries to assist women in matters never contemplated for aid in the male system³⁶. In a recent decision by the Sixth Circuit,³⁷ the court of appeals reversed an order finding the Michigan Department of Corrections in contempt for an attempt to end WLS' involvement in family law work for female prisoners. In their opinion, the Sixth Circuit rebuked the *Glover* Court for overstepping the boundaries of the state's obligation to provide legal access as set forth in *Lassiter v. Department of Social Services*³⁸ which clearly states that the only conditions under which the appointment of counsel was mandatory occurred when the personal liberty of the litigant was at stake. Based on the ruling of the Supreme Court and absent similar services provided to male prisoners, the Sixth Circuit determined that the Department of Corrections was improperly ordered to provide full time legal counsel for convicted female felons for child custody litigation. However, a mandate from the district court still governs the training of paralegals and their employment by the state, the adequacy of and access to the collection contained in the law libraries, and the continuation of the

WLS contract for legal counsel to female felons, albeit under more limited conditions.

Another exception to the *Bounds* standard lies in the legal access portions of *Knop v. Johnson & Hadix v. Johnson*³⁹ which were unified for decision by the Sixth Circuit Court of Appeals. The *Knop/Hadix* Court put aside the *Bounds* standard on the basis that the “touchstone” of “meaningful access” was untouched by illiterate and otherwise unqualified prisoners. The *Bounds* decision specified that the goal of the Court was to assure “meaningful” access to the courts. Prison law libraries were presented as a constitutionally acceptable method to achieve this goal. However, the plaintiff classes in *Knop/Hadix* contend that the law library system was implemented in such a way that access to the courts is effectively denied; moreover, even well implemented law libraries would not be of assistance to illiterate prisoners or prisoners otherwise unable to make use of them. The *Hadix*⁴⁰ decision ordered that PLS (Prison Legal Services⁴¹) be instated to aid prisoners unable to make sufficient use of the law library. Included in the provisions made for PLS was a requirement to educate prisoner paralegals as a work force for PLS. Further, the order required the Michigan Department of Corrections to enhance the law libraries at the facility housing the plaintiff class. Finally, the order required that the Department of Corrections adopt a grievance system that meets the standards of the federal prison grievance system. In the *Knop*⁴² decision, the court mandated an external non-profit corporation be formed to administer a system of civilian and prisoner paralegals with a practicing attorney as director to be selected by a board of governors (three chosen by the Michigan Department of Corrections and three chosen by the plaintiff class). The *Knop* court explained this requirement as a remedy to the potential conflict of interest created by having an employee of the state representing a

prisoner against the state.⁴³

In *Knop/Hadix*⁴⁴ the Sixth Circuit affirmed the motivation of the lower court's orders but denied the methods as overly intrusive. The *Hadix*⁴⁵ decision was described as "judicial legislation run wild" and a "'mother knows best approach'... [to] constitutional adjudication."⁴⁶ The *Knop*⁴⁷ decision received less critical treatment as the Sixth Circuit only saw fit to comment:

The Supreme Court seems to have been far less concerned than the *Knop* court about reliance on assistance provided by employees of the state. Perhaps the advantages of placing all prisoner paralegals on the payroll of a non-profit corporation would outweigh the disadvantages of doing so. We do not believe, however, that the courts may appropriately tell the Department of Corrections how to strike this balance.⁴⁸

Clearly the overly intrusive and elaborate remedies mandated in *Hadix* drew a fairly strong reprimand from the Sixth Circuit; indeed, the most striking result from the Sixth Circuit was remand of the legal access portion of both cases to the *Knop* court. In contrast to the rebuke of the *Hadix* court, the *Knop* court received only passing comment on a more conservative application of comity and parsimony of action.

Upon remand, the Sixth Circuit ruling in *Knop/Hadix* was interpreted to require the functional equivalent of the "fabled jail house lawyers." Both the *Hadix* and *Knop* courts originally expressed interest in the jail house lawyers, determined by the Supreme Court to be the least intrusive remedy sufficient to assure access to the courts in *Johnson v. Avery*.⁴⁹ However, both courts had previously abandoned the idea, citing the inadequacy of untrained prisoners. The *Knop* and *Hadix* courts stated the following respectively:

The often fabled jailhouse lawyers or writ-writers are, at least in the Michigan system, too few and often too uninformed to provide adequate assistance to the inmates. [also quoted by the Sixth Circuit]⁵⁰

At most ten per cent [sic] of the...jailhouse lawyers possess rudimentary legal skills.... Inmate paralegals offer no better source of legal assistance than the doubtful aid available from jailhouse lawyers.”⁵¹

This lies in direct contradiction to Justice Marshall's assessment of the nation's jailhouse lawyers in *Bounds* from 1971.⁵²

The *Knop* court issued an order requiring submission of a “Revised Interim Plan for Legal Access” from the Michigan Department of Corrections. The Court required that the plan include a system, utilizing inmate ‘writ writers’ to render aid to prisoners in certain categories that were hindered from making full use of the law library or other available avenues of access to the courts. A component of this plan includes an extensive examination of the transient population the Michigan Reformatory (one of three prisons housing the *Knop* plaintiff class) to determine eligibility for service under the plan. The information collected to under the Revised Interim Plan is the basis of this work. *Lewis v. Casey* is the controlling precedent in prisoner access to the courts. However, it does not render previous precedent moot, because of the way the Court constructs the reality of prisoner’s right of access.

Legal Access after *Lewis v. Casey*

Plaintiff counsel in *Hadix/Knop* includes Elizabeth Alexander, an accomplished litigator for the ACLU’s Prison Project. Ms. Alexander also argued for the plaintiff class in *Lewis v Casey*.⁵³ That class had been granted certiorari at the time that the Revised Interim Plan was submitted. In crafting his order for *Knop/Hadix*, Judge Enslen was aware that *Lewis v. Casey* dealt with substantially similar issues and would have

mandatory authority in *Knop/Hadix*. This, in part, explains the cautious steps taken by both parties and the court in deciding the issues⁵⁴. Any conclusions of law drawn from *Knop/Hadix* are subject to review under *Lewis v. Casey*. Any analysis of the facts regarding legal access must also consider the new realities of *Lewis v. Casey*.

Plaintiff counsel was not the sole participant in *Lewis v. Casey*⁵⁵ from *Knop/Hadix*. The Attorney General of Arizona solicited the signatures of all of the Attorneys General from other states on an *Amicus Curiae* brief in support of the appeal in *Lewis v Casey*,⁵⁶ a case that has since been decided by the Supreme Court. When Michigan received the brief, thirty other states had already signed. The decision rendered in this case was anticipated to be the definitive statement on the requirements of access to the courts, but as with many opinions by Justice Scalia, the answer tends toward a precise legal definition of problem and resolution, rather than a simple mandate.

Instead of codifying exceptions to the *Bounds* standard or reversing flagrant intrusions into the executive branch's sphere of control, the Court ruled eight to one that *Lewis v. Casey* would be decided on the basis of 'standing.' Rather than addressing the unequal protection offered to prisoners with specified impairments or the recent trend of micro-management of state departments of correction by the federal bench, the Court directed the lower courts to assess standing of cases on the basis of 'actual harm' done to a specific prisoner's ability to access the courts. Thus, the key factor in subsequent cases involving access to the courts would be a determination of whether the plaintiff suffered an actual harm to him/herself and, thereby, established standing to appear before the court. While the decision in *Lewis* was unexpected by both parties, it is not without precedent in the field of prisoner access to the courts. The Ninth Circuit had developed a

substantial body of case law that hinged primarily on the proof of actual harm to the prisoner which effects the standing of the case.

"[A] reviewing court should focus on whether the individual plaintiff before it has been denied meaningful access." (internal quotations omitted.)⁵⁷

"Appellant also contends that inadequacies in the breadth of legal materials provided *and in the availability of the CBCC* [Clallam Bay Corrections Center] *law library* unlawfully denied him access to the courts... In addition, we have recognized that the Constitution does not guarantee a prisoner unlimited access to a law library. Prison officials of necessity must regulate the time, manner, and place in which library facilities are used. More importantly, Mr. Johnson failed to demonstrate that these inadequacies in any way handicapped his access to the courts." (internal quotes omitted and emphasis added.)⁵⁸

"A prisoner contending that his right of access to the courts was violated because of inadequate access to a law library must establish two things: First, he must show that the access was so limited as to be unreasonable. Second, he must show that the inadequate access caused him actual injury, *i.e.*, show a specific instance in which [he] was actually denied access to the courts." (internal quotations omitted.)⁵⁹

In rendering the opinion, Justice Scalia departed from the arguments of both appellants and appellees in *Lewis v. Casey* and focused on the fact bound nature of standing in this particular case. *Lewis v. Casey* made the following points of law: 1) To establish a violation of *Bounds*, the plaintiff must demonstrate "actual injury" in his/her efforts to present a *non-frivolous* claim to the courts. 2) *Bounds* may only be read to provide affirmative assistance to access the courts for direct or collateral attacks on convictions and conditions of confinement. 3) The instant case had only two instances of 'actual harm' and could not require system-wide relief. The opinion also reaffirmed the substantial deference to the executive branch required by previous decisions like *Turner v. Safley*⁶⁰

Thus, the new standard in access to the courts cases is to be actual harm of a specific prisoner's case because of inadequate access to the courts. The implication is

that this new standard precludes any valid action in the area of access to the courts by making a claim present in the courts *de facto* proof of no violation. At the very least there will never be another access to the courts case citing access to the courts as the basis of the original claim. Critics of the decision have gone further in positing that if a prisoner is not so impaired that he or she can make a valid claim to the courts, he or she has no valid claim. If the prisoner has an impairment that precludes access to the courts he or she cannot get the petition to be seen by the courts. Although this statement has great rhetorical value, it is not precisely true. An inmate may be able to petition the courts through a “simplified” filing process and a more lenient standard of review mandated for prisoner actions. However, recent federal court “reforms” have made summary dismissal of such petitions much more likely than in the past. Further, reforms in the Michigan State Court System have imposed substantial procedural burdens on prisoner litigation. This issue is dealt with in the Legislation Section.

Lewis v. Casey clearly takes access to the courts into a much more favorable realm for state departments of corrections by increasing the threshold of a valid claim from a situation that *could* adversely influence their access to one that *has occurred* and must be proven to be non-frivolous. However, state departments of correction are simultaneously in a seemingly unenviable position if such a suit gets to the courts because to be there it must be valid, *prima facie*. Also in the favor of the state, *Lewis v. Casey* gives guidance that almost precludes the system-wide remedy so familiar to current access to the courts related suits.

The implications of *Lewis v. Casey* for *Knop/Hadix* are less clear. Although Judge Feikens (the original *Hadix* judge) has denied the applicability of *Lewis v. Casey* to

Glover v. Johnson, Judge Enslen has not yet ruled as of the time of this work. As stated above, many such cases existed as exceptions to the *Bounds* standard and there will doubtlessly be exceptions to the *Lewis* standard. Many federal judges have ignored the Supreme Court's demand for comity and deference to the experience of the executive branch. Many will doubtlessly ignore the Court's intent in *Lewis*. Given the bewildering array of remedies for inmate access to the courts, a tool is needed to impose order and establish a clear comparison based on relevant factors common to all prior cases.

Typology of Assistance in Access to the Courts

The following typology was presented at the 1996 annual meeting of the Academy of Criminal Justice Sciences (Loper, 1996). It has been updated but remains substantially intact. With the profusion of standards for access to the courts enacted since *Ex Parte Hull*, it seems warranted to make use of a tool to organize these various standards. This typology differentiates standards of access by intrusiveness to the executive branch, but is also informed by funding. Each category is annotated with a citation(s) of the decision in which it was used. For purposes of illumination, the cases discussed above have been inserted in the appropriate annotated portion of the typology. In some cases the standard listed in the typology has received a small amount of actual use, but all standards in the typology have at least been suggested in numerous cases or law review articles (Smith, 1987; Bluth, 1972).⁶¹ In some cases remedies were denied by the court for lack of adequate implementation, but not on their merits. These cases are noted with an asterix in the typology itself.

TABLE 1, Typology of Inmate Access to the Courts

Passive- No state resources / Minimal intrusion	Affirmative Intervention- Minimal state resources	Remedial Intervention- Extra-ordinary state resources
No Mandated Access to the Courts Prior to <i>Ex Parte Hull</i> , 312 U. S. 546 (1941)	Law Libraries <i>Bounds v. Smith</i> , 430 U.S. 817 (1977) <i>Smith v. Bounds</i> , 538 F.2d 541 (4 th Cir. 1975) <i>Smith v. Bounds</i> , 610 F.Supp. 597 (E.D.N.C. 1985)	Paraprofessional Training Courses <i>Glover v. Johnson</i> , 855 F.2d 277 (6 th Cir. 1988). <i>Glover v. Johnson</i> , 721 F.Supp. 808 (E.D.Mich. 1989). <i>Hadix v. Johnson</i> , 694 F.Supp. 259 (E.D.Mich. 1988).
Legal Mail Privileges- Access to External Professionals or Paraprofessionals <i>Ex parte Hull</i> , 312 U. S. 546 (1941) <i>Nolan v. Scafati</i> , 430 F.2d 548 (1 st Cir. 1970) <i>Cross v. Powers</i> , 328 F.Supp. 899 (W.D.Wis. 1971)	Paid Jailhouse Lawyers / Writ Writers Using Libraries <i>Knop v. Johnson</i> , 977 F.2d 996 (6 th Cir. 1992) <i>Casey v. Lewis</i> , 43 F.3d 1261 (9 th Cir.1994), Segregation only. <i>Casey v. Lewis</i> , 834 F.Supp. 1553 (D.Ariz. 1993).* Segregation only.	Paid Civilian Paraprofessionals <i>Knop v. Johnson</i> , 685 F.Supp. 636 (W.D.Mich. 1988). <i>Hadix v. Johnson</i> , 694 F.Supp. 259 (E.D.Mich. 1988).
Jailhouse Lawyers (Non-sanctioned or Tolerated) <i>Johnson v. Avery</i> , 393 U.S. 483 (1969) <i>Wolff v. McDonnell</i> , 418 U.S. 539 (1974) <i>Cruz v. Hauck</i> , 515 F.2d 322 (6 th Cir. 1975)	Legal Classes / Assistance from Law Students (Outreach or Law Clinic) <i>Williams v. Department of Justice</i> , 433 F.2d 958 (5 th Cir. 1970) <i>Cross v. Powers</i> , 328 F.Supp. 899 (W.D.Wis. 1971) <i>Cepulonis v. Fair</i> , 563 F.Supp. 659 (D.Mass. 1983) <i>Cepulonis v. Fair</i> , F.2d 1 (1stCir. 1970)	Contract Legal Assistance <i>Glover v. Johnson</i> , 855 F.2d 277 (6 th Cir. 1988). <i>Glover v. Johnson</i> , 721 F.Supp. 808 (E.D.Mich. 1989). <i>Hadix v. Johnson</i> , 694 F.Supp. 259 (E.D.Mich. 1988).
		Staff Lawyers <i>Murray v. Giarrantano</i> , 109 S.Ct. 2765 (1989)* <i>Smith v. Bounds</i> , 538 F.2d 541 (4 th Cir.1975)* <i>Smith v. Bounds</i> , 657 F.Supp. 1327 (E.D.N.C.1986).

In many cases the courts have risen above the requirement of affirmative aid to remedial level orders which demand extraordinary measures that go beyond even the

most invasive of “affirmative” orders. Remedial level orders are often entered to repair a harm, as with the *Glover* order requiring extra assistance for women until they gain the experience with self-help law to the point of parity with male prisoners. Remedial level orders may also punish the state for failure to adhere to less intrusive orders, as with the decision in *Smith v. Bounds* requiring staff attorneys because of “contumacious” behavior on the part of the North Carolina Department of Corrections.⁶² It is ironic that the case that determined the least intrusive measure required to assure access to the courts, *Bounds v. Smith* entered into a remedial level in 1986 when the state failed to comply with the result of the remanded decision after ten years.

Based on this typology, it is apparent that all three Michigan cases, including *Glover*, have been treated at the remedial level. After the Sixth Circuit decision combining *Knop* and *Hadix*, it is also apparent that the facts do not support such intrusive measures. On remand, the *Knop/Hadix* Court was directed to find less intrusive means of assuring inmate access to the courts. Essentially, the *Knop/Hadix* Court was told to use an affirmative intervention.

Federal judges do not have uncontested power in the construction of legal reality. Legislatures enact the laws that courts interpret to construct that reality. Legislatures also provide input to the ongoing construction of rights.

The Effect of Legislation on Prisoner Access to the Courts

The focus of this thesis is directed to an exploration of the judicial construction of reality vis-a-vis prisoner access to the courts. No discussion of the legal construction of reality would be complete without an understanding of the legislation that governs the courts. Discussion of these laws do not further the analysis of the judicial construction of

the right of access; however, the laws in this section will provide a great deal of influence on future construction of the right and deserve consideration as a reality imposed on the judiciary. The influence of legislation is organic to prior decisions. Therefore, only the most recent legislation with the most potential for direct influence in this arena of prisoner's rights is dealt with specifically.

The Prison Litigation Reform Act of 1996⁶³ (PLRA), is too recent to have explicitly entered the decisions discussed in previous sections. However, the Sixth Circuit issued an administrative order which is binding to District Courts and is thus the relevant application of the legislation to the Michigan Cases⁶⁴. The most significant remaining section of PLRA applies only to prisoners filing *In Forma Pauperis* (IFP). This status is literally: as a pauper. IFP status allows a prisoner to proceed with a lawsuit without paying the required fees. Critics have claimed that PLRA "raises the bar" on inmate litigation and makes it harder for indigent inmates to file *Habeas Corpus* and Section 1983 actions (National Prison Project, 1996a; Prison Legal News, 1996). The Sixth Circuit supports this interpretation:

No longer do courts first focus on the merits of a prisoner's complaint. Rather, it is the prisoner's financial status that the courts must initially examine. Pauper status for inmates, as we previously knew it, no longer exists. All prisoners while incarcerated must now pay the required filing fees and costs. When an inmate seeks pauper status, the only issue is whether the inmate pays the entire fee at the initiation of the proceeding or over a period of time under an installment plan. *In re Prison Litigation Reform Act*, 1997 FED App. 0047P (6th Cir.)

Other remaining sections of PLRA provide diverse mechanisms to reduce the amount of prisoner litigation in the courts. PLRA granted more options for dismissal of prisoner petitions and offers penalties for petitions without proper merit. There is nothing in the PLRA to facilitate inmate access to the courts.

The section found most egregious by opponents of PLRA is a controversial directive for summary disposal of existing consent decree, unless the court holds a trial and makes a finding of a current violation of law. This section has been overturned in fifteen separate actions by various Federal District Courts (National Prison Project, 1996b). Significantly, Judge Enslen ruled against this provision in *Hadix/Knop*⁶⁵ and in another Michigan prisoner's rights case.⁶⁶ In *Hadix/Knop*⁶⁷ he ruled that the provision intruded on the ability of the courts to enforce an order. In the *United States v. Michigan* consent decree, he ruled that PLRA was subject to a hearing before termination-effectively reversing the language of the act. Judge Feikens, the original *Hadix* judge, also ruled against this section of PLRA in the sections of *Hadix* remaining under his control⁶⁸ for similar reasons as Enslen had in *Hadix/Knop*.⁶⁹

Another recent piece of legislation with potential effects on prisoner access to the courts is the Antiterrorism and Effective Death Penalty Act of 1996. Since Michigan does not have the death penalty, that section and the anti-terrorism sections are largely irrelevant to the study at hand. However, one provision of the act serves to limit prison access to the courts through restrictions on *Habeas Corpus* petitions. The Antiterrorism and Effective Death Penalty Act places a one year time limit on *Habeas Corpus* petitions filed by state prisoners to reduce the number of such petitions in the courts. Shortly after the act was signed, the Supreme Courts ruled in *Felker v. Turpin*⁷⁰ which upheld the provisions of the act related to *Habeas Corpus* petitions. The Court ruled that the act did not prevent courts from entertaining a petition.

The new restrictions on successive habeas petitions constitute a modified *res judicata* rule, a restraint on what is called in habeas practice 'abuse of the writ.' The doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial

decisions. *McCleskey v. Zant*, 499 U.S. 467, 489. The new restrictions are well within the compass of this evolutionary process and do not amount to a "suspension" of the writ. *Felker v. Turpin* No. 95-8836 A-890 (1996) p. 10-12. [original page location]

In an effort to curtail abuse of the court system, Congress has passed these two pieces of legislation. The effect of this legislation is now working its way through the courts and being incorporated into the construction of the access to the courts. The eventual effects of this legislation are expected to hamper inmate's ability to vindicate their rights in the courts. The burden of extra procedural requirements can logically be expected to be most severe for indigent and impaired prisons.

This literature review defines the issue of access to the courts in general terms, via the typology created from case law and specific terms in relation to the research conducted in this work, via the Michigan cases. The typology establishes that there are many constructions of the right of access to the courts. The issues introduced in *Hadix*, *Knop*, and *Glover* question the adequacy of these constructions in the face of real world complications. By establishing the history of these cases, and positioning of the current construction of access to the courts on the typology, this literature review establishes the current dominant legal construction of the right of access to the courts. Inmates now have a right to a law library (*Bounds*), the right to assist each other in the absence of other aid (*Johnson*), and the right to come before the court and claim they have no access to the courts (*Lewis*). The thesis question of this work is: Are inmates able to effectively access the courts with these guarantees? This question can be answered by examining the prevalence of impairments that the courts have recognized to prevent such access. The social science literature has shown that a useful understanding of the actions of the courts can be found in social construction perspective.

¹ A narrow scope review of the literature revealed no single work that dealt with the law as creating a reality that binds actors. This is discussed later in this work.

² Fair can include a number of factors that are decidedly unfair. Consistency and relative comprehensibility are all most lay people can expect.

³ In the allegory of the cave, Plato lays out a world where “reality” is, to the observers, pictures on a wall formed by shadows cast by objects in front of a fire behind them. In this allegory the actors have no concept of any other “reality” and never see the source of the shadows. He then sets a cave dweller free to view the world. Plato claims that such a person would recognize reality in its true form, if somewhat gradually. This ‘enlightened’ soul would then return to the cave and describe the newly discovered ‘truth’ and be thought mad by the cave dwellers. He uses this analogy to illuminate his feelings about the relation between the thoughts of philosophers on an enlightened intellectual plane and the resistance of baser sorts to new realities presented by the philosophers. Plato indicates two separate realities for people of two different orientations. More importantly, in establishing the knowledge base of the cave dwellers, he describes a social construction of reality.

⁴ In an attempt to secure the loyalty of young men in defending society, Socrates suggests convincing young men that they sprung from the earth fully formed and that their childhoods were like dreams. Other citizens are brothers born of the earth and will surely defend the land that gave them birth from attack. In effect, Socrates suggests reconstructing reality for the young men for a higher purpose.

⁵ The term “courtroom workgroup” had not been coined at the time of the Ryan and Alfini (1979) study.

⁶ While case law is not an “extra-legal” factor, the case law was external to the facts of the case at hand.

⁷ If the problem extra-legal factors predicting outcomes and judges are identified as the sole decision-makers, then judges must stop using these criteria. Court reform activists have called for a change in their chosen indicators for years, but have largely failed to explore the problem beyond positivist simplifications.

⁸ As a punishment, he was forced to wear female cloths over male cloths. Brown continues to attribute this to a power imbalance between men and women (i.e., a man humiliated by wearing women’s clothing).

⁹ The effects of which are examined in detail later in this chapter.

¹⁰ 1966 is the first year in which prisoner’s rights cases were recorded as a separate category.

¹¹ *Hadix v. Johnson*, 694 F.Supp. 259 (E.D.Mich.1988).

¹² *Hadix v. Johnson*, sub nom., *Knop v. Johnson*, 977 F.2d 996 (6th Cir.1992).

¹³ *Knop v. Johnson*, 467 F.Supp. 467 (W.D.Mich.1987).

¹⁴ *Knop v. McGinnis*, ---- U.S. ---- cert. denied.

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

¹⁶ *Knop v. Johnson*, 977 F.2d 996, at 1006 - 1007 (6th Cir. 1992).

¹⁷ *Ex parte Hull*, 316 U.S. 546 (1941).

¹⁸ The Constitution of the United States, Article One, Section Nine, Sub-section two.

Under specified conditions Congress may abridge the Great Writ.

¹⁹ *Wolff v. McDonnell*, 418 U.S. 539 (1974). *Procunier v. Martinez*, 416 U.S. 396 (1974).

²⁰ *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *Murray v. Giarratano*, 492 U.S. 1 (1989).

²¹ *Turner v. Safley*, 482 U.S. 78 (1987). *Johnson v. Avery*, 393 U.S. 483 (1969). *Hudson v. Palmer*, 468 U.S. 517 (1984).

²² *Bounds v. Smith* 430 U.S. 817 (1977).

²³ *Ex parte Hull*, 316 U.S. 546 (1941). *Johnson v. Avery*, 393 U.S. 483 (1969).

Procunier v. Martinez, 416 U.S. 396 (1974). *Wolff v. McDonnell*, 418 U.S. 539 (1974).

Hudson v. Palmer, 468 U.S. 517 (1984). *Turner v. Safley*, 482 U.S. 78 (1987). *Lewis v. Casey*, Slip Opinion No. 94-1511 (1996). These cases are a small proportion of the category.

²⁴ Part of the continuing adversarial debate between prisoners' rights activists and prison administrators stems from a misunderstanding of this point. The right did not exist before the court created it. The prison officials did not prevent the prisoner from exercising a right. Only once the right is created by the courts is it reality. There is a tendency in both sides to consider their own position retroactively valid upon victory. This only indicates their misunderstanding of the process.

²⁵ The author does not intend this comment to deny such intentional violations of prisoners' right; rather, it should emphasize the demarcation between a time when there was no such right and the new legally constructed reality of the right.

²⁶ *Johnson v. Avery*, 393 U.S. 483 (1969).

²⁷ In this case the state refers to all levels of government (Federal, State, County, and Municipal) if that unit of government incarcerates convicted persons. This definition of "state" will be used throughout this work.

²⁸ *Younger v. Gilmore*, 404 U.S. 15 (1971).

²⁹ Paraphrased from *Gilmore v. Lynch*, 319 F.Supp. 105 at 110 (N.D.Cal.1970) *aff'd sub nom. Younger v. Gilmore*, 404 U.S. 15.

³⁰ *Bounds v. Smith*, 430 U.S. 817 (1977).

³¹ *Johnson v. Avery*, 393 U.S. 483 (1969).

³² *Bounds v. Smith*, 430 U.S. 817 (1977).

³³ See Below

³⁴ *Glover v. Johnson*, 934 F.2d 703 (6th Cir. 1991).

³⁵ Women's Legal Services, succeeded PLS in the women's system.

³⁶ The *Glover* court mandated assistance in matters related to conditions of confinement and post conviction remedies, but also mandated assistance in matters ranging from child custody to immigration law.

³⁷ *Glover v. Johnson*, Slip Opinion No. 94-1617 (6th Cir. 1996). *Glover v. Johnson* 75 F.3d 264, 268-269 (6th Cir. 1996).

³⁸ *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

³⁹ *Knop v. Johnson*, 977 F.2d 996 (6th Cir. 1992) hereafter referred to as *Knop/Hadix*.

⁴⁰ *Hadix v. Johnson*, 694 F.Supp. 259 (E.D.Mich. 1988).

⁴¹ The same PLS as the *Glover* suit.

⁴² *Knop v. Johnson*, 685 F.Supp. 636 (W.D.Mich. 1988).

⁴³ No such conflict was found with the State Appellate Defender's Office (SADO), which represents indigent prisoners on appeals on their convictions. In fact, the director of

SADO, Barbara Levine, was an expert witness and advisor for the plaintiff class throughout the *Hadix* action.

⁴⁴ *Knop v. Johnson*, 977 F.2d 996 (6th Cir. 1992).

⁴⁵ *Hadix v. Johnson*, 694 F.Supp. 259 (E.D.Mich. 1988).

⁴⁶ *Knop v. Johnson*, 977 F.2d 996 at 1010 and 1005 [quoting *Murray v. Giarratano*, 492 U.S. 1 at 11] (6th Cir. 1992).

⁴⁷ *Knop v. Johnson*, 685 F.Supp. 636 (W.D.Mich. 1988).

⁴⁸ *Knop v. Johnson*, 977 F.2d 996 at 1008 (6th Cir. 1992).

⁴⁹ *Johnson v. Avery*, 393 U.S. 483 (1969).

⁵⁰ *Knop v. Johnson*, 667 F.Supp. 467 at 488 (W.D.Mich. 1987).

⁵¹ *Hadix v. Johnson*, 879 F.Supp. 743 (E.D.Mich.1995).

⁵² *Bounds v. Smith*, 430 U.S. 817 (1977). Quoted above.

⁵³ *Lewis v Casey*, 43 F.3d 1261 (9th Cir., 1994) rev'd and remanded. A case charging that the state's reliance on the *Bounds* standard is inadequate to insure access to the courts.

⁵⁴ The Michigan Department of Corrections would not agree to a consent decree or similar resolution prior to the announcement of the Supreme Court's decision in *Lewis v. Casey*. For similar reasons, the *Knop* court did not wish to render decisions only to be forced to revise them under the forthcoming *Lewis* standard.

⁵⁵ *Lewis v. Casey*, Slip Opinion No. 94-1511 (1996).

⁵⁶ *Lewis v Casey*, 43 F.3d 1261 (9th Cir., 1994) rev'd and remanded.

⁵⁷ *Sands v. Lewis*, 886 F.2d 1166, 1169 (9thCir.1989).

⁵⁸ *Johnson v. Moore*, 948 F.2d 517, 521 (9thCir.1991), quoting from *Lindquist v. Idaho State Board of Corrections*, 776 F.2d 851, 858 (9thCir.1985).

⁵⁹ *Vandelft v. Moses*, 31 F.3d 794, 797 (9thCir.1994) quoting from *Sands v. Lewis*, 886 F.2d 1166, 1171 (9thCir.1989).

⁶⁰ *Turner v. Safley*, 482 U.S. 78 (1987).

⁶¹ For a complete list of decisions reviewed in the formation of this typology see the "Law Cited" section of the bibliography.

⁶² *Smith v. Bounds*, 657 F.Supp. 1327 (E.D.N.C.1986).

⁶³ Prison Litigation Reform Act, Pub. L. No. 104-134, § 801-10, 110 Stat. 1321 (1996).

⁶⁴ *In re Prison Litigation Reform Act*, 1997 FED App. 0047P (6th Cir.).

⁶⁵ *Hadix v. Johnson*, No. 4:92:CV:110 (W.D.Mich.1996).

⁶⁶ *United States v. Michigan*, No. 1:84 CV 63 (W.D.Mich.1996).

⁶⁷ *Hadix v. Johnson*, No. 4:92:CV:110 (W.D.Mich.1996).

⁶⁸ *Hadix v. Johnson*, No. 80-73581 (E.D.Mich.1996).

⁶⁹ *Hadix v. Johnson*, No. 4:92:CV:110 (W.D.Mich.1996).

⁷⁰ *Felker v. Turpin* No. 95-8836 A-890 (1996).

DATA COLLECTION

Mandate for Data Collection

All original information presented in this paper was collected by mandate of the Federal Court of the Western District of Michigan. The *Knop/Hadix* Court directed the Michigan Department of Corrections to:

Develop and implement a system to identify prisoners who are unable to make effective use of the legal access system that defendants operate. To accomplish this, defendants must assess intelligence, reading ability, reading comprehension, writing ability, learning disability, and level of physical or mental impairment. To the extent that any of these factors impairs the capability of a prisoner to use a law library to prepare and file a meaningful brief, the provision of access to a law library alone is insufficient.¹

Within 30 days after the first six months of implementation [of the program detailed in the Revised Interim Plan, ordered in this opinion], defendants shall submit to the parties and the Court an evaluation of performance of their program.²

Thus, the information collected was originally intended to satisfy the above requirement of the courts. The task of collecting and analyzing this data fell to the Office of the Special Administrator of the Executive Division and select staff at the Michigan Reformatory. The results were recorded into a computerized database and later analyzed by central office staff. This analysis was presented to the *Knop/Hadix* Court and plaintiff attorneys as agreed in the Revised Interim Plan submitted to the court prior to the pilot implementation. As noted below, special consideration was given to the later use of this data.

Method of Data Collection

For purposes of the pilot study, the Michigan Department of Corrections screened the entire population of the Michigan Reformatory, a prison with a six month transient population of 1,715 prisoners (and a mandated daily population not to exceed 1,234 prisoners). The first figure excludes transient prisoners with stays of less time than is

normally required to complete the intake process³. Eligibility under any one criterion made the prison eligible for assistance. In some cases verification of a criterion required an extended review. During this time the prisoner was treated as if he were eligible. The population was screened for the following eligibility criteria. 1) The prisoner cannot read and/or write at or above the ninth grade. 2) The prisoner lacks the intelligence necessary to prepare coherent pleadings. 3) The prisoner possesses a physical or mental impairment that prevents him from using a law library to prepare and file a coherent pleading. 4) The prisoner possesses a learning disability that would hamper him from filing coherent pleadings. 5) Prisoners in segregation with court deadlines that are not able to prepare a timely and coherent pleading with materials available within the segregation unit. A detailed description of the criteria is available in Appendix B.

This screening required vast resource expenditures in terms of staff time and material. Because of the massive effort on the part of the Michigan Department of Corrections and the intrusive nature of the screening to prisoners, once declared eligible, prisoners were not tested for other impairments. Testing also proceeded from the less intrusive criteria to more intrusive. Because this method was used, the sample can only accurately be used to assess the number of inmates in need of assistance under these criteria. Forcing prisoners to undergo extensive testing to participate in the Legal Writer Program would not have been legally or ethically defensible regardless of the quality of data produced. The criteria used present a useful operationalization of “prisoners who cannot read or write English, or [sic] who lack the intelligence to make coherent legal pleadings, or who because of protracted confinement in administrative or punitive segregation or protective custody, may not be able to identify the books they need.”⁴

These criteria were chosen by the court and represent a continuing expansion of the construction of prison access to the courts.

The bulk of the task of data collection was performed by the Reformatory's Intake Case Manager for all incoming prisoners and Resident Unit Managers for prisoners already at the Reformatory using a form created for the pilot program. The information gathering process was monitored and corrected by the on-site program staff to insure quality and central office staff to insure consistency of method. Additional information and professional judgment was provided from other sources. Reading level as determined by completion of a G.E.D. (General Educational Degree) or a current score on the T.A.B.E. (Test of Adult Basic Education) was provided by the Reformatory school psychologist. Information regarding a mental impairment that would prevent a prisoner from making effective use of the law library, as determined by staff from the Michigan Department of Corrections mental health team at the Michigan Reformatory and Michigan Department of Mental Health. Diagnosis of a physical impairment or temporary condition that would prevent a prisoner from making effective use of the law library, as determined by Department of Corrections medical staff- was provided by the Reformatory health care team. The partially completed forms for each prisoner were sent to each of these departments for confirmation and completion. The on-site program staff did a commendable job of tracking forms generated throughout the process. Other quality assurance methods are noted below.

Method of Quality Assurance in Data Collection

All prisoners in the transient Reformatory population are accounted for in the database created for this project. There are 41 missing cases from prisoners who

transferred prior to screening and 66 incomplete forms that represent the last group sent to the medical team. While there is not 100 percent representation, it appears that missing data occur for reasons that do not indicate a systematic bias. The process used to assure the quality of the final numbers included a number of verifications. First, the actual transient population was verified through population count sheets and transfer logs from the Michigan Reformatory records office. Second, information from prisoners regarding their eligibility status was verified through their institutional records at the time of their interviews. All discrepancies were tracked and resolved by the Program Manager at the Reformatory. Third, original documents were subject to scrutiny for errors at the conclusion of the pilot period by three different interest groups (plaintiff attorneys, on-site program staff, and central office staff). Fourth, the data collection process was scrutinized by the court appointed monitor. Fifth, the data collection process was scrutinized by the Michigan Department of Corrections' educational testing consultant. Sixth, the data collection process was scrutinized by central office staff. Seventh, the data presented in this paper was accepted into evidence without objection in the subsequent *Knop/Hadix* hearing. Any inconsistencies found between cross referenced records were resolved using the original document source information or further investigation by staff.

Quality assurance would not be complete without mentioning ethical requirements observed in data collection. First, the collection of data was mandated by the courts and observed by plaintiff attorneys, legal counsel to the prisoner population. Second, prisoners were not compelled to participate in any way. Their assistance was requested during the initial interview; any prisoner that refused the interview was

described on the forms as having no response and the information was determined from records. Third, because of the sensitive nature of medical and mental health records, only clinical staff were aware of the actual impairment attached to an individual prisoner. The rest of the project staff at any level, including the Warden and Special Administrator of the Executive Division, were not aware more than the prisoners name and that an impairment existed that could qualify the prisoner for assistance from the program. The names of such prisoners are already commonly available to staff at all levels from the mental health call out sheets. Finally, this presentation deals only with aggregated data and does not uniquely identify individual prisoners.

Endnotes for Chapter 3, Data Collection —————

¹*Knop v. Johnson*, Unpublished Order dated 22 December, 1994 on remand from 6th Circuit. Page 7.

²*Knop v. Johnson*, Unpublished Order dated 22 December, 1994 on remand from 6th Circuit. Page 21.

³ The time required to complete intake varies according to the prisoner's situation. Some prisoners are held overnight while in transit or for brief periods during court actions. This group essentially includes prisoners not permanently assigned to the Michigan Reformatory and represents a small number.

⁴*Knop v. Johnson*, 977 F.2d 996 at 1005-1006 (6th Cir. 1992).

PRISONERS IN NEED OF SPECIAL ASSISTANCE

Eligible Prisoners

The results of the Michigan Reformatory pilot evaluation may be of particular interest because of the comprehensive scope of the data collection. Every effort has been made to retain the detail of that data. As noted in chapter three, the intrusive nature of the testing required the Michigan Department of Corrections to apply the least intrusive measures first. Only prisoners who could not be definitely determined to be eligible or not eligible by these less intrusive measures were assessed with the more intrusive measures. Intrusive measures are those which may have been onerous to the prisoner such as the complete T.A.B.E. (Test of Adult Basic Education) Reading test. Intrusive measures also include those which presented a possible disruption to the functioning of the institution such as testing prisoners in segregation. This would have required the prisoner to be removed from segregation and brought to the school or it would have required a teacher to leave the school and administer the test in the segregation unit. Prisoners in segregation were assumed eligible until proven otherwise regardless of impaired status so none were assessed with the more intrusive measures. Finally, intrusive measures include resource intensive measures such as individual assessment of an inmate by medical or mental health staff. Once a prisoner was determined eligible no further assessment was required.

The product of this assessment process was compiled in a database rather than with simple tabulation. The results of the pilot were comprehensive and accurate, but circumscribed by the process that created them. The results presented in this section are individually valid, but will not tabulate properly. The total number of eligible prisoners

is presented separately. The following tables represent the number of prisoners qualifying under each eligibility criterion. These are followed by a table that indicated the total number of eligible prisoners excluding overlap from multiple qualifying criteria. Each sub-section is labeled with the qualifying criterion mandated by the *Knop* Court and includes a brief explanation of the result.

The prisoner cannot read and/or write at or above the ninth grade.

The least intrusive measure of this criterion required prison staff to review the inmate's educational record for notation of a G.E.D. If the prisoner indicated that he had a G.E.D at the initial intake interview (on the intake screening form: LAP-1 - see Appendix C), prison staff requested confirmation from the United States Department of

TABLE 2, G.E.D. Criterion

Label	Frequency	Percentage
No G.E.D.	1015	59.2%
Yes G.E.D.	639	37.3%
Transferred	61	3.6%
Total	1715	100.0%

Education. Without some confirmation present in an inmate's file, he was noted not having a G.E.D. The results of the G.E.D.

assessment do not qualify any prisoners. However, 639 prisoners were excluded from the more intrusive tests dealing with reading level. The 1015 that did not possess a G.E.D. were further tested with the T.A.B.E. Locator.

The T.A.B.E. Locator is a short test used by the Department of Corrections to estimate the approximate reading level of prisoners for specific detailed testing with the more exhaustive T.A.B.E. Battery. Rather than requiring all 1015 prisoners to complete the entire T.A.B.E. Battery prisoners scoring in the lower ranges on the T.A.B.E. Locator were accepted as meeting the reading criterion of the *Knop* Court's order. The T.A.B.E.

Locator is scored in five groups. In order, those groups are Low, Easy, Medium, Difficult, and Advanced. Each grouping has a corresponding range of grade levels for

TABLE 3, T.A.B.E. Locator

Label	Frequency	Percentage
Refused T.A.B.E.	174	10.1%
Low score grouping	16	0.9%
Easy score grouping	145	8.5%
Medium score grouping	156	9.1%
Difficult score grouping	81	4.7%
Advanced score grouping	73	4.3%
Prisoner in segregation	46	2.7%
No T.A.B.E. Locator score	739	43.1%
Prisoner transferred	285	16.6%
Total	1715	100.0%

reading ability. Low, Easy, and Medium fall entirely and unambiguously below the ninth grade reading level. With only the T.A.B.E. Locator results, 317 prisoners were assessed as eligible. The 46 prisoners

in segregation were considered eligible until proven otherwise and 174 prisoners refused to take the T.A.B.E. Locator. Scores in the 'Advanced' range ended at approximately the 8.9 grade level. The T.A.B.E. Locator could not distinguish actual reading level in that degree of detail. Thus, all prisoners scoring in both the Advanced and Difficult ranges were required to complete the T.A.B.E. Battery before they could be assessed as eligible or ineligible.

The T.A.B.E. Battery is a more exhaustive and accurate assessment of reading level. The complete Battery takes several hours to complete. Both the Department of Corrections and Plaintiff Counsel recognized this fact. Unfortunately, in making the program less onerous to prisoners, the data collection lost consistency across conditions. One indication of the necessity of this decision can be seen by the number of prisoners that refused the T.A.B.E. testing process (n=219). This figure combines the 45 that

refused the T.A.B.E. Battery and the 174 that refused the T.A.B.E. Locator. The T.A.B.E. Battery was used to distinguish 37 additional eligible prisoners. Although the recruitment of prisoner legal writers is beyond the scope of this work, it is worth noting that many of the prisoners who elected to take the complete T.A.B.E. Battery were

TABLE 4, T.A.B.E. Battery

Label	Frequency	Percentage
T.A.B.E. Battery not needed	1462	85.2%
Prisoner qualified	37	2.2%
Prisoner not qualified	171	10.0%
Prisoner refused	45	2.6%
Total	1715	100.0%

motivated by a desire to be selected for the legal writer training phase of the pilot. 36 of the 171 prisoners assessed as ineligible for assistance applied for the

legal writer position. 354 prisoners were found eligible for legal writer assistance under the reading level criterion.

The prisoner lacks the intelligence necessary to prepare coherent pleadings.

Screening for the intelligence criterion was accomplished by an examination of the special education records at the prison school. Under Department of Corrections policy, all prisoners with developmental disabilities are eligible for special education

TABLE 5, Special Education Criterion

Label	Frequency	Percentage
No special education	1534	89.4%
Yes special education	123	7.2%
Prisoner transferred	58	3.4%
Total	1715	100.0%

classes. Michigan State law also requires special educational programming for the developmentally disabled. Screening for such impairments

occurs for all incoming prisoners during the reception and guidance phase. As an additional check, the intake screening form (see Appendix C, LAP-1) includes an

assessment by the intake case manager or the resident unit manager of the inmate's developmental disability. 123 prisoners qualifying for special education were qualified under the intelligence criterion without further screening. Many of the special education prisoners appear on the reading level screening totals because most have current T.A.B.E. scores as part of their special education program. Prisoners with current T.A.B.E. scores (less than 6 months old) did not require additional testing.

The prisoner possesses a learning disability that would hamper him from filing coherent pleadings.

This criterion was operationalized as the need for Special education programming. See Table Five. Physically based learning disabilities, those based on hearing or visual impairments were operationalized as medical conditions. See Table Six.

The prisoner possesses a physical or mental impairment that prevents him from using a law library to prepare and file a coherent pleading.

Screening for physically and mentally impaired prisoners was performed by Michigan Reformatory clinical staff. In an effort to assure the privacy of medical records

TABLE 6, Medical or Mental Health Criterion

Label	Frequency	Percentage
No medical or mental health condition	1641	95.7%
Qualifying medical condition	15	0.9%
Qualifying mental health condition	1	0.1%
Transferred	58	3.4%
Total	1715	100.0%

and to maintain doctor-patient privilege, custody staff was not informed of the impairment.

Rather, a form was returned to the Legal Writer Program office stating that the prisoner possessed a qualifying impairment. Any prisoner not otherwise qualified or in

segregation was screened through his medical records. This screening process revealed fifteen prisoners with qualifying mental health issues and one prisoner with a qualifying medical condition. While these numbers may seem low, the Michigan Reformatory is reserved for young and generally healthy male prisoners. Prisoners with known medical conditions are generally housed closer to the Duane Waters Hospital in the Jackson, MI (Michigan Department of Corrections, 1997).

Prisoners in segregation with court deadlines that are not able to prepare a timely and coherent pleading with materials available within the segregation unit.

All prisoners in segregation were considered eligible for service under the pilot program if they had a deadline while still in segregation or immediately after release. Screening of segregation prisoners was accomplished by the legal writer assigned to the segregation area. As with other prisoners, segregation prisoners were presumed qualified until proven otherwise. The disposition of all cases started by the legal writers is examined in Table Eight. There were no eligible requests made from segregation during the pilot.

Qualifying Prisoners

Of the 1715 screened during the six month pilot, 468 qualified for assistance under the criteria mandated by the Federal District Court. However, simply qualifying under these criteria does not signify a need for assistance in accessing the courts. To be eligible for assistance the prisoner must present a non-frivolous claim and state a specific remedy. The next section details the requests for assistance received by the Legal Writer Office during the pilot.

Eligible Requests

In all, 100 prisoners requested assistance. The request for service is the most basic qualifying criterion. Without contact to the Legal Writer Office, no assistance can be rendered. To be able to apply, prisoners must be aware of the program. Incoming prisoners were told about the program during the intake and screening process. Other prisoners were notified of the program during verbal announcements on numerous occasions including their own screening by their Resident unit managers (RUMs). *The Hilltop News*, the prison newspaper, carried extensive articles on the program, and flyers were posted in common areas. Adequate notification of the prisons regarding the program was not challenged by plaintiff attorneys. Requesting assistance was facilitated

TABLE 7, Eligible Requests

100	Inmate requests for service (by Kite)
5	Withdrew or Refused Testing
10	Verified not eligible
7	Transferred
78	Interviewed by LAP staff
1	Withdrew
1	Verified not eligible
1	Service requested is not provided by LAP
75	Assigned a legal writer
13	Verified not eligible
8	Transferred before completion of requested assistance
7	Withdrew or Refused testing
5	Counsel assigned- no further LAP service
2	Service requested is not provided by LAP
3	Pending determination of eligibility
38	Verified eligible and requested authorized assistance
9	Currently working with legal writer
4	Withdrew / No service provided
11	Counsel assigned- no further LAP service
13	Assistance provided
1	Transferred prior to completion of work

by a flexible and often informal process. Any prisoner could submit a kite¹ to the office. RUMs or assistant resident unit managers (ARUMs) were tasked with assisting prisoners

unable to make use of the institutional mail (kite system). Several requests for assistance came with an informal endorsement from ARUMs. The Legal Writer Office was open to prisoners on law library or regular library call out. Many verbal requests were submitted during these times. In the case of verbal requests, staff or prisoner legal writers recorded the request and processed it as other requests. Table Seven summarizes of all requests for assistance received by the Legal Writer Office. The left column gives a diminishing tally of requests and the column on the right describes their attrition through the eligibility screening process. As with all other aspects of this program, prisoners were presumed eligible until proven otherwise. Thus in many cases, the prisoner was determined ineligible after the service was completed (i.e. letter requesting counsel or requests for trial transcripts).

The progressive exclusion of cases represented in this table reflects the fact that not all requests for assistance adhere to the specific guidelines for eligible cases. Many cases appear to require an eligible intervention, but subsequent facts arise that make the service required ineligible. Only the final number of 38 should be used to measure the actual number of prisoners that were verified eligible and made eligible requests for assistance. Thus, out of 468 individual prisoners that met at least one qualifying criterion, only 38 presented a valid request for service.

¹ A Kite is intra-institutional mail.

DISCUSSION

This thesis uses the legally constructed reality of adequate access to the courts as a basis for an analysis of the empirically verifiable fact of inmate impairment. This does not exclude the possibility that the courts have not adequately addressed the impairments that may effect inmate access. For example, the courts have decided that a ninth grade reading level is sufficient to use a law library and existing mechanisms to meaningfully access the courts. This cutoff point is highly debatable, but for the purposes of this work, the legal construct of reality is the 9th grade reading level. By its definition, the legal construction of reality is a socially derived product of the court system. Although the term 'judicially created reality' has been used freely in this work, it is with the recognition that the judge only canonizes the results of the courtroom process. This process relies on the input of both parties to a decision and the judge. The results of an empirical analysis of impairment at the Michigan Reformatory indicate that there is substantial deviation between the legal construction of access to the courts and the fact in practice¹.

Based on criteria mandated by the Federal District Court, 468 prisoners would be unable to achieve meaningful access to the courts. However, given the final criteria of an eligible claim, only 38 prisoners would be denied meaningful access to the courts without the Legal Writers Program. This result indicates that 38 inmates would have standing to bring a claim if they were able to submit a petition that would pass summary dismissal. The simple result of this thesis is that there is a significant difference between the right of

access to the courts as constructed by case law and the ability of inmates to vindicate this right.

The Construction of Prisoner Access to the Courts

The first objective of this work is to establish the current construction of prisoner access to the courts. The courts have created this meta-right out of necessity. Early decisions based on the right to petition for *Habeas Corpus* have been expanded to provide a mechanism for prisoners to vindicate all other rights. Since its creation in *Ex Parte Hull*, this legal reality has been reconstructed in the courts to encompass an ever-increasing range of contingencies. *Johnson v. Avery* provides for assistance from other inmates at the expense of the executive's authority to govern prisons. *Johnson* is significant in that it was the first to recognize that all inmates might not be able to vindicate their right of access because of impairments. *Younger v. Gilmore* created the requirement for the state to provide affirmative assistance to ensure a fair hearing. *Younger* is unique in that it makes the prison administration responsible for providing resources. In this regard, *Younger* places the right of access on equal footing with less abstract rights like the right to medical care. *Bounds v. Smith* remains the most procedurally applicable of the access to the courts decisions. *Bounds* establishes the minimum duty of the state to assure access to the courts. For unimpaired prisoners, *Bounds* is still the defining construction of the right of access.

Lewis v. Casey provides a legal solution to a real world condition that threatens the construction of inmate access. If the court assumes that *Avery's* legal assistance agreements and the *Bounds'* law libraries are sufficient to provide access to the courts,

Lewis v. Casey answers claims that prisoners with impairments cannot achieve access to the courts. *Lewis* does not deny that some prisoners cannot achieve access to the courts under the prevailing construction of the right. However, *Lewis* places the burden of proving lack of access on the prisoner. *Lewis* left the current construction of the right of access essentially unchanged but in doing so effectively ‘raised to the bar’ on an inmate’s attempt to vindicate the right of access by requiring additional procedural barriers (i.e. impaired inmates must prove standing by proving actual harm). Recent legislation such as PLRA and the Antiterrorism and Effective Death Penalty Act of 1996 will only add barriers to vindication of the right of access. The current construction of the right of access is that inmates have the right to affirmative assistance to achieve meaningful access to the courts, but have significant procedural barriers in place. In essence, prisoners have the right to access the courts, but must prove, in court, any disability that may require assistance to vindicate that right.

Ability of Prisoners to Vindicate the Right of Access

The second portion of this thesis is an inquiry into the reality of impairment necessitating special assistance to achieve access to the courts. An assessment was made of the entire six-month transient population of the Michigan Reformatory. The results of this assessment answer the following questions. 1) What is the nature of the injury? Systematic impediments to bringing a non-frivolous claim against a department of corrections resulting in the continued or repeated violation of an inmate’s rights. 2) What is the programmatic need based on the total eligible impaired population? In the population of the Michigan Reformatory, 468 of 1715 or 27.2% of the prisoners may have

had standing if their rights had been violated and they chose to bring suit. 3) What is the programmatic need based on the fusion of appropriate claims and eligible population?

During the six months of the pilot, only 38 eligible non-frivolous claims were brought to the Legal Writer Office. This represents about 2.2% of the population. Despite this small proportion, access to the courts is a right protected by extensive case law. Therefore, correctional administrators must make plans to vindicate this right or suffer court action. The reality of access to the courts is that all prisoners now suffer substantial procedural burdens and impaired prisoners must find help or prove that they need assistance before they can achieve access to the courts.

Steps and Deadlines of a Typical Inmate Suit in Michigan

The Table Eight provides a detailed description of the state remedies that federal law requires a typical prisoner to exhaust before he or she can even file a *Habeas Corpus* action. This list is based on a tool created by Legal Access Pilot staff to guarantee timely service by the legal writers. Each action on this list has been regularly encountered during the Legal Access Pilot at the Michigan Reformatory. The deadlines and procedural burdens are accurate in the state of Michigan during the Legal Access Pilot. This list does not convey the full onerousness of these requirements only the deadlines and procedural path that any litigant, including an indigent or illiterate inmate, is required to fulfill. For a more detailed examination of this information see (Appendix D, Annotated Michigan Post Conviction Remedies Time Line). In this example, delayed applications are used whenever possible to present a best case for the prisoner in terms of deadlines.

TABLE 8, A Typical Inmate's Path to *Habeas Corpus* Relief

Action	Deadline
Timely Appeal as of Right / Request for Counsel Michigan Law requires a response within 14 days. This application should be made by the trial attorney, but is often ignored, thus requiring a Delayed Application for Leave to Appeal (Court of Appeals). Prisoners with attorneys appointed for the Court of Appeals have achieved 'meaningful access.'	42 days after sentencing
Request for Transcripts (Indigent) Note: Michigan Law requires a response in 28 days if conviction is by plea or 56 days if conviction is by trial.	No time limit
Motion to Show Cause Needed if transcripts are denied or not received.	
Delayed Application for Leave to Appeal (COA) Must include a letter explaining delay. If denied in COA, go to MSC.	12 months from denial of motion for relief
Delayed Application for Leave to Appeal (MSC) Includes same as regular leave to appeal plus a letter explaining delay.	56 days from opinion denial
Motion for Reconsideration (MSC) Use only if MSC accepted the case and made a decision. Note: denial = no decision.	21 days from opinion/order
Motion for Relief from Judgement (Sentencing Court) The action is referred to as the state <i>Habeas Corpus</i> .	No time limit
Motion for Reconsideration (Sentencing Court) If Motion for Relief from Judgement is denied.	21 days from denial of motion for relief
Delayed Application for Leave to Appeal (COA) Must include a letter explaining delay. If denied in COA, go to MSC.	12 months from denial of motion for relief
Delayed Application for Leave to Appeal (MSC)	56 days from denial by COA
Federal Habeas Corpus \$5.00 filing fee or proof of indigency required. Must have inmate account statement attached. Must request counsel even if counsel has previously been denied.	No time limit
Response to Motion to Dismiss	60 days from Motion to Dismiss

Note: MSC= Michigan Supreme Court

COA= Court of Appeals (Mich.)

All these steps must be completed in order before federal actions can result.

Based only on the numbers provided by Hanson and Daley (1995), in 1992 nearly 15,300² inmate suits were rejected by the federal courts for failure to navigate similar requirements made by the states. Further, up to 3200³ more petitions failed because of the inmates' inability to navigate the requirements of the federal appeals system. Policy makers have tried to prevent further backlog by imposing additional burdens to the *pro se* litigant. This in turn has forced more prisoners into failure to comply with the court rules. It is conceivable that the dramatic increase in backlog is due in part to repetitions of technically flawed petitions. Policy makers could address this by responding to the impairment found in this research.

Policy Implications for the Michigan Cases

In *Lewis v. Casey*⁴, the Supreme Court required that suits charging violation of a prisoner's right of access to the courts must show *harm in fact* occurring from an act or omission on the part of state. This decision reverses years of case law requiring states to answer speculations of essentially unprovable assertions of potential harm. While this may seem like a broad victory for departments of correction, it requires a proactive role in avoiding costly litigation by inmates who can prove actual harm.

Under this new standard, the state will have a more difficult task prevailing over an inmate who has already established actual harm. It will therefore be desirable for the Michigan Department of Corrections to prevent the harm in the first place. Failing that, it would be desirable for the state to have verifiable proof that the instance of harm could only occur in an exceedingly small portion of the prisoner population or only under rare

circumstances. This would reduce the possibility of class action or orders for system level relief. The first option would obviously be preferable. In this way, prisoner claims would fail to enter costly litigation. For a state to recognize circumstances that may harm a prisoner's access to the courts, the state would need a sound body of empirical research defining the characteristics of its prisoner population that may effect access to the courts. Using the results of this study, the Michigan Department of Corrections can more accurately estimate the number of potentially eligible prisoners in its custody. An administrator may also wish to conduct a similar, if somewhat more limited, assessment of his or her own prisoner population. With this information, policy makers would be free to rationally assess the impact of new programs to address the needs of prisoner populations. While a new program may benefit a given category of prisoners, it may not be cost effective or politically desirable to offer that program to the entire prison population. Option two addresses such circumstances. A policy maker may make a programming decision that ultimately produces harm in fact to a prisoner. When such a circumstance occurs, the courts would be likely to find in favor of the inmate who has already proven violation of his or her rights. As is often the case when courts assume the role of policy maker, the executive branch loses its autonomy and ability to balance expenditures against other needs⁵. Even a cursory examination of the case law reveals that such decisions, when implemented on a class wide basis, can be very costly and seemingly infinite in duration⁶.

This study removes access to the courts from the realm of speculation and anecdote and provides basis to assess actual need. Although this will be a useful tool for

administrators, it may have greater effect in causing all players to reevaluate their roles in what often tends to be a marathon litigation with few positive effects in relation to resource expenditure. Decision making in cases regarding access to the courts is unlike other areas. Rather than forcing a decision of least obnoxious remedial measures on administrators, this information may present new opportunities to vindicate prisoners rights while simultaneously lessening the risk and burden on correctional administrators.

Access to the courts for prisoners offers a unique situation for civil rights advocates, attorneys general, and federal judges alike. It is one of the few instances when they are bona fide experts in substantive as well as procedural aspects of a correctional process. Unfortunately, this expertise often conflicts along the same boundaries as old adversarial relationships. This situation places correctional agencies at an unusual disadvantage. In most matters, correctional agencies are able to rely upon in-house experts in procedural matters. In many cases contracted consultants bolster the opinions of these experts. Unlike other subjects of inmate litigation, access to the courts hinges on a judge's personal perceptions of "reality." The reality of prisoner access to the courts is not constructed by the usual means. The courtroom workgroup's expertise plays a far more prominent role than in other matters. The judge may preside over any number of inmate suits. He or she may also be involved in the summary disposition of prisoner suits. It is natural that a judge would become frustrated with the quality of prisoner petitions and form his or her own opinions about the desirability of the remedy. In actions not related to access to the courts, the judge must rely on testimony, evidence, and the occasional fact finding tour. However, for the most part, he or she is swayed by the

credibility of expert witnesses. Many court actions against correctional agencies have devolved into détente between opposing experts. Even in such cases, the Supreme Court often finds it necessary to remind lower courts that these experts have more knowledge of correctional management than the federal bench. This strategy is not as effective with legal matters. Nearly all of the players in an inmate rights lawsuit are experts in the law except the correctional administrators. Consultants brought in by a department of corrections are at best viewed as just another voice coequal with the other “experts” already present. At worst they are viewed with a contempt reserved for non-practicing attorneys because the court room is already saturated with would-be experts each pressing his or her own construction of the reality of inmate litigation.

It seems that some federal judges are pleased to administer agencies and public policy by judicial fiat in realms to which they freely admit no expertise (Feikens, 1991). The arena of inmate access to the courts offers the federal bench additional temptation to dispense with the notions of comity and federalism. First, the bench is tempted to abandon deference to the sound penological goals as determined by agency. Correctional policies are (or should be) based on a rational assessment of all known factors and all projected outcomes. While a federal judge may know exactly what is required to get an inmate’s pleading “[through] the courthouse door”⁷, he or she may not know the whole effect of such an action. The judge’s knowledge of the procedural aspect of access to the courts does not necessarily produce the programmatic, security, and political expertise necessary to administer an executive agency⁸. Second, the expertise of the court may stir

the bench to seek the “best” solution that may or may not be balanced with the practical need to refrain from resource expenditure.

What the court often fails to realize is that the same set of circumstances that makes it a subject matter expert also presents a moral obligation to be part of the solution. Generally, the court has no particular expertise in any given policy area within a correctional system. The court relies on the testimony of witnesses and documents offered in evidence by one of the adversarial parties (Defendants or Plaintiffs). The court then renders a decision on whether the alleged harm violated the protected rights of the prisoner or prisoners. A principal recently brought back to the forefront of judicial decision making, comity, demands that the court produce orders that respect the role of the executive branch in decision making and only order the least intrusive remedy available. This allows the “experts” to make penologically sound decisions on policy that reflect the role chosen for the executive by the electorate and that best reflect the day to day realities of a correctional institution.⁹ In cases involving access to the courts, nearly everyone in the courtroom is a subject matter expert.

This fact often allows the adversarial players to openly encourage the bench to recognize the apparent validity of anecdotal evidence presented by counsel in the form of argument rather than testimony. When the court accepts this role as expert and active player, by making decisions based on experience, it often fails to recognize the equally active role it may play in the remedy. Until *Lewis v. Casey*¹⁰, the federal bench seemed eager to exercise unconstitutional administrative power over the day to day operation of various departments of correction. The federal judiciary has not exercised the

administrative powers granted under the constitution; the courts have the power to administer their own offices. Within the narrowly drawn scope of constitutionally protected access to the courts presented in *Lewis v. Casey* (direct and indirect attacks on conviction and civil rights actions), the courts have seemingly ignored their own role in facilitating prisoner access to the courts.

The court has no “facilitated” mechanism in place to serve the legal needs of the indigent and/or impaired prisoner¹¹. There are some “simplified” forms available to prisoners, but the court rules governing the filing those forms are often enough to confuse attorneys and thoroughly befuddle impaired *pro se* litigants. It is the duty of the court to assess its own operation and the effects produced thereby that serve to limit an impaired inmate’s ability to gain access. If the administration of the system of law is such that it precludes those it was meant to protect, then corrections is less at fault for the deprivation of the right of access to the courts than the bench itself.

Impaired prisoners are the group most directly effected by the absence of required assistance in accessing the courts. *Bounds* granted literate prisoners the access to law libraries or other means of accessing the courts. This standard of assistance has survived challenges since the ruling of *Bounds* in 1978. There is no imperative to reassess this standard. However, prisoners unable to use the law library effectively because of an impairment cannot adequately vindicate their right of access. Although the mere existence of this right should be enough reason to require assistance, there are legitimate penological goals associated with this right. First, it allows for the redress of grievances without recourse to violence (Silberman, 1992). Silberman claims that access to the

courts gives prisoners hope of an impartial hearing of their complaints. This forum of last resort reduces tensions and facilitates the smooth operation of the prison. Second, any attempts to curtail or failure in the duty to facilitate prisoner access would in fact be counterproductive. Meritorious suits could result from efforts to curtail inmate access (Thomas, 1988). Third, departments of correction sponsoring 'writ writer' programs could benefit from the continued autonomy offered by a non-court-mediated solution. Participation in the program by inmate paralegals could be used to enhance administrative control of the inmate's behavior (Bluth, 1972). Illicit payment could be more closely controlled by restricting inmate's access to a writ writer to a supervised situation in a designated work area (Alpert & Huff, 1981).

Essentially, many authors have recognized the moral and legal imperative to protect the rights of prisoners held by the state. There are also benefits to the administration of prisons for maintaining a system in which prisoners can react nonviolently to situations in which they feel wronged.

Conclusion

This thesis defines the current construction of the right of access to the courts for prisoners and compares the legally constructed reality with the fact of inmate impairment. There are many inmates with the potential to be denied the ability to pursue not just the right of access but all other rights. Without the ability to access the courts, all other rights are at the discretion of the prison administration. The construction of the right of access assumes that all prisoners will be able make use of resources provided by the prison. Not all prisoners are equipped to make use of these resources. This inconsistency will

produce the need for more litigation or the wholesale denial of rights to prisoners with impairments.

Endnotes for Chapter 5, Discussion

¹ As stated in Chapter 3, legal protections of an inmate's right to confidential legal correspondence prevented this study from actually using a direct measure of the inmates' ability to obtain meaningful access to the courts on their own. Thus, this thesis relies on the judicial construction of impairment that prevents meaningful access to the courts. It is also appropriate to use a legally constructed definition to examine the legal construct of the right of access.

² Of 26,800 petitions for Habeas Coprus, 57% were rejected for failure to exhaust state remedies.

³ Of 26,800 petitions for Habeas Coprus, 57% were rejected for procedural default.

⁴ *Lewis v. Casey*, ---- U.S. ----- (1996) Slip Opinion No. 94-1511, Decided 6/24/96.

⁵ The courts view only the issue at hand and have the power to mandate compliance with a standard deemed necessary by the court. This often occurs at the expense of other budget areas as executive departments are constrained by legislative allocations. While the separation of powers long prevailed in this area, causing the courts to eschew prisoner rights cases altogether, *Rhodes v. Chapman*, 452 U.S. 337, 357 (1981) described the Court's activist stance requiring expenditures beyond those provided for by the legislative branch. "Funding for prisons has been dramatically below that required to comply with basic constitutional standards" *ibid.* at 377 (Marshall Dissenting) "In the current political climate, it is unrealistic to expect legislators to care whether the prisons are overcrowded... the political process offers no redress."

⁶ See *Hadix v. Johnson* 694 F.Supp. 259 (E.D. Mich. 1988), *Hadix v. Johnson* 712 F.Supp. 550 (E.D. Mich. 1989), *Hadix v. Johnson* 740 F.Supp. 433 (E.D. Mich. 1990), *Hadix v. Johnson* 792 F.Supp. 527 (E.D. Mich. 1992), *Hadix v. Johnson* 977 F.2d 996 (E.D. Mich. 1992), *Hadix v. Johnson* 879 F.Supp. 743 (E.D. Mich. 1995), *Hadix v. Johnson* 694 F.Supp. 259 (E.D. Mich. 1988), *Glover v. Johnson* 478 F.Supp. 1075 (E.D. Mich. 1979), *Glover v. Johnson* 510 F.Supp. 1019 (E.D. Mich. 1981), *Glover v. Johnson* 531 F.Supp. 1036 (E.D. Mich. 1982), *Glover v. Johnson* 659 F.Supp. 621 (E.D. Mich. 1987), *Glover v. Johnson* 662 F.Supp. 820 (E.D. Mich. 1987), *Glover v. Johnson* 855 F.2d 277 (6th Cir.1988), *Glover v. Johnson* 721 F.Supp. 808 (E.D. Mich. 1989), *Glover v. Johnson* 934 F.2d 703 (6th Cir.1991), *Glover v. Johnson* 850 F.Supp. 592 (E.D. Mich. 1994), *Glover v. Johnson* 862 F.Supp. 180 (E.D. Mich. 1994), *Glover v. Johnson* 879 F.Supp. 752 (E.D. Mich. 1995), and *Glover v. Johnson* 75 F.3d 264 (6th Cir.1996).

⁷ *Knop v. Johnson*, 977 F.2d 996 at 1006 (6th Cir.1992)

⁸ *Knop v. Johnson*, 977 F.2d 996

⁹ The day to day realities of an institution are often ignored to facilitate the executive and legislature's political needs. Nearly any "line professional" in criminal justice knows that political consideration (including legal obligations forced on them by the courts) often take precedence over day to day realities. I do not choose to pursue this argument because it is nearly impossible for the line professional to recognize whether it is a political or legal consideration that causes the seemingly ubiquitous "unrealistic" policies that seem to flow from a central bureaucracy.

¹⁰ *Lewis v. Casey*, ---- U.S. ----- (1996) Slip Opinion No. 94-1511, Decided 6/24/96.

¹¹There are other areas of the law in which court seemingly makes no effort to facilitate the access of indigent and impaired prisoners or similarly disadvantaged free citizens. A recent Sixth Circuit decision denied prisoners' claims of entitlement to assistance for areas such as "domestic relations, personal injury, deportation, workers compensation, social security, detainer, wills and estates, and taxation" *Glover v. Johnson*, 1996 FED App. 0048P (6th Cir.) 96a0048p.06 (page 10). This opinion was reinforced in *Lewis v. Casey*,(---- U.S. ----- (1996) Slip Opinion No. 94-1511, Decided 6/24/96.) (pages 9-11) wherein the court determined that the issue of legal access for prisoners applies only to provision of "the tools to attack their [inmate's] sentences, directly or collaterally, and to challenge the conditions of their confinement. Prior to the preceding decisions the federal court ordered the Michigan Department of Corrections to provide assistance in precisely the areas denied by the Sixth Circuit as not constitutionally required. At no time was the lower court inclined to modify its practices or paperwork to facilitate inmate access.

APPENDICES

APPENIX A
Simplified § 1983 Form

FORM TO BE USED BY A PRISONER FILING A COMPLAINT
UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

In the United States District
Court
For the Western District of
Michigan

(Enter the full name of the plaintiff in this action)

v.

(Enter the full name of the defendant
or defendants in this action)

**Instructions for Filing a Complaint by a Prisoner
Under the Civil Rights Act, 42 U.S.C. ' 1983**

The clerk will not file your complaint unless it conforms to these instructions and to these forms.

Your complaint must be legibly handwritten or typewritten. You, the plaintiff, must sign and declare under penalty of perjury that the facts are correct. If you need additional space to answer a question, you may use the reverse side of the form or an additional blank page.

Your complaint can be brought in this court only if one or more of the named defendants is located within this district. Further, you must file a separate complaint for each claim that you have unless they are all related to the same incident or issue

You are required to furnish, so that the United States marshal can complete service, the *correct name and address of each person you have named as defendant*. A PLAINTIFF IS REQUIRED TO GIVE INFORMATION TO THE UNITED STATES MARSHAL TO ENABLE THE MARSHAL TO COMPLETE SERVICE OF THE COMPLAINT UPON ALL PERSONS NAMED AS DEFENDANTS.

In order for this complaint to be filed, it must be accompanied by the filing fee of \$60.00. In addition, the United States marshal will require you to pay the cost of serving the complaint on each of the defendants.

If you are unable to pay the filing fee and service costs for this action, you may petition the court to proceed in forma pauperis by completing and signing the attached declaration (page 4). If your prison account exceeds \$ _____, you must pay the filing fee and service costs.

You will note that you are required to give facts. THIS COMPLAINT SHOULD NOT CONTAIN LEGAL ARGUMENTS OR CITATIONS.

I. Previous Lawsuits

- A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment?

Yes ☐ No ☐

- B. If your answer to A is yes, describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this Previous lawsuit

Plaintiffs _____

Defendants _____

2. Court (If federal court, name the district. If state court, name the county) _____

3. Docket Number _____

4. Name of judge to whom case was assigned _____

5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?) _____

6. Approximate date of filing lawsuit _____

7. Approximate date of disposition _____

II. Place of Present Confinement

- A. Is there a prisoner grievance procedure in this institution?

Yes ☐ No ☐

- B. Did you present the facts relating to your complaint in the the state prisoner grievance procedure?

Yes ☐ No ☐

- C. If your answer is YES,

1. What steps did you take? _____

2. What was the result? _____

- D. If you answer is NO, explain why not _____

- E. If there is no prisoner grievance procedure in the institution, did you complain to the prison authorities?

Yes ☐ No ☐

- F. If your answer is YES,

1. What steps did you take? _____

2. What was the result? _____

III. Parties

(In the item A below, place your name in the first blank and place your present address in the second blank.

Do the same for additional plaintiffs, if any.)

A. Name of Plaintiff _____
Address _____

(In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use item C for the names, positions, and places of employment of any additional defendants.)

B. Defendant _____ is employed as
_____ at _____

C. Additional Defendants _____

IV. Statement of Claim

(State here as briefly as possible the *facts* of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheets if necessary.)

V. Relief

(State *briefly exactly what you want the court to do for you*. Make no legal arguments. Cite no cases or statutes.)

Signed this _____ day of _____, 19 _____

(Signature of Plaintiff)

I declare under penalty of perjury that the foregoing is true and correct.

(Signature of Plaintiff)

(Date)

APPENDIX B

Screening Criteria

1. The prisoner cannot read and/or write at or above the ninth grade.
 - a) Prisoner was not eligible under this criterion if he possessed a G.E.D.. This indicates that he passed a nationally standardized test of reading and writing at the eleventh grade level. Prisoners were screened for a G.E.D. at the initial interview and through a check of school records.
 - b) Prisoner was eligible if he scored an 'L,' 'E,' or 'M' on the T.A.B.E. Locator¹. The T.A.B.E. Locator is a survey test designed to gauge the approximate functioning level of reading and language use. Results of 'L,' 'E,' or 'M' place the prisoner in the following academic ranges respectively:
 - i) L, Low, grade 0 - 1.9
 - ii) E, Easy, grade 1.6 - 3.9
 - iii) M, Medium, grade 3.6 - 6.9
 - c) Prisoner was required to complete the full T.A.B.E. battery² if he scored a 'D' or an 'A' on the T.A.B.E. Locator. Only a result of greater than ninth grade on the T.A.B.E. battery made a prisoner ineligible under this criterion. Locator results of 'D' or 'A' merely indicated that more testing was required.
 - i) D, Difficult, grade 6.6 - 8.9
 - ii) A, Advanced, grade 8.6 - 14.9
2. The prisoner lacks the intelligence necessary to prepare coherent pleadings.
 - a) Prisoners found eligible for Michigan Department of Corrections Special Education programming were eligible for Legal Writer assistance.
3. The prisoner possesses a physical or mental impairment that prevents him from using a law library to prepare and file a coherent pleading.
 - a) Mental Health conditions meeting this requirement must meet a two part test:
 - i) Global Assessment of Functioning (GAF)³ score of 55 or less
 - ii) Diagnosis of one of the following⁴:
 - a) 295 Schizophrenia
 - b) 296, 301 Bipolar disorder
 - c) 295.70 Schizo-affective disorder
 - d) 296.2, 296.3 Major depressive disorder
 - e) 298.80, 295.40, 297.30, 298.90 Psychosis
 - f) 290, 293, 294 Chronic brain disorder with function impairment
 - g) other condition considered to be a severe disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality or ability to cope with ordinary demands of life (Michigan Department of Corrections, 1996).
 - h) Medical conditions meeting this requirement are determined by on-site health care professionals.

- b) The prisoner possesses a learning disability that would hamper him from filing coherent pleadings.
 - c) Prisoners found eligible for Michigan Department of Corrections Special Education programming were automatically eligible for Legal Writer assistance.
- 4. Prisoners in segregation with court deadlines that are not able to prepare a timely and coherent pleading with materials available within the segregation unit.
 - a) Prisoners in segregation received immediate attention and review of their cases upon notification of the Legal Writer Office. Cases of prisoners in segregation were treated eligible until proven otherwise. Prisoners with deadlines within ten days of their release from segregation were eligible.
 - b) Prisoners eligible outside of segregation are eligible while in segregation.

(Michigan Department of Corrections, 1995).

¹TABE: Test of Adult Basic Education. The TABE is normed to a prison population and is used throughout the Michigan Department of Corrections. "The TABE is a comprehensive testing tool for reading, mathematics, language, and spelling. It provides both diagnostic and prescriptive information. The TABE Locator is a brief pre-test, established to help examiners choose the right battery test level for each examinee." (internal quotes omitted) (Michigan Department of Corrections, 1996).

²Note: TABE battery is a description, and TABE Locator is a proper name.

³GAF scores are determined by trained clinical staff using criteria in the DSM-IV (American Psychiatric Association, 1994).

⁴Diagnostic criteria for these disorders are taken from the DSM-IV (American Psychiatric Association, 1994).

APPENDIX C

INTAKE SCREENING FORM- LEGAL ACCESS PROJECT

Number: _____ DOB: __/__/__ Arrival Date: __/__/__

Name: _____

I. This section identifies potentially eligible prisoners needing assistance:

MEDICAL INFORMATION:

Completed by: _____ Date: __/__/__

Does prisoner have any learning impairment that would impair his ability to file coherent pleadings? Yes No

Mental Health Issue(s): Yes No

Describe mental health/learning impairment or health care issues below, and effect on behavior which would limit his ability to file coherent pleadings:

Recommend for Legal Writer assistance?: Yes No

Is there a health problem STAFF should know about?: Yes No

State problem below: _____

Has a MEDICAL RELEASE been signed?: Yes No Date Signed: __/__/__

CASEMANAGER CONDUCTING INTAKE INTERVIEW:

Completed by: _____ Date: __/__/__

Are there any conditions which would lead you to believe prisoner may be qualified for assistance:

EDUCATIONAL BACK GROUND:

Completed by: _____ Date: __/__/__

Is his native language English? Yes No

If not, can he speak/write/understand English? Yes No Highest grade completed? _____

When was prisoner given TABE test: __/__/__

Scores: English: __ Reading: __

Level Scores: English: __ Reading: __

II. This section to be completed if prisoner potentially qualifies for Legal Writer Training:

Completed by: _____ Date: __/__/__

Classified to General Population? Yes No

GED/11th Grade/ reading/writing ability verified? Yes No

Two Years Left to Serve at MR, and willingness to remain at MR? Yes No

Six Months Misconduct Free? Yes No

Overall prison record demonstrates good adjustment/trustworthiness? Yes No

LAP 1

Distribution: LAP Office, Counselor file

5/22/95

APPENDIX D

Annotated Michigan Post Conviction Remedies Time Line

This form is not intended as an authoritative legal tool. It is a working product created to enhance administrative control over the work of the Michigan Department of Correction's Legal Writer Pilot at the Michigan Reformatory and as an educational tool. The authors: Peter Mingus and Kall Loper take no responsibility for the use or accuracy of this working product.

Action	Deadline	Authority
Timely Appeal as of Right / Request for Counsel Michigan Law requires a response within 14 days. This application should be made by the trial attorney, but is often ignored, thus requiring a Delayed Application for Leave to Appeal (Court of Appeals). Prisoners with attorneys appointed for the Court of Appeals have achieved 'meaningful access.'	42 days after sentencing	MCR 7.203 MCR 6.425(E) MCR 6.425 (F)
Request for Transcripts (Indigent) Note: Michigan Law requires a response in 28 days if conviction is by plea or 56 days if conviction is by trial.	No time limit	MCR 6.433(B) MCR 7.210(B)3(b)
Motion to Show Cause Needed if transcripts are denied or not received.		MCR 7.210(B)(1)
Application for Leave to Appeal Requires 9 to 12 months for reply from MSC (1) Application (6) Proof of service (2) The opinions or orders (7) Notice of hearing being filed (3) Notice of hearing (8) An appendix (4) Motion of waiver for (9) Statement as to why the filing fee court should grant leave (5) Affidavit of indecency (10) Letter requesting clerk of the court to file package *A complete copy is also sent to the prosecutor	21 days from opinion/denial	MCR 7.302 MCR 7.302(A)
Delayed Application for Leave to Appeal (MSC) Includes same as regular leave to appeal plus a letter explaining delay.	56 days from opinion denial	MCR 7.302(C)(3)
Motion for Reconsideration (MSC) Use only if MSC accepted the case and made a decision. Note: denial = no decision.	21 days from opinion/order	MCR 7.313(D)
Motion for Relief from Judgement (Sentencing Court) The action is referred to as the state <i>Habeas Corpus</i> .	No Time Limit	MCR 6.500
Motion for Reconsideration (Sentencing Court) If Motion for Relief from Judgement is denied.	21 days from denial of motion for relief	MCR 6.504(B)(3)

Note: MSC= Michigan Supreme Court COA= Court of Appeals
Continued

Application for Leave to Appeal (COA) If Motion for Reconsideration is denied.	21 days from denial of motion for reconsideration	MCR 7.205(A)
Delayed Application for Leave to Appeal (COA) Must include a letter explaining delay. If denied in COA, go to MSC.	12 months from denial of motion for relief	MCR 7.302(F)
Application for Leave to Appeal (MSC)	21 days from denial by COA	MCR 7.302
Delayed Application for Leave to Appeal (MSC)	56 days from denial by COA	MCR 7.302(C)(3)
Federal Habeas Corpus \$5.00 Filing fee or proof of indigency required. Must have inmate account statement attached. Must request counsel even if counsel has previously been denied.	No time limit	28 USC § 2254
Response to Motion to Dismiss	60 days from Motion to Dismiss	FCR 12(b)6

Note

MSC= Michigan Supreme Court

COA= Court of Appeals (Mich.)

MCR= Michigan Court Rule #

FCR= Federal Court Rule #

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