Gideon Incarcerated: Access to Counsel in Pretrial Detention

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INTRODUCTION

In 1962, Clarence Gideon, a fifty-one-year-old white man who had been in and out of prison most of his life, won a case in the Supreme Court. *Gideon v. Wainwright* famously extended the right to appointed counsel to indigent criminal defendants in state courts. While Gideon's Supreme Court victory is well known, it was not the end of his road.[1] After winning a right to an appointed lawyer, Gideon needed to find one who would take his criminal case. He was referred to a lawyer with the local ACLU who agreed to represent him alongside an experienced criminal defense attorney.[2] But then, on the eve of trial, Gideon dismissed them, apparently because he did not trust them.[3] He petitioned to be allowed to represent himself, a request which the trial court denied without noting the irony.[4] The trial judge then allowed him to select his own lawyer.[5] He chose Fred W. Turner.[6] Gideon was a challenging client. He was frustrated that even after winning in the Supreme Court, he still had to face another trial. He prepared piles of mostly meritless motions that he wanted to file.[7] Turner had to work hard to win over his "prickly" client and earn his trust.[8] He visited Gideon frequently in the local detention facility and included him in developing the pretrial and trial strategy.[9] Ultimately, Gideon was acquitted, illustrating the incomparable value of the right he had just won.

Gideon counts among the most iconic of Supreme Court decisions.[10] In sweeping language, *Gideon* described lawyers as necessary to level the playing field between individual defendants and the coercive power of the state—as well as between wealthy and poor defendants. The "obvious truth," the Court wrote, was that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[11] Any other outcome would be un-American, the Court explained: unlike other nations, "[f]rom the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to

1. This account is drawn from ANTHONY LEWIS, GIDEON'S TRUMPET (Vintage Books 1989).
2. *Id.* at 235–36.
3. *Id.* at 236–37.
4. *Id.* at 237.
5. *Id.*
6. *Id.*
7. *Id.* at 238.
8. *Id.* at 250.
9. *See* Bruce R. Jacob, *Memories of and Reflections About* Gideon v. Wainwright, 33 STETSON L. REV. 181, 259 (2003).
10. This is true even though, by the time Gideon's case was heard, the Court had already decided that appointed counsel was required for poor defendants facing felony charges in federal courts. *See* Johnson v. Zerbst, 304 U.S. 458, 463 (1983). In addition, almost all states already provided some form of legal assistance to indigent defendants facing felony charges. *See* Hope Metcalf & Judith Resnik, Gideon *at Guantánamo: Democratic and Despotic Detention*, 122 YALE L.J. 2504, 2518 (2013) [hereinafter Gideon *at Guantánamo*].
11. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

assure fair trial before impartial tribunals in which every defendant stands equal before the law."[12]

Gideon's mandate has since been extended to include subsidized counsel for a first appeal;[13] to children in delinquency proceedings;[14] and to all defendants facing the prospect of jail time,[15] and even some who do not.[16] Nonetheless, its lofty promise of equal justice has never come close to being realized and today faces new challenges. In the year *Gideon* was decided, the United States had around 200,000 prisoners.[17] At that time, "a prisoner [like *Gideon*] could mail a hand-written petition for the writ of certiorari to the U.S. Supreme Court—in pencil—and have someone read it."[18] Today, that would be impossible. As of 2017, the combined total of state and federal prisoners in the United States topped two million persons, a 500% increase over the last forty years.[19] Nearly one of every 200 Americans is behind bars.[20] As of 2013, seventeen states and the Federal Bureau of Prisons were operating at 100% or more of their highest detention capacity.[21]

The last two decades have also witnessed a tremendous increase in the use of pretrial detention, both in the United States and globally.[22] On any given day in the United States, around 450,000 people are detained pretrial either due to their ineligibility for or their inability to pay bail.[23] Because of the widespread prevalence

12. *Id.*

13. *See* Douglas v. California, 372 U.S. 353, 357 (1963).

14. *See In re* Gault, 387 U.S. 1, 36–37 (1967).

15. *See* Argersinger v. Hamlin, 407 U.S. 25, 40 (1972).

16. *See* Alabama v. Shelton, 535 U.S. 654, 658 (2002).

17. Abbe Smith, *Gideon Was a Prisoner: On Criminal Defense in a Time of Mass Incarceration*, 70 WASH. & LEE L. REV. 1363, 1366 (2013) (citing THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS: STATE AND FEDERAL PRISON POPULATION, 1925–2010 (2012)).

18. *Id.* (citing LEWIS, *supra* note 1, at 35).

19. *Criminal Justice Facts*, SENT'G PROJECT, http://www.sentencingproject.org/criminal-justice-facts/ [https://perma.cc/8AME-R3LR] (last visited Sept. 5, 2018).

20. *See* Reid Wilson, *Prisons in These 17 States Are Now over Capacity*, WASH. POST: GOVBEAT, Sept. 20, 2014, http://www.washingtonpost.com/blogs/govbeat/wp/2014/09/20/prisons-in-these-17-states-are-filled-over-capacity [https://perma.cc/E5PH-98MH].

21. *See id.*

22. *See generally* OPEN SOC'Y JUSTICE INITIATIVE, PRESUMPTION OF GUILT: THE GLOBAL OVERUSE OF PRETRIAL DETENTION (2014), https://www.opensocietyfoundations.org/sites/default/files/presumption-guilt-09032014.pdf [https://perma.cc/93PS-5JVS] (discussing global pretrial detention rates).

23. PRETRIAL JUSTICE INST., PRETRIAL JUSTICE: HOW MUCH DOES IT COST? 1 (2017), http://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=4c666992-0b1b-632a-13cb-b4ddc66fadcd&forceDialog=0 [https://perma.cc/G9ZV-TJVT] [hereinafter HOW MUCH DOES IT COST?]; *see also* Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG., Aug. 13, 2015, http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html [https://web.archive.org/web/20150814002053/http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html]. In the federal system, between 1995 and 2010, the percentage of federal defendants who were detained pretrial increased from 59% to 76%. *See* THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, PRETRIAL DETENTION AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 1995–2010 (2013), https://www.bjs.gov/content/pub/pdf/pdmfdc9510.pdf [https://perma.cc/65PK-AN5F].

of money bail, incarcerated criminal defendants are more likely to be poor.[24] A recent study found that most people who are unable to pay their bail have incomes within the bottom third nationally: "[I]n 2015 dollars, people in jail had a median annual income of $15,109 prior to their incarceration, which is less than half (48%) of the median for non-incarcerated people of similar ages."[25] In other words, people in jail "are drastically poorer than their non-incarcerated counterparts."[26] These factors ensure that *Gideon*'s promise of equal justice will be realized or thwarted in this country's jails and prisons. This aspect of *Gideon* has gone understudied; most attention to date has focused on our grievous failure to properly fund *Gideon*'s mandate[27] and the devastatingly low standard of representation that the Supreme Court has found to meet constitutional requirements.[28]

As a result of these trends, the number of people whose Sixth Amendment rights are now mediated by the state is very high and increasing. When defendants are detained in jails or prisons pretrial, the state controls every aspect of their attorney relationships. As the population of incarcerated persons has swelled in local, state, and federal facilities around the country, the infrastructure supporting the attorney-client relationship is under increasing stress. The result is an array of new cases about the challenges of lawyering in jails and prisons. These cases

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24. *See* JUSTICE POLICY INSTITUTE, BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 2 (2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail_executive_summary.pdf [https://perma.cc/P9U4-LV3B] [hereinafter BAIL FAIL] ("From 1992 to 2006, the use of financial release, primarily through commercial bonds, increased by 32 percent."). In total, "70 percent of people charged with a felony were assigned money bail in 2006." *Id.* In addition, BJS data demonstrates increases in average bails amounts of over $30,000 between 1992 and 2006. *Id.*

25. BERNADETTE RABUY & DANIEL KOPF, PRISON POLICY INITIATIVE, DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME 2 (2016), http://www.prisonpolicy.org/reports/DetainingThePoor.pdf [https://perma.cc/GZ3C-7DMM].

26. *Id.* Although detaining a person solely due to his or her inability to pay is unconstitutional, *see* Bearden v. Georgia, 461 U.S. 660, 674 (1983), the practice is still widespread. In fact, one recent study of magistrate judges in Philadelphia found that judges are more likely to release *wealthy* defendants without requiring money bail. *See* Aaron Siegel, Inconsistent Justice: The Effect of Defendant Income and Extraneous Factors on Bail Amount (Mar. 9, 2017) (unpublished B.A. thesis, Harvard College), http://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=8ca9fd5d-7cbb-1a51-6ba9-bdf166463cb4&forceDialog=0 [https://perma.cc/V6KU-FM37]. In addition, wealthy defendants may be able to pay "for extensive conditions of release" to avoid incarceration. BAIL FAIL, *supra* note 24, at 14. Bernie Madoff and Marc Dreier were able to pay for security, video monitoring, and various other conditions to allow them to remain in their homes pending trial. *See* Alan Feuer, *Bail Sitters*, N.Y. TIMES, Dec. 24, 2009.

27. *See, e.g.*, Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150 (2013); Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236 (2013).

28. *See* Bright & Sanneh, *supra* note 27, at 2169–70 ("Lawyers have been asleep, intoxicated, under the influence of drugs, and mentally ill while supposedly defending clients. They have been unaware in death penalty cases of their client's intellectual disabilities, brain damage, mental illnesses, childhood abuse . . . and, in one case, of their client's real name."). All of these convictions and sentences were upheld under the Supreme Court's standard in *Strickland v. Washington*, 466 U.S. 668 (1984), which presumes "even in the face of facts to the contrary—that lawyers are competent and make strategic decisions." *Id.* at 2170.

challenge the lack of private space for legal visits,[29] lengthy waiting times for attorney-client visits;[30] remote carceral placements,[31] interference with legal mail,[32] and monitoring of legal phone calls[33] and legal email.[34] While the cases tend to focus on individual types of intrusion by the state (for example, on the opening of legal mail), read together, they paint a picture of lawyers and clients struggling to create meaningful and productive relationships through the walls of jails and prisons.[35] Despite (or perhaps because of) these mounting challenges, many courts have become less receptive to Sixth Amendment claims from people behind bars, putting *Gideon*'s core principles in jeopardy.[36]

Gideon won the right to a lawyer. What this meant for him was that he had a person who worked diligently, both for and with him, to win his trust, prepare his case, and ultimately secure his freedom. For many jailed clients, and the lawyers who represent them, this second part of Gideon's story is no longer possible. This Article

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29. *See* United States v. Roper, 874 F.2d 782, 790 (11th Cir. 1989) (no Sixth Amendment violation resulting from facility where pre-trial detainee was required to speak loudly through a telephone and a steel door to communicate with defendant because there was no showing of injury).

30. *See* Benjamin v. Fraser, 264 F.3d 175, 187–88 (2d Cir. 2001) (Sixth Amendment violation based on delays ranging from forty-five minutes to two hours or longer).

31. *See* United States v. Lucas, 873 F.2d 1279, 1281 (9th Cir. 1989) (no Sixth Amendment violation resulting from detention in facility 120 miles from his appointed counsel).

32. *See* Oliver v. Fauver, 118 F.3d 175, 178 (3d Cir. 1997) (no Sixth Amendment claim based on interference with legal mail because prisoner could not prove actual injury); McCain v. Reno, 98 F. Supp. 2d 5, 7–8 (D.D.C. 2000) (no Sixth Amendment injury due to opening and reading of inmate correspondence outside his presence due to lack of actual injury); Hunter v. Quinlan, 815 F. Supp. 273, 275–76 (N.D. Ill. 1993) (no Sixth Amendment violation when prison official opened, read, and retained letter to inmate's attorney because the letter contained nothing of legal substance).

33. *See* Brown v. Madison Cty. Ill., No. 3:04-cv-824-MJR, 2008 WL 2625912, at *4 (S.D. Ill. June 27, 2008) (granting inmate one unmonitored weekly telephone call to his attorney against jail policy of monitoring all telephone calls); United States v. Brooks, 66 M.J. 221, 225 (C.A.A.F. 2008) (finding no Sixth Amendment harm caused by monitoring of telephone conversations with appointed counsel because defendant failed to show injury).

34. Stephanie Clifford, *Prosecutors Are Reading Emails from Inmates to Lawyers*, N.Y. TIMES, July 22, 2014, http://www.nytimes.com/2014/07/23/nyregion/us-is-reading-inmates-email-sent-to-lawyers.html [https://web.archive.org/web/20170711220637/http://www.nytimes.com/2014/07/23/nyregion/us-is-reading-inmates-email-sent-to-lawyers.html].

35. A handful of recent news articles also document these challenges. *See* Nicole Chavez, *Lawsuit: Travis County Jail Inmates Had Calls to Attorneys Recorded, Shared*, AUSTIN-AMERICAN STATESMAN, Apr. 29, 2014, http://www.statesman.com/news/local/lawsuit-travis-county-jail-inmates-had-calls-attorneys-recorded-shared/Jlgxf0IiIAE9pd4jL9E1DM/ [https://perma.cc/2P35-XKPM] (recording of attorney client phone calls); Rebecca Boucher, *Hell Is Trying to Visit My Jailed Client*, MARSHALL PROJECT (July 28, 2017, 6:00 AM), http://www.themarshallproject.org/2017/07/27/hell-is-trying-to-visit-my-jailed-client [https://perma.cc/UE7N-NSE2] (describing the process for visiting a client incarcerated at Rikers Island facility in New York City). Female lawyers have described additional problems related to jail security procedures, including invasive searches and the prohibition of underwire bras. *See, e.g.*, Scott Dolan, *Portland Jail Tells Female Attorneys to Remove Detector-Triggering Bras Before Seeing Clients*, PORTLAND PRESS HERALD, Sept. 18, 2015, http://www.pressherald.com/2015/09/18/female-attorneys-forced-to-remove-underwire-bras-before-meeting-with-clients-at-portland-jail [https://perma.cc/6M6U-8JSH]; Deborah Becker & Rachel Paiste, *Female Lawyers Allege Improper Searches on Prison Visits*, WBUR (Feb. 17, 2015), http://www.wbur.org/news/2015/02/27/woman-lawyers-prison-visits [https://perma.cc/XC79-C3PU] (proposed search at MCI Norfolk facility).

36. *See infra* Part II.

traces the hidden ways in which mass incarceration has worked to thwart *Gideon*'s promise, both in fact and in law, for incarcerated criminal defendants. It then proposes possibilities for reinvigorating the Sixth Amendment's protections, through intersecting strategies for regulation and structural litigation, with the ultimate goal of breaking our national reliance on pretrial detention.

Part II tracks the evolution of the courts' handling of prisoners' Sixth Amendment. *Gideon* both shaped and, in turn, has been shaped by the Court's doctrine on lawyering in prison. While *Gideon* was itself an essential building block in the Court's jurisprudence protecting prisoners' right of access to courts under the Due Process Clause, it has also been degraded (both doctrinally and practically) as the courts have retreated from protecting the constitutional rights of prisoners. As this Part illustrates, many federal courts now analyze the Sixth Amendment claims of pretrial defendants under a framework developed to balance the constitutional rights of convicted prisoners against the state's penological interests, essentially subsuming this aspect of the law of pretrial detention into the law of punishment.

Part III explores possible strategies for reclaiming *Gideon*'s promise in American jails by improving the standards governing attorney-client relationships and by drawing attention to the deficiencies in jail systems through constitutional litigation. This Part presents the findings of a fifty-state survey of the jail rules governing attorney-client visits, mail, and telephone calls. In states in which jails standards regimes are robust, they represent a vision of the role that jails play in facilitating the attorney-client relationship against which actual practices may be evaluated and challenged. And, recognizing that the improvement in jail standards has often been driven by the threat of litigation, this Part then describes a new legal strategy for challenging limits on counsel access as a violation of the Sixth Amendment rights of incarcerated pretrial detainees.

Finally, Part IV concludes by considering the role of counsel access advocacy in the broader project of criminal justice reform. Sixth Amendment litigation could helpfully enhance the movement to limit the use of money bail, in particular by problematizing the outsourcing of detention to rural jails. In addition, by illuminating the current inconsistencies in their jurisprudence and the systemic harms that have resulted, access to counsel advocacy could force courts to confront their legitimation of pretrial punishment.

I. THE PROMISE AND EROSION OF *GIDEON* IN JAIL

While better known for its iconic status in constitutional criminal procedure, *Gideon* was also an important building block in opening jails and prisons to review of constitutional abuses.[37] The ideals of *Gideon* helped structure claims for subsidized court access for incarcerated people, which in turn helped open jails and

37. *Gideon* can also be understood outside the prison context "as launching a wider understanding of government provisioning," resulting in a "'civil *Gideon*' movement . . . calling for the recognition of rights to state-funded lawyers in cases about health, housing, and family life." Gideon *at Guantánamo*, *supra* note 10, at 2512–13.

prisons to greater oversight by courts. Paradoxically, this blurring of the lines between different kinds of incarcerated claimants and different types of claims has meant that the Sixth Amendment claims of incarcerated defendants have also, in some jurisdictions, been frustrated by the Court's withdrawal from its commitment to carceral oversight. Given the intersection between poverty and pretrial detention, the result has been the gradual hollowing out of *Gideon*'s promise, even for those defendants who do receive appointed counsel. This Part tracks these doctrinal shifts and explores their impact on the right to counsel for incarcerated claimants.

A. Gideon*'s Role in Building Subsidized Court Access for Prisoners*

Until the 1960s, federal courts generally declined to review alleged violations of state prisoners' rights,[38] citing concerns about "separation of powers; the lack of judicial expertise in penology; and the fear that intervention by the courts [would] subvert prison discipline."[39] This so-called "hands-off" doctrine began to erode in 1960s-70s, as the Supreme Court became more engaged in reviewing the constitutionality of criminal procedure.[40] After the Attica riot in 1971, civil rights organizations began to aggressively and systematically litigate prison cases.[41] "[F]aced with sometimes uncontested proof of brutal and unhealthful jail and prison environments not just in isolation cells but throughout facilities, judges began to find that such conditions also violated the constitutional rights of inmates and to issue injunctive orders . . . ."[42]

This breakdown of the "hands off" doctrine was enhanced by the Court's developing jurisprudence protecting and expanding prisoners' rights to court access under the Fourteenth Amendment. Two decades prior to *Gideon*, the Supreme Court struck down a Michigan statute that prevented prisoners from filing legal documents with the courts unless they were found to be "properly drawn" by the parole board.[43] In *ex parte Hull*, the Court held that "the State and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus."[44] Over the next several years, the Court decided a series of cases under the

38. *See* Lorijean Golichowski Oei, Note, *The New Standard of Review for Prisoners' Rights: A "*Turner*" for the Worse?*, 33 VILL. L. REV. 393, 399 (1988) (quoting *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871)) ("Courts considered prisoners to be "'slave[s] of the State," having "not only forfeited their liberty, but all their personal rights . . . ."'"); Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2000 (1999) (reviewing MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998)); *see also* Mark Berger, *Withdrawal of Rights and Due Deference: The New Hands Off Policy in Correctional Litigation*, 47 UMKC L. REV. 1 (1978–1979); Notes and Comments, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

39. Ronald L. Goldfarb & Linda R. Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 181 (1970) (citations omitted).

40. *See id.* at 183.

41. *See* Schlanger, *supra* note 38, at 2018.

42. *Id.* at 2003.

43. *See Ex parte* Hull, 312 U.S. 546, 549 (1941).

44. *Id.*

Equal Protection and Due Process Clauses that removed the obstacles preventing indigent prisoners from accessing the courts. In relatively quick succession, the Court held that the state must provide transcripts or trial records free of cost to allow indigent defendants a meaningful appeal,[45] that indigent prisoners must be allowed to file appeals and petitions for habeas corpus without paying docket fees,[46] and that the state could not prevent illiterate prisoners from seeking assistance from "jailhouse lawyers,"[47] or limit access to prisoners to members of the bar and licensed investigators. [48]

Then, in the early 1970s, prisoners from several facilities in North Carolina sued, arguing that they were denied access to the courts in violation of the Due Process Clause of the Fourteenth Amendment by the state's failure to provide them with access to adequate law library facilities. In holding in *Bounds v. Smith* "that the fundamental constitutional right of access to the courts requires prison authorities to assist in the preparation and filing of meaningful legal papers," the Court first discussed its line of cases removing state-imposed barriers to court access.[49] Then, citing *Gideon* and its progeny, the Court went on to explain that its "decisions have consistently required states to shoulder affirmative obligations to assure all prisoners meaningful access to the courts."[50] It acknowledged the economic challenges, but concluded that "the cost of protecting a constitutional right cannot justify its total denial" and affirmed that incarcerated prisoners were required to be given "a reasonably adequate opportunity to present claimed violations of constitutional rights to the courts," with the cost borne by the state.[51]

Gideon's core message—that subsidies for lawyers for the poor are "essential to the legitimacy"[52] of our criminal justice system—underpins the *Bounds* decision. While noting that "a habeas corpus petition or civil rights complaint need only set forth facts giving rise to the cause of action," the Court rejected the State's argument that prisoners could successfully raise these claims without access to a law library or

45. Griffin v. Illinois, 351 U.S. 12, 20 (1956) (holding that the Due Process and Equal Protection Clauses require that, if states make appellate courts available, they cannot be denied to the poor based on their inability to pay).

46. Burns v. Ohio, 360 U.S. 252, 257–58 (1959) (extending the principles in *Griffin v. Illinois* to prevent discrimination against the poor in view of the state's supreme court).

47. *See* Johnson v. Avery, 393 U.S. 483, 490 (1969). While *Johnson* primarily concerned habeas petitions, its holding was then extended to cover assistance in civil claims in *Wolff v. McDonnell*, 418 U.S. 539, 577–80 (1974).

48. *See* Procunier v. Martinez, 416 U.S. 396, 420 (1974) (finding an unjustifiable burden on the right of prisoners' access to the courts by weighing financial and time costs imposed on attorneys by travel to remote prisons), *overruled in part on other grounds by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

49. Bounds v. Smith, 430 U.S. 817, 824 (1977). The Supreme Court had previously, in 1971, affirmed per curiam and without opinion the conclusion of a three-judge district court that a state is constitutionally required to provide state prisoners with access to the courts in the form of adequate legal research resources or a sufficient alternative. *See* Younger v. Gilmore, 404 U.S. 15, 15 (1971).

50. *Bounds*, 430 U.S. at 824.

51. *Id.* at 825; *see also Procunier*, 416 U.S. at 419–21 (striking down regulation preventing attorneys from relying on law students and paraprofessionals to interview incarcerated clients).

52. Gideon *at Guantánamo*, *supra* note 10, at 2512.

other forms of legal assistance and emphasized the importance of "an adversary presentation"[53] to ensure their meaningful consideration. The Court stopped short of requiring access to counsel for prisoners' habeas and civil rights claims (instead encouraging local experimentation),[54] but noted that providing counsel as the means of fulfilling the state's constitutional obligation would have a number of advantages in terms of efficiency, accuracy, and prison administration.[55]

Thus, in *Bounds*, the Court relied upon *Gideon* as a building block in creating a broader right of access to courts for prisoners. The Court did not require the provision of lawyers to prisoners seeking to vindicate civil rights and habeas claims, but once again acted to level the playing field between the individual and the state in the interest of protecting fundamental constitutional values. And, in so doing, it blurred some of the doctrinal distinctions between incarcerated pretrial criminal defendants and post-conviction civil litigants and habeas petitioners.[56] While, in *Bounds*, this strategy worked to break down institutional barriers for all incarcerated people seeking access to courts, it also meant that the Sixth Amendment rights for incarcerated pretrial defendants became linked to, and even dependent upon, the existence of court-access rights for prisoners more generally.

*B. The "*Turner-*ization" of Court Access*

When *Bounds* was decided, the Court speculated that a mere 500 lawyers would be necessary to provide representation for the entire U.S. prison population.[57] By 1987, when the Court decided *Turner v. Safley* and reshaped the constitutional law of prisons, this was no longer the case.[58] The United States was in the early stages of a massive expansion of its incarcerated population. The Bureau of Justice Statistics noted that the total population had "reached a record 581,609," bringing "total growth in the prison population since 1980 to nearly 252,000 inmates—an increase of about 76% in the 7-year period."[59]

In *Turner*, Missouri prisoners challenged two regulations.[60] One regulation limited prisoner-to-prisoner correspondence, except when involving familial relationships.[61] The other prevented prisoners from marrying except with the permission of the superintendent of prisons, which was to be granted only for

53. *See Bounds*, 430 U.S. at 825–26.

54. *Id.* at 832.

55. *Id.* at 831–32.

56. The Sixth Amendment is mentioned nowhere in the majority opinion in *Bounds*. In dissent, Chief Justice Burger highlighted the way in which the majority elided distinctions between different types of claimants and claims. He drew the distinction between requiring the states to fund federal constitutional guarantees, like the Sixth Amendment right to counsel, and federal statutory guarantees, like the right to collateral review of a criminal conviction. *Id.* at 833–36.

57. *See id.* at 831–32.

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

59. BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISONERS IN 1987 (1998), https://www.bjs.gov/content/pub/pdf/p87.pdf [https://perma.cc/ZUL7-BN9Z].

60. *See Turner*, 482 U.S. at 81–82.

61. *Id.*

"compelling reasons."[62] The district court and the Eighth Circuit applied strict scrutiny and struck down both provisions.[63]

The Supreme Court took a different tack. While acknowledging its precedents requiring "federal courts . . . [to] take cognizance of the valid constitutional claims of prison inmates," the Court instead emphasized that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform."[64] Writing for the majority, Justice O'Connor noted that "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."[65] The realities of prison administration required a more deferential standard of review. As O'Connor explained, "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."[66] The Court thus concluded that while prisoners retain their constitutional rights, "a prison regulation impinging on inmates' constitutional rights 'is valid if it is reasonably related to legitimate penological interests.'"[67] Applying its new standard, the *Turner* Court upheld the ban on correspondence as "reasonably related to valid corrections goals" that did not "unconstitutionally abridge the First Amendment rights of prison inmates."[68] By contrast, the Court found the broad ban on marriage unrelated to the penological interests proffered by the state, and struck it down as written, while leaving open the possibility of narrower restrictions on the right to marry.[69]

Turner wrote a transformation (or "*Turner*-ization")[70] of the constitutional law of prisons. A few years later, the Court indicated that its test applied to all constitutional claims brought by prisoners.[71] In *Washington v. Harper*, the Court considered a policy that permitted the involuntary use of psychotropic medication; although the allegation was that the policy violated the Due Process Clause, the

62. *Id.*

63. *Id.* at 83.

64. *Id.* at 84 (quoting Procunier v. Martinez, 416 U.S. 396, 405 (1974)).

65. *Id.*

66. *Id.* at 89.

67. *Id.* (quoting Jones v. N.C. Prisoners' Union, 433 U.S. 119, 128 (1977)). *Jones* involved a challenge to prison regulations preventing prisoner meetings and mass mailings for the purpose of union organizing. Citing its recent case, *Greer v. Spock*, 424 U.S. 828 (1976), in which the Court upheld a ban on political meetings at Fort Dix on the grounds that a military base was not a public forum, the Court concluded that the state needed only a rational basis for its distinctions between the prisoners' union and other groups like Alcoholics Anonymous. *Turner*, 482 U.S. at 134.

68. *Turner*, 482 U.S. at 93.

69. *Id.* at 97–99.

70. *See* James E. Robertson, *The Rehnquist Court and the "Turnerization" of Prisoners' Rights*, 10 N.Y.C. L. REV. 97 (2006).

71. *See* Washington v. Harper, 494 U.S. 210, 224 (1991) ("We made it clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights.").

Court majority explained that "the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights."[72]

Turner has fundamentally reshaped the way that courts view the constitutional law of prisons,[73] and prisoner court-access claims have not been exempt. This transformation became apparent in *Lewis v. Casey*, a 1996 class action challenging the adequacy of library facilities in Arizona.[74] Following a three-month bench trial, the district court, relying on *Bounds*, ruled in favor of the prisoners, finding a number of deficiencies in the Arizona Department of Corrections' (ADOC) library system, with a particularly significant impact on prisoners in solitary confinement and illiterate or non-English speaking prisoners.[75] Having found ADOC liable for violating the Due Process rights of its prisoners, the court appointed a Special Master who conducted a multi-month investigation and provided a proposed permanent injunction detailing a variety of reforms, which the court adopted.[76] The Ninth Circuit, in large part, affirmed.[77] Applying *Turner*, the Supreme Court concluded that the district court's order was insufficiently deferential to prison administration, particularly given the security issues involved in providing court access to "lockdown" prisoners, as well as the intrusiveness and detail of the injunction plan . . . ."[78] In addition, the *Lewis* majority imposed an actual injury requirement for prisoners seeking to vindicate court access claims.[79] Thus, a prisoner alleging an access-to-courts violation was required to demonstrate not only that the legal resources provided were insufficient, but that the state's deficiency somehow "hindered his efforts to pursue a legal claim."[80] While noting that *Bounds* included no such injury requirement, Justice Scalia, writing for the majority, argued that it could not have eliminated this "constitutional prerequisite."[81]

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72. Washington, 494 U.S. 210, 224 (1991); *see also* Shaw v. Murphy, 532 U.S. 223, 229 (2001) ("[I]n *Turner*, we adopted a unitary deferential standard for reviewing prisoners' constitutional claims . . . .").

73. *Turner* marked a new period in the law of prisons, a return to the "hands off" doctrine after approximately two decades. *See* Lisa D. Levinson, *Prisoners' Rights*, 75 DENV. U. L. REV. 1055, 1057–60 (1998) (describing evolution of the Supreme Court's prison jurisprudence); Hedieh Nasheri, *A Spirit of Meanness: Courts, Prisons and Prisoners*, 27 CUMB. L. REV. 1173, 1175–85 (1997).

74. Lewis v. Casey, 518 U.S. 343, 346–47 (1996).

75. *See id.* at 347.

76. *See id.*

77. *See id.*

78. *Id.* at 361–62.

79. *Id.*

80. *Id.* at 351. Some circuits had already adopted an injury or prejudice requirement prior to *Lewis*, relying on *Weatherford v. Bursey*, 429 U.S. 545 (1977). *See, e.g.*, Bishop v. Rose, 701 F.2d 1150, 1156 (6th Cir. 1983). However, the version endorsed by the Court was more stringent. *See* Hadix v. Johnson, 182 F.3d 400, 404–06 (6th Cir. 1999) (reading *Lewis* to require a finding of system-wide injury giving rise to non-frivolous access-to-court claims).

81. *Lewis*, 518 U.S. at 351.

Lewis' impacts were dramatic. In addition to "a marked contraction in the availability of law libraries and other legal services to prison inmates,"[82] the injury requirement in *Lewis* created a significant barrier to prisoner court access claims.

C. The Turner*-ization of the Sixth Amendment*

The *Turner*-ization of the court access cases has also reshaped how most courts view Sixth Amendment counsel access claims made by incarcerated defendants. Since the mid-twentieth century, courts have been tangling with the question of what kinds of state intrusions into the attorney-client relationship violate the Sixth Amendment right of access to counsel. The early cases generally made clear that, at the very least, the right to a lawyer meant counsel loyal to the client's interests and free from conflict.[83] In 1942, in *Glasser v. United States*, the Supreme Court granted a new trial to a defendant whose lawyer had also been appointed to represent his co-defendant.[84] The Court explained:

> [T]he assistance of counsel guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired.[85]

These early decisions were equally clear that the right to a lawyer includes the right to confidential consultation with that person both before and during trial.[86] In 1951, the D.C. Circuit considered the case of Judith Coplon, who was tried and convicted on allegations that she had taken intelligence reports from the Department of Justice where she worked and passed them to a Russian spy.[87] In arguing for a new trial, Coplon alleged that while wire-tapping her phones, the FBI had intercepted phone conversations between her and her counsel, both before and during her trial.[88] The district court denied her motion for a new trial, holding that the FBI's intrusion on her privacy did not violate the Sixth Amendment right to counsel unless the evidence gathered was used to convict.[89] On appeal, the D.C. Circuit disagreed, concluding that the jurisprudence "unequivocally establish[es] the principle that the two Amendments [the Fifth and the Sixth] guarantee to persons accused of crime the right privately to consult with counsel both before and during trial. This is a fundamental right that cannot be abridged, interfered with or impinged upon in any manner."[90] The Court went on to explain

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

83. *See* Glasser v. United States, 315 U.S. 60 (1942) (awarding new trial for defendant whose counsel was appointed to represent his co-defendant at trial).

84. *See id.*

85. *Id.* at 70.

86. *See* Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951).

87. *See id.*

88. *See id.* at 757.

89. *See id.* at 759.

90. *Id.* at 759.

that if the client had "on other occasions ample personal consultation with his lawyer, face to face, which no person overhead . . . [that] fact would not erase the blot of unconstitutionality from the act of intercepting other consultations."[91]

The D.C. Circuit affirmed these principles shortly thereafter in *Caldwell v. U.S.*,[92] which involved a defendant who was indicted for jury-tampering. While his case was pending, the prosecution hired an investigator, Bradley, to assist in the case, who, while operating undercover, became acquainted with Caldwell and his lawyer.[93] Bradley was then hired by the defense to assist in the preparation of *their* case, which included a plan to steal Caldwell's file from the U.S. Attorney's office.[94] The D.C. Circuit found the decision in *Coplon* controlling, concluding that the

> Constitution's . . . guarantees of . . . due process of law and effective representation by counsel, lose most of their substance if the Government can with impunity place a secret agent in a lawyer's office to inspect the confidential papers of the defendant and his advisors, to listen to their conversations, and to participate in their counsels of defense.[95]

The remedy for violations of these core elements of the attorney-client relationship was straightforward; not only did challenged practice have to stop, but the resulting proceeding was tainted and therefore void. In an oft-cited line from the *Glasser* case, the Court explained that: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[96]

In the years following *Glasser*, lower courts easily applied these Sixth Amendment principles across jail walls. They confirmed that incarcerated clients were entitled to regular meetings with their counsel both before and during trial;[97]

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91. *Id.*

92. 205 F.2d 879 (D.C. Cir. 1953).

93. *See id.* at 880.

94. *See id.*

95. The Supreme Court has taken a somewhat different view when the informant's information is not used at trial. *See* Hoffa v. United States, 385 U.S. 293 (1966) (involving two separate trials). In *Hoffa*, a government informant was present during some conversations between the defendant and his attorneys for the first trial, which resulted in a hung jury. *Id.* The informant's testimony was then separately used to successfully prosecute the same defendant in a trial for jury tampering. *Id.* The Court found that while there might have been a Sixth Amendment violation that could have invalidated the results of the first trial (had the jury not hung), they did not infect the second trial on the jury tampering charges, given that none of the incriminating statements made by the defendant had occurred in the presence of his lawyers. *Id.* at 308. Notably, the Court assumed without deciding that both *Coplon* and *Caldwell* were correctly decided. *Id.* at 307.

A decade later, relying on *Hoffa*, the Court held in *Weatherford v. Bursey*, 429 U.S. 545 (1977), that the presence of a government informant in defendant's conversation with counsel did not violate the Sixth Amendment when the informant's attendance at the meeting was requested by the defendant and the district court found that the informant had not communicated anything about the meetings to his superiors in law enforcement or to the prosecutors in the case.

96. Glasser v. United States, 315 U.S. 60, 76 (1942).

97. Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951).

to have confidential legal conversations and correspondence;[98] and to have contact visits with their counsel with the ability to consult and share documents.[99] Then came *Turner* and *Lewis*, and with them a fragmenting of the doctrine governing prisoners' right-to-counsel to claims.

Some courts, following *Turner* and *Lewis*, have continued to analyze right-to-counsel access claims primarily through the Sixth Amendment lens. In *Benjamin v. Fraser*, for example, the Second Circuit discussed the appropriate standard to apply to jail practices governing defense attorney visits.[100] The court rejected the argument that *Lewis* governed the case, explaining that while "the right to counsel and the right of access to the courts are interrelated, since the provision of counsel can be a means of accessing the courts, . . . the two rights are not the same."[101] The Second Circuit also expressed doubt that *Turner* was applicable to cases involving the constitutional rights of pretrial detainees.[102] The *Turner* standard, the court explained, depends upon an assessment of "penological interests," or "interests that relate to the treatment (including punishment, deterrence, rehabilitation, etc . . . .)"

98. *See* Lamar v. Kern, 349 F. Supp. 222 (S.D. Tex. 1972) (concluding that censoring and withholding prisoner mail to and from courts and attorneys violated the First and Sixth Amendments); Palmigiano v. Travisono, 317 F. Supp. 766 (D.R.I. 1970).

99. *See* Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973) (forbidding prisons from limiting attorney-inmate contact to a visiting room with a soundproof glass barrier, where attorney and client must communicate by phone and exchange papers through a guard); Goldsby v. Carnes, 365 F. Supp. 395 (W.D. Mo. 1973) (requiring attorney consultation rooms to be private except for a small glass panel); Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972) (finding city jail conditions allowing attorney-client conversations to be overhead by staff and other prisoners violated Sixth Amendment); Case v. Andrews, 603 P.2d 623 (Kan. 1979) (finding jail policy of visually monitoring all attorney-client consultations violated Sixth Amendment).

In deciding these cases, lower courts often relied on both the Sixth and Fourteenth Amendments, reflecting the Supreme Court's blending of these doctrines. For example, in *Taylor v. Sterrett*, the Fifth Circuit, in considering a challenge to a jail mail policy, found it "unnecessary to consider separately the Sixth Amendment rights of the prisoner-plaintiffs." 532 F.2d 461, 472 (5th Cir. 1976). Any infringement of the right to effective counsel by the reading of an inmate's correspondence with an attorney is included within a concurrent abridgement of the right of access to the courts. *Id.* at 473.

100. 264 F.3d 175 (2d Cir. 2001).

101. *See* Benjamin v. Fraser, 264 F.3d 175, 185 (2d Cir. 2001). As the court noted in rejecting the addition of a prejudice requirement, this kind of harm is very hard to demonstrate in the context of a Sixth Amendment claim:

> It is not clear to us what "actual injury" would even mean as applied to a pretrial detainee's right to counsel. Lewis describes "actual injury" as a showing that a "non-frivolous legal claim had been frustrated or was being impeded" due to the action of prison officials. The reason pretrial detainees need access to the courts and counsel is not to present claims to the courts, but to defend against the charges brought against them.

Id. at 186. Interestingly, in the absence of any relevant Sixth Amendment precedent from the Supreme Court, the Second Circuit relied on *Procunier v. Martinez*, 416 U.S. 396 (1974), which struck down a regulation preventing attorneys from relying on law students and paraprofessionals to interview incarcerated clients. The court noted that *Procunier* was also a court access case, but reasoned that its more protective standard was applicable because of its factual similarities. *Id.* at 187.

102. *Id.* at 187.

which are "arguably not an appropriate guide for the pretrial detention of accused persons."[103]

While not anomalous,[104] the Second Circuit's approach has been rejected by many other courts which, following *Turner* and *Lewis*, evaluate the Sixth Amendment claims of pretrial defendants as part of the broad (and less clearly grounded)[105] right of access to courts. Picking up on the tone and reasoning of *Turner* and *Lewis*, courts in these cases demonstrate more concern about the challenges of modern prison administration, and show an increasing willingness to overlook a growing number of so-called "harmless" intrusions on the right to counsel.[106] They are reluctant to punish occasional (or even regular) mistakes occurring in the prison bureaucracy.[107] And they recognize the potential for lawyer criminality and misconduct (quite a departure from *Gideon*'s portrayal of the lawyer as champion on behalf of the poor and marginalized).[108] Finally, in line with the Court's instruction in *Lewis*, courts are

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103. *Id.* at 187 n.10; *see also* Mauro v. Arpaio, 188 F.3d 1054, 1059 n.2, 1067 (9th Cir. 1999) (en banc) (Kleinfeld, J., dissenting) (arguing that *Turner* is inappropriate for cases involving pretrial detainees).

104. *See, e.g.*, Covino v. Vt. Dept. of Corrs., 933 F.2d 128 (2d Cir. 1991) (vacating and remanding on the grounds that district court should have considered whether transfer to a facility 56 miles away unconstitutionally impaired his right to counsel); Carr v. Tousley, No. CV-06-0125SJLQ, 2009 WL 1514661, at *33 (D. Idaho May 27, 2009) ("In challenging regulations which adversely affect the Sixth Amendment right to counsel by impeding attorney visitation, a pretrial detainee is not required to demonstrate actual injury."); Lynch v. Leis, No. 1:00-CV-274 SJD, 2002 WL 33001391 (S.D. Ohio Feb. 19, 2002) (unpublished) (striking down restrictive collect-call policy as violation of the Sixth Amendment).

105. *See* Lewis v. Casey, 518 U.S. 343, 366 (1996) (Thomas, J., concurring) (noting that "the majority opinion in *Bounds* failed to identify a single provision of the Constitution to support the right created in that case . . . .").

106. Williams v. Woodford, 384 F.3d 567, 584–85 (9th Cir. 2004) ("When the government deliberately interferes with the confidential relationship between a criminal defendant and defense counsel, that interference violates the Sixth Amendment right to counsel if it substantially prejudices the criminal defendant."); Ervin v. Busby, 992 F.2d 147, 150 (8th Cir. 1993) (evidence of actual prejudice necessary to maintain a claim based on interference with right to counsel); Fleury v. Collins, No. 10-cv-01361-LTB-KLM, 2011 WL 1706835, at *4 (D. Colo. Apr. 14, 2011) (unpublished) (dismissing prisoner's Sixth Amendment claims because he "provided absolutely no explanation of how the alleged supervision and monitoring of his telephone calls to counsel 'compromised [his] defense.'") (alterations in original); Horacek v. Seaman, No. 08-10866, 2009 WL 2928546, at *10 (E.D. Mich. Sept. 10, 2009) ("[T]o establish a Sixth Amendment violation by defendants' alleged monitoring of his telephone calls to his attorney, plaintiff must show that monitoring prejudiced his defense of the criminal charges against him."); *Carr*, 2009 WL 1514661, at *33 ("Since Plaintiff has not alleged how he was prejudiced as a result of the alleged monitoring of telephone calls . . . [he] has not stated a constitutional violation."); Thomsen v. Ross, 368 F. Supp. 2d 961 (D. Minn. 2005) ("Plaintiff's Sixth Amendment claim fails for essentially the same reason: failure to show prejudice from any interference with his mail."); United States v. Noriega, 764 F. Supp. 1480 (S.D. Fla. 1991) (no Sixth Amendment violation when prisoner's attorney phone calls were monitored and contents were communicated to the prosecution because the communications were not prejudicial).

107. *See* Lewis v. Cook Cty. Bd. of Comm'rs, 6 Fed. Appx. 428, 430 (7th Cir. 2001) (finding no Sixth Amendment violation when prisoner alleged that his communications with counsel were chilled by the repeated opening of his legal mail); *Thomsen*, 368 F. Supp. 2d at 961 (finding that the improper opening of three letters caused no loss of counsel's assistance).

108. *See, e.g.*, Nordstrom v. Ryan, 856 F.3d 1265, 1272 (9th Cir. 2017) (allowing scanning (but not reading) of legal mail "to confirm that it does not include suspicious features such as maps [of the

very reluctant to impose particular modes or methods of communication as a constitutional matter. Some explicitly conclude that no confidentiality in one form of communication (particularly phone and email) is required because alternative confidential forms of communication (postal mail and in-person visits) are presumed to be available, even if logistically challenging and time-consuming.[109]

*D. The Cause and Effect of "*Turner*-ization"*

The use of the *Turner* standard in access to counsel cases likely reflects some justifiable confusion about the Supreme Court's doctrine. More significantly, however, it reflects the real challenge of making process rights meaningful in a context where the use of incarceration is disconnected from the determination of guilt and innocence.

As an initial matter, the Court's own use of the *Turner* standard has been inconsistent.[110] Although the Court indicated in *Washington v. Harper*[111] that the *Turner* standard applies to all constitutional claims brought by prisoners,[112] more recently, in *Johnson v. California*, the Court limited its use "only to rights are 'inconsistent with proper incarceration.'"[113] Writing for the majority in *Johnson*, Justice O'Connor posited that cases involving "claims of cruel and unusual punishment and racial segregation fell outside the new standard because they were

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prison], and making sure that illegal goods or items that pose a security threat are not hidden in the envelope."). *But see* Mann v. Reynolds, 46 F.3d 1055 (10th Cir. 1995) (finding that prison policy prohibiting contact visits between attorneys and their clients implicated the Sixth Amendment because prison offered no explanation "for singling out attorneys for restricted contact.").

109. *See, e.g.*, Aswegan v. Henry, 981 F.2d 313, 314 (8th Cir. 1992) ("Although prisoners have a constitutional right of meaningful access to the courts, prisoners do not have a right to any particular means of access, including unlimited telephone calls."); Stamper v. Campbell Cty., No. 2007-49 (WOB), 2009 WL 2242410 (E.D. Ky. July 24, 2009) (finding no violation of the Sixth Amendment when telephone privileges were revoked for five days); Saunders v. Dickerson, No. 1:07cv1094 (LMB/BRP), 2008 WL 2543428, at *4 (E.D. Va. June 25, 2008) (pretrial detainee whose telephone privileges were suspended while he was in administrative segregation failed to state a viable Sixth Amendment claim because he could have written or had in-person visits with the attorney, and because he failed to show prejudice), *aff'd*, 313 Fed. Appx. 665 (4th Cir. 2009); Woods v. St. Louis Justice Ctr., No. 4:06-CV-233 CAS, 2007 WL 2409753, at *10–11 (E.D. Mo. Aug. 20, 2007) (granting summary judgement on Sixth Amendment claim based on limited phone access to attorney where other means of communication were available); Barr v. Levi, No. 06-4683, 2007 WL 1410900, at *1–2 (E.D. Pa. May 11, 2007) (dismissing complaint of inmate who alleged that revocation of his telephone privileges violated his right to counsel when plaintiff could write or receive in person visits); Cesal v. Bureau of Prisons, No. 04-CV-281-DLB, 2006 WL 2803057, at *6 (E.D. Ky. Sept. 28, 2006) (rejecting claim by prisoner whose legal calls were limited and monitored because "reasonable limitations on the number and length of such phone calls do not establish a constitutional violation where the prisoner has other perfectly adequate means of communication.").

110. *See generally* Trevor N. McFadden, Note, *When to Turn to* Turner*? The Supreme Court's Schizophrenic Prison Jurisprudence*, 22 J.L. & POL. 135, 136–37 (2006) (noting that despite its professed commitment to *Turner*, the Court has only irregularly applied its test to procedural due process cases and has never applied it to Fifth or Eighth Amendment cases).

111. Washington v. Harper, 494 U.S. 210, 224 (1991).

112. *See id.*

113. Johnson v. California, 543 U.S. 499, 500 (2005) (quoting Overton v. Bazzetta, 539 U.S. 126, 131 (2003)).

incompatible with 'public respect for our system of justice.'"[114] Applying *Johnson*, then the counsel access claims of pretrial detainees should fall outside *Turner*. The motivating concern of *Gideon* was that without the help of a lawyer, poor defendants would be wrongfully convicted and punished. Thus, under *Gideon*'s logic, lawyer access is essential to ensuring to the reliable determination of innocence and guilt and therefore to the legitimacy of our justice system.

It's unlikely, however, that this ambiguity in the Supreme Court's jurisprudence completely accounts for the inconsistent treatment of counsel access claims by the lower federal courts. The challenge they confront is more profound. As the Second Circuit pointed out in *Benjamin*, *Turner* justified abridging the rights of prisoners by pointing to the state's countervailing penological interests, interests which do not exist with respect to pretrial detainees. Yet as the use of pretrial detention has skyrocketed, creating a large and growing population of legally innocent people in jail, lower courts have increasingly been asked to balance the basic constitutional rights of the detained against the pressing demands of correctional administration. While some courts have continued to enforce the distinction between the pretrial and the convicted, most courts, in applying *Turner*, have chosen to make the availability of rights dependent on carceral status, thereby privileging the practical challenges of managing the logistics of mass incarceration over the normative concerns of justice. In doing so, these courts implicitly acknowledge the diminished value of procedural protections like those *Gideon* guarantees for people whose punishment began long before adjudication, and for whom incarceration is more about their poverty or race than their guilt.[115] In short, the courts' misplaced reliance on *Turner* in these cases reflects their struggle to manage the disconnect between the justice system as conceived of in the law of criminal procedure, and in practice.

Turner-ization has significantly hindered the ability of incarcerated defendants to successfully assert their Sixth Amendment rights. Without the ability to consult regularly, to speak privately, to sit together in the same room, to review and to discuss documents together, the right to counsel is hollow. And when access challenges impede lawyers in their work, adding additional wasted hours for each visit, lawyers must increasingly ration their time between clients, undermining the constitutional guarantee of counsel free from conflict.[116]

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114. Robertson, *supra* note 70, at 107.

115. *See supra* notes 27–28 and accompanying text; *see also* DAVID ARNOLD, WILL DOBBIE & CRYSTAL S. YANG, RACIAL BIAS IN BAIL DECISIONS 2 (2018), https://www.princeton.edu/~wdobbie/files/racialbias.pdf [https://perma.cc/3TGZ-WE7B] (finding that in Miami and Philadelphia, black defendants are 3.6 percent more likely to be assigned monetary bail than white defendants and receive bail amounts that are over $9000 greater); P.R. Lockhard, *"A Multibillion-Dollar Toll": How Cash Bail Hits Poor People of Color the Hardest*, VOX (Dec. 6, 2017, 1:20 PM), https://www.vox.com/identities/2017/12/6/16739622/ucla-report-bail-low-income-race [https://perma.cc/K3S7-82X9] (documenting racial disparities in bail amounts charged in Los Angeles).

116. Moreover, because most courts following *Bounds* have held that appointing a lawyer meets the state's constitutional burden to provide access to courts, the existence of a lawyer, no matter how

The impact of this chipping away at the Sixth Amendment is hard to measure in individual cases—it can be challenging to prove how more regular visits, easier communication, and improved trust between the client and the lawyer play into the disposition of a particular case. The *Lewis* injury requirement has consequently proven to be an insurmountable burden in many recent cases alleging Sixth Amendment violations.[117] The results of the denial of access are much easier to see in the aggregate. Detained defendants are far more likely to end up convicted and incarcerated due in part to "the substantial difficulty faced by a pretrial detainee attempting to mount a successful defense from a jail cell."[118] A study of over 150,000 defendants booked into a Kentucky jail over a one-year period found that defendants "who are detained for the entire pretrial period are much more likely to be sentenced to jail and prison"[119] and to "longer jail and prison sentences"[120] with the most significant effects "for low-risk defendants."[121] Additionally, faced with high defense burdens, jailed defendants "often accept plea bargains in lieu of persevering through trial."[122] Of course, lack of access to counsel is only one factor in these outcomes, but it is one of the ways in which overreliance on detention perpetuates itself.

The ideals of *Gideon* helped build up a subsidized commitment to court access for incarcerated people claiming violations of their fundamental constitutional rights. Tragically, however, as our jail and prison populations have expanded and the Court has slowly backed away, once again, from enforcing the constitutional rights of prisoners, the Court's decision not to draw clear distinctions between right to counsel and prisoner court access claim has led to an erosion in the Sixth Amendment. Given the well-established overlap between poverty and pretrial

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limited a prisoner's contact with her, invalidates all other possible claims to legal resources. *See, e.g.*, Bourdon v. Loughren, 386 F.3d 88, 93 (2d Cir. 2004) ("[W]e confirm that the appointment of counsel can be a valid means of satisfying a prisoner's right of access to the courts."); United States v. Smith, 907 F.2d 42, 45 (6th Cir. 1990) (stating that "the state does not have to provide access to a law library to defendants in criminal trials who wish to represent themselves" and waive their right to counsel); Peterkin v. Jeffes, 855 F.2d 1021, 1042 (3d Cir. 1988) ("[T]he provision of lawyers is one means by which a state may provide prisoners with meaningful access to courts."); Howland v. Kilquist, 833 F.2d 639, 643 (7th Cir. 1987) ("[T]he trial court's offer of appointment of counsel . . . , and the appointment of standby counsel, satisfied any obligation which the state had to provide [the detainee] with legal assistance."). Thus, the *Bounds* Court's opinion, which could reasonably be read as urging the states to expand access to subsidized counsel for prisoners' claims, has now, in some instances, become a mechanism for denying legal resources to criminal defendants whose lawyers are ineffective or just unavailable.

117. *See supra* note 106 (listing cases).

118. Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1355 (2013).

119. CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES 4 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf [https://perma.cc/F7W4-D6P4].

120. *Id.*

121. *Id.*

122. Wiseman, *supra* note 118, at 1355.

detention, the result is another undoing of *Gideon*'s promise, even for those defendants who do receive appointed counsel. Simply put, there is now, in many jurisdictions, a different Sixth Amendment for incarcerated people.

II. RENEWING *GIDEON*'S PROMISE IN JAILS AND PRISONS

The previous Part illustrated how the *Turner*-ization of counsel access claims has undermined the Sixth Amendment claims of incarcerated defendants. This Part explore two possible avenues for reconstituting them, through improved jail standards and through constitutional litigation challenging the denial of counsel access in jails. Increasingly, jail facilities do not house only or all pretrial prisoners; nor is the scope of the Sixth Amendment's right to counsel limited to pretrial detainees.[123] Nonetheless, in most states, jails are still the institutions where the Sixth Amendment's protections are likely to be realized or thwarted. Thus, a renewed focus on improving standard protections for the attorney-client relationship in jails could help to draw attention to the challenges raised by overreliance on pretrial detention and build a mandate for resolving them. Moreover, because the populations in many jail and prison facilities include both people who have a constitutionally protected right to counsel and those who do not, advocacy to improve lawyer access could ultimately prove beneficial even to prisoners who would not have their own constitutional claims. As *Gideon* helped to pave the way to broader court access claims by prisoners, a renewed focus on the denial of Sixth Amendment rights could begin to open up court access to prisoners more generally.

A. The Regulatory Framework and Potential Avenues for Reform

While the case law no longer offers clear guidance, a robust right to counsel is still visible in some states' jail standards. To gain a window into the landscape of standards governing the Sixth Amendment rights, we conducted a survey of electronically available state jail rules governing three significant elements of the attorney-client relationship: visits, phone calls, and mail.[124]

1. Methodology

One of the challenges inherent in ensuring the Sixth Amendment rights of incarcerated people is the decentralized nature of jail organization. Historically, jails in most states were run on an *ad hoc* basis by local sheriffs' departments, as an

123. *See supra* notes 13–15 and accompanying text (describing the Court's jurisprudence expanding the right to counsel).

124. I am tremendously grateful to Leila Abu-Orf, Amber Frey, and particularly to Janet Kearney for their able assistance in designing and conducting this survey. The complete results of the survey are available at *Gideon Incarcerated: Access to Counsel in Pretrial Detention*, LOY. U. NEW ORLEANS, http://law.loyno.edu/library/gideon-incarcerated-access-counsel-pretrial-detention [https://perma.cc/8NFW-DJDF] (last visited Sept. 26, 2018).

ancillary function to law enforcement.[125] Then, beginning in the 1970s, as jail conditions became the subject of litigation as part of the broader rejection of the hands-off doctrine,[126] some states began to adopt different forms of state standards governing jail operations.[127]

While this process is patchwork and incomplete, some two-thirds of states (not including the six "unitary" systems)[128] have now adopted some form of statewide standards governing their local jails, although not all of these standards are enforceable or measured through regular oversight.[129] Initially, the impetus for these standards came primarily from outside the correctional system, from advocacy groups, media investigations, and successful litigation.[130] Eventually, however, as the pressures for change began to build, some within the corrections community began to see the standards process as a mechanism for avoiding costly litigation and for drawing increased public attention and financial support. Thus, most states have considered adopting prison standards, even if they have thus far failed to implement them.[131]

We began by identifying the states that have adopted statewide jails standards, a task complicated by the lack of uniformity in jail administrative structures from state to state.[132] We located thirty-four states where jail control is localized, but subject to some form of statewide standards, whether mandatory or voluntary.[133]

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125. *See* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, JAILS: INTERGOVERNMENTAL DIMENSIONS OF A LOCAL PROBLEM 3–4 (1984) (describing the historical origins of American jails).

126. *See supra* notes 38–39 and accompanying text.

127. *See* Joel A. Thompson & G. Larry Mays, *State-Local Relations and the American Jail Crisis: An Assessment of State Jail Mandates*, 7 POL. STUD. REV. 567, 567–68 (1988).

128. Unitary states are those in which jail functions are an integrated part of the state corrections system. *Id.* at 569. These states include Alaska, Connecticut, Delaware, Hawai'i, Rhode Island, and Vermont.

129. *See* MARK D. MARTIN, JAIL STANDARDS AND INSPECTIONS PROGRAMS: RESOURCE AND IMPLEMENTATION GUIDE 45 (2007) (cataloguing mandatory standards and inspection programs). For an extensive overview of the corrections oversight mechanisms, see Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754 (2010).

130. *See* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 125, at 97.

131. A survey conducted of jail administrators in Arizona found that: "Many of the jailers interviewed anticipated statutory minimum standards as a welcome support in obtaining desperately needed improvements that have been forestalled by low priority funding and public indifference in their local jurisdictions." Patricia A. Metzger, *Cry for Standards: Report on Living Condition and Facilities in Arizona's Local Jails and Prisons*, 1975 ARIZ. ST. L.J. 251, 396; *see also* NAT'L INST. OF JUSTICE, MAINE JAILS: PROGRESS THROUGH PARTNERSHIPS 6 (1987) (noting that standards can help to ensure consistent operations and defend against liability).

132. The last comprehensive survey we were able to locate was conducted by the National Institute of Corrections in 2007. *See* MARTIN, *supra* note 129. Our data indicates that there has been an increase in the number of states with jail standards over the last decade.

133. Alabama; Arkansas; California; Florida; Georgia; Idaho; Illinois; Indiana; Iowa; Kentucky; Louisiana; Maine; Maryland; Massachusetts; Michigan; Minnesota; Missouri; Montana; Nebraska; New Jersey; New York; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; South Carolina; Tennessee; Texas; Utah; Virginia; West Virginia; and Wisconsin.

The six unitary states all have standards that govern their facilities, including those that hold pretrial detainees.[134] Ten states lack any form of statewide standards.[135]

Standards, where they exist, are generally codified in four places (in some states, they appear in more than one):[136] statute; regulation; in statewide policies developed by the state correctional system or some other kind of statewide commission or association; and facility-specific rules and procedures. We focused our attention on statewide regulations and policies, as those rules are the most detailed, accessible, and amenable to reform efforts.

We then conducted searches of the administrative regulations available on Westlaw and on the websites of the states' departments of corrections and other rule-making bodies. From those searches, we were generally able to locate the statewide rules or identify their source. In some instances, we were able to determine that statewide policies existed, but were not publicly available.[137]

2. Findings

Our survey indicated that of the thirty-eight states with some form of electronically available statewide standards, all but two (Michigan and Alabama[138]) have at least some rules governing counsel access in their jails. In addition, one state, Colorado, which does not have statewide jail standards, has some limited statutory protections for counsel access.[139] There is significant variation among the states,

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Some states have more than one level of jail standards for different forms of jails. For example, in Kentucky, jails that house state prisoners are subject to different standards than jails that do not. Other states have different standards for different parts of the jail system. For example, in New York, the Department of Corrections oversees state prisons, the New York City Department of Corrections oversees prisons and jails in New York City, and county jails are under local control.

134. Alaska; Connecticut; Delaware; Hawai'i; Rhode Island; and Vermont.

135. Arizona; Colorado; Kansas; Mississippi; New Hampshire; New Mexico; Nevada; South Dakota; Washington; and Wyoming.

136. In these cases, we chose to report the most detailed set of rules.

137. For example, the Utah Sheriffs Association conducts voluntary inspections, but their standards are not electronically available to the public. Nor are the standards promulgated by the Montana Sheriffs and Peace Officer Jail Standards Task Force. Montana has repeatedly considered adopting mandatory standards. *See* DAVID S. NISS, MEMO TO THE LAW AND JUSTICE INTERIM COMMITTEE RE: NO. 3 - JAIL STANDARDS (2008), http://leg.mt.gov/content/committees/interim/2007_2008/law_justice/meeting_documents/LJIC%20JAIL%20STANDARDS.pdf [https://perma.cc/S5GU-ZNXV]. Georgia has two sets of standards, only one of which is available to the public.

This overview is incomplete. Without canvassing the policymaking bodies in every state, which was beyond the scope of this project, we cannot be certain that the picture of each state's rules that emerges from electronically available policies is complete. Our goal, however, was to represent the standards that are easily accessible to jail administrators, staff, advocates, and the public.

138. In addition to the state's statutory protections, we found references to Alabama Legal-Based Jail Guidelines, but were not able to locate the guidelines themselves.

139. Colorado law provides:

> Any person committed, imprisoned, or arrested for any cause, whether or not such person is charged with an offense, shall be allowed to consult with an attorney-at-law of this state whom such person desires to see or consult, alone and in private at the place of custody, as many times and for such period each time as is reasonable . . .

both in terms of the substance of their protections as well as in the level of specificity at which they operate. The states can be characterized as having standards that are minimal, general, or detailed, although the groupings are inexact and states that have detailed standards in one area may be lacking specificity in others. Furthermore, although greater detail is not necessarily associated with increased rights protections, it is at least possible that providing more specific guidance on implementation helps to promote compliance.

Minimal-standard states require only that jail administrators develop and publicize written policies. California, for example, requires the "facility administrator [to] develop written policies and procedures to ensure inmates have access to the court and to legal counsel. Such access shall consist of: (a) unlimited mail . . . and, (b) confidential communications with attorneys."[140] Other minimal standard states include Kentucky, Maryland, North Carolina, Oregon, South Carolina, West Virginia, and Wisconsin.

General-standard states go beyond requiring the existence of policies to establishing basic minimal requirements for attorney access. Idaho, for example, requires that attorneys are allowed to visit inmates "at reasonable hours other than during regularly scheduled visiting hours,"[141] and that incoming correspondence from counsel "may be opened only to inspect for contraband" in the presence of the prisoners, "but . . . not read."[142] General-standard states include Arkansas, Delaware, Florida, Indiana, Iowa, Maine, Massachusetts, Minnesota, Missouri, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Tennessee, Texas, Vermont, and Virginia.

Finally, there are a handful of states, including several of the unitary states, with detailed standards governing attorney access. Nebraska's standards on attorney visiting, for example, provide that attorneys and their assistants shall be able to meet with their clients "at any reasonable time, for any reasonable length of time," and that "in the event of an emergency, then attorneys or their legal assistants shall be allowed to visit their clients at any time."[143] Unless requested by counsel or the client, "all attorney-client visits shall be contact visits." These visits "shall be in a private area . . . so as to allow for confidential communication among up to four [4] people with adequate writing space."[144] These conversations shall not be impeded by "physical barriers such as wire mesh, glazed barriers, or other . . . obstructions . . . ."[145] These visits may not be "monitored, except through glazed observation panels or by means of closed circuit television . . . ."[146] States

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COL. REV. STAT. ANN. § 16-3-403 (West 2018).

140. CAL. CODE REGS. tit. 15, § 1068 (2018).

141. IDAHO SHERIFFS' ASSOC., MINIMUM STANDARDS FOR DETENTION FACILITIES ch. 14.22.01 (2014).

142. *Id.* ch. 14.07.

143. 81 NEB. ADMIN CODE § 9-003.1B (1980).

144. *Id.* § 9-003.01C.

145. *Id.*

146. *Id.*

with detailed standards include Alaska, Connecticut, Georgia, Hawai'i, Illinois, Louisiana, and Rhode Island.

States that have jail standards usually address the requirements of the Sixth Amendment availability through policies governing attorney visits, mail access, and phone calls.

a. Mail

Most states with publicly available standards offer some protections for legal mail, most commonly some form of guarantee of its confidentiality. Most states allow sealed mail to be sent to attorneys (and often courts and government officials and agencies).[147] Most also specify that incoming mail is to be opened in the presence of the prisoner,[148] but a few states, consistent with the conflicts in the case law on the subject, prohibit reading of prisoners' legal mail.[149] Some also require subsidies for indigent prisoners' legal correspondence. Idaho, for example, specifies that "[i]ndigent inmates are provided with writing supplies and postage for all letters to their attorneys, the courts, government officials, officials of the confining authority, or administrators of grievance systems.[150] California provides that "those inmates who are without funds shall be permitted . . . without limitation on the number of postage paid envelopes and sheets of paper to his or her attorney and to the courts."[151]

147. Alaska; Arkansas; California; Connecticut; Delaware; Florida; Georgia; Hawai'i; Idaho; Illinois; Indiana; Iowa; Kentucky; Louisiana; Maine; Maryland; Massachusetts; Michigan; Minnesota; Missouri; Nebraska; New Jersey; New York; Ohio; Oklahoma; Pennsylvania; Rhode Island; Tennessee; Texas; Vermont; Virginia; West Virginia; and Wisconsin.

148. Alaska; Arkansas; California; Connecticut; Delaware; Florida; Georgia; Hawai'i; Idaho; Illinois; Indiana; Iowa; Louisiana; Maine; Massachusetts; Minnesota; Missouri; Nebraska; New Jersey; New York; Ohio; Oklahoma; Pennsylvania; Rhode Island; South Carolina; Tennessee; Texas; Vermont; Virginia; and West Virginia.

149. *See, e.g.*, Alaska ("Incoming mail to a prisoner that is clearly marked as coming from an individual or organization listed in this subsection is privileged and may only be opened in the presence of the prisoner, and only to search for contraband. . . . Outgoing privileged mail may not be searched for contraband nor read for content . . . ."); Florida ("Privileged mail includes mail from attorneys, courts, and public officials. If incoming privileged mail is opened to determine that it is privileged mail and contains no contraband, it must be done in the presence of the inmate. Only the signature and letterhead may be read."); Georgia ("When inspecting privileged mail, the deputy is to 'thumb' through and separate the pages to ensure contraband has not been concealed. Facility staff shall not read or censor privileged mail.").

150. IDAHO SHERIFFS' ASSOC., *supra* note 141, ch. 14.08.

151. CAL. CODE REGS. tit. 15, § 1063 (2018); *see also* CONN. DEP'T OF CORRS., ADMIN. DIRECTIVE NO. 10.7: INMATE COMMUNICATIONS 4.D. (2012), https://portal.ct.gov/-/media/DOC/Pdf/Ad/ad1007pdf.pdf?la=en [https://perma.cc/QNV2-393G] ("An indigent inmate . . . shall be permitted the following items free of charge: . . . 2. five (5) letters per month addressed to the court or attorneys . . . . Additional free correspondence to courts and attorneys may be authorized by the Unit Administration based upon the reasonable needs of the inmate; 3. a writing instrument; and, 4. writing paper (no more than 20 sheets of paper to the courts or attorneys per month. Additional sheets of paper to the courts or attorneys may be authorized by the Unit Administrator based upon the reasonable needs of the inmate)."); DEL. DEP'T OF CORR., POL'Y OF DEP'T OF CORR., NO. 4.0: OFFENDER MAIL (IV)(E)(3) (2016), https://doc.delaware.gov/assets/

b. Visits

Thirty-three states have rules governing attorney visiting processes in their jails.[152] Seven states specify that visits can occur during all waking hours or outside regular visiting hours.[153] Three states provide for expanded rules during times of

documents/policies/policy_4-0.pdf [https://perma.cc/4R8P-4DD3] ("Procedures should be established at each facility to provide indigent offenders with necessary mail supplies for legal/ privileged mail"); FLA. SHERIFFS ASS'N, FLORIDA MODEL JAIL STANDARDS ch. 9.3g (2017), https://www.flsheriffs.org/uploads/docs/FMJS_Standards._01-01-2017.pdf [https://perma.cc/ 7AVW-PY6F] ("Inmates without funds will be supplied with writing materials and postage to correspond with attorneys and the court."); IDAHO SHERIFFS' ASS'N, STANDARDS FOR DET. FACILITIES ch. 14.08 (2014), http://www.idahosheriffs.org/index_htm_files/Jail%20 Standards%20Manual%20February%202018%20Final.pdf [https://perma.cc/A7SK-38ZF] ("Indigent inmates are provided with writing supplies and postage for all letters to their attorneys, the courts, government officials, officials of the confining authority, or administrators of grievance systems."); IOWA ADMIN. CODE r. 201-50.19 (356,356A)(1)(b) (2017) ("A reasonable amount of postage shall be provided to indigent prisoners held beyond 24 hours for communication with the courts and for at least two letters per week of a personal nature."); LA. ADMIN. CODE tit. 22, Pt III, § 3105(F) (2017) ("Inmates shall be able to obtain paper, postage, forms, notarial services, technical information and specific legal materials needed to insure their rights to court access."); NEB. JAIL STANDARDS BD., STANDARDS FOR COMMUNITY RESIDENTIAL FACILITIES - MAIL, VISITING AND TELEPHONE SERVICE ch. 8.002.07 (2012), https://ncc.nebraska.gov/sites/ncc.nebraska.gov/files/pdf/jail_ standards/jail_rules_and_reg/Title77/CHAPTER8.pdf [https://perma.cc/75PD-FWAX] ("Indigent inmates shall receive sufficient materials and postage for a reasonable amount of correspondence to maintain family and communities ties, and for legal or other confidential correspondence."); N.J. ADMIN. CODE § 10A:31-19.7(e) (2017) ("Letter-writing materials shall be provided to inmates by staff and the facility shall assume the cost of mailing legal correspondence for indigent inmates."); OHIO ADMIN. CODE 5120:1-8-06(F) (2017) ("Indigent inmates shall receive writing materials, envelopes and postage for two letters per week."); OKLA. ADMIN. CODE § 310:670-5-9(1) (2017) ("The facility shall provide postage, one (1) time per week, for prisoners who do not have funds for correspondence with their attorney, court officials, elected officials, and next of kin."); S.C. JAIL & PRISON INSPECTION DIV., MINIMUM STANDARDS FOR LOCAL DETENTION FACILITIES IN SOUTH CAROLINA standard 2032 (2013), http://www.sccounties.org/Data/Sites/1/media/publications/sc-jail-standards-final.pdf [https://perma.cc/G83Y-2LQZ] ("If an inmate is indigent, he/she shall be provided sufficient postage, envelopes, and writing materials to write two (2) personal letters per week if he/she wishes to do so. Like provisions apply should an indigent inmate wish to communicate with his/her lawyer(s) and court officials."); TENN. COMP. R. & REGS. 1400-01-.11(6) (2017) ("Facilities shall also provide postage for all legal or official mail."); W. VA. CODE R. § 95-1-17 (2017) ("Indigent inmates shall be provided, without cost, sufficient stationery and postage for all letters to attorneys, courts, and public officials and two (2) personal letters per week.").

152. Alaska; Arkansas; California; Connecticut; Florida; Georgia; Hawai'i; Idaho; Illinois; Indiana; Iowa; Kentucky; Louisiana; Maine; Maryland; Massachusetts; Minnesota; Missouri; Nebraska; New Jersey; New York; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; Rhode Island; South Carolina; Texas; Vermont; Virginia; and Wisconsin.

153. ALASKA DEP'T OF CORRS., POLICIES AND PROCEDURES 808.01: LEGAL RIGHTS OF PRISONERS VII.A. (2007), http://www.correct.state.ak.us/pnp/pdf/808.01.pdf [https://perma.cc/ MCZ6-6B9E] ("Attorneys and legal representatives may visit a prisoner at the institution between 8 AM and 10 PM daily or at any time during the initial 24 hours of a client's incarceration except at meal times or while the institution conducts a population count."); GA. SHERIFF'S ASS'N, MODEL JAIL POLICY AND PROCEDURES MANUAL (2014), policy no. 519(II)(A)-(B) (2014), https://georgiasheriffs.org/law-enforcement-portal/law-enforcement-resources/publications [https://perma.cc/3X5Q-NK24] ("Attorneys are permitted to confidentially visit with inmates between 0700-2300 hours. During the first 24 hours, there are to be no time restrictions . . . . Attorney visitation may be limited only if the visit will cause an unnecessary disruption that endangers the facility

emergency.[154] Missouri is the only state to explicitly codify restrictions on visiting rights. Its jail standards provide that: "It is constitutional to limit visitors. Limitations, such as time, frequency, duration of visits and number of visitors, can be placed on visitation rights." [155]

Beyond protecting access to visits, most states have rules protecting their confidentiality although the scope and extent of the procedures to protect confidentiality varies.[156] For example, Indiana's policy provides that: "Inmates shall

security . . . ."); IDAHO SHERIFFS' ASS'N, *supra* note 141, ch. 14.22.01 ("Attorneys and clergy shall be permitted to visit inmates at reasonable hours other than during regularly scheduled visiting hours); ILL. ADMIN. CODE tit. 20 § 701.200(b)(1) (2017) ("Attorneys . . . shall be permitted to visit detainees at reasonable hours other than during regularly scheduled visiting hours or periods."); LA. ADMIN. CODE tit. 22, Pt III, § 3101 (2017) ("Inmates may receive visits from attorneys or attorney-delegates at any reasonable time between wake-up and lights-out."); N.J. ADMIN. CODE § 10A:31-15.4(c) (2017) ("Visits of attorneys and representatives of attorneys shall be permitted without notice, or upon reasonable notice, during at least six hours each business day."); R.I. DEP'T OF CORRS. POLICY & PROCEDURE, ACCESS TO INSTITUTIONAL FACILITIES BY ATTORNEYS AND THEIR AGENTS, 13.02-5 DOC III.F.1 (2015), http://www.doc.ri.gov/documents/administration/policy/policies/13.02-5.pdf [https://perma.cc/GKC5-9UW8] ("Attorneys and their agents are permitted to visit incarcerated clients between the hours of 8:30 AM and 8:30 PM every day, and at other times should special circumstances arise.").

154. HAW. DEP'T OF PUB. SAFETY, CORRS. ADMIN. POLICY AND PROCEDURES, Policy No. COR. 15.02 (2010), https://dps.hawaii.gov/wp-content/uploads/2012/10/COR.15.02.pdf [https://perma.cc/LT35-3XCE] ("Each facility shall establish contingency plans for necessary attorney visits during the evenings or weekends where there is an emergent situation with the inmate's case"); 81 NEB. ADMIN. CODE § 9-003.01B (2017) ("However, in the event of an emergency, then attorneys or their legal assistants shall be allowed to visit their clients at any time"); R.I. DEP'T OF CORRS. POLICY & PROCEDURE, *supra* note 153, III.F.1 ("Attorneys and their agents are permitted to visit incarcerated clients between the hours of 8:30 am and 8:30 pm every day, and at other times should special circumstances arise. Prior approval by the warden or designee is required for access outside the hours of 8:30 to 8:30 pm.").

155. MO. SHERIFFS ASS'N, MISSOURI CORE JAIL STANDARDS, MCJS 6.5.6 (2017), https://www.mosheriffs.com/wp-content/uploads/2017/05/Section-6-Constitutional-Protections.pdf [https://perma.cc/ZB86-BJ5K].

156. ALASKA DEP'T OF CORRS., *supra* note 153, VII.A. ("(1) The institution shall ensure that the attorney or attorney's representative can speak privately with the prisoner and exchange or review legal documents without interference from correctional staff, except for a search for contraband. (2) The institution may not monitor conversations between an attorney or the attorney's representative and a prisoner except upon court order."); ARK. CRIMINAL DET. FACILITIES REVIEW COMM., CRIMINAL DET. FACILITY STANDARDS 2014, Section 6-1002(B) (2014), https://www.dfa.arkansas.gov/images/uploads/criminalDetentionOffice/proposedjailStandards.pdf [https://perma.cc/7P3J-RKH6] ("Legal consultation(s) shall be permitted in private, shall be unmonitored, and occur at the place of detention on a reasonable basis."); CAL. CODE REGS. tit. 15, § 1068 (2017) (referring to "confidential consultation with attorneys"); COLO. REV. STAT. ANN. § 16-3-403 (West 2017) ("Any person committed, imprisoned, or arrested for any cause, whether or not such person is charged with an offense, shall be allowed to consult with an attorney-at-law of this state whom such person desires to see or consult, alone and in private, at the place of custody . . . ."); FLA. STAT. § 901.24 (2016) ("A person arrested shall be allowed to consult with any attorney entitled to practice in this state, alone and in private at the place of custody . . . ."); GA. SHERIFF'S ASS'N, *supra* note 153, policy no. 519(II)(A) ("Attorneys are permitted to confidentially visit with inmates between 0700-2300 hours"); HAW. DEP'T OF PUB. SAFETY, CORRS. ADMIN. POLICY AND PROCEDURES, Policy No. COR. 12.02, 4.0.11.b.3 (2009), https://dps.hawaii.gov/wp-content/uploads/2012/10/COR.12.02.pdf [https://perma.cc/U86G-UQTW] (stating that visits "shall be in an area where the attorney client privilege can be honored, but that staff may keep visual contact without monitoring the conversation"); ILL. ADMIN. CODE tit. 20 §

have confidential access to their attorneys and the authorized representatives of their attorneys,"[157] while Nebraska has a detailed policy governing the kind of space in which attorney-client meetings should take place and the ways in which they may

701.200(b)(2) (2017) ("An area for interview between a detainee and his or her attorney . . . shall be provided and arranged so as to ensure privacy."); 210 IND. ADMIN. CODE 3-1-15(a) (2017) ("Inmates shall have confidential access to their attorneys and the authorized representatives of their attorneys."); 501 KY. ADMIN. REGS. 3:140 (Sect.1)(4)(a)(1)-(2) (2017) ("The jailer, jail administrator, or jail personnel shall ensure the right of a prisoner to have confidential access to his attorney or authorized representative. (a) To the extent available in the jail and reasonable use by an attorney, 'confidential access' shall include a meeting with counsel in a private room in the jail . . . (1) Jail employees and other prisoners shall not enter the room during the attorney-client meeting, unless an emergency or the security of the jail requires. (2) The room should be located so that conversations in ordinary tones with the door closed cannot be overheard by others outside the room . . . ."); LA. ADMIN. CODE tit. 22, Pt III, § 3101(B) (2017) ("Inmate communications, with attorneys by telephone or personal visit shall be entirely confidential."); ME. DEP'T OF CORRS., DET. AND CORR. STANDARDS FOR ME. COUNTIES AND MUNICIPALITIES, J.17. (2017), http://www.maine.gov/sos/cec/rules/03/201/201c001.pdf [https://perma.cc/9L6F-MCYM] ("Visits and access to attorneys and their attorneys' authorized representatives should be provided during normal business hours."); MD. CODE REGS. 12.14.03.06(C)(4) (2018) ("The managing official shall have written policy and procedure regarding inmate legal matters, which include provisions for . . . (4) Confidential visits with legal counsel and their authorized representatives"); MINN. STAT. ANN. § 481.10 (West 2017) ("All officers or persons having in their custody a person restrained of liberty, except in cases where imminent danger of escape or injury exists, shall admit any attorney retained by or on behalf of the person restrained, or whom the restrained person may desire to consult, to a private interview at the place of custody . . . ."); 81 NEB. ADMIN. CODE § 9-003.01C (2017) ("Contact visits between inmates and their attorneys or the attorneys' legal assistants shall be in a private area or room so as to allow for confidential communication among up to four (4) people with adequate writing space. No physical barriers such as wire mesh, glazed barriers, or other physical obstructions shall be placed between inmates and visitors. Such visits shall not be monitored, except through glazed observation panels or by means of closed circuit television as necessary."); N.J. STAT. ANN. § 10A:31-3.14(c) (West 2017) (stating that "[a]ll facilities shall include interview areas which provide for confidential consultation with attorneys," and that "suitable meeting facilities shall be provided for inmates to meet with attorneys and representatives of attorneys in privacy with reasonable comfort"); N.Y. COMP. CODES R. & REGS. tit. 9, § 7031.2 (2018) ("Visits between prisoners and their legal counsel shall not be monitored except visually."); 10A N.C. ADMIN. CODE 14J.1208(d)(3), (5), (6) (2016) ("Confidential attorney visitation areas shall: . . . (3) provide seating and a writing table for the inmate and attorney; . . . (5) provide a way for the attorney to contact officers if needed; and (6) provide a minimum of 30 foot-candles of artificial light."); N.D. DEP'T OF CORRS. & REHAB., NORTH DAKOTA CORRECTIONAL FACILITY STANDARDS, standard 85 (2017) https://docr.nd.gov/sites/www/files/documents/jails/North%20Dakota%20Correctional%20Facility%20Standards.pdf [https://perma.cc/KY77-LKP9] ("Visits by legal counsel may be subject to staff or video observation, but without audio-monitoring. Audio or video recording of attorney visits is prohibited."); OHIO ADMIN. CODE 5120:1-8-06(H) (2018) ("Inmates shall have access to legal counsel of record including telephone contact, written communication, and confidential visits."); 37 PA. CODE § 95.233(5) (2017) ("Written local policy must require that accommodations be made to provide for the privacy of conversation during these visits."); S.C. JAIL & PRISON INSPECTION DIV., *supra* note 151, standard 2034(a) ("Each facility shall establish policies and procedures to ensure the right of inmates to have access to legal counsel, courts, and legal materials. Such policies and procedures shall include at least the following: (1) The right of an inmate to communicate with legal counsel without censorship or monitoring . . . ."); TENN. COMP. R. & REGS. 1400-01-.12(8) (2018) ("Inmates shall have unrestricted and confidential access to the courts."); 6 VA. ADMIN. CODE 15-40-600 (2018) ("Written policy and procedures shall ensure that attorneys are permitted to have confidential visits with detainees."); W. VA. CODE R. § 95-1-17 (2017) ("Visitation facilities shall be private and confidential with no monitoring of conversations.").

157. 210 IND. ADMIN. CODE § 3-1-15(a).

be monitored.[158] North Dakota allows visits to be subject to video or visual observation, but not audio-monitoring.[159]

Only a few states explicitly mandate that visits should be "contact," which facilitates conversation and the sharing of documents, as well as the development of a relationship between client and counsel.[160] At least two federal courts have held that the state must offer a rationale for failing to allow a prisoner to have a contact visits with attorneys,[161] but it's not clear whether the inadequate space or staffing conditions in many jails would suffice as a justification.

c. Phone Calls

Twenty-one states have standards providing for (or assuming the practice of) attorney-client phone calls.[162] Some additional states require facility administrators to create phone policies, although without specific reference to attorney-client calls.[163] Fewer have rules governing the regularity and duration of these calls,[164] and most of those that do offer only access that is "reasonable."[165] For example, Idaho's policy provides only that "[c]alls to attorneys shall be of reasonable duration."[166]

The protection in detailed-standards states also show considerable variation, and are both enabling and limiting. Connecticut allows prisoners to initiate two calls a month, in addition to those received from the attorney.[167] The policy further provides that calls "answered by a busy signal shall not be counted," but "those

158. *See* 81 NEB. ADMIN. CODE § 9,003.01B (2017) ("Contact visits between inmates and their attorneys or the attorneys' legal assistants shall be in a private area or room so as to allow for confidential communication among up to four (4) people with adequate writing space. No physical barriers such as wire mesh, glazed barriers, or other physical obstructions shall be placed between inmates and visitors. Such visits shall not be monitored, except through glazed observation panels or by means of closed circuit television as necessary.").

159. *See* N.D. DEP'T OF CORRS. & REHAB., *supra* note 156.

160. Alaska; Kentucky; Nebraska; North Carolina; Vermont; and West Virginia.

161. *See* Mann v. Reynolds, 46 F.3d 1055, 1060–61 (10th Cir. 1995); *see also* Ching v. Lewis, 895 F.2d 608, 610 (9th Cir. 1990). In both cases, the courts found that the presumptive right to contact visits was protected as part of the Fourteenth Amendment guarantee of access to courts.

162. Alaska; Connecticut; Delaware; Georgia; Hawai'i; Idaho; Illinois; Indiana; Kentucky; Louisiana; Maine; Maryland; Minnesota; Nebraska; New Jersey; New York; North Dakota; Ohio; Rhode Island; Texas; and Vermont.

163. *See, e.g.*, Arkansas; California; Florida; Missouri; Pennsylvania; and West Virginia.

164. Connecticut; Hawai'i; Idaho; Illinois; and Maine. South Carolina's policy does not create an affirmative requirement but states that "restrictions on making telephone calls should not be imposed unless such privileges have been suspended and/or restricted based on legitimate government interests related to the safe and secure operation of the facility; to prevent continued criminal activities; or other similar concerns." S.C. JAIL & PRISON INSPECTION DIV., *supra* note 151, standard 2033.

165. Georgia; Idaho; Nebraska; Texas; and West Virginia. Tennessee requires that: "The facility shall establish reasonable hours during which attorneys may visit and/or telephonically communicate." TENN. COMP. R. & REGS. 1400-01-.12(8) (2018). Vermont provides that lines should be available to receive privileged calls on a "regular basis." VT. DEP'T OF CORR., APA RULE #13-043, DOC Policy#325 (2013), http://www.doc.state.vt.us/about/policies/rpd/rules/325-telephone-use [https://perma.cc/P8VV-CYEX].

166. IDAHO SHERIFFS' ASS'N, *supra* note 151, ch. 14.13.01.

167. CONN. DEP'T OF CORRS., *supra* note 151, 5.F.

answered by a person or machine" do.[168] In addition, the standards provide that "[a]n inmate's request for a call to an attorney shall be honored either by the close of the first business day following the day on which the request was received or on the day specified by the inmate, whichever shall occur later."[169] Hawai'i, by contrast, requires prisoners to request permission in writing to use the phone and to provide an explanation of "the need to communicate by phone in lieu of using other means of court access such as personal visits by their attorney, communication by mail, or use of the law library for research."[170] If permission is granted, Hawai'i's policy further provides that legal calls should be limited to no more than three calls per week, with each call limited to ten minutes."[171]

Notably, few states specifically protect attorney phone access for prisoners who have been assessed as posing a security threat or are being disciplined. Alaska provides that, "[p]risoners whose telephone access has been limited or suspended must still be allowed telephone calls to an attorney . . . ."[172] Idaho also explicitly prevents attorney calls from being revoked for disciplinary infractions.[173] Finally, only thirteen states have rules protecting the confidentiality of attorney-client phone calls.[174]

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168. *Id.*

169. *Id.*

170. HAW. DEP'T OF PUB. SAFETY, *supra* note 156.

171. *Id.*

172. ALASKA DEP'T OF CORRS., *supra* note 153, VII.A.1.d.

173. *See* IDAHO SHERIFFS' ASS'N, *supra* note 151, ch. 14.08.

174. ALASKA ADMIN. CODE tit. 22, § 05.530(b) (2018) ("A prisoner's call to an attorney may not be monitored unless authorized by a court."); CONN. AGENCIES REGS. § 18-81-46 (2018) ("Such calls [to attorneys] shall be placed by staff who shall verify the party's identity prior to placing the inmate on line. The staff member shall then move out of listening range of the inmate's conversation. The employee placing the call may maintain visual observation of the inmate."); DEL. DEP'T OF CORR., POL'Y OF DEP'T OF CORR., No. 3.17 (V)(I) (2015), https://doc.delaware.gov/assets/documents/policies/policy_3-17.pdf [https://perma.cc/XE3G-ZZVK] ("All Offender calls may be monitored and recorded for security purposes with the following exceptions: 1. Legal calls . . . ."); GA. SHERIFF'S ASS'N, *supra* note 153, policy no. 5.18(II)(F) ("Inmates calling their attorney or probation/parole officers are to notify the Shift Supervisor to ensure the call is not monitored and the confidentiality of the conversation is maintained."); IDAHO SHERIFFS' ASS'N, *supra* note 151, ch. 14.13.02 ("Calls to attorneys shall not be monitored."); ILL. ADMIN. CODE tit. 20, § 701.190 (2017) ("Telephone calls may be monitored unless prior special arrangements have been made to make or receive confidential telephone calls to or from the detainee's attorney."); 210 IND. ADMIN. CODE 3-1-16(l) (2017) ("Conversations between an inmate and his or her legal representative may not be monitored or recorded without a court order."); LA. ADMIN. CODE tit. 22, Pt III, § 3101(B) (2017) ("Inmate communications, with attorneys by telephone or personal visit shall be entirely confidential."); MINN. STAT. ANN. § 481.10 (West 2017) ("[A]ll officers or persons having in their custody a person restrained of liberty whether or not the person restrained has been charged, tried, or convicted, shall provide private telephone access to any attorney retained by or on behalf of the person restrained."); 81 NEB. ADMIN. CODE § 9-004.03 (2017) ("Telephone calls to or from legal counsel shall not be monitored."); N.Y. COMP. CODES R. & REGS. tit. 9, § 7031.2(b) (2017) ("Telephone communications between prisoners and their legal counsel shall not be monitored except visually."); N.D. DEP'T OF CORRS. & REHAB., *supra* note 156, standard 84 ("These calls may not be audio monitored or recorded."); R.I. DEP'T OF CORRS. POLICY & PROCEDURE, ACCESS TO INSTITUTIONAL FACILITIES BY ATTORNEYS AND THEIR AGENTS, 24.02-4 DOC II.C.3.f. (2010) ("Calls that will not be recorded - attorney calls."); VT. DEP'T OF CORR., *supra* note 165, at 6.A. ("Inmate telephone conversations, with

3. The Limits and Possibilities of Standards

As this survey illustrates, protections for the Sixth Amendment rights of prisoners are unevenly codified in state jail standards around the country. In a handful of states, like Nebraska and Connecticut, the policies governing counsel access are specific, designed not only to codify well-established constitutional rights, but to anticipate and resolve challenges that might impact successful representation. In many other states, however, the standards are general or nonexistent. And, of course, the formal existence of these standards may have little or no relationship with actual practice on the ground. The difficulty of locating the applicable rules in many states might also indicate that, in some jurisdictions, they are not widely understood or followed. Nonetheless, in many states, they represent an important frame of reference for evaluating and challenging practices on the ground.

The standards review processes, which occur on a regular basis in some states, as well as the inspections that some states conduct as part of their enforcement efforts or invite while seeking accreditation, offer further opportunities to reinforce and shift these norms. Drawing attention to variations in state policies has, in some documented instances, led to state efforts to eliminate problematic, outlier policies or to adopt better ones.[175] Moreover, the limited available research suggests that jail standards can be helpful in improving jail conditions.[176]

The adoption of new model standards also presents the opportunity to highlight the challenges of counsel access in jails and prisons and to encourage the adoption of more detailed protections. The Core Jail Standards (Core Standards) of the American Correctional Association (ACA), adopted in 2010, were intended to set a basic floor achievable for jails of all sizes.[177] The Core Standards provide that "[i]nmate access to counsel is ensured. Such contact includes, but is not limited to,

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the exception of privileged communications, shall be recorded and may be monitored."); W. VA. CODE R. § 95-1-17 (2017) ("Telephone calls shall not be monitored unless authorized by a prior court order.").

175. For example, the Liman Program at Yale conducted a 50-state survey of visiting rules, in collaboration with the Association of State Correctional Administrators. Following the collection of the data, Washington State removed its requirement that noncitizen visitors provide proof of legal visits. Utah eliminated its unique provision mandating that only English be spoken during prison visits. *See* Chesa Boudin et al., *Prison Visitation Policies: A Fifty-State Survey*, 32 YALE L. & POL'Y REV. 149, 174 (2013).

176. Thompson & Mays, *supra* note 127 (finding that mandatory standards were associated with improved programs and operating procedures in the jails). Somewhat surprisingly, despite the prevalence and popularity of standards, we were unable to locate much in the way of empirical research supporting their efficacy.

177. The ACA has been drafting professional correctional standards for over 70 years. *See The History of Standards and Accreditation*, ACA, https://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards___Accreditation/About_Us/ACA_Member/Standards_and_Accreditation/SAC_AboutUs.aspx?hkey=bdf577fe-be9e-4c22-aa60-dc30dfa3adcb [https://web.archive.org/web/20180130180337/https://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards___Accreditation/About_Us/ACA_Member/Standards_and_Accreditation/SAC_AboutUs.aspx?hkey=bdf577fe-be9e-4c22-aa60-dc30dfa3adcb] (last visited Jan. 30, 2018). The standards for Adult Local Detention Facilities are in their fourth edition; however, as of 2009, only 130 jails had been accredited under these standards. *See* Scott Strait & Tim Ahlborn, *New "Core Jail Standards" Provide Sheriffs and Jail Managers with Much-Needed Guidance*, 71 CORRECTIONS TODAY 60 (2009).

telephone communications, uncensored correspondence, and visits."[178] The hope is that offering certification in the Core Standards will create an achievable starting point for jail reform.[179] In addition, the 2011 American Bar Associations Standards for Criminal Justice on the Treatment of Prisoners (ABA Standards) include several provisions on access to legal counsel that would expand upon and clarify those found in most current state standards. The ABA Standards explain that: "Correctional authorities should facilitate prisoners' access to counsel."[180] In addition to the type of protections already present in some states' current rules, the ABA Standards require prisoners with a pending criminal charge to be placed "sufficiently near the courthouse where the case will be heard that the preparation of the prisoner's defense is not unreasonably impaired."[181] They confirm that attorney-client meetings should be contact, absent "an individualized finding that security requires otherwise" and that counsel and clients should be able to share "previously searched documents without intermediate handling of those papers by correctional authorities."[182] The ABA standards clarify that counsel visits and phone calls should not count toward a prisoner's limited personal visit and telephone time, nor should counsel access be contingent on a prisoner's level of programming or privileges, unless the "prisoner has engaged in misconduct directly related to such visits or communications," and even then, counsel visits should only be "reasonably restrict[ed], but not eliminate[d]."[183] These national standards undergo regular review and update processes.[184] Such a review might provide a starting point for identifying other ways to facilitate access to counsel despite limited resources.

Given the current state of the case law, jail administrators in most jurisdictions lack clear guidance as to their responsibilities to incarcerated pretrial defendants and others in their facilities who may also have valid Sixth Amendment claims.[185] Nonetheless, this survey suggests some basic principles for reform.

First, jail standards should offer specific guidance on how to implement counsel access policies to protect against inadvertent constitutional violations. For example, Georgia's model standards provide that "[w]hen inspecting privileged mail, the deputy is to 'thumb' through and separate the pages to ensure contraband

178. AM. CORR. ASS'N, CORE JAIL STANDARDS § 1-Core-6A-02 (2010), http://corrections.wpengine.com/wp-content/uploads/2014/09/Core-Jail-Standards-as-printed-June-2010.pdf [https://perma.cc/GY9W-3KCW].

179. *See* Strait & Ahlborn, *supra* note 177.

180. AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS § 23-9.4 (a) (3d ed. 2011).

181. *Id.* § 23-9.4 (b).

182. *Id.* § 23-9.4(c)(ii)(A, D).

183. *Id.* § 23-3.7(d) (restrictions relating to programming and privileges).

184. *See The History of Standards and Accreditation*, *supra* note 177 (describing the revision process).

185. Increasingly, jail facilities do not house only or all pretrial detainees, which further complicates the task of ensuring that the Sixth Amendment's protections are respected for all those who are entitled to them.

has not been concealed. Facility staff shall not read or censor privileged mail."[186] This kind of specific directive both communicates the purpose of the policy and gives line officers with clear operational guidance. By contrast, some states indicate that privileged mail must be opened in the presence of the prisoner, but do not explain that this practice is designed to protect the confidentiality of prisoner mail.[187] Similarly, many state standards provide for attorney visits, but offer limited guidance for structuring them. A particularly important omission is the failure to specify that such visits must be contact,[188] even though at least two federal courts have held that contact visits are constitutionally required absent special circumstances.[189]

In addition, standards should address potential challenges of implementation. Most states' standards do not indicate how deviations in routine should be addressed, yet failure to allow counsel access in the event of an emergency can raise constitutional concerns. Three states do specifically allow additional attorney visiting hours in special circumstances, but interestingly, none specify whether additional phone access should be permitted in these situations, even though phone calls might be easier to facilitate.[190] Jail standards should also address attorney access for detainees who present a security risk or who are being disciplined. Providing attorney access for detainees in administrative or disciplinary segregation can raise additional logistical and legal challenges.[191] Only a few states, however, protect attorney phone access for these prisoners, and only one state, Idaho, explicitly prohibits access to attorney calls from being revoked as a disciplinary measure. More explicit policies would make it easier for jail administrators and line officers to fulfill their constitutional obligations even in extraordinary situations.

Standards should also specify when subsidies are required for detainees who are indigent. Mail continues to be a significant method of attorney-client communication, yet not all detainees have the financial means to purchase the necessary materials. Failure to subsidize mail could, depending on the availability of other means of communication, raise constitutional concerns. Therefore, some states explicitly provide for a certain amount of subsidized mail per month for indigent prisoners.

Finally, jail standards should more directly address access to technology. At present, the standards lack even consistent protection for telephone access, despite the time and costs savings that could potentially accrue to the criminal justice system

186. GA. SHERIFF'S ASS'N, *supra* note 153, policy no. 5.16(2)(F).

187. *See supra* note 167 and accompanying text.

188. *See* Strait & Ahlborn, *supra* note 177.

189. *See* Boudin et al., *supra* note 175.

190. *See* IDAHO SHERIFFS' ASS'N, *supra* note 151.

191. *See, e.g.*, U.S. v. Martinez-Hernandez, 2015 WL 6133050 (D.P.R. Oct. 15, 2015) (alleging violations of the Sixth Amendment right to counsel based on defendants' place in administrative segregation).

by allowing more regular phone access.[192] Alaska appears to be alone among the states in mandating that prisoners must be allowed to receive legal faxes from their attorneys, limited to two pages.[193] The federal corrections system currently has email,[194] but prisoners must consent to monitoring before they are allowed to use it, even to communicate with their lawyers.[195] Similarly, Ohio's regulations state that if a jail provides email service to prisoners, "the incoming and outgoing emails shall be subject to review for security reasons."[196] As a result of these disclaimers, most challenges to monitoring of legal email have failed on the grounds that the prisoner is notified of the surveillance and consents, and due to the availability of other (less efficient) forms of confidential communication.[197] Drawing attention to the current barriers to attorney-client access could create the opportunity to reconsider the costs and benefits of preventing email and other technologies from being used for confidential legal communications.[198]

B. Structural Litigation

Historically, a major driver for both the development of professional standards and their adoption is the threat of litigation.[199] Thus, litigation may be necessary to encourage the development of more rigorous standards for protecting Sixth Amendment rights in prison. Particularly, in the jurisdictions that have applied *Turner* and *Lewis* to right to counsel claims, an alternative approach is needed that

192. Even in states that protect confidential calls, jails may create barriers that that unduly restrict telephone access. For example, the New Orleans Sheriff permits lawyers to make unrecorded phone calls to their clients from specified landlines; however, it records and shares with the Orleans Parish District Attorney all calls made to cellphones. *See* Richard A. Oppel Jr., *Calling Your Lawyer's Cell from Jail? What You Say Can and Will Be Used Against You*, N.Y. TIMES, May 22, 2018, https://www.nytimes.com/2018/05/22/us/new-orleans-jail-call-lawyer.html.

193. ALASKA DEP'T OF CORRS., *supra* note 153; ALASKA DEP'T OF CORRS., POLICIES AND PROCEDURES, 810.03 (2013), http://www.correct.state.ak.us/pnp/pdf/810.03.pdf [https://perma.cc/8PLC-QGGM].

194. *See Stay in Touch*, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/inmates/communications.jsp#email [https://perma.cc/UN5E-FSXZ] (last visited Sept. 5, 2018).

195. *Id.*

196. OHIO ADMIN. CODE 5120:1-8-06 (E) (2017).

197. *See* United States v. Walia, No. 14-CR-213 (MKB), 2014 U.S. Dist. LEXIS 102246, at *47 (E.D.N.Y. July 25, 2014); United States v. Asaro, No. 14-Cr-26 (ARR), 2014 U.S. Dist. LEXIS 97396, at *2 (E.D.N.Y. July 17, 2014); F.T.C. v. Nat'l Urological Grp., Inc., No. 1:04-CV-3294-CAP, 2012 WL 171621, at *2 (N.D. Ga. Jan. 20, 2012).

198. An important caveat is that in many jurisdictions where video visiting technology has been adopted, it has become a replacement for, rather than a supplement to, in person visits, to the great detriment of prisoners and their families. *See* Natasha Haverty, *Video Calls Replace In-Person Visits in Some Jails*, NPR (Dec. 5, 2016, 5:21 PM), https://www.npr.org/2016/12/05/504458311/video-calls-replace-in-person-visits-in-some-jails [https://web.archive.org/web/20180306130621/https://www.npr.org/2016/12/05/504458311/video-calls-replace-in-person-visits-in-some-jails]. Similarly, expanding technological access to counsel risks opening the door to other limits on counsel access.

199. R. Morgan, *Developing Prison Standards Compared*, 2 PUNISHMENTS & SOC'Y 325, 339 (2000).

foregrounds the structural nature of the challenge incarcerated defendants face in trying to maintain productive relationships with their counsel.

To review, *Lewis* required a showing of actual injury for prisoners alleging violations of their access to courts.[200] The requirement has subsequently been adopted by a number of courts considering prisoners' right-to-counsel claims and has proved fatal in nearly all of the resulting cases. A similar requirement, imposed by the Supreme Court in *Strickland v. Washington*, has resulted in similar outcomes for defendants who try to challenge their convictions on the basis that their counsel was ineffective. Under the *Strickland* standard, to prevail on a claim of ineffective counsel, a defendant must prove that (1) counsel's performance was deficient, given prevailing norms of practice and that (2) counsel's performance prejudiced the defense such that there is reason to doubt the outcome of the trial.[201] Both *Strickland* and *Lewis* mean that the success of the defendant's claim is based on constructing an alternative reality, in which different lawyering conditions and decisions would have resulted in a different outcome. Courts have, for the most part, been very reluctant to credit these claims, whether the cause of the lawyer's ineffective performance is personal or structural.[202]

Recognizing that *Strickland* presents a nearly insurmountable barrier to addressing structural deficiencies in the public defender system, challenges have been brought in some jurisdictions based on a theory of "constructive denial" of right to counsel based on the Supreme Court's decision in *United States v. Cronic*.[203] Decided the same day as *Strickland*, *Cronic* offers a limited exception to *Strickland*'s prejudice requirement.[204] Writing for the majority, Justice Stevens explained that the right to counsel must protect the criminal process as a "confrontation between adversaries" and not "a sacrifice of unarmed prisoners to gladiators."[205] At a minimum, defense representation must "require the prosecution's case to survive the crucible of meaningful adversarial testing."[206] If the defense "entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the . . . process itself presumptively unreliable" and no showing of prejudice is required.[207]

200. *See* Lewis v. Cook Cty. Bd. of Comm'rs, 6 Fed. Appx. 428 (7th Cir. 2001).

201. Strickland v. Washington, 466 U.S. 668, 687–88 (1984).

202. *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 686–87 (2007) (distinguishing personal and structural forms of ineffective assistance).

203. *See* United States v. Arbolaez, 450 F.3d 1283, 1295 (11th Cir. 2006); Crutchfield v. Wainwright, 803 F.2d 1103, 1108 (11th Cir. 1986).

204. *See* United States v. Cronic, 466 U.S. 648 (1984).

205. *Id.* at 657 (quoting United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975)).

206. *Id.* at 656.

207. *Id.* at 659.

For decades, *Cronic* went relatively unexamined.[208] Then, in 2008, the New York Civil Liberties Union brought a lawsuit on behalf of twenty poor defendants, arguing that New York state's failure to adequately fund local public defender offices in five counties violated their Sixth Amendment rights.[209] Specifically, the lawsuit in *Hurrell-Haring v. New York* alleged that "the system-wise failure to use expert witnesses to test the prosecution's case and support possible defenses; complete breakdowns in attorney-client communication; and a lack of any meaningful advocacy on behalf of clients."[210] The Department of Justice filed a statement of interest in the case to argue that constructive denial of the right to counsel can occur when:

> (1) on a systemic basis, counsel for indigent defendants face severe structural limitations, such as a lack of resources, high workloads, and understaffing of public defender offices; and/or (2) indigent defenders are unable to or are significantly compromised in their ability to provide the traditional markers of representation for their clients, such as time and confidential consultation, appropriate investigation, and meaningful adversarial testing of the prosecution's case.[211]

In other words, the constructive denial cases rely on the logic of *Cronic*; when structural barriers to representation are so high that the defendant is effectively deprived of counsel, the criminal process is no longer a "confrontation between adversaries," and *Strickland* does not apply.[212]

Hurrell-Harring settled in 2014. Pursuant to the settlement, New York agreed to fully fund and staff its indigent defense offices in the defendant counties.[213] The settlement provides that every indigent defendant shall have a lawyer for his or her first court appearance and mandates that New York shall hire enough lawyers, investigators, and supporting staff to ensure that every lawyer has the capacity to vigorously represent their clients.[214]

Hurrell-Harring has been part of a recent wave of structural litigation challenging funding deficits around the country. In Pennsylvania, a class action suit alleged that funding deficiencies in the country resulted in the constructive denial of counsel to indigent criminal defendants.[215] The DOJ filed an amicus brief in the

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208. David Carroll, Executive Director of the Sixth Amendment Center, speculates that "it might not have been on attorneys' radars because the criminal defendant in *Cronic* lost his ineffective assistance claim." Lorelei Laird, *The Gideon Revolution*, 103 ABA J. 44, 47 (2017).

209. *See* Amended Complaint, Hurrell-Harring et al. v. New York, No. 8866-07 (N.Y. Sup. Ct. Oct. 21, 2014), https://www.clearinghouse.net/chDocs/public/PD-NY-0002-0002.pdf [https://perma.cc/STA7-NZHH].

210. *See* Plaintiffs' Mem. of Law in Opposition to the State Defendant's Motion for Summary Judgment at 41, *Hurrell-Harring et al.*, No. 8866-07.

211. Statement of Interest of the United States at 7, *Hurrell-Harring et al.*, No. 8866-07.

212. *Cronic*, 466 U.S. at 657.

213. Stipulation and Order of Settlement at 5–9, *Hurrell-Harring et al.*, No. 8866-07. These conditions were subsequently extended to all New York counties.

214. *Id.* at 5, 8.

215. *See* Kuren v. Luzerne County, 146 A.3d 715 (Pa. 2016).

Pennsylvania Supreme Court urging the court to find that "indigent criminal defendants who are assigned counsel in name only may vindicate their Sixth Amendment right through a constructive denial-of-counsel claim for prospective injunctive relief . . . ."[216] In September 2016, the court agreed.[217] Similarly, in 2017, in *Tucker v. State of Idaho*, the Idaho Supreme Court found that the district court had erred in analyzing each plaintiff's case separately under Strickland.[218] The court explained that the "issues raised in this case"—"systemic, statewide deficiencies plaguing Idaho's public defense system"—"do not implicate *Strickland*."[219] Rather, the court continued, "[a] criminal defendant who is entitled to counsel, but goes unrepresented at a critical stage of prosecution, suffers an actual denial of counsel and is entitled to a presumption of prejudice."[220]

While a *Cronic* jurisprudence of structural reform is only beginning to be developed (and may fare less well without active support from the DOJ), its framework for alleging a constructive denial could be adapted to challenge the conditions of lawyering in jails and prisons. Following *Cronic* and its recent progeny, the argument would be that structural deficiencies within a jail or prison can result in the constructive denial of the right to counsel for the prisoners within their walls. In other words, having a lawyer that a prisoner cannot access as a result of the state's restrictions is the constitutional equivalent of not having one at all.

A lawsuit brought on behalf of the Orleans Public Defender (OPD) in 2012 offers an example of how to raise this type of global access challenge. OPD's lawsuit argued that the conditions under which its attorneys were required to interact with their clients violated the Sixth Amendment to the U.S. Constitution as well as provisions of the Louisiana Constitution and the Louisiana regulations governing jail standards.[221]

According to the pleadings in the case, the prison facilities in Orleans Parish lacked sufficient and available space for confidential meetings.[222] In some facilities, attorneys and clients were forced to speak loudly through plexiglass walls in rooms that are not sound-proofed, so their conversations could easily be overhead by other prisoners, attorneys, and staff.[223] Sometimes the visiting rooms were locked, so attorney-client visits would happen in general visiting spaces.

Wait times for attorneys coming to visit their clients often exceeded an hour or even two.[224] Attorneys regularly were unable to meet with their clients because

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216. Brief for the United States as Amicus Curiae in Support of Appellants, *Kuren*, 146 A.3d 715 (No. 57 MAP 2015).

217. *Kuren*, 146 A.3d at 718.

218. *See* Tucker v. State, 394 P.3d 54 (2017).

219. *Id.* at 62.

220. *Id.* at 63 (citing United States v. Cronic, 466 U.S. 648, 658–60 (1984)).

221. Motion for Preliminary Injunction, OPD v. Gusman, No. 2011-10638 (La. Mar. 2012).

222. Petition for Declaratory Judgment, Injunction & Writ of Mandamus, *Gusman*, No. 2011-10638 (Oct. 4, 2011).

223. *Id.*

224. *Id.*

they had to leave for court, or because visiting hours would end before the client was brought to the meeting.[225] Visiting hours were limited—and sometimes not honored—so attorneys regularly would arrive at the jails during scheduled hours only to be arbitrarily turned out.[226]

The facilities also lacked places for contact visits and offered no mechanisms (like pass-through slots) for attorneys to share and review documents with their clients.[227] Therefore, attorneys were required to turn these documents over to prison staff to share with the prisoners.[228] In addition to compromising their confidentiality, these documents were often never delivered to their clients.[229]

The New Orleans lawsuit led to a stipulated preliminary injunction, so it is unclear how this kind of case will fare if ultimately tested in litigation.[230] Nonetheless, this kind of framing (which presents a full picture of the conditions of lawyering in a facility) could have clear advantages, particularly in jurisdictions that have adopted the requirement that Sixth Amendment claimants demonstrate injury resulting from state interference in their relationships with counsel. Adopting a structural approach would allow for a more comprehensive exploration of the challenges of access at a particular facility or set of facilities, and a more accurate framing of the issues at stake in the case. In addition, it could help courts to address the constitutional problem, without requiring them to issue holdings constitutionalizing particular forms of access.

Finally, invoking *Gideon* in the framing of these cases may carry some power to help restructure the terms of this debate. Even as the Court has gradually withdrawn from its commitment to ensuring meaningful court access for prisoners, the persuasive power of *Gideon* is in some ways undiminished. As Hope Metcalf and Judith Resnik have observed: "although famously (and scandalously) underfunded, *Gideon* as an ideal is rarely challenged."[231] They credit the power of *Gideon*, "the call for disciplined and accountable government action that stood in opposition to the unfettered intrusions that 'despotic' regimes visited on people under their control," with structuring the litigation and the policy debates that ultimately extended court

225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. The New Orleans lawsuit was also brought on behalf of OPD rather than its clients, a model which has been employed in other jurisdictions. *See* State *ex rel.* Mo. Pub. Def. Comm'n v. Waters, 370 S.W.3d 592 (Mo. 2012) (en banc) (seeking a writ of prohibition to challenge the continued appointment of clients to the severely overworked public defender). To date, however, successful *Cronic* litigation has been brought on behalf of indigent criminal defendants.
231. Gideon *at Guantánamo*, supra note 10, at 2510. This is not to say that there have been no criticisms of *Gideon*. While the bulk of the discussion of *Gideon* has centered on its perpetual underfunding, some observers have also argued that defense counsel cannot be successful "for structural reasons . . . because the very nature of plea bargaining or sentencing prevents it." Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049, 1067 (2013). In addition, the "accuracy movement" focuses not on counsel, but on reform of process and its enabling science and technology. *Id.* at 1069.

access to the post-9/11 detainees at Guantanamo.[232] Therefore, when these access cases are structural, framing them in terms of the fundamental right to assistance of counsel, rather than about the right to mail or to phone access, or to increased visiting hours, it helps to tie these cases to a powerful legacy, potentially reshaping how they are understood by the courts and the public.

III. THE DECARCERAL PROMISE OF THE SIXTH AMENDMENT

Building more robust regulatory protections and challenging unfulfilled constitutional commitments will help draw attention to the erosion of Sixth Amendment protections for prisoners. But these guarantees will be impossible to fulfill in facilities that are chronically under-resourced or operating well over capacity. The ultimate goal of exposing the constitutional problems with counsel access should not be to direct more resources into building renovations or jail staffing, but rather to decrease the number of people whose relationships with counsel are controlled by the state. Structural challenges to Sixth Amendment violations in jail should be used to bolster the growing movement to reduce overreliance on pretrial detention.

Over the last fifteen years, "[d]etention of the legally innocent has been consistently driving jail growth,"[233] leading to a renewed interest in bail reform.[234] Prompted by a wealth of new research highlighting the financial and social costs of pretrial detention,[235] a number of states have adopted legislation to eliminate or reform the use money bail.[236] In addition, there has been a flood of successful

232. *See* Gideon *at Guantánamo*, *supra* note 10, at 2510.

233. RABUY & KOPF, *supra* note 25; *see also* RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 7–9 (2015) (describing the growth in jail operations over the last thirty years, even as national crime rates have fallen).

234. *See* Wiseman, *supra* note 118, at 1352 ("Since the founding of this country, judges have required individuals to post some form of collateral in order to incentivize them to appear at a trial that they strongly wish to avoid–a process that could ultimately lead to their conviction and imprisonment.") (citation omitted). This is by no means the first attempt to reform our bail system. *See* KRISTEN BECHTEL ET AL, PRETRIAL JUSTICE INST., DISPELLING THE MYTHS: WHAT POLICY MAKERS NEED TO KNOW ABOUT PRETRIAL RESEARCh 2 n.1 (2012) (describing a first wave of reform efforts beginning in the 1960s, a second beginning in the 1980s, and a third, starting in 2000).

235. Over the last few years, a wealth of new research has illustrated that money bail is unnecessary, ineffective, and destructive. A 2017 report by the Pretrial Justice Institute (PJI) found that pretrial detention costs the country thirty-eight million dollars a day, or fourteen billion dollars annually. HOW MUCH DOES IT COST?, *supra* note 23, at 2. According to PJI, most of this money pays "to detain people who are mostly low risk, including many whose charges will ultimately be dropped." *Id.* The experience in Washington D.C., where in 2016 ninety percent of those arrested were released without bond, validates this conclusion. "[O]f those released, 88 percent made every court date and most were not rearrested." Nissa Rhee, *Has Bail Reform in America Finally Reached a Tipping Point?*, CHRISTIAN SCI. MONITOR, Apr. 3, 2017, https://www.csmonitor.com/USA/Justice/2017/0403/Has-bail-reform-in-America-finally-reached-a-tipping-point [https://web.archive.org/web/20171206141515/https://www.csmonitor.com/USA/Justice/2017/0403/Has-bail-reform-in-America-finally-reached-a-tipping-point].

236. *See generally* PRETRIAL JUSTICE INST., WHERE PRETRIAL IMPROVEMENTS ARE HAPPENING (2018), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?

litigation in jurisdictions around the country challenging the use of bail to keep poor people in jail pending trial.[237] Despite these initial signs of progress, however, reducing the pretrial detention population will continue to be a struggle because the source of the problem is multifaceted, including decisions made by law enforcement, prosecutors, judges, magistrates, bail commissioners, jail administrators, and county politicians. Further compounding the challenge are the incentive structures that have developed to support the current system.[238]

In the short run, improved lawyer access would improve outcomes for those clients who have representation at bail hearings. The Supreme Court has yet to require appointed counsel for indigent defendants in bail hearings; therefore, representation is patchy.[239] Nonetheless, people who are represented are far more likely to be released on their own recognizance or receive lower and more affordable bail than their unrepresented counterparts. [240]

Over time, challenges to state interference with the Sixth Amendment right to counsel would draw attention to the true costs of over-detention. Specifically, this advocacy could help to reverse the national trend towards exporting detention to rural communities. As the Vera Institute for Justice has documented, increasing reliance on rural jails threatens to undermine some of the progress that is being realized in other areas of pretrial detention reform.[241] While jail populations in large

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DocumentFileKey=a9274937-579b-c76c-8f03-3f2417919f9c&forceDialog=0 [https://perma.cc/LCP8-M8BK] (cataloguing and describing efforts to improve pretrial justice).

237. Equal Justice Under Law, a Washington D.C.-based non-profit, has filed twelve challenges in nine states since 2015. *See Ending American Money Bail,* EQUAL JUSTICE UNDER LAW, https://equaljusticeunderlaw.org/money-bail-1/ [https://perma.cc/Y9EC-37N6] (last visited Sept. 5, 2018). Seven lawsuits have successfully ended the use of money in bail in Clanton, Alabama; Velda City, Missouri; Ann, Missouri; Moss Point, Mississippi; Dothan, Alabama; Ascension Parish, Louisiana; and Dodge City, Kansas. *Id.* Equal Justice Under Law is also working with Representative Ted Lieu (D-CA), who in 2016 introduced the No Money Bail Act, which seeks to eliminate the use of money bail. No Money Bail Act of 2016, H.R. 4611, 114th Cong. (2d Sess. 2016), https://www.congress.gov/bill/114th-congress/house-bill/4611/text [https://perma.cc/2ZUT-EVKM]. Civil Rights Corps, another D.C.-based non-profit, recently won challenges to the money bail system in Harris County, Texas, and in New Orleans, Louisiana. In August 2018, California became the first state to entirely eliminate the use of money bail. *See* Thomas Fuller, *California Is the First State to Scrap Cash Bail*, N.Y. TIMES, Aug. 28, 2018, https://www.nytimes.com/2018/08/28/us/california-cash-bail.html.

238. JACOB KANG-BROWN & RAM SUBRAMANIAN, VERA INST. FOR JUSTICE, OUT OF SIGHT: THE GROWTH OF JAILS IN RURAL AMERICA (2017) (hereinafter OUT OF SIGHT) (citing Robin King Davis, Brandon K. Applegate, Charles W. Otto, Ray Surette & Bernard J. McCarthy, *Roles and Responsibilities: Analyzing Local Leaders' Views on Jail Crowding from a Systems Perspective*, 50 CRIME & DELINQ. 458, 460–61, 473–74 (2004)), http://www.safetyandjusticechallenge.org/wp-content/uploads/2017/06/Out_of_sight_report.pdf [https://perma.cc/K6TP-CN85].

239. *See* Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333 (2011) (documenting the results of a national survey of pre-trial representation).

240. *See* THE CONSTITUTION PROJECT NAT'L RIGHT TO COUNSEL COMM., DON'T I NEED A LAWYER? PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING 32–36 (2015), https://constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf [https://perma.cc/G7JW-AP29] (describing the results of several empirical studies documenting better outcomes for represented defendants in bail hearings).

241. OUT OF SIGHT, *supra* note 238, at 9.

urban areas are stabilizing or even shrinking, jail populations in rural areas are growing.[242] Vera attributes this development to the interplay between two factors: a lack of justice system capacity to quickly process and release pretrial defendants,[243] and a financial structure in which jail facilities benefit from prolonged incarceration.[244] Access to counsel litigation could provide a counterweight against the outsourcing of detention to rural communities by forcing both the charging and detaining authorities to factor in the costs of fulfilling *Gideon's* mandate at a distance. Potential claims could include challenges to the transfers themselves, as well as to limits on access to other channels of communication once in-person visits are made more challenging by the decisions of the state.[245]

Finally, access to counsel litigation will expose another aspect of the yawning gap between *Gideon* in promise and in practice. The cruel reality is that even those indigent defendants who receive competent appointed counsel are often obstructed from accessing their lawyers through (likely unnecessary) detention by the state. Yet, this second barrier to counsel access is largely unseen despite its impact on incarcerated defendants and their lawyers. In fact, the intractable challenge of underfunding is likely masking the much more soluble problem of counsel access, the resolution of which would actually help to ensure the most efficient use of limited defense resources.

In addition to their tactical value, however, the Sixth Amendment claims of pretrial detainees could help to draw attention to the way in which federal courts are increasingly eliding the distinctions between the charged and convicted,

242. "[B]etween 1970 and 2013, the proportion of pretrial detainees outside of major metropolitan areas grew from 37 to 51 percent." *Id.* at 11. As of 2017, the pretrial detention rate in rural counties is higher, at 265 people per 200,000, than in urban counties, at 200 per 200,000. *Id.* at 12.

243. Some counties in Georgia, Montana, Oklahoma, Nevada, and Utah "rely on circuit judges who cover multiple districts and sometimes can only convene district court a few times per month or per year in any one area." *Id.* at 19 (quoting Davis, Applegate, Otto, Surette & McCarthy, *supra* note 238, at 460–61, 473–74 (2004)). This can result in larger jail populations as detainees face significant waiting time before receiving a bail determination. In addition, these counties have fewer pre-trial services and diversion programs. *Id.* at 19. Without community-based partners that can help to "design a detention alternative or fashion appropriate conditions of release," courts may fall back on incarceration. *Id.* at 20.

244. Increasingly, the market for jail beds is national. In the 1970s, more than half of U.S. counties held no people in their jails for other authorities; by 2013, eighty-four percent "held some people, either pretrial or sentenced, for other county jails, state prisons, or federal authorities like the Federal Marshals, the Bureau of Prisons, or Immigration and Customs Enforcement." *Id.* at 13–14. Many cash-strapped rural jurisdictions have tried to take advantage of these trends by building out extra bed capacity for boarders, for whom they receive per diem payments. *Id.* at 21. "Some counties, such as those in Kentucky, Louisiana, Mississippi, Oklahoma, and Tennessee, have come to rely on a consistent flow of state prisoners or detained undocumented immigrants—and thus money from the state or federal government—to sustain basic system operations, from staff salaries, to patrol cars, to equipment." *Id.*

245. For example, the incarceration of pre-trial defendants far from their attorneys might provide the basis for a successful Sixth Amendment challenge. *See* Procunier v. Martinez, 416 U.S. 396, 420 (1974) (finding an unjustifiable burden on the right of prisoners' access to the courts by weighing financial and time costs imposed on attorneys by travel to remote prisons), *overruled in part on other grounds by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

acknowledging and constitutionalizing the reality that pretrial detention is increasingly acting as a substitute for punishment.[246] The constitutional law of criminal procedure, with its orientation toward the accurate determination of guilt and innocence, is increasingly at odds with the practice of criminal justice as a mechanism of social control, predominantly tracking race and class.[247] The counsel access claims highlight this conflict, by forcing courts to consider the constitutional rights of legally innocent people whom the state is treating identically, if not worse, than those whose guilt has been adjudicated. Access to counsel litigation thus represents an opportunity not only to make significant improvements in our current system of indigent representation; it also creates a space to highlight and challenge, both in the courts and with the public, the ways in which the procedural protections guaranteed by the Constitution have been both nullified and legitimated by the abuses of pretrial detention and mass incarceration.

246. *See* Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297 (2012).

247. Issa Kohler-Hausmann has described this disparity between the "adjudicative model" where "a finding of guilt triggers the question of how punishment should be deployed as social control" and the "managerial model" wherein "the imperative of social control is at work largely irrespective of guilt or innocence in any particular case." Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 624 (2014).